IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CIVIL APPEAL NO.3 OF 2017

(Originating from Civil Case No. 290 of 2015 Kisutu Resident Magistrates Court)

1. RAMADHANI HAFIDHI MBELWA.....1ST APPELLANT
2. MOHAMED S. MALIMBICHI----------2ND APPELLANT

VERSUS

HILDA MATO SIGIRA----------RESPONDENT

JUDGMENT

This is an appeal against the judgment and decree of the trial court which had awarded the respondent a sum of Tsh 13,000,000/= being specific damages for damaged car with Reg. No. T 486 BWV make Toyota Noah and Tsh 4.000,000/-general damages. The dual appellants were held jointly and severally liable to pay the decreed amount. The facts giving raise to these proceedings are recapped as follows. That in 2011 respondent and her husband (spouse) one Jacob Casthom Mwambegde alleged jointly owned a motor vehicle Registration No. T. 486 BMV make Toyota Noah (although a motor vehicle registration card bears a name of Jacobs Casthom Mwambegele as sole proprietor). That on 20/7/2014 Jacobs Casthom Mwambegele gave his share to the respondent who gained full ownership although the registration continued to remain in the name if Jacobs Casthom Mwambegele. That on the same year, to wit 2014 the respondent engaged the second appellant as her driver to drive the

said vehicle (the arrangements were verbal, and the terms and conditions are unknown). On 23/2/2015 the above mentioned motor vehicle was involved into a fatal road accident, at Makondeko area, Mbezi Kimara, where it knocked a motor vehicle registration No. T 384 AAM make Toyota Hiace thereby caused death of one Mary Paskal Philipo, who was a conductor of a Toyota Hiace and both motor vehicles were severely damaged, where the respondent's vehicle was almost writ off.

The 1st appellant who was alleged to be driving the respondents motor vehicle, disappeared/vanished and abandoned the respondents motor vehicle at the scene of accident. The 1st appellant admitted to have been driving a motor vehicle T 486 BMV Noah on the fateful date which he allege he was given by the 2nd appellant (Mr. Mohamed). The 1st appellant disowned the respondent, being a stranger to him. The 2nd appellant also disowned completely the respondent, on explanation that a motor vehicle which he gave the 1st appellant is a property of one Safari. The 1st appellant also admitted to had been charged and convicted in a traffic case. The respondent stated that as a result of that accident she had suffered the following: to compensate the deceased's children, to compensate owner of an Hiace and her motor vehicle was broken beyond repair. The trial court nodded with the respondent claims and awarded the respondent Tsh 13,000,000/= being value of a motor vehicle Noah (which were pleaded and claimed as special damages) and Tsh 4, 000,000/= being loss for disturbances (which were pleaded as general damages).

The appellants were aggrieved, lodged an appeal on the following grounds. The trial court erred in law and fact by dealing with the plaintiff

who has no cause of action against the appellants; the trial court erred in law and fact by making a decision on the wrong case; The trial court erred in law and fact by not reading properly the proceeding before it hence arrived at wrong decision; the trial court erred in law and fact by totally failing to evaluate properly the evidence in the record hence arrived to a wrong conclusion of the matter before it; the trial court erred in law and fact by arriving to the decision without dealing with the preliminary objection on point of law raised by the appellants.

Mr Carlos Cathbert Advocating for the appellant submitted that the trial court erred to deal with a plaint which had no cause of action against the appellant as Jacob Casthom Mwambegele is the owner of a motor vehicle T. 486 BWV make Toyota Noah, but the respondent claim ownership while she does not have any document for ownership. That a deed of gift dated 17/7/2014 did not change ownership from Jacob Mwambagele to Hilda Mato Sigira (respondent). He submitted that a deed of gift is not registered. It was his submission that the respondent had no cause of action against the appellants as the motor vehicle is not registered in her name.

That the decision of a trial court was made on wrongcase as the one who ought to claim is Jacob Casthom Mwambegele and not Hilda Mato Sigira. That Hilda Mato Sigira ought to sue as a recognized representative or registered special power of attorney. That the trial magistrate did not give reason why preliminary objection raised by the appellant were not dealt with. That order 14 rule 2 CPC stipulate that issues of law must be

dealt with first. That in this matter preliminary objections were not heard, as such appellants were denied their right.

In reply Mr. Charles Alex learned counsel for respondent submitted that there is no dispute that Hilda Mato Sigira was and is still spouse of Jacob Casthom Mwambegele and when the cause of action arose the marriage was there and is still subsisting. That there is no dispute that Jacob Casthom Mwambegele gave the respondent a motor vehicle at issue as a gift of celebrating 50 years, and the same was not objected by the appellant before Riwa- RM. That a deed of gift is a contractual document and therefore is valid and lawful. He cited section 2 of the Law of Contract that at the time when a motor vehicle involved into an accident was a property of the respondent. That according to the Sales of Goods Act and the Law of Contract, ownership of a property passes as it is intended or at the time intended by the parties to the contract. That a deed of gift is very clear as found by the trial Magistrate that he gave the respondent from the date their marriage attained 50 years and from the date they signed a deed of gift, which is 17/7/2014, as per a deed of gift.

That an argument that Jacob Mwambegele is still on a card of a motor vehicle does not viciate or taint the validity of a deed of gift. That an argument that a deed of gift is not registered does not make it invalid neitherremoved an intention of Jacob Mwambegele, which was executed in a deed of gift. That above all the motor vehicle in issue was acquired jointly by spouse in 2011. As such the trial court ruled correctly that the respondent is the owner of a motor vehicle and therefore was entitled to sue or claim. That non disposal of a preliminary objection is not fatal hence

cannot vitiate the proceedings. That an issue whether there is a cause of action is a matter of evidence, which has to be proved, as such it could not be proved at preliminary before hearing. He cited *Domin P.K.G. Mshana Vs Alumasi Chande& A. G, Civil Case No 68/1994 HC* at page 2 and *Mwombeki LambwalilaVs Agency Maritime International (T) Ltd* (1983) TLR 1, to cement a proposition that cause of action is a matter to be proved by evidence. That the grounds of preliminary objection were extensively dealt during hearing the suit, as such there was no miscarriage of justice by an omission to determine a preliminary objection before a trial. That even if the preliminary objection could be determined before trial, the trial magistrate could arrive at the same position as arrived after hearing both parties in a main case.

On rejoinder, Mr Carlos learned Advocate submitted that a deed of gift was all about respondent attaining 50 years of age and not marriage as contemplated by the learned counsel for the respondent. That a deed of gift cannot change ownership unless registered. That Sales of Good and the Law of Contract does not apply to this case. That a deed of gift cannot introduce the respondent as owner of a motor vehicle. Therefore here was no cause of action against the appellants. That it was important to determine the preliminary objection first. That a case of **Dominic** (supra) the court just made a definition of a preliminary objection ona cause of action.

Basically majority of issues conversed on the grounds of appeal, as featured in the submissions, are hinged on a question of a deed of gift and whether it conferred *locus standi* the respondent to sue the appellants over

a cause of action whose subject matter is a motor vehicle T 486 BMV make Toyota Noah registered in a name of one Jacobs Casthom Mwambegele who is not a party to a suit (proceedings).

As aforesaid, I repeat, a motor vehicle T. 486 BWV make Toyota Noah which is the subject matter of this proceedings, it is registration cards bears a name of Jacobs Casthom Mwambegele. It is common knowledge that a registration card is a *primafacie* evidence of ownership of motor vehicle. Rule 20(2) of the Road Traffic (Motor vehicles Registration) Regulation, G.N. 177 of 2001, provides, I quote,

> *"The registration card shall be evidence of ownership of the vehicle and any matter therein...."*

Rule 6 the Road Traffic (Motor Vehicles Registration) Regulation, G.N 177/2001 provide. I quote;

> *"on transfer of a vehicle the transferor shall within seven days of the date of such transfer furnish the licensing authority with the name and place of residence of the transferee and the date of the transfer. The transferee shall comply with the provision of section 16 of the Act and before forwarding to the licensing authority shall enter thereon the particulars set out in form J with respect to the transfer of ownership.* "

Now section 16 (1) (a) & (b) of the Road Traffic Act, Cap 168 R.E 2002 provides, I quote;

"Within seven days after the sale or other disposition of any kind whatsoever of any registered motor vehicle or trailer the person selling or otherwise disposing of it shall

(a) notify the Registrar...of the sale or disposition, the name and address of the new owner...

(b) deliver the registration certificate of the vehicle to the Registrar

Subsection 4 of section 16 (supra), is all about Registrar to change ownership of a motor vehicle and amend the certificate of registration and issue a new certificate of registration and deliver the amended certificate to a new registered owner of a motor vehicle. The other forms of disposition or change of ownership (apart from sale mentioned above) are repossession, deceased estate, within company or family. The disposition herein falls under category of change of ownership within family.

Presumably the learned counsel for the appellants probably is what he meant and stands or clings for on his argument, that a gift deed per se does not change ownership, rather there ought to be change or transfer of ownership from Jacobs Casthom Mwambegele to the respondent. In other words he rooted that the respondent had nothing to claim while a motor vehicle is not her property. The learned counsel for the respondent was of a different view, that a deed of gift had the effects of conferring ownership to the donee, citing the Sales of Goods Act and Section 2 of the Law of Contract. I ascribe to this proposition. As I have stated above that a registration card is a mere *primafacie* evidence of ownership. In a case of

Harith Saidand Brothers ltd vs Martin s/o Ngao (1981) TLR 327, this Court, Hon. Samatta J (as he then was) held and I quote,

> *"non – registration of change of ownership under provision of the Road Traffic Act 173 does not change the legal position on passing of property; a motor vehicle registration card is not a document of title for the purposes of the provisions of the Sales of Goods Ordinance"*

It goes without much saying that the respondent has a good title over a motor vehicle T486 BMV by virtue of a deed of gift dated 17/7/2014. Indeed, there was an argument from the counsel for the respondent that the respondent was and is still a spouse of one Jacobs one Jacobs Casthom Mwambegele. Moreover even a deed of gift, reveal the same motor vehicle was given to the respondent by Jacobs Casthom Mwambegele, out of natural love and affection. Section 61 of the Law of Marriage Act Cap 29 R.E 2002, which is all about gifts between husband and wife, provides and I quote,

> *"where, during the subsistence of a marriage, eithers spouse gives any property to the other, there shall be rebuttable presumption that the property thereafter belongs absolutely to the donee"*

In the circumstances, as submitted by the learned counsel for the respondent, that from the date of execution of a deed of gift, a title of ownership of said motor vehicle had passed to the respondent and the said Jacob Casthom Mwambegele is bound by a deed of gift, to the extent that he cannot after words make a u-turn to claim ownership. This suffices to dispose the first and second ground, which both succumb.

Regarding an argument that the trial court did not dispose the preliminary objection raised by the appellants in their respective defence. Admittedly order 14 rule 2 Cap 33 R.E 2002 presupposes matters of law to be determined first. However this goes in hand with a principal that the one who brings his/her case or issue, a preliminary objection for this matter must prosecute it. It was expected the appellants when the matter was said to be due for first pre trial conference and prior it was mounted to mediation, they were duty bound to raise their concern that they had embed a notice of preliminary objection into their respective written statement of defence and an excuse that they a layman, is not a defence. So far they remained quiet, it will be taken as good as having abandoned their alleged preliminary objections. Be as it may, it is not the law that issues of law must be disposed first. As the wording of Rule 2 of Order 14 (supra) is not coached on mandatory terms, for appreciation, I reproduce it.

> *"where issues of both law and fact arise in the same suit and the court is of opinion that the case or any part thereof may be disposed of an issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit postpone the settlement of issues of fact until after the issues of law have been determined".*

There are two conditions here for a preliminary objection to be determined first, for one thing the court must form an opinion that the case or part thereof may be disposed of on the issues of that law only, for another is still the duty of the court to ascertain whether to postpone settlement of issues of fact or not. Actually the wholly thing remain at a courts discretion.

Now can a P.O that there is no cause of action, be taken as a pure point of law, capable to dispose the matter at preliminary stage? The learned Counsel for respondent was of a view that this attracts both matters of law and facts as at a certain point you must prove by evidence. I ascribe to this proposition, that it was also a matter of facts. More important, as submitted by the learned Counsel for the respondent that the issue pertaining to a cause of action, was deliberated at length in the findings of the trial court when evaluating evidence. As such the appellant's preliminary objection was determined in the due course. And therefore this argument that preliminary objections were not determined at the preliminary stage, has no leg upon which can peg on.

Regarding a ground that the trial magistrate did not read properly the proceedings or else that had failed totally to evaluate properly the evidence in the record,

This complains had no bearing at all. The trial court evaluated the evidence to the effects that the first appellant has admitted to have been driving a motor vehicle at issue on a fateful day also admitted to have caused the fatal accident and to have been convicted and sentenced for dangerous driving and driving without valid driving license. The first appellant mentioned the second appellant as the one who gave him a motor vehicle at issue. The second appellant did not dispute that, only disowned the respondent, in lieu thereof alleged to had been given that motor vehicle by one Mr. Safari, who later was revealed to be family member of the respondent. However this is taken as a more scapegoat to distance from liability. In her testimony the respondent (PW1) had stated I quote:

"My driver Mohamed S. Malimbidi 2nd defencant had handed my car to 1st defendant Ramadhani without my consent. When I phoned Mohamed said the car was being driven by his land lord (1st defendant) and not him".

On cross-examination to PW1 the 2nd appellant only asked a question pertaining to a contract of service and insurance caver note. Actually the conduct of the second appellant to handover a motor vehicle to the 1st appellant who had no valid driving license, was a gross abuse of trust and amounted to negligence. A story could be different, if the motor vehicle could had involved into an accident while under second appellant.

In view of that the trial court was justified to find both appellants liable for a loss and damage occasioned. In the circumstances the trial magistrate cannot be faulted to had arrived at a wrong conclusion. May be the trial court should be faulted for failure to evaluate properly evidence which led to wrong assessment of general damages and award of specific damages.

I understand that the appellate court cannot interfere with award or assessment of damages made by the lower court, unless it is satisfied that the lower court had deployed a wrong principle. In **Winfield & Jolowicz** (supra) at page 765, the author jot down, I quote:-

"Since the assessment of damages for non-pecuniary loss is not an exact mathematical process...the Court of Appeal should not interfere unless the judge has acted on a wrong principal of law, or misapprehended the facts

or has for other reasons made a wholly erroneous estimate of the damage suffered"

This position was reiterated by the defunct Court of Appeal of East Africa sitting at Kampala in a case of **Kilembe Mines Limited Vs. David Bitegge**, Civil Appeal No. 46 of 1971, at page 4, the Court held, I quote:-

"The principles which guide this court on appeal of this nature are well known and suffice to say that before it can disturb the finding of the court of first instance as to the quantum of damages it must be satisfied that the learned judge in assessing the damages applied a wrong principle of law (as by taking into account some relevant one), on short of this, that the amount awarded is either so inordinately law or so inordinately high that it must be a wholly erroneous estimate of damages"

In the instant matter the trial court had awarded the respondent a sum of Tsh 13,000,000/= which the respondent (PW1) had alleged being a value of the car (Noah) and which in a plaint she pleaded under a head of special damages. It is a trite law that special damages must be pleaded and proved (see **Winfield & Jelowicz** on Tort (supra at page 756).

In this matter the respondent had just pleaded, but she did not tender any evidence to prove a value of the alleged motor vehicle (Noah). A value of a motor vehicle cannot be proved by mere words of mouth. The respondent was expected to tender or produce sales agreement to prove

its value, which nevertheless could be subjected to depreciation value test. As such an award of Tsh 13,000,000/= was erroneously made, the same is faulted for want of strict proof.

Regarding the award of Tsh 4,000,000/= for general damages, the trial magistrate had just awarded it without adducing any reason for a grant, what the trial court did , just took a figure pleaded by the respondent and awarded as it is. That was a wrong principle, as for one things general damages are awarded at a discretion of the court, as such it was wrong for the respondent to plead a specific amount, Now in the circumstances of this case where the respondent had suffered damages to compensate the victim to wit deceased's children, to repair a motor vehicle Hiace for a third party and loss of her car which was alleged to be write off. And inview of the fact that the awarded damages were paged in erroneous principle, and were too low and minimal. I reassess the same to Tsh 10,000,000/= for which the dual appellants are held jointly and several liable.

Save for the award of damages which have been disturbed to the extent explained, the appellants appeal is doomed to fail for want of merit.

Appeal dismissed with costs.

HON: E.B.LUVANDA
JUDGE
22/06/2018