

TANZANIA / JUDGMENT

CIVIL APPEAL NO 4010 OF 2024 JULICAN FINANCIAL SERVICES LIMITED

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA DAR ES SALAAM SUB
REGISTRY AT DAR ES SALAAM CIVIL APPEAL NO. 4010 OF 2024 (Arising from the Judgement and
Decree of the Resident Magistrate's Court of Dar es Salaam at Kisutu (Hon. R.M. Mbuya, PRM) in
Civil Case No. 9 of 2021 dated 6th October 2023)

JULICAN FINANCIAL SERVICES LIMITED.....APPELLANT VERSUS THEOPHIL
JOHANSON KILEO.....1ST RESPONDENT MAJEMBE AUCTION MART
LIMITED.....2ND RESPONDENT

JUDGEMENT

Date of last order: 1st November 2024 Date of Judgement: 4th December 2024 MTEMBWA, J.: This Appeal stems from the decision of the Resident Magistrate's Court of Dar es Salaam at Kisutu in Civil Case No. 9 of 2021. Briefly, sometime in 2018, the 1st Respondent entered into a loan agreement with the Appellant in the sum of Tanzanian Shillings 3,000,000/= and, later, Tanzania Shillings 1,000,000/=. The loan was secured by the 1st Respondent's Motor vehicle registered as T 784 BQR, make SCANIA 114-

340. It could appear, as per the records, the loan could not be satisfactorily serviced. As a result, under the instructions of the 1 Appellant, the 2nd Respondent seized the 1st Respondent's Motor vehicle pledged as collateral. The facts reveal further that it was agreed that, the 1st Respondent would pay Tanzanian Shillings 700,000/= as security costs for the safety of his vehicle seized by the 2nd Respondent. To that effect, a commitment letter was executed. After a discussion between the Appellant and the 1st Respondent, consensus was reached that the outstanding amount be reduced to Tanzanian Shillings 7,000,000/=. On 11th July 2020, the 1st Respondent's wife took over and signed the agreement to repay the agreed sum, while the 1st Respondent agreed and signed as a guarantor who pledged the exact Motor vehicle as collateral. After executing the new agreement to repay the outstanding sum, on 29th July 2020, the Appellant, through her Chief Executive Officer, wrote a letter directing the 2nd Respondent to release the Motor vehicle to the 1st Respondent, the owner. However, it was later revealed that the vehicle was vandalized and several items were

missing. As a result, a complaint was filed at Kawe Police Station, and an investigation was launched. Following such misunderstanding, the 1st Respondent thought it wise to commence proceedings against the Appellant and the 2nd Respondent claiming for payment of the sum of Tanzania Shillings 140, 2 000,000/= as the Motor vehicle's replacement value or pay Tanzanian Shillings 80,000,000/= being the replacement value of the missing items and repair costs of the vehicle; payment of Tanzanian Shillings 300,000/=, an amount equivalent to the daily income expected from business; payment of Tanzania shillings 30,000,000/= being general damages; Payment of interest at Court's rate from the date of judgment to the date of satisfaction; an order that the Appellant is not entitled to claim for the repayment of the outstanding amount; and costs of the suit. The Appellant and the 2nd Respondent resisted the claim. In addition, the Appellant raised a counterclaim claiming for Tanzanian Shillings 35,100,000/= being principal sum, interest, and penalties; payment of Tanzania Shillings 15,000,000 being general damages; payment of damages for loss of business; interest on the decretal sum and costs of the suit. Having gathered the evidence adduced, the trial Court was satisfied that the 1st Respondent proved his claims to the required standards and proceeded to dismiss the counterclaim raised by the Appellant. Dissatisfied, the Appellant has fronted the following grounds of appeal, and I quote in verbatim;

1. The Learned Trial Magistrate erred in law and fact by holding that the 1st Respondent did prove his case to the required standard set by Law. 3
2. The Learned Trial Magistrate erred in Law and fact for holding that the Appellant is negligent without proving the said Negligence.
3. The Learned Trial Magistrate erroneously in Law for proceeding to determine the suit and delivered judgment after expiration of speed track and subsequently granting an order for extension of speed track out of the required time.
4. The Learned Trial Magistrate erred in Law and fact for holding that the Appellant is liable to pay the 1st Respondent compensation without assessing the extent of damages occurred.
5. The Learned Trial Magistrate erred in Law and fact for holding that the Appellant is liable to refund the Respondent while the 1st Respondent defaulted to repay the loan.
6. The Learned Trial Magistrate erred in Law and fact for ordering that the Appellant to return the Mortgaged Property to the 1st Respondent while 1st Respondent defaulted to repay the loan.
7. The Learned Trial Magistrate erred in Law and fact for ordering that the Appellant is liable to repair, pay equivalent or purchase the equivalent Motor vehicle (Mortgaged Property) and handle it over to the 1st Respondent, while the said Vehicle at all material time was under custody of the 2nd Respondent.

8. The Trial Magistrate erred in law and facts by failing to take into account and improperly evaluating the evidence adduced on behalf of the Appellant and written submission, hence reached a wrong conclusion, finally decide the case basing on the Respondent evidence. 4
9. The Learned Trial Magistrate erred in Law and fact for holding that the Appellant failed to prove Counter claim and dismissed while the 1st Respondent is in default of payment of secured loan from the Appellant.
10. In all the circumstances of the case, the findings of the Trial Magistrate are insupportable in Law or on the basis of the evidence adduced. When the matter came up for orders on 31st July 2024, the 1st Respondent was represented by Mr. Godwin Fissoo, the learned counsel, who had the briefs of Mr. Omary Mdemu, the learned counsel for the Appellant. The 2nd Respondent was not present. By consent, an order to argue this Appeal by way of written submissions was entered. However, having realized that the 2nd Respondent was not represented when an order was entered, on 1st November 2024, I extended the time for him to file his reply submissions. Having reviewed the records, I am satisfied that parties adhered to the agreed schedule. Having prefaced what transpired, Mr. Mdemu started arguing on the fifth ground of appeal. He complained that the learned trial Magistrate erred in law and fact by holding that the Appellant is liable to refund the 1st Respondent while he is the one who defaulted on repaying the loan. The learned counsel argued that the trial Magistrate misdirected himself because no issue was raised and agreed upon by the parties on whether the 1st Respondent overpaid the loan. Similarly, there was no prayer in the Complaint to refund the 1st Respondent for overpaying the loan. Mr. Mdemu contended further that the clear position of the law is that parties are bound by their pleadings and the relief not sought should not be awarded. He insisted that the trial Magistrate erred in awarding the 1st Respondent the sum of Tanzania Shillings 2,000,000/= as a Refund for the overpayments. He added that the 1st Respondent acknowledged and conceded to the outstanding amount and referred this Court to Paragraphs 10 and 11 of the Complaint. He also complained about the award of Tanzanian Shillings 5,000,000/= as punitive damages and further Tanzanian Shillings 5,000,000/= as compensation. He insisted that the award did not correspond with the 1st Respondent's prayers in the Complaint. To fortify, he cited the cases of *Masaka vs. Rogers Andrew & Others*, Civil Appeal No. 497 of 2021, Court of Appeal of Tanzania at Kigoma and *Makori Wassaga vs. Mwanakombo & Another* (1987) T.L.R 88. While abandoning the third ground of appeal, Mr. Mdemu compressed the first, second, and fourth grounds of appeal and argued them altogether. Referring this Court to page 18 of the impugned Judgment, the learned counsel observed that the trial Magistrate departed from the issues framed by the parties and formulated a new 6 issue styled whether there was vandalization to the 1st Respondent's vehicle. He contended that "vandalization" differs from "stealing" in that, while the former corresponds to willful or deliberately destroying someone's property, the latter means taking someone's property without permission. He insisted that the trial Magistrate created or raised the issue without affording the parties a right to be heard. To add effect, he referred this Court to page 19 in the case of *Masaka Mussa vs. Roger Andrew Lumenyela & 2 Others*, Civil Appeal No. 497 of 2023, Court of Appeal of Tanzania at Kigoma.

Mr. Mdemu also compressed the sixth and seventh grounds of appeal and argued them together. He contended that the trial Magistrate erred in law and fact by ordering that the vehicle pledged as security be returned to the 1st Respondent, repaired, or paid an amount equivalent to its value. He referred this Court to Exhibits P1, P2, P3, and P8 as tendered by the 1st Respondent. He also referred this Court to paragraphs 10 and 11 and prayer (f) to the Complaint, indicating clearly that the 1st Respondent had an unpaid outstanding amount. Stretching further, Mr. Mdemu argued that it was unreasonable to order the return of the Motor vehicle pledged as security. In his further note, Mr. Mdemu submitted that the 1st Respondent had the duty to prove negligence as a result of the stolen items from the 7 vehicle pledged as security. While citing sections 110 and 115 of the Evidence Act and the case of Hemed Issa vs. Mohamed Mbilu

(1984) TLR 113, the learned counsel observed that the burden of proof lies on the person who alleges. The 1st Respondent failed to prove his claim to the required standards, yet the trial Magistrate proceeded to issue orders related to refund, compensation, and punitive damages. He cited the case of Reliance Insurance Company (T) Ltd & 2 others vs. Festo Maomapayo, Civil Appeal No. 23 of 2019, the Court of Appeal of Tanzania at Dodoma, where it was observed that damages must be specifically pleaded and strictly proved. Mr. Mdemu also compressed the eighth, ninth, and tenth grounds of appeal and argued them together. He argued that the trial Magistrate failed to consider and adequately evaluate the evidence adduced by the Appellant. He added that the Appellant brought three witnesses: an executive officer of the Appellant (DW1), the 2nd Respondent's officer who seized the vehicle (DW2), and the police officer who investigated the stolen items from the Motor Vehicle (DW3). The 2nd Respondent herein is a limited company and an independent contractor, professionally registered as a debt collector. She agreed with the Appellant to offer debt collection services and seized the Motor vehicle in dispute. To date, it is still under her control. The Appellant denied 8 responsibility for the missing items because the vehicle was not under her control. Mr. Mdemu also contended further that the Appellant is not liable for the acts done by the 2nd Respondent exercising her duties professionally as an independent contractor. He cited the cases of Alcock vs. Wraith & Others (1991) 59 BLR 16 and Bonaki Hotel vs. Paul Meela (sic). The learned counsel also faulted the trial Magistrate for dismissing the Appellant's Counterclaim. He added that there was no dispute that the 1st Respondent secured a loan from the Appellant and pledged his Motor vehicle as collateral. Similarly, there is no dispute that the 1st Respondent defaulted on loan repayment. She claimed the total sum of Tanzanian Shillings 35,100,000/= being principal sum, interest, and penalties due since 20th April 2018 to date. She also claimed Tanzania Shillings 15,000,000/= as general damages, loss of business, and cost of the suit. On the strength of the foregoing arguments and statutory provisions cited hereinabove in support of the appeal, the learned counsel implored this Court to allow the appeal with costs. In response to the fifth ground of appeal, Mr. Fissoo was not far from conceding that it is trite that parties are bound by their pleading, and so is the court. However, he faulted the Appellant for failing to grasp 9 what paragraphs 10 and 11 of the Complaint entail because

there was no acknowledgment of the outstanding loan or amount. It is vivid that, by way of counterclaim, the Appellant claimed against the 1st Respondent for payment of Tanzanian Shillings 35,000,000/= as well as Tanzania Shillings 15,000,000/= as general damages for causing disturbances and inconvenience to the Appellant. In contrast, the second issue was framed to answer whether the plaintiff defaulted to repay the loan. He referred this Court to page 7 of the impugned judgment, where the said issue was answered negatively, and the trial Magistrate gave a detailed evaluation of facts and evidence. Mr. Fissoo argued further that it is trite that the first Appellate Court has to re-evaluate the trial Court's evidence and come out with its findings based on the evidence on record. He added that case evaluation serves as the foundation upon which legal strategies are built. It thoroughly analyzes the facts, evidence, and legal principles relevant to a particular case. The ultimate goal is to assess each case's strengths and weaknesses and make an informed decision. He was fortified by the decision of Kaimu Said vs. Republic, Criminal Appeal No. 391 of 2019. It was argued further that the trial Magistrate found out that, despite the 1st Respondent acknowledging the huge debt, the Appellant 10 had no right to claim since the vast interests and penalties were contrary to Exhibit P1 and P3 (Loan Agreements). He contended that the trial Magistrate was correct in evaluating the loan agreement and discovered that the interest applicable was 4% and not 20 % as alleged. Still, the Appellant also needed to associate how the said interest accrued. There is no way the Appellant can benefit from his own wrong since it is the principle of law that no person should be allowed to benefit from his wrong. He cited the case of Valerian Moses Bandungi vs. Gozbert Cleophace and Another, Misc. Land Application No. 23 of 2022, High Court of Tanzania (sic), where it was observed that failure to cross-examine a witness on a crucial matter ordinarily implies the acceptance of the truth of the witness evidence. Therefore, the Appellant's failure to challenge the repayment receipts means that the trial Magistrate rightly accepted that the loan was fully repaid. He implored this Court to dismiss the fifth ground of appeal with costs. In response to the first, second, and fourth grounds of appeal, Mr. Fissoo argued that using the words "stealing" or "vandalization" had nothing to do with evaluating the facts and evidence. He did not differentiate between the two words. He added further that, in view of the evidence adduced by PW1 and DW1, the vehicle was in good 11 condition before the attachment and that the missing spare parts and vandalization were directly linked to the Motor vehicle mishandling while in the Appellant and 2nd respondent's custody. Regarding whether there was negligence on the part of the Appellant, the learned counsel argued that the Appellant had a duty to ensure that the attached Motor vehicle was kept in a secured location and protected from any potential harm, including theft and vandalization. Nevertheless, the said motor vehicle was parked beside the road outside the fence of the residential house of the 2nd Respondent in an unsecured location, where it was exposed to vandalization and theft. As such, the Appellant had a duty of care. He cited the case of Kyela District Council, Nsimbi Solomon Mwambeja vs. Leonard Mwinuka Civil Appeal No. 24 of 2020. Hence, the liability in this case is directly tied to the Appellant and 2nd Respondent. He referred this Court to page 26 of the impugned

Judgement.

In response to the sixth and seventh grounds of appeal, Mr. Fissoo considered Mr. Mdemu's arguments the same as those in the first, second, and fourth grounds of appeal. He was not ready to reiterate the same arguments. He referred this Court to page 35 of the impugned

Judgment.

12 Regarding the eighth, ninth, and tenth grounds of appeal, Mr. Fissoo argued that the trial Magistrate's decision was correct and based on a thorough analysis of the evidence. Stretching further, he submitted that the Appellant and the 2nd Respondent (acting as a debt collector for the appellant) wrongfully attached the motor vehicle in dispute after the 1st Respondent had fully repaid the loan, which the Appellant did not refute. The testimonies and documentary evidence from PW1, DW1, and DW2 corroborate that the Appellant issued a letter (Exhibit P9) instructing the second respondent to release the vehicle. The 1st Respondent refused to receive the vehicle back due to vandalism and theft of the spare parts, which the inspection report prepared by DW3 confirmed. Regarding the counterclaim, Mr. Fissoo argued that the trial Magistrate correctly dismissed it because the Appellant failed to provide evidence of the alleged 20% monthly interest rate. He considered the Counterclaim unfounded. In his final analysis, Mr. Fissoo implored this Court to dismiss the eighth, ninth, and tenth grounds of appeal. Based on the preceding arguments and cited authorities, the learned counsel beseeched this Court to dismiss the appeal with costs. The 2nd Respondent's reply submissions were prepared and filed by Mr. Melchoior Tarimo, the learned counsel. In response to the fifth 13 ground of appeal, Mr. Tarimo did not find it worthy because it concerned loan repayment. As the debt collector, she found herself misplaced in the context. Regarding the first, second, and fourth grounds of appeal, Mr. Tarimo argued that she was supposed to be a co-appellant since she was too condemned for negligence. As such, she can not dispute the grounds raised and arguments in support thereof. He was of the opinion, however, that the 2nd Respondent is keenly waiting for an order from this Court directing her where to handle the vehicle in dispute. In his final analysis, Mr. Tarimo considered the Appellant to have nothing to claim against the 2nd Respondent. In that respect, the appeal should be determined between the Appellant and the 1st Respondent. Rejoining to the fifth ground of appeal, Mr. Mdemu faulted the 1st Respondent's stance for failure completely to respond to the Appellant's arguments. He insisted that the trial Magistrate raised and discussed a novel issue regarding overpayment and refunding, which had not existed before. On the other hand, the 1st Respondent in his Plant admitted the outstanding balance in view of paragraphs 10 and 11. Besides, there was no prayer to refund the amount paid in excess and punitive damages. Mr. Mdemu also detailed on the loan agreements, interests, penalties, and penal interests. With respect, I will not consider the 14 arguments because they were not part of his submissions in chief. For future reference, counsels should refrain from detailing issues not so explained in their submissions in chief. The rationale behind this is not far to fetch; the opposing parties must also be given an opportunity to address the issue in their reply submissions. Rejoining the first, second, and fourth grounds of appeal, Mr. Mdemu insisted that the trial Magistrate departed from the issue framed and agreed upon by the parties, thereby renovating a novel one. The issue

agreed upon by the parties related to “stolen items” and not “vandalization of the items”.

Regarding the sixth and seventh grounds of appeal, Mr. Mdemu rejoined that the 1st Respondent defaulted on loan repayment. As a result, the 2nd Respondent seized a Motor vehicle pledged as security. He insisted that the 2nd Respondent is an independent debt collector engaged by the Appellant. He reminded this Court that the 1st Respondent paid storage charges to the 2nd Respondent to keep his Motor vehicle until the loan was fully satisfied. Rejoining the eighth, ninth, and tenth grounds of appeal, Mr. Mdemu argued that the assertion that the 1st Respondent paid for the loan is an afterthought because it cannot be traced from the pleadings. He referred this Court again to paragraphs 10 and 11 and prayer (f) in the Complaint, which indicates that the 1st Respondent had an outstanding 15 balance. Similarly, it was an afterthought that there was an overpayment. Having rejoined, Mr. Mdemu implored this Court to consider the arguments and cited authorities in his submissions in chief and rejoinder submissions and allow the appeal with costs. Having dispassionately considered the rival arguments by the parties, the question is whether the appeal is worthy considering the evidence available on records. In determining this Appeal, I shall also seek the guidance of the Court of Appeal of Tanzania in *Mapambano Michael @ Mayanga vs. Republic*, Criminal Appeal No. 258 of 2015, where it was observed that the first appellate Court must subject the entire evidence on record to a fresh re-evaluation to arrive at a decision and that it may coincide with the trial Court or may be different altogether. While guided by the above principle, it is also a trite law that whoever alleges the existence of any fact bears the duty to prove the same. This principle is gathered from sections 110, 112, and 115 of the Evidence Act (supra) and judicial precedents, including *Manager NBC Tarime vs. Enock M. Chacha* (1993) TLR 228. In the fifth ground of appeal, Mr. Mdemu complained that the learned trial Magistrate erred in law and fact by holding that the Appellant is liable to refund the 1st Respondent while it was him who defaulted to repay the loan. He contended further that parties are bound by their pleading, and the relief not sought or founded on it should not be awarded. He insisted that the trial Magistrate erred in granting the 1st Respondent the sum of Tanzania Shillings 2,000,000/= as a refund for the overpayment; Tanzania Shillings 5,000,000/= as punitive damages and further Tanzania Shillings 5,000,000/= as compensation. He referred this Court to Paragraphs 10 and 11 of the Complaint, where the 1st Respondent acknowledged and conceded to the outstanding amount. Indeed, according to Exhibit P1, on 20th April 2018, the Appellant and the 1st Respondent entered into a loan agreement in which the latter was advanced the sum of Tanzania Shillings 3,000,000/=, repayable within one month by 19th May 2018 with an additional fixed interest of Tanzania Shillings 600,000/=. The loan was secured by a Motor vehicle in the 1st Respondent's name registered as T784 BQR, make Scania. According to Exhibit P3, on 1st June 2018, the two entered into another loan agreement in which the 1st Respondent was advanced the sum of Tanzania Shillings 1,000,000/=, repayable within one month by 30th June 2018 with an additional fixed interest of Tanzania Shillings 200,000/=. This time, the loan was not secured and or guaranteed by anything. According to clause 4 of both loan agreements, the default to pay on the agreed contractual time attracted a monthly penal interest of 4%. As per Exhibit P6 (Demand Notice), it could appear that the 1st Respondent defaulted on payment. As a result, the sum of Tanzania Shillings 13,975,000/= became due as of 30th May 2020. This was followed by the seizure or

attachment of the Motor vehicle pledged as security by the 2nd Respondent on 30th May 2020. According to the facts revealed by the Plaint, the seizure of the security necessitated a round table negotiation. As a result, by agreement, the outstanding sum was reduced to Tanzanian Shillings 7,000,000/=. To that effect, the parties executed another loan agreement that was admitted as Exhibit P8, in which the 1st Respondent became the guarantor while his wife became a borrower. At the outset, I would like to comment in passing on Exhibit P8. Mr. Fissoo considered it as a continuation of the previous loan agreements (Exhibits P1 and P3) between the Appellant and the 1st Respondent. With respect, that did not click in my mind because, considering the import thereof, the borrower is GLORIA WOINDUMI NKYA, while the 1st Respondent is the guarantor. By the way, the Agreement was secured by Barua ya Ofisini and Veta Kongowe Pwani. I did not know what the securities referred to. In my opinion, this agreement (Exhibit P8) has nothing to do with the dispute. If any dispute arose therefrom, a separate suit could have been preferred between the Appellant and the named borrower. Even if negotiations resulted in its execution, as the record stands, the 1st Respondent will remain the guarantor and not the borrower. For this reason, I will disregard it. The records reveal that the 1st Respondent never adhered to the agreed repayment schedule. According to Exhibit P1, the loan was supposed to be repaid in full by 19th May 2018, failure of which a month penal interest of 4% would apply. Similarly, in view of Exhibit P3, the loan was supposed to be paid within one month by 30th May 2018. According to Exhibit P4 (payment receipts), the 1st Respondent paid a total sum of Tanzanian Shillings 6,800,000/= on 30th April 2019, 2nd May 2019, 3rd May 2019 and 9th October 2019. In terms of clause 4 to exhibits P1 and P3, the 1st Respondent was in default and thus attracted a monthly penal interest of 4%. The question is to what extent the 1st Respondent was indebted to the Appellant. The matter was filed at the trial Court on 19th January

2021. Since there is no evidence or account details on each loan agreement default status, I will calculate the penal interest from the date of default to the date of filing this suit at the trial Court. Thus, going by the terms of Exhibit P1, the 1st Respondent, as of 19th January 2021, was in default by thirty-one (31) months equal to Tanzanian Shillings 8,064,000/= and thirty (30) months in view of Exhibit P3 equal to Tanzanian shillings 2,640,000/=. Both inclusive of the principal sum and penal interest. However, it is on record that the 1st Respondent paid the total sum of Tanzanian Shillings 6,800,000/=. In that stance, the outstanding balance as of 19th January 2021 payable by the 1st Respondent to the Appellant was Tanzanian Shillings 3,904,000/=. The penal interest continues to accrue as the amount remains unpaid. The monthly penal interest rate of 4% will be applicable until the principal sum is paid in full. On the premises, I agree with Mr. Mdemu that the trial Court strayed by awarding the sum of Tanzanian Shillings 2,000,000/= as a refund to the 1st Respondent. According to the evidence available, there was no overpayment. As alluded to above, the 1st Respondent fell into default, and, as such, he breached clauses 4 to the preamble and 1 (a) and (b) of the terms of Exhibits P1 and P3, thus blatantly violating section 37 of the Law of Contract Act, which provides that the parties to a contract must perform their respective promises unless such performance is dispensed with or excused under the provisions of the 20 Act or any other law. Black's Law Dictionary, 8th Edition of

2004 defines the term “breach of contract” to mean any violation of a contractual obligation by failing to perform one's own promise by repudiating it or by interfering with another party's performance. In the case of Philipo Joseph Lukonde vs. Faraji Ally Said Civil Appeal No. 74 of 2019, Court of Appeal of Tanzania at Dodoma, the Court observed that; Where parties have freely entered into binding agreements, neither courts nor parties to the agreement, should interpolate anything or interfere with the terms and conditions therein Since Exhibits P1 and P2 reflect what the parties intended to be bound with, this Court cannot interpolate anything or interfere with the terms of the agreement. Given the import of section 101 of the Tanzania Evidence Act, this Court considers them to be what the parties intended to be bound with. This principle was restated in the case of Lulu Victor Kayombo vs. Oceanic Bay Limited and Mchinga Bay Limited, Consolidated Civil Appeals No. 22 and 155 of 2020 where the Court stated, thus; Documentary evidence reflected repositories and memorial of truth as agreed between the parties and retained the sanctity of their understanding. 21 In Nicholaus Mwaipyana vs. The Registered Trustees of Little Sisters of Jesus Tanzania (Civil Appeal No.276 of 2020)

[2023] TZCA 17578 (30 August 2023), the Court noted that; It is the law, according to section 101 of the Evidence Act that if there be a contract which has been reduced to writing, verbal evidence will not be accepted so as to add to or subtract from or in any manner to vary or qualify the written contract. The rationale behind the rule is to uphold the value of written proof and effectuate the finality intended by the parties. The applicability of the rule, according to the authority in Jos Hansen and Soehne v. GK. Jetha Limited [1959] E.A. 1563 is conditional upon there being established that the terms of the parties agreement are wholly contained in the written document. Mr. Mdemu complained that it was wrong for the trial Court to award the sum of Tanzanian Shillings 5,000,000/= as punitive damages and Tanzanian Shillings 5,000,000/= as compensation, which was not prayed for by the 1st Respondent in his prayer clause to the Plaint. Of course, it will lead to injustice if a Court considers or grants a relief for which no prayer is made by the claimant (Plaintiff). This is because the other party may not have had an opportunity to oppose or resist such relief. In Melchiades John Mwenda vs Gizelle Mbagha & Others (Civil Appeal No. 57 of 2018) [2020] TZCA 1856 (13 November 2020), the Court stated; 22 Given the above, we think, the trial High Court fell into error when it declared the second respondent the lawful owner of the disputed land. We say so because; first, in addition to the reasoning in the foregoing paragraph, the evidence did not prove so on a balance of probabilities and, secondly, the second respondent did not plead ownership by way of counterclaim. It is elementary law which is settled in our jurisdiction that the court will grant only a relief which has been prayed for - see: James Funke Gwagilo v. Attorney General

[2004] T.L.R. 161 and Hotel Travertine Limited & 2 Others v. National Bank of Commerce Limited [2006] T.L.R. 133 (emphasis mine) In this case, the 1st Respondent never pleaded or prayed for punitive damages or compensation. I am aware of the provisions of Order VII, Rule 7 of the Civil Procedure Code, which allows the Court to grant reliefs, though not prayed for when it finds necessary for the good end of justice. However, taking such

recourse is risky because it may lead to injustice to the other party. And if such a stance is taken, plausible reasons should be given, which, in this case, I don't see any. That said, I allow the fifth ground of appeal. Arguing on the first, second, and fourth grounds of appeal, Mr. Mdemu submitted that the trial Magistrate departed from the issues framed by the parties and formulated a new one styled whether there was vandalism to the 1st Respondent's Motor vehicle. He contended that "vandalization" differs from "stealing" in that, while the former corresponds to willful or deliberately destroying someone's property, the latter means taking someone's property without permission. In response, Mr. Fissoo argued that using the words "stolen" or "vandalization" had nothing to do with evaluating the facts and evidence. He added that, in view of the evidence adduced by PW1 and DW1, the vehicle was in good condition before the attachment, and thus, the missing spare parts are directly linked to the Motor vehicle mishandling while in the Appellant and 2nd Respondent's custody. I agree with Mr. Mdemu that vandalization differs slightly from theft or stealing. Vandalism is the willful destruction or damaging of property in a manner that defaces, mars, or otherwise adds a physical blemish that diminishes the property's value. Theft involves taking a thing capable of being stolen with the intention of permanently depriving the owner. There is, indeed, a thin line between the two terms. Semantically, there would be no harm if they are related. I passed through the Judgment of the trial Court and noted that, logically, the learned trial Magistrate related the two terms to an act of destroying the property belonging to someone else. In that stance, I disagreed with Mr. Mdemu that the trial Magistrate innovated a new issue, discussed it, and arrived at a conclusion, resulting in an injustice to the Appellant. To that end, I dismiss the first, second, and fourth grounds of appeal. 24 Arguing on the sixth and seventh grounds of appeal, Mr. Mdemu contended that the trial Magistrate erred in law and fact by ordering that the vehicle pledged as security be returned to the 1st Respondent, repaired, or pay an amount equivalent to its value. He referred this Court to Exhibits P1, P2, P3, and P8 as tendered by the 1st Respondent. First, I should say, as alluded before, there is no dispute that the 1st Respondent and the Appellant entered a loan agreement (Exhibit P1) in which the Motor vehicle in dispute was pledged as security. It must be noted here that, in view of Exhibit P3, the vehicle in dispute was not pledged as security. I have already resolved that the 1st Respondent never paid the first loan on time. As a result, the default attracted a monthly penal interest of 4% up to when the same will be fully paid. It is on record that the said Motor vehicle was seized by the 2nd Respondent on 30th May 2020 under the instructions of the Appellant. The seizure was in respect to clause 5 of Exhibit P1, which stipulated that when the borrower fails to pay the outstanding balance, the lender shall, among other things, sell the property pledged as security to secure the loan. In my opinion, the Appellant was correct in seizing the Motor vehicle pledged as security for purposes of sale. I don't see anything in controversy. As said before, that is what parties intended to be bound by the terms they freely executed. This Court has no power to interpolate 25 anything or interfere with the terms of the agreement. Unless the parties enter into a separate agreement, this Court cannot order the release of the said motor vehicle to the 1st Respondent. Mr. Mdemu also faulted the

learned trial Magistrate for ordering the repair or replacement of the missing items or a refund equivalent to the value of the Motor vehicle. At the outset, I need to comment as follows. On page 30 of the typed Judgment, the trial Court ordered re- inspection by either the police force or another government agency like TEMESA to know the vehicle's current status and identify what more happened, including wear and tear and body damages. The trial Court also ordered, in addition, the Appellant and the 2nd Respondent, to make such repairs save for the battery and sample cover. The repair will be done under the supervision of the 1st Respondent or his appointed technician. The learned trial Magistrate's stance was confusing. First, in civil cases, gathering evidence for one party is undesirable by ordering re- inspection of the missing items, including wear, tear, and body damage. Since there was nothing tangible for the Court to rely on, the proper recourse was to disregard the prayer and dismiss the claim but not to order the recollection of the evidence to the detriment of the other parties. If left unattended, it may lead to injustice to other parties. 26 Secondly, it is too confusing to order re-inspection and then, at the same time, order repair of the vehicle. While waiting for the inspection report, the question would be what and which should be repaired. It must be noted that when a criminal allegation is raised in a civil case, the standard of proof is not beyond reasonable doubt but higher than a mere balance of probabilities (see *International Commercial Bank Limited vs. Jadecam Estate Limited* (Civil Appeal No. 446 of 2020) [2021] TZCA 673 (15 November 2021)). The question would be whether theft or vandalization was proven to the required standards. According to Exhibit P10 (Vehicle inspection report), fifteen

- (15) items were missing. In view of Exhibit P13, the value of the missing items was estimated to be Tanzanian Shillings 68,000,000/=. Exhibit P5 (handling note) insinuates something else. It indicates that the Vehicle handled to the 2nd Respondent was not working properly (Gari halitembei). It had no Battery, and its engine oil was leaking. It was signed before three witnesses, including Peter Maige, Athuman Seleman, Sunday F. Mohamed and Ally Samweli. It could appear the vehicle was under the supervision of Selemeni Mkutano. Having passed through the evidence adduced, I am satisfied that it was unsafe to condemn, without materials to rely on, that the vehicle was mechanically okay when the 2nd Respondent seized it. There is 27 evidence that it was not mechanically defective, and that is why it was pulled from Goba area to the 2nd Respondent's yard. It was not quickly established whether the missing items were attached to the vehicle during the seizure. In this, I expected to see the evidence of Selemeni Mkutano, who is expected to be the technician who supervised the vehicle before the seizure. Peter Maige, Athuman Seleman, Sunday F. Mohamed and Ally Samweli were important witnesses because they witnessed the handling process and signed Exhibit P5. It was very unfortunate that PW2 was not present when the vehicle was handled to the 2nd Respondent, and as such, he could not tell on the vehicle's condition before it was seized. Exhibit P10 (Vehicle inspection report) is the evidence of missing items. It is not, with respect, the evidence that the items were attached to the vehicle before the 2nd Respondent seized it. The records are silent as to how the value of the missing items was

reached at. There is no evidence to prove the value of each missing item. In the circumstances, it was unsafe to condemn without evidence on records. The 1st Appellant did not prove his allegations of missing items and their value to the required standards. That said, the order to repair the vehicle is hereby vacated. The 1st Respondent, if still interested, may initiate an investigation to know whether there was theft and whether the missing items were attached to the vehicle before the 2nd Respondent seized it. Mr. Mdemu complained that the 1st Respondent had the duty to prove negligence regarding the stolen items from the vehicle pledged as security. He condemned him for failing to prove his claim, yet the trial Magistrate proceeded to issue orders related to refund, compensation, and punitive damages. Mr. Fissoo insisted that the vehicle was left unattended outside the 2nd Respondent's House, thereby exposed to thieves and vandalizers. I have already resolved in the foregoing arguments that the claim on missing items was not proven to the required standard. As such, negligence can not arise. Since I have also already vacated the orders related to repair, refund, compensation, and punitive damages orders, I see no reason to discuss this issue anymore. Regarding the eighth, ninth, and tenth grounds of appeal, Mr. Mdemu complained the trial Magistrate failed to consider and adequately evaluate the evidence adduced by the Appellant. He added that the 2nd Respondent is a Limited Company and independent contractor, professionally registered as a debt collector, and thus, the Appellant cannot be liable for the acts done by her. The learned counsel also faulted the trial Magistrate for dismissing the Appellant's Counterclaim. 29 On his part, Mr. Fissoo argued that the trial magistrate's decision was correct and based on the analysis of the evidence. As regards the missing items, I have already resolved that there were no materials to rely on, which is why I vacated the order relating to the vehicle's repair. Indivisibly, as said before, the 1st Respondent may launch the investigation processes if he is still interested in demonstrating his rights. Regarding the Counterclaim, I have already resolved that the 1st Respondent did not adhere to the terms and conditions of the loan agreements (Exhibits P1 and P3). As such, there were no overpayments. In such circumstances, the trial Magistrate was wrong to dismiss the counter-claim filed by the Appellant. The order dismissing the counterclaim is hereby vacated and set aside. As argued, the eighth, ninth, and tenth grounds of appeal are allowed to the extent indicated above. In her Counterclaim, the Appellant also prayed for Tanzanian Shillings 15,000,000/= as general damages and damages for loss of business. I passed through the evidence adduced by the Appellant, and I could not see the materials to rely on. The Appellant failed to prove on the balance of probabilities for the Court to invoke its discretionary powers to grant such orders. In that stance, such orders are refused. 30 In the final analysis, the Appeal is allowed to the extent indicated below;

1. The orders related to payment of Tanzanian Shillings 2,000,000/= as overpayments; Payment of Tanzanian Shillings 5,000,000/= as compensation for general damages and payment of Tanzanian Shillings 5,000,000/= as punitive damages are here vacated as set aside.
2. The order to release the Motor vehicle pledged as security is hereby vacated and set aside.

3. An order condemning the Appellant to pay costs is hereby vacated and set aside.
4. The order of dismissal of the Counterclaim is hereby vacated and set aside.
5. The outstanding balance as of 19th January 2021 payable by the 1st Respondent to the Appellant is Tanzanian Shillings 3,904,000/= inclusive of principle and penal interest. The same shall attract a contractual penal interest rate of 4% per month from 19th January 2021 until the principal sum is paid in full.
6. The prayers for the award of Tanzanian Shillings 15,000,000/= as general damages and damages for loss of business are hereby refused. 31
7. The Appellant shall recover her costs arising out of this Appeal. I order accordingly. Right of appeal explained. DATED at DAR ES SALAAM this 4th December 2024. H.S. MTEMBWA
JUDGE 32

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