IN THE COURT OF APPEAL OF TANZANIA

AT TANGA

(CORAM: MAKAME, J.A., RAMADHANI, J.A., And LUBUVA, J.A.)

CIVIL APPEAL NO. 18 OF 1995

BETWEEN

1. THE NATIONAL BANK OF COMMERCE)
2. AHMED JUMA AHMED t/a AHMED JUMA)...APPELLANTS
COURT BROKER & AUCTIONEER)

AND

AHMED ALI ABDERHAMAN.....RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania at Tanga)

(Msumi, J.)

dated the 16th day of June, 1993

in

Civil Case No. 24 of 1993

JUDGMENT OF THE COURT

RAMADHANI, J.A.:

The UHURU newspaper of 01st May, 1993 carried a notice of the instructions of the first appellant, the National Bank of Commerce, to the second appellant, Ahmed Juma, to auction certain property belonging to the respondent, Ahmed Abderhaman. Consequently the respondent sued for a declaration that the intended auction was illegal and/or unlawful and, in the alternative, but without prejudice to the first prayer, sought an order to avoid the guarantee agreements between himself and the first appellant.

The plaint was filed on 10th May, 1993 and on 18th May, the appellants were given up to 26th May to file their

.../2

written statement of defence (WSD). But that was not done. So, on 27th May, time was extended to 16th June but again in vain. However, on 17th June, Mr. Akaro, learned advocate for the appellants, asked the District Registrar to put the matter before a judge "for orders on a prayer to be made which might end up the proceedings immediately - a probable settlement by consent is had in mind." The matter was put before MSUMI, J., as he then was, who gave the following order which is the subject matter of this appeal:

> In conclusion consent judgment is entered against both defendants. As prayed it is hereby declared that the intended sale by auction of the plaintiff's property to be illegal and unlawful. And consequent to this judgment plaintiff is hereby relieved of any liability arising from the purported guarantee. Plaintiff is entitled to his costs which is to be taxed.

The appellants have come with this appeal canvassing two grounds:

1. That the learned High Court Judge erred in law and fact by deciding on and entering judgment on matters not specifically admitted by the first Appellant.

2. That the learned High Court Judge erred in law by grossly misdirecting himself on the procedure of recording judgment on admission.

.../3

Before us the appellants were represented by Mr. Mramba, learned advocate, and the respondent was represented by Dr. Lamwai, learned counsel. Mr. Mramba started with the second ground of appeal and submitted that the procedure of recording judgments on admission as set out in O.XII R.1 of the Civil Procedure Code was not followed. That order provides:

> Any party to a suit may give notice, by his pleading or otherwise in writing, that he admits the truth of the whole or any part of the case of any other party.

As already said, the appellants have not, to this moment, filed their WSD and so, they cannot be said to have admitted by their "pleading." Mr. Mramba merely made an oral admission before MSUMI, J. Therefore, that provision was not followed, as correctly argued by Mr. Mramba. However, the learned advocate conceded that he misled the learned judge as he did not, in the first place, submit his admission in writing. Any way that provision is there to be followed.

Dr. Lamwai, on the other hand, submitted that O.XII R.1 was not applicable because the learned judge used the phrase "consent judgment" and that means he dealt with the matter under O.XV R.1 which provides:

> Where at the first hearing of a suit it appears that the parties are not at issue on any question of law or of fact, the court may at once pronounce judgment.

Mr. Mramba objected to that and pointed out that as there is no WSD then there could not have been a "first hearing." Dr. Lamwai countered that by submitting that in the vocabulary of the Civil Procedure Code there is no such thing as 'mention' but that every meeting of the court is a 'hearing'. The learned advocate submitted that mention is a creation of the courts and not a requirement of the CPC.

Admittedly, the CPC does not talk of mention but, without going into a discussion and determination of when there can be a first hearing, we think that there can be a hearing without a WSD having been filed. This is clear from O.X R.1 which Dr. Lamwai cited in the alternative and/or in addition to O.XV R.1. Now O.X R.1 provides as follows:

> At the first hearing of the suit the court shall ascertain from each party or his advocate whether he admits or denies such allegations of facts as are made in the plaint or written statement (<u>if any</u>) of the opposite party, and as are not expressly or by necessary implication admitted or

> denied by the party against whom they are made. The court shall record such admissions and denials. (The emphasis is ours).

It is obvious that in the absence of a WSD a judge can still ascertain admissions and denials and that is done in a hearing, or to be precise in a first hearing. We, therefore, agree with Dr. Lamwai that MSUMI, J. could be taken to have acted under O.XV R.1 and so, he gave a consent judgment.

However, that rule apply only where "the parties are not at issue on any question of law or of fact." Can the parties in this appeal be said not to have been at issue on any question of law or of fact? This takes us to the first ground of appeal.

The appellants, in their first ground, complain that the learned judge erred in law and in fact by entering judgment on matters not specifically admitted by the appellants. Mr. Mramba submitted that they only conceded the first prayer of the respondent which is an "order declaring the said announced intended sale by auction of the plaintiff's properties, scheduled for 15th May, 1993, to be illegal and unlawful." It is better, in order to appreciate fully this complaint, to reproduce what was said before MSUMI, J. by Mr. Mramba, learned advocate for the appellants, and by Mr. Msakamari, learned counsel for the respondent.

.../6

Mramba: We wish to tell the court that we concede to the plaintiff prayers including main one as contained in 8th paragraph of the plaint. Since the other prayers are in the alternative, we submit that the same cannot be granted after we have conceded to the main prayer.

We have been forced to take this position because plaintiff was a guarantor to loans taken from the first defendant's bank by M/S Mkwakwani Bazaar Ltd. Plaintiff guaranteed the loans. The intended sale of the plaintiff's mortgaged property was made without issuing notice to the plaintiff as a guarantor. For this we feel that we have no case against the plaintiff...

Msakamari: In the plaint, we have already denied the alleged guarantee. So an order should be made relieving the plaintiff of the said guarantee. And the consequence should be that the title deeds which are currently in the possession of the first defendant be restored to my client...

Mramba: It is true that the plaintiff's title deeds are with the first defendant's bank. Unless the plaintiff made the alleged guarantee, one wonders why the said documents came into the possession of the bank. We concede that the intended sale of the house was illegal as no notice was given to the plaintiff.

.../7

Dr. Lamwai conceded that the appellants admitted the first prayer but argued that Mr. Mramba specifically told MSUMI, J. "We wish to tell the court that we concede to the plaintiff prayers including main one as contained in 8th paragraph of the plaint." Dr. Lamwai pointed out that paragraph 8 of the plaint is loud and clear in its denial:

> ... the plaintiff deny any liability arising from the claimed transactions stated in paragraph 7 above and has already communicated the said denial to the first Defendant ...

Paragraph 7 of the plaint provides:

> That the said intended sale by auction is stated to be occasioned by an outstanding loan owed by Messrs Mkwakwani Bazaar Limited to the bank, which is claimed by the first defendant to have been guaranteed by the Plaintiff. The first Defendant's letter Ref. No. NBC/54/10/214/Vol.II dated 28/4/1993 forms Annexure "B" to this plaint.

Dr. Lamwai contended that the combined effect of paragraphs 7 and 8 is an unequivocal denial of liability under any guarantee agreement. So, he argued, when Mr. Mramba conceded to the prayer contained in paragraph 8, he was conceding to a declaration that the guarantee agreements between the appellants and the respondent were void.

.../8

We must confess that we found the submission of Mr. Mramba before MSUMI, J. not easy to comprehend. Mr. Mramba himself was not in a position to explain to us what he had meant by some of his utterances. With due respect to him, if he had done what he now seeks to fault the learned judge for not having done, that is, if he had followed O.XII R.1 and had made his admissions in writing, he would have marshalled his thoughts and would not have strayed into this muddle. So, we now have to figure out what was and what was not admitted.

As we have said, prima facie Mr. Mramba could be taken to concede the avoidance of the guarantee agreements. But that is what was contained in the second prayer:

> In the alternative, and without prejudice to the aforesaid prayers: an order declaring that the agreements between the Plaintiff and the first Defendant is void.

Now, what the courts do when there is a main prayer and another prayer is asked in the alternative, is not to grant both of them but to grant one or the other. This is why Mr. Mramba said "Since the other prayers are in alternative, we submit that the same cannot be granted after we have conceded to the main prayer." The main being the declaration that the intended sale was illegal and/or unlawful.

.../9

Admittedly, Mr. Msakamari pointed out that the plaintiff has clearly denied in the plaint the alleged guarantee and asked MSUMI, J. to relieve him of the said guarantee. However, Mr. Mramba pointed out to the learned judge that "Unless the Plaintiff made the alleged guarantee, one wonders why the said documents came into the possession of the bank." This was after it was admitted that the bank was in possession of the title deeds. Mr. Mramba went further to emphasise to the learned judge that "We concede that the intended sale of the house was illegal as no notice was given to the plaintiff." (emphasis is ours).

From that labyrinth before the learned judge, it emerges that Mr. Mramba conceded the first prayer only, that is, that the intended sale was illegal and/or unlawful for the simple reason that notice of the sale had not been given to the plaintiff. Mr. Mramba did not concede to the avoidance of the guarantee agreements between the appellants and the respondent. Instead he left that as a triable issue for the respondent to show why the appellants were in possession of the title deeds. We, therefore, do not agree with the learned judge that "consequent to this judgment plaintiff is hereby relieved of any liability arising from the purported guarantee." That was not part of the consent judgment. We certainly do not agree with the learned judge that:

.../10

> By conceding to the plaintiff's prayer for the nullification of the said sale, inferably defendants must be taken to concede to plaintiff's denial that he is liable under the alleged guarantee.

It is abundantly stated by the appellants that they conceded to the nullification of the intended sale because no notice of sale was given to the respondent.

Therefore, and with all due respect, we uphold only that part of the judgment which declares the intended sale to be illegal and unlawful and we quash the rest. We order that the case goes back to the High Court to proceed with the matter. Of course, we are aware that the appellants have not filed their WSD and that the time given by the court to do that expired before the proceedings of 8/7/1993. However, we leave that matter to be dealt with by the court accordingly.

The appeal is allowed to the extent explained above. Costs to follow the event.

DATED at TANGA this 26th day of SEPTEMBER 1997.

L. M. MAKAME
JUSTICE OF APPEAL

A.S.L. RAMADHANI
JUSTICE OF APPEAL

D. Z. LUBUVA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

(M.S. SHANGALI)
DEPUTY REGISTRAR