IN THE COURT OF APPEAL OF TANZANIA

AT ZANZIBAR

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

CIVIL APPEAL NO. 59 OF 1996

B E T W E E N

1. SHABIR F.A. JESSA
2. MAKAME USSI MACHANO . . . . . APPELLANTS

A N D

RAJ KUMAR DEOGRA. . . . . RESPONDENT

(Appeal from the decision of the High Court of Zanzibar at Vuga)

(Hamid, C.J.)

dated the 9th day of March, 1995

in

Civil Case No. 22 of 1992

JUDGEMENT OF THE COURT

LUBUVA, J.A.:

In this appeal, Shabir F.A. Jessa and Makame Ussi Machano, hereinafter referred to as the first and second appellants respectively, are appealing against the decision of the High Court of Zanzibar (Hamid, C.J.) in Civil Case No. 22 of 1992. In that case, Raj Kumar Deogra, the respondent, had sued the appellants for the sum of shillings 18,141,560/= as the agreed price of goods sold and delivered to the appellants. From the evidence on record, it is apparent that the respondent was a business man resident in Zanzibar running a shop business. The respondent was known and familiar to the second appellant, Makame Ussi Machano, a Commissioner of Police stationed in Dar es Salaam Police Headquarters who is now dead. It is also apparent that the second appellant carried out some business in partnership with the first appellant, whom he introduced to the respondent on

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the day the first and second appellants visited the respondent's shop in Zanzibar. Relying on the second appellant's guarantee for the payment, the respondent allowed the appellants to take delivery of goods from his (respondent) shop in Zanzibar worth shillings 18,141,560/=. This amount was not paid despite repeated demands by the respondent. Consequently, a suit was filed in the High Court of Zanzibar against the appellants for the recovery of the amount. The learned Chief Justice awarded judgment infavour of the respondent. He held that the appellants were liable because in their partnership business they received the goods from the respondent's shop for which no payment had been made. From that decision, this appeal has been preferred.

In this appeal, Dr. Lamwai, learned Counsel assisted by Mr. Tadayo, learned Counsel represented the appellants and on the other hand Mr. A. Patel, learned Counsel advocated for the respondent. In the memorandum of appeal, seven grounds were raised. However, at the commencement of the hearing of the appeal Dr. Lamwai who sought to introduce two additional grounds of appeal abandoned ground four of the original grounds and one of the additional grounds. In sum total therefore, Dr. Lamwai argued six grounds including one additional ground. From these grounds, we think three salient points are raised. First, that it was not proved that the appellants were business partners, second whether the appellants were liable jointly or severally and thirdly, that the suit against the second appellant abated as there was no proper legal representative.

Dealing with ground one which relates to the first point, Dr. Lamwai vehemently criticised the learned Chief Justice for the finding that the appellants were business partners. He stated

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that although it was alleged in the plaint that the appellants were business partners, which was denied in the written statement of defence, it was the duty of the respondent to prove the alleged business partnership. In this case, he said, this was not done, and so, the finding on the business partnership was without foundation, Dr. Lamwai stressed. Referring to Section 238 of the Law of Contract Decree, Cap. 149 of the Laws of Zanzibar, it was Dr. Lamwai's further submission that for a business partnership it was necessary to prove that there was a known particular firm in existence to which the appellants were members. In here, Dr. Lamwai charged, no such proof was forthcoming, in which case the mere conduct of the appellants was not enough to establish the existance of a partnership. In a further attempt to disprove the existence of business partnership, Dr. Lamwai urged that the word 'partnership' as it appears in the evidence was used in a loose and general sense and not strictly as a technical legal term.

With regard to business partnership, Mr. Patel, learned Counsel took the view that the conduct of the appellants was such that the respondent was led to believe that they (appellants) were in business partnership. Mr. Patel referred to the fact that the appellants went together to the shop of the respondent where, upon the recommendation and assurance of the second appellant, the respondent agreed to issue the goods. Such representation, Mr. Patel insisted, satisfies the requirement of Section 238 of the Law of Contract, Decree, Cap. 149 of the Laws of Zanzibar.

With respect, we agree with Mr. Patel, learned Counsel on his submission regarding business partnership. In our

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considered opinion, there is sufficient and credible evidence in support of the existence of a business partnership between the appellants. From the evidence of the respondent, it is clear that the appellants were together at the shop of the respondent in Zanzibar. As a result of the representation of the second appellant, the respondent believed that the appellants were partners in business. In his evidence, the respondent states:

> "Kwa siku ile hakunitajia wenzake lakini walipokuja Zanzibar kuchukua mali ndipo aliponitajia Shabir na mwenzake Moh'd kuwa ndio partner wake. Shabir hakukataa kama yeye si partner na pia Moh'd hakukataa kuwa hivyo wote walikuwa partner kwa kukubali wote. Makame Ussi alikuwa Kamishna wa Polisi na aliposema vile mimi niliamini na wale watu nilichukulia kama ni partners."

From this it is no gainsay that the respondent was led to believe that the appellants were partners in business. On this clear representation by the second appellant that they were partners, from which the first appellant did not disassociate, we can hardly understand Dr. Lamwai's plea that the word partner was used in a loose and general meaning different from the normal legal meaning. With respect, we cannot accept this. It is elementary that in much the same way the representation was made to the respondent, a layman, the consequence of it is what in our view, matters. That is, the respondent was made to believe that the one making the representation was in partnership with the first appellant. This representation, we are satisfied, meets with the requirement of Section 238 (1) of the Law of Contract Decree, Chapter 149 of the Laws of Zanzibar. Section 238 (1) reads:

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> A person, who has, by words spoken or written or by his conduct, led another to believe that he is a partner in a particular firm, is responsible to him as a partner in such a firm.

For that reason, it is our view that the learned Chief Justice of Zanzibar came to the correct conclusion in his finding that the appellants were partners in business. Ground one therefore fails.

We will next deal with the issue whether the appellants are liable jointly or severally. Under this head we think that most of the other grounds of appeal, namely, one, three and five have a bearing. Dr. Lamwai, has vigorously contended that the appellants are not liable. It was Dr. Lamwai's submission that as there was no credible evidence to prove liability against the appellants, it was mere conjuncture on the part of the learned Chief Justice to find the appellants liable. On the other hand, Mr. Patel, learned Counsel for the respondent supporting the decision of the Chief Justice dwelt at length with the conduct of the second appellant, Makame Ussi Machano. In the first place, Mr. Patel narrated, the second appellant physically went together with the first appellant to the shop of the respondent seeking to take delivery of the goods. Secondly, the second appellant undertook to guarantee the payment for the goods and this is evident from the testimony of the second appellant himself (DW.1) urged Mr. Patel. In the evidence, Mr. Patel further stated, the second appellant quite clearly said: "Raju ametoa mali kutokana na guarantee yangu". Generally translated, it means that Raju, the respondent, has released the goods because of the second appellant's guarantee. The guarantee referred to is Exh. P1 which reads:

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"11/6/1991 Makame Ussi Total 18,141,560/=
nimechukua mali yenye thamani hiyo hapo
juu kwenda Dar-es-Salaam na naondoka na
Bareto kuchukua fedha thamani ya mali
hiyo kesho kutwa.

Signed

Makame Ussi
11/6/1991"

On the basis of such clear and unambiguous undertaking, Mr. Patel contended, the learned Chief Justice cannot be faulted for holding the second appellant liable to pay for the goods in the event the payment is not otherwise effected. Dr. Lamwai was firmly of the view that the second appellant did not sign Exhibit P1 as a guarantee for payment. According to Dr. Lamwai, the second appellant wrote and signed Exhibit P1 for the purpose of introducing the first appellant to the respondent. In further elaboration, Dr. Lamwai asserted that the second appellant merely sought to assure the respondent that the first appellant was known to him, (second appellant) and nothing more.

With great respect, we do not agree with Dr. Lamwai, learned Counsel. It is incredible that a senior and experienced police officer of the rank of Commissioner of Police did not know the meaning and implication of what he had written and signed for in Exhibit P1. In our considered view, the message in it is loud and clear to any ordinary and sensible person. It is all the more so for any one venturing into business of any kind. It hardly needs any amount of sophistication or high education to understand the implication of the message written and signed for in Exhibit P1. As correctly pointed out by

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Mr. Patel, from the evidence on record, it is evident that the respondent trusting the word of the second appellant, a senior police officer, released the goods believing and as guaranteed in Exhibit P1 payment would be effected. In such circumstances, and as it turned out, the second appellant cannot in our view, turn round denying liability to pay for the goods on the ground that he did not sign Exhibit P1 as a guarantee for payment. It was Dr. Lamwai's further submission that the second appellant is such a casual person that it is possible that he could have signed Exhibit P1 without first understanding its content and implication. To say the least, we find this ridiculous and unacceptable. To our minds, for a person in the position of the second appellant to allow himself to be an easy victim of such casual way of doing things, he should be prepared for the consequences of such conduct. Regrettably, liability to pay for the goods delivered is such a consequence. For this reason, we are, with respect, in agreement with the learned Chief Justice that the appellants are liable for the goods delivered from the respondent's shop.

There is yet another aspect regarding liability. This relates to the evidence of Anthony Bareto, (PW.2) an employee of the respondent. On 11/6/1991 Bareto went to Dar es Salaam, where, according to the second appellant he would be paid the money, Shs. 18,141,560/=. He travelled together with the appellants. This accords with the undertaking in Exhibit P1 by the second appellant that in two days time, the appellants would go to Dar es Salaam with Bareto for payment. It was however, a futile trip as Bareto returned to Zanzibar without the money. This again in our view, is strong supportive evidence that the appellants

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were so greatly involved with the transaction leading to the delivery of the goods that they cannot escape the liability to pay. Dr. Lamwai sought to discredit Bareto as an unreliable witness. We do not, with respect, agree with him. The learned Chief Justice who had the advantage of hearing and assessing the demeanour and credibility of the witness believed and accepted his evidence as truthful. That was a question of fact to which the learned Chief Justice was entitled to make a finding.

As regards annexures "A" and "B" to the written statement of defence, Dr. Lamwai strongly criticised the learned Chief Justice for finding these annexures as forgeries. He contended that the evidence of the appellants was more credible than that of the respondent, an illiterate person who, could, with difficulty sign at times in Hindi or in the conventional writing. And so, on the basis of these annexures, Dr. Lamwai insisted, the goods delivered to the appellants were paid for in cash. In that case Dr. Lamwai urged, the claim against the appellants for the goods does not arise. Mr. Patel, learned Counsel for the respondent ardently maintained that the documents in annexures "A" and "B" were fabricated in order to escape liability. He therefore concluded that the finding that the documents were forged was sound. This is because Mr. Patel stated, in the first place, the authorship of the letter of 9.10.1991, Annexure D, addressed to M/S Kesaria and Company Advocates, and the purported agreement of 11/6/1991 Annexure B, have been denied by the respondent. Secondly, Mr. Patel further contended, the receipts shown in Annexure "A" having nothing to do with the amount, the subject matter of the suit in this case.

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As the bone of contention in this suit was the non payment for the goods taken from the respondent's shop, the receipts in support of the appellants' claim to have paid in cash was central. In this case the second appellant denies liability on the ground that on the dates in question, he purchased the goods from the respondent by payment in cash. He sought to use the receipts marked as annexure "A" to the written statement of defence as supportive evidence of cash payment which was rejected by the learned trial Chief Justice as forgeries. In our considered opinion, we agree with Mr. Patel, learned Counsel that the learned Chief Justice properly rejected the receipts (Annexure"A"to the written statement of Defence) as forgeries for the following reasons: First, we think, as correctly pointed out by Mr. Patel, learned Counsel, Annexure "A" to the written statement of defence is not relevant to the claim, the subject matter of the suit. It is to be observed that the suit involves goods worth a total sum of shillings 18,141,560/= while the receipts numbers 10061 and 10062 of 11.6.1991 (Annexure "A")even if accepted as genuine, add up to a total of not more than shillings 2,049,350/= only. It seems to us therefore that it does not stand to reason and logic that an amount which has no comparison with the suit claim is to be raised in defence. Secondly, the respondent having denied writing the letter of 9.10.1991 (Annexure D to the written statement of defence) it was imperative to furnish evidence to prove the authenticity of the letter. In the absence of such proof, on balance of probability the argument that the documents were, as it were, doctored in order to accommodate the appellants' line of defence is plausible. For that reason, we are satisfied that there are no grounds for faulting the learned Chief Justice in

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his finding that the documents in Annexure "A" of the written statement of defence were forgeries. This, effectively disposes of grounds two and three and five. The other grounds have also been dealt with in the course of this judgment.

Before concluding this judgment we wish to deal briefly with the issue of the legal representative of the second appellant. Of course we are aware of the fact that this was not one of the grounds raised in the memorandum of appeal but we allowed it to be canvassed at the hearing of the appeal. It is apparent from the record that the second appellant, Makame Ussi Machano closed his defence case on 19.5.1994 and sometime thereafter he died. Following his death, on the application of the advocate for the respondent, Amina Makame Ussi, the daughter of the second appellant, was joined on 13.9.1991 as the legal representative. Dr. Lamwai strongly contended that the legal procedure for the appointment of the legal representative for the estate of the second appellant was not followed. He took the view that as no letters of administration were granted, there was no proper legal representative for the second appellant. Consequently, Dr. Lamwai expressed doubts that the suit against the second appellant had abated.

We agree with Mr. Patel, learned Counsel for the respondent. that the suit against the second appellant did not abate. This is so because an application had been made for the legal representative of the second appellant to be joined as a party after his death, which application was granted on 13.9.1994 with the concurrence of the learned Counsel for the first appellant. Amina Makame Machano was thus joined. This was done in accordance with the requirement of the law under Order 26 Rule 4 and Section 129 of the Civil Procedure Decree. In this case, it is to be observed,

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the second appellant having died after his case had been closed, there was not much left to be done in the case before the delivery of the judgment. Moreover, the second appellant was represented by a lawyer throughout. In that case, we think the interests of the second appellant or his estate were not prejudiced by having Amina Makame Machano joined as a party to the suit in this manner. At any rate, the circumstances of this case are such that in our view, the provisions of Order XXVI Rule 6 of the Zanzibar Civil Procedure Decree would apply. In part, Order XXVI Rule 6 states:

> "..... there shall be no abatement, by reason of the death of either party between the conclusion of the hearing and the pronouncing of the judgment....."

From these provisions it is clear that the death of the second appellant having taken place between the conclusion of the hearing of the suit and the pronouncement of the judgment, the suit against the second appellant did not abate. Thus, with respect, Dr. Lamwai's doubts that the suit against the second appellant abated by reason of death is unfounded.

Consequently, for the foregoing reasons, the appeal is dismissed with costs.

DATED AT DAR ES SALAAM THIS DAY OF 1997.

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