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THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
[CIVIL DIVISION]

CIVIL APPEAL NO. 61 OF 2016

(ARISING FROM NAKAWA CHIEF MAGISTRATE'S COURT CIVIL SUIT NO.1347 OF 2009)

10 **DEMBE TRADING ENTERPRISES LTD:: APPELLANT**

VERSUS

MUGISHA JOHN BOSCO :: RESPONDENT

BEFORE: HON. JUSTICE ESTA NAMBAYO

JUDGMENT

15 The Appellant, Dembe Trading Enterprises, being dissatisfied with the judgment and
decree of the Chief Magistrate at Nakawa Chief Magistrate's Court in Civil Suit
No.1347 of 2009 appeals to this court on grounds that: -

1. The learned Chief Magistrate erred in law and in fact in holding that the Respondent was not in breach of the sale agreement.
- 20 2. The learned Chief Magistrate erred in law and in fact in holding that the Appellant unlawfully resold the car to another person.
3. The learned Chief Magistrate erred in law and in fact in denying the Appellant the balance of UGX 4,800,000/- (four million eight hundred thousand shillings only), general damages and costs of the suit.
- 25 4. The learned Chief Magistrate erred in law and in fact in holding that the Appellant pays UGX 25,400,000 (twenty-five million four hundred thousand shillings only) as a refund of the purchase price for the car to the Respondent.

5. The learned Chief Magistrate erred in law and in fact in ordering that the Appellant pays general damages of UGX 10,000,000 (ten million shillings only) to the Respondent.

6. The learned Chief Magistrate erred in law during the conduct of the trial by committing several errors in contravention of the Civil Procedure Rules S.I 71-1.

Background to the Appeal

The background to this appeal is that on the 31st August, 2007, the Appellant and the Respondent entered into a contract for sale of Motor Vehicle Reg. No. UAJ 613P Land Cruiser-Prado at Ugshs. 24,500,000/= [twenty-four million, five hundred thousand shillings only]. The Respondent made a part payment of Ugshs. 12,700,000/= at execution of the agreement and the vehicle was handed over to him on condition that the balance was to be paid in six equal installments not later than the end of February, 2008. On the 18th April, 2008, bailiffs acting on orders of a money lending company called J & T Financial Services Ltd impounded the vehicle and took it at Kira Road Police Station. While there, a Police Officer drove out the vehicle and got involved in a motor accident at Mukono where the vehicle got burnt and the remains were taken to Mukono Police Station. The Appellant picked the burnt remains of the vehicle and sold them as scrap at Ugshs. 4,000,000/- [four million shillings only], on allegations of recovery of some of the outstanding balances by the Respondent. It is the Appellant's claim that at the time of filing this suit at Nakawa Chief Magistrate's Court, the Respondent was still indebted to it in the sum of Ugshs 4,800,000/= and therefore the trial Chief Magistrate erred in law and fact to find that the Appellant should pay the Respondent the entire sale price of the motor vehicle, hence this appeal.

Representation:

55 Counsel Raymond Ndyagambaki appeared for the Appellant while F.X Ogwado was for the Respondent. Counsel for the parties filed written submissions.

Duty of this court as a first appellate court

This being a first appeal, this Court is required to re-appraise the evidence and make its inferences on issues of law and fact. See *Banco Arabe Espanol -v- Bank of*
60 *Uganda SCCA No. 8 of 1998 and Bogere Moses and Another -v- Uganda, Supreme Court Criminal Appeal No.01 of 1997.*

Ground 1: The learned Chief Magistrate erred in law and in fact in holding that the Respondent was not in breach of the sale agreement.

Appellant's submissions.

65 Counsel Ndyagambaki submitted that a breach of contract occurs when one or both parties fail to fulfill the obligations imposed by the terms of the contract. He relied on the case of *United Building Services -v- Yafesi Muzira t/a Quickest Builders & Co. H.C.C.S. No. 154 of 2005* and explained that there was a contract between the Appellant and the Respondent. That the Respondent made a part payment of Ugshs.
70 12,700,000/= at the execution of the agreement and the balance was to be paid within 6 months ending on the 28th of February, 2008. Counsel referred this Court to page 23 of the record of appeal where the Respondent (DW1) informed Court that he issued postdated cheques amounting to Ugshs 8,500,000 dated 24/11/2007 and 24/03/2008 as security for payment but all the cheques were dishonored. Counsel
75 further explained that under clause 5 of the sale agreement [Ex P.1], it was agreed that the Respondent would only get the Motor Vehicle Log Book after full payment of the purchase price. That the Respondent's Ledger Account [Exh. P5], shows the

outstanding balance as Ugshs 4,800,000/= (four million, eight hundred thousand shillings only), as at 6th August, 2008. Counsel also contended that under Ex. P3, the
80 undertaking dated 20th May, 2008, the Respondent acknowledged indebtedness to the Appellant without any duress or force and promised to pay the balance. Counsel relied on the *case of Ajay Industrial Corporation Limited & Anor –v- Jesey Technical services limited & Anor HCCS No. 129/2012*, in which Justice Madrama [as he then was], discussed the effect of acknowledgment of a debt and explained that
85 in this case Exh P3 was not contested by the Respondent at trial. That the Respondent also admitted indebtedness by a statutory declaration dated 29th of August, 2008 (Ex P8) 3 months after the undertaking to pay. Counsel submitted that the Respondent's evidence in rebuttal was full of grave inconsistencies and contradictions which pointed to the deliberate untruthfulness of the Respondent
90 which go to the root of his entire case. He relied on the case of *Kabasongola -v- Kabaruli HCCA No. 16 of 20015* where court while relying on the case of *Uganda -v- Abdallah Nassur [1982] HCB*, stated that; '*where grave inconsistencies occur, the evidence may be rejected unless satisfactorily explained while minor inconsistencies may have no adverse effect on the testimony unless it points to deliberate*
95 *untruthfulness.*'

Counsel further referred this court to page 7 paragraph 1 lines 89-90 and page 2 line 24, of the record of appeal where the Respondent testified that he took the log book to the bank and obtained a loan of 10,000,000/- [ten million shillings only] which he topped up and paid the balance to the Appellant within 2 weeks, yet in
100 cross-examination, the Respondent contradicted himself when at page 8, paragraph 2 & 3 line 120-130 and page 23 paragraph 2 of the record of appeal, he testified that Post bank paid the Appellant in April, 2008, more than 2 months after the deadline of end of February, 2008 and in breach of the sale agreement [see Exh. P1

clause 2(b)]. That the Respondent failed to avail receipts confirming the alleged
105 payment despite an order of Court on the 11/07/2011 at page 14 to produce
receipts that tally with payment of Ugshs. 25,400,000/-.

Further to the above, Counsel submitted that at page 7 & 17 of the record of
appeal, the Respondent testified that the motor vehicle was registered in his name
on the 24th November, 2007 but no copy of the log book was adduced in evidence.
110 That at page 8 of the record of appeal, according to the learned trial Chief
Magistrate, the Respondent testified that at the time the car was impounded in May,
2008 it was still in the names of the Appellant. DW2, a supervisor at URA examined
Exh P.2 [the log book] which the Appellant presented and informed court that it was
genuine and authentic (page 26 of the record of appeal). That the Respondent also
115 testified in the affidavit that he swore as part of the pleadings in the case he filed at
the Chief Magistrate's Court- Mengo, Civil Suit No. 1205 of 2008 dated 15th May,
2008 [Exh. P6] declaring that the car was still in the name of the Appellant. (See
page 23 of the record) Counsel averred that the Respondent by his own admission
testified that he failed to pay by February, 2008 since his last alleged payment was
120 in April, 2008. That the Respondent did not present any receipts to prove the same
and he admitted that he issued the Appellant with security cheques which were
banked and dishonored on 26/11/2007, 27/12/2008 and 26/03/2008 as seen at page
23 of the record of Appeal.

Counsel further submitted that the learned trial Magistrate erred by disregarding
125 vital evidence presented by the Appellant in regard to breach of the sale agreement.
He relied on Exh. P6, the Pleadings in Civil Suit No. 1205 of 2008 [Mengo Court]
dated 15th May, 2008 containing an affidavit sworn by the Respondent declaring that
the Appellant was the registered owner of the motor vehicle which was proof on
oath of the Respondent's untruthfulness, Ex P3 an undertaking dated 20th May, 2008.

130 That the alleged illegal detention and torture according to paragraph 13(c) of the Respondent's amended defense took place in August, 2008 and therefore, the trial Magistrate erred in holding that the undertaking was obtained by force. Counsel prayed that this court be pleased to find that there was breach of the contract by the Respondent.

135 **Respondent's submissions in reply**

In reply, Counsel F.X Ogwado referred to paragraph 5 of the sale agreement [Exh.1] which states that the original logbook will be surrendered to the purchaser only after the seller has received the full sums of money due under the agreement and transfer registration of the logbook into the names of the purchaser at the
140 purchaser's cost. He explained that on the 24th /11/2007, the vehicle was transferred and registered in the names of the Respondent on the application of the Appellant (Dexh 2). That the Appellant neither pleaded nor alleged any fraud on the part of the Respondent. That on the 26th /8/2008, the vehicle was arbitrarily impounded by the Appellant and sold to Nouwa Kyabi (Ex. P4) without the Respondent's consent.
145 Counsel argued that the Respondent discharged his duty under the contract on the 24th /11/2007 when he paid the full purchase price and had the motor vehicle log book transferred into his names as per the provisions of Paragraph 5 of the contract. Counsel relied on Section 30 of the Traffic and Road Safety Act which provides that;

*"The person in whose name a motor vehicle, trailer or engineering plant not subject
150 to a hiring agreement, or a hire-purchase agreement or a finance lease agreement is registered shall, unless the contrary is proved, be presumed to be owner of the motor vehicle, trailer or engineering plant".*

He submitted that the trial Magistrate rightly held both in law and in fact that the Respondent was not in breach of the contract.

155 **Analysis**

From evidence on record, the sale agreement [PExh.1], was executed on the 31st August, 2007. The purchase price of the vehicle was 25,400,000/- [twenty-five million, four hundred thousand shillings only]. Upon execution of the agreement, the Respondent paid 12,700,000/- [twelve million seven hundred thousand shillings only] with the balance to be paid in six equal instalments not later than the end of February, 2008. Under paragraph 5 of the sale agreement, the Respondent was to get the log book upon full payment of the purchase price. The Respondent claims to have paid the balance in two weeks after obtaining a loan from Post Bank and then transferred registration of the vehicle into his names. He relied on a copy of the URA vehicle registration file to confirm registration of the vehicle into his names [see D Exh.2]. He explained to court that the log book was with the Bank as he deposited it there before obtaining the loan, but he did not present a copy of the log book registered in his names to court, neither did he present any evidence from the bank to confirm that he deposited the log book with it. Be that as it may, the URA file that the Respondent presented [D Exh.2], shows the date of first registration of the vehicle in issue as 7th/09/2007 and the name of owner at first registration as Mugisha John Bosco. This is not correct. Mugisha John Bosco is not the first owner of the vehicle in issue as he only purchased the vehicle from the Appellant and therefore, the Appellant was the first owner of the vehicle in Uganda.

Secondly, in civil suit No. 1203 of 2008 filed at Mengo Chief Magistrate's Court by the Respondent against J&T Financial Services Ltd, the Respondent states in paragraph 4(a) of the plaint that on the 10th/10/2007, he obtained a loan of Ugshs. 4,200,000/- from J&T Financial Services Ltd which was to be re-paid within one month at an interest rate of 6%. Under paragraph 6 of the plaint, the Respondent states that M/V Registration No. UAJ 613P was illegally given as security as it was

not supposed to be a subject of security because its ownership was conditioned to completion of payment of the balance to the registered proprietor M/S Dembe Enterprises Ltd who was still in possession of the motor vehicle logbook. This means that by the 10th/10/2007, the vehicle was still registered in the names of Dembe
185 Enterprises. This confirms that the URA file [D Exh.2] presented with record showing that the Respondent was registered as owner of the vehicle on the 7th/09/2007 is not correct.

The Respondent claims that the Appellant's Sales Manager, Pereira Bobby, approved transfer of the vehicle into his names. He relied on a letter dated 16th/11/2007 on a
190 headed paper of the Appellant Company to the Licensing Officer of IRD, Kampala. The URA receiving stamp shows that the letter was received at URA on the 13th/2/2012 for a transaction that took place on the 7th/09/2007. This would mean that the request to transfer registration of the vehicle made by the Appellant on the 16th/11/2007, was made after the transfer was effected on the 7th/09/2007 and URA
195 received the letter of request to transfer about 5 years after the transfer. This is practically impossible.

The other receipts on the URA file presented to court, the yellow receipts, are dated 31/05/2010 in respect of Toyota Land Cruiser, received in the bank on the 07/06/2010. It is not clear why these receipts were brought to court, but what I'm
200 sure of is that they cannot be used to support the alleged transfer effected on the 7th/09/2007.

In cross examination, Mr. Patrick Mpeirwe, the officer from URA informed Court that PExh.2 [the log book], presented by the Appellant appeared to be genuine because it was properly sealed and he was conversant with the signature on it. He confirmed
205 to court that he did not have a copy of the log book in the names of Mugisha John Bosco. In re-examination Mr. Mpeirwe states that it is possible that there was

another log book at the time of transfer to the names of the Respondent because the bank could not have lodged a caveat without a log book. This confirms to me that the Appellant had the car log book all this time.

210 ***S.101 of the Evidence Act provides that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he or she asserts, must prove that those facts exist.***

In this case, without presentation of the log book alleged to be registered in the names of Mugisha John Bosco, I find that the Respondent has failed on the balance
215 of probabilities, to prove that he registered the vehicle into his names. I believe the reason the Respondent could not register the vehicle in his names is because he had not paid the full purchase price as provided under paragraph 5 of the sale agreement [PEXh.1]. It is my finding therefore, that the Respondent breached the sale agreement and as such, the learned trial Chief Magistrate erred in law and in
220 fact in holding that the Respondent was not in breach of the sale agreement. This ground of appeal succeeds.

Ground 2: Whether the learned Chief Magistrate erred in law and in fact in holding that the Appellant unlawfully resold the car to another person.

Submissions for the Appellant

225 Counsel for the Appellant submitted that under clause 7 and 9 of the sale agreement the seller had the right to impound the Motor Vehicle if the purchaser failed to remit the balance in time and sell the motor vehicle by private treaty or any preferred method without notice to the purchaser. That the Respondent acknowledged indebtedness in Ex P3 on the 20th May, 2008. Secondly, that the
230 Respondent was admitting non-payment of the balance until April, 2008 yet the deadline for payment of the final installment was February, 2008 and no receipts

were produced to prove the said payment. Counsel further explained that Ex P8 is a statutory declaration made before a Commissioner for oaths dated 29/08/2008 admitting indebtedness and the grave inconsistencies in the Respondents evidence
235 generally point to non-payment of the outstanding amount. That no evidence of payment of the balance was adduced in form of receipts or any other proof. Counsel submitted that there is no law that prohibits a seller from selling goods without recourse to Court where there is an express right to do so. He relied on Section 39 (1(c) of the Sale of goods Act (Now Section 51 (1(c) of The Sale of goods and
240 Supply of Services Act) and explained that an unpaid seller has the right to resale goods. That in this case, the Appellant had all the rights under the agreement to sale the motor vehicle as per the Sale Agreement [Ex P1].

Further to the above, Counsel explained that it was admitted by both PW1 (on page 14 of the record of appeal) and DW1 (page 17 and 18) that the car was impounded
245 by bailiffs appointed by money lenders to the Respondent and that while in police custody the car was driven by a police officer who had an accident and the car got burnt. PW1 said that with the authority and verbal agreement of the Respondent (page 13), he sold the scrap vehicle to mitigate the loss. Counsel relied on the case of *Oketha Dafala Valente -v- Attorney General HCCS 69 of 2004*, where Justice
250 Mubiru while citing the case of *African Highland Produce Ltd -v- Kisorio [2001] 1 EA 1*, noted that "*At common law, the Plaintiff had a duty to take all reasonable steps to mitigate the loss sustained.*"

He submitted that the sale of the scrap to Nouwa Kyabi on the 26th /8/2008 was the Appellant's attempt to mitigate the loss that had already occurred and that the sale
255 was justified and lawful.

Submissions for the Respondent

In reply, Counsel for the Respondent submitted that the Appellant illegally impounded and re-sold the Respondent's Motor Vehicle on the 26th August, 2008 to a one Nuwa Kyabi without any colour of right and in total disregard of a caveat by Post Bank and in contravention of the provisions of Section 30 of the Traffic and Road Safety Act. Counsel also prayed that in the absence of a valid express authorization, the Appellant's act of re-selling the Respondent's motor vehicle was unlawful and therefore, this ground should fail.

Analysis:

Under paragraph 9 of the sale agreement [PEXh.1] that was signed by both parties, the seller reserved a right to impound the vehicle if the purchaser defaulted on payments. The Respondent admitted default and indebtedness to the Appellant in his undertaking dated 20th/05/2008 [PEXh.3]. By then the outstanding amount was 14,800,000/-. The Respondent's indebtedness can also be confirmed in paragraph 6 of the plaint in the case that he filed against J & T Financial Services Ltd in Civil Suit No. 1203 of 2008 at Mengo Chief Magistrate's Court on the 15th /5/2008. The Appellant had the right to impound and sell the vehicle under paragraph 9 of the sale agreement. Therefore, the Appellant's sell of the motor vehicle was not illegal. It was provided for in the sale agreement and I therefore agree with the submission of Counsel for the Appellant that the learned Chief Magistrate erred in law and in fact in holding that the Appellant unlawfully resold the car to another person. This ground of appeal also succeeds.

Ground 3: The Learned Chief Magistrate erred in law and in fact in denying the Appellant the balance of Ugshs 4,800,000 (four million eight hundred thousand shillings only), general damages and costs.

Counsel for the Appellant argued that Exh. P3, the undertaking dated 20th May, 2008 was not obtained by any force or duress. That the alleged illegal detention and torture according to paragraph 13(c) of the Respondent's amended defense took
285 place in August, 2008. Counsel submitted that the trial Chief Magistrate erred in holding that the said undertaking was obtained by force. He explained that the Respondent by his own admission breached the sale agreement by failure to pay the outstanding sum of Ugshs 4,800,000/= (four million eight hundred thousand shillings only). That Ex P5, the Appellant's ledger account gives an account of the
290 monies paid and the outstanding balance and it was never challenged by the Respondent.

In reply, Counsel for the Respondent contended that the Appellant had no right to claim UGX 4,800,000/= after reselling the Respondent's car without his consent. He submitted that he who comes to equity must come with clean hands. That full
295 payment was made to the Appellant who signed transfer forms and the transfer of the motor vehicle into the names of the Respondent was effected on 24th 11, 2007. That the Appellant's plaint was filed on the 6th November, 2009 long after receiving official communication about the change of proprietorship as evidenced by D.Ex2. That the Appellant never pleaded any particulars of fraud and therefore, the
300 Respondent's ownership cannot be impeached at this stage. Counsel referred this court to the case of *Mumtaz Kassam & Anor -v- Ebrahim Kassam & Anor ULR (2008) 56*, where it was held that;

*"Court does not have a duty or obligation to correct or distort parties' primary pleadings in order to give judgment for one of the parties. This principle is strict
305 with an Appellate Court which is supposed to hear from the parties and not act for the parties."*

He further submitted that the Respondent had an insurance certificate D.Ex1 for the suit vehicle but the Appellant's act of re-selling a motor vehicle that did not belong to it, deprived the Respondent of his right to claim under the insurance policy. That an award of general damages and costs was well deserved. The award of damages was to indemnify the Respondent of the loss of his car and the right to claim under insurance. He relied on the case of *Ronald Kasibante –v- Shell (U) Ltd ULR [2008] 690*.

In re-joinder, Counsel for the Appellant averred that the Respondent had a balance of 4,800,000 as confirmed by the ledger (P.EX 5) and the undertaking (P.EX 3). Counsel submitted that the Authority of *Mumtaz Kassami & Anor –v- Ebrahim Kassam & Anor ULR [2008]* is cited out of context and that Court should take judicial notice that in Uganda, motor third party insurance is not necessarily issued in the names of the registered owner but in the names of the person who takes out the insurance and as such, D.EX1 is not cogent evidence of ownership. That the case of *Ronald Kasibante –v- Shell (U) Ltd ULR [2008] 690* is actually applicable to the instant case in so far as indemnity to the Appellant for inconvenience caused by breach of the car sale agreement is concerned.

Analysis

It has been established that the Respondent breached the sale agreement. P Exh. 5, the Respondent's ledger, shows an outstanding balance of 4,800,000/- against him. The Respondent has not anywhere in his evidence on record challenged this evidence. I find that the Respondent is indebted to the Appellant in the sum of Ugshs 4,800,000 (four million eight hundred thousand shillings only) which is reflected in the ledger. This would also mean that the Respondent is not entitled to any refund and the counter claim is dismissed. Therefore, the Learned Chief Magistrate erred in law and in fact in holding that the Appellant pays Ugshs

25,400,000/= (twenty-five million, four hundred thousand shillings only) as a refund of the purchase price for the car to the Respondent.

335 **General Damages and Costs**

In *Uganda Revenue Authority -v- Wanume David Kitamirike CACA No. 43 of 2010*, Court held that;

340 *"... general damages mean compensation in money terms through a process of the law for the loss or injury sustained by the plaintiff at the instance of the defendant.....intended to restore the wronged party into the position he would have been in if there had been no breach of contract."*

In *James Fredrick Nsubuga -v- Attorney General, HCCS No. 13 of 1993*, Court noted that the award of general damages is in the discretion of court, and is always as the law will presume to be the natural and probable consequence of the
345 defendant's act or omission.

S. 61(1) of the Contracts Act provides for compensation for loss or damage caused by breach of contract and states that;

350 *"where there is breach of contract, the party who suffers the breach is entitled to receive from the party who breaches the contract compensation for any loss or damage sustained by reason of the breach."*

In *Kibimba Rice Company Ltd -v- Umar Salim, SCCA No. 7 of 1988*, it was held that: -

355 *"Evidence had to be led to prove claims for general damages for inconvenience, mental suffering and anguish. Counsel having been unable to show any particular evidence on this claim, it was correct to make no award."*

In the instant case, much as the Appellant is entitled to receive compensation from the Respondent, there was no evidence presented by the Appellant to show what loss it suffered or any indication in figures as to what would be fair and adequate quantum of damages. Considering guidance from the *Kibimba Rice Company Ltd - v- Umar Salim case* (supra) and in light of the circumstances of this case, I'm unable to award general damages to the Appellant.

Costs

Section 27(2) of the Civil Procedure Act provides that the award of costs is in the discretion of court and costs of any action shall follow the event unless for good reasons court directs otherwise.

The Appellant in this case was compelled to file this suit after the Respondent breached the motor vehicle sale agreement. In my view, the breach makes this a proper case for award of costs to the Appellant which are hereby awarded. Therefore, all the grounds of this appeal succeed and this Court makes the following orders: -

- 1. The judgement and decree of the trial Chief Magistrate are hereby set aside.**
- 2. The Respondent pays the Appellant the outstanding balance of UGX 4,800,000/- [four million eight hundred thousand shillings only] being money owing to the Appellant Company.**
- 3. The Respondent also pays costs of this appeal and the costs of the suit in the lower Court.**

I so order.

Dated, signed and delivered by mail at Kampala this 4th day of November, 2021.

380

Esta Nambayo

JUDGE

4th/11/2021.