

THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM
(CORAM: RAMADHANI, J A.; NSEKELA, J A.; And KIMARO, J A)

CIVIL APPEAL NO. 64 OF 2005

BETWEEN

REMIDIUS EDINGTON KISSASSI ... 1ST APPELLANT
GRACE KISSASSI ... 2ND APPELLANT

AND

CHRISTOPHER JOHN MAKATTA ... 1ST RESPONDENT
BETTY MAKATTA ... 2ND RESPONDENT
(Appeal from the Judgment of the High Court of Zanzibar at

Zanzibar,)

(Mshibe A. Bakari, J.)

dated the 13th day of January, 2005

in

Civil Case No. 21 of 1993

JUDGMENT OF THE COURT

.....

RAMADHANI, J.A.:

When an appeal involving the same parties first came before this Court a retrial was ordered and we have no idea why that was so. This is the second time the parties have come to this Court. There is still much to be desired in the way the retrial was conducted and recorded. For example, it is not very clear which exhibit numbers refer to which documents. Then a number of matters were not proved but were glossed over. For instance, when was the building on Plot No. 25 Migombani, erected? When did the hotel business

start? Also issues were framed but they were not dealt with as they should have been.

We are of the decided view that it will not be fair to the parties to order another retrial. The alternative is for us to step into the shoes of the trial court, as we are entitled to do and, since this is the first appeal, we proceed with it by way of rehearing. For the avoidance of doubt we are going to use the first names of the parties and also we shall renumber the exhibits as we will indicate hereinafter.

Christopher John Makatta, 1st respondent, and his wife, Betty Makatta, 2nd respondent, jointly sued Remidius Edington Kissassi, 1st appellant, and his wife, Grace Kissassi, the 2nd appellant. Remidius is the owner of Plot No. 25 at Migombani, Zanzibar, registered as No. T.208/83 of 19/01/1983.

The story of Christopher is that on 23/07/1992 he concluded a written Agreement, now taken as Exh. P 1, with Remidius containing four items. One of the items is that the two jointly and in equal shares built a house on Plot No. 25 Migombani (hereinafter we shall refer to it as the Plot). On 31/07/1992 they registered a partnership called Jambo Inn Migombani Company. The establishment of the partnership was a second item of the Agreement.

Christopher produced a form under The Registration of Business Names Decree, Cap 168 titled "Statement of Particulars in the Case of a Firm", which we regard as Exh. P 2. He also produced a Certificate of Registration under the same decree and an "Extract from Register" of Business. We take them as Exh. P 3 and Exh. P 4, respectively. He stated that when the hotel business started he was the manager.

Christopher said that the title deed of the Plot was not amended as stipulated in the Agreement (Exh. P 1) and, so, they concluded a Statutory Declaration which they said should be taken as a title to the "said house in equal and undivided shares". We shall refer to that declaration as Exh P 5. We may point out that the then Registrar General, who was responsible for the registration of Exh P 5, Ussi Khamis Haji, PW 3, categorically said:

This is not a conveyance. No transfer for consideration. Therefore, it is optional registrable document.

Christopher concluded his evidence by revealing that the partnership was unceremoniously terminated by Remidius on 19/09/1993. He asked the court to grant the following prayers: One, to declare that the partnership is dissolved; Two, to declare that the house is a joint property of Remidius and Christopher; Three, Remidius to be ordered to give an account of the business from 19/09/1992; and Four, Christopher to get his dues.

Remidius acknowledged the Agreement of 13/07/1992 (Exh. P1) but said that Christopher's contribution was just shs. 4,050,000/=. He flatly disowned the Statutory Declaration, Exh P5 and said that he signed it while admitted in hospital. He prayed for a declaration by the court that they are not partners in equal shares and that Christopher is to be reimbursed what he had originally contributed.

The learned trial judge found in favour of Christopher and he declared that the partnership was dissolved; that the house on the Plot was jointly owned by Remidius and Christopher in equal shares; Remidius was to give an account of the business as from 19th September, 1993, and if he failed to do so, then his shares in the Plot to be forfeited and be used as a setoff. The learned judge ordered interest at bank's rate from the date of the judgment to the date of full payment of decretal amount.

Remidius has appealed to this Court advancing seven grounds of appeal which were argued by his learned advocate, Mr. Bernard Ngatunga. In the first ground it was argued that Exh P 1 was wrongly admitted as it was not registered as required under section 4 of the Registration of Documents Decree Cap 99. That section requires all documents involving interest on land to be registered. Dr. Masumbuko Lamwai, learned counsel for the respondent, replied that Exp. P 1 did not require registration. First, he pointed out, its title is

"Agreement" and then its contents refer to a creation of a partnership. He underscored that the document was not a conveyance or a mortgage, or a tenancy agreement.

Ground two seeks to err the learned judge in taking the Statutory Declaration, Exh P 5, as a proof of joint ownership while he had earlier on found that it did not create title to property. Dr. Lamwai said that the Statutory Declaration should be read together with other documents which were made at about the same time and that these documents together created a partnership relation and ownership. Dr. Lamwai pointed out that such other documents were the Agreement, Exh P 1; the Certificate of Registration of Business, Exh. P 3; and the "Extract from Register", Exh P 4.

The gist of ground three is that the learned judge erred in holding, without any proof, that the partnership continued to exist after 19th September, 1993. Dr. Lamwai adopted his response in ground two to answer this ground. We may as well observe that the two grounds are unrelated.

Ground four attacks the holding of the learned judge that Christopher was operating the business as a partner while there was no evidence of that. Dr. Lamwai replied that the learned judge's holding is supported by the statements of Remidius himself.

As for ground five the learned judge was faulted for holding that the Plot is a joint property of Remidius and Christopher. Mr. Ngatunga reiterated that Exh P 1 should not have been admitted and that it is that document which is taken as proof of joint ownership. He also argued, in the alternative, that even if Exh. P 1 was properly admitted the contract was futuristic, meaning that it depended on certain events to happen in the future. Dr. Lamwai said that the Statutory Declaration (Exh P 5) was not a proof of title but that the learned judge applied the doctrine of estoppel, that is, Remidius could not refute what he categorically stated regarding joint ownership of the house built on the Plot.

The complaint in ground six is that the learned judge erred in holding that Remidius breached the terms of the partnership without even ascertaining what those terms were. Mr. Ngatunga submitted that the partnership envisaged by the Agreement, Exh P 1, did not take place since their spouses were not included and that a fresh partnership solely between Remidius and Christopher came into being and that there were no terms spelt out for this partnership. Dr. Lamwai argued that the terms of the partnership could be obtained from the documentary and oral evidence given by the parties. Dr. Lamwai pointed out that Remidius himself conceded to have terminated the services of Christopher.

In ground seven the learned judge is accused of not writing a proper judgment. Mr. Ngatunga argued that essential matters were not taken into account, for example, the fact that the Agreement, Exh P 1, was contingent was overlooked. Again he argued that, though it was brought to the attention of the learned judge that there were in existence two partnership agreements he only considered one agreement. Dr. Lamwai merely said that he was adopting his arguments in all the other six grounds to show that there was a proper judgment.

As we have pointed out earlier we are of the decided view that we have to look at the issues framed at the trial and deal with them one after another but at the same time considering the submissions made on the grounds of appeal at appropriate junctures.

The first issue was: Whether there is a partnership known as Jambo-Inn Migombani Company. If yes, who were the members?

The Certificate of Registration, Exh P 3, is specifically for the registration of partnerships but it merely mentions the business name as "Jambo Inn Migombani Company". It is the "Extract from Register", Exh P 4, which is explicit that the registered business was a partnership between Christopher and Remidius who were to operate the bank account jointly. Mr. Ngatunga submitted that the partnership envisaged by the Agreement, Exh P 1, did not materialize

since their spouses were not included. He contended that a fresh partnership only between Remidius and Christopher came into being.

The answer to issue one is Yes there was a partnership called Jambo Inn Migombani Company which was between Remidius and Christopher only. We say so because section 234 of the Contract Decree defines partnership to mean:

the relation which subsists between persons who have agreed to combine their property, labour or skill in some business, and to share profits thereof between them

All the evidence we have recounted above tallies with this definition of partnership.

For the avoidance of doubt, that partnership is not established by the Agreement, Exh P 1, which we shall deal with later, but it is documented in Exhibits P 2, 3, and 4.

Issue two: Whether the business operated on the Plot is a joint business between the Plaintiffs and the defendants? This issue need not detain us. From our findings in issue one, Jambo Inn Migombani Company is the business operated on the Plot and it is between Christopher and Remidius only. Hence our answer to the second issue is that the business on the Plot is a joint one between Remidius and Christopher and does not include the two wives.

Issue three: In what capacity was the 1st Plaintiff operating the said business and on what terms? Mr. Ngatunga at the end of the day conceded that the learned trial judge's finding that Christopher operated the business as a partner was correct. That disposes part one of the third issue; the capacity in which Christopher operated the business, and we also dismiss ground 4 of appeal which seeks to fault that holding.

As for the second part of issue three, under what terms Christopher operated the business. There is no exhibits prescribing the terms of the partnership. In such a situation we have to fall back on the provisions of section 244(c) and (d) of the Contract Decree, Cap 149:

In the absence of any contract to the contrary the relations of partners to each other are determined by the following rules –

- ...
- (c) each partner has a right to take part in the management;
- (d) each partner is bound to attend diligently to the business of the partnership, **and is not entitled to any remuneration for acting in such business;** (Emphasis is ours.)

In fact Christopher himself said in the examination-in-chief:

We employed the Hotel Manager called Moshiro. I was the one who brought that manager. I was not the manager I was just a director of the company. I was not the manager at all.

Christopher's denial in Court of being the hotel manager contradicts paragraph 9 of the Amended Plaint: "That upon the commencement

of business, the 1st Plaintiff became manager". Be it as it may, he was duty bound to operate the business without payment.

Our answer to part two of issue three is that the terms under which Christopher operated the business are those spelt out in section 244 (c) and (d) of the Contract Decree.

Issue four: Who owns Plot No. 25 at Migombani Zanzibar? The learned trial judge said this in his judgment:

On answering the fourth issue, the statutory declaration exhibit P 5 is very clear that the Plot No. 25 Migombani Zanzibar is owned by the 1st Plaintiff and the 1st Defendant jointly in equal shares. Since the statement in the said Statutory Declaration was made by the 1st Defendant himself that the Plot is jointly owned by himself and the 1st Plaintiff, he cannot now deny the truth ...The 1st Defendant is therefore estopped from denying that the Plot No. 25 at Migombani is owned by him and the 1st Plaintiff.

So, the learned trial judge found that the Plot is jointly owned because of Exh P 5 and the doctrine of estoppel and Dr. Lamwai subscribes to that.

There is no doubt at all that the Statutory Declaration, Exh P 5, has no evidential value of conveyance and making Christopher a co-owner of the Plot as the learned trial judge rightly held:

It is true that Statutory Declaration never creates title deed to property but most of the times it stands as the true statement by the maker.

But even if it is Remidius' true statement, does it convey title?

Section 115 of the Evidence Decree, Cap 5 makes estoppel part of the law of Zanzibar:

When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon that belief, neither he nor his representative shall be allowed, in any suit or proceedings between himself and that person or his representative, to deny the truth of that thing.

But the question is whether estoppel can override the requirement of section 4 of the Registration of Documents Decree, Cap 99? We think not. The parties themselves knew this and hence the stipulation in paragraph 2 of the Agreement (Exh P 1) that:

REMIDIUS E. KISSASSI shall facilitate the transfer of the property in the Land Register from the name of REMIDIUS E. KISSASSI to the names REMIDIUS E. KISSASSI and CHRISTOPHER J. MAKATA in joint Tenancy.

It is not in dispute that that was not done and that was why the Statutory Declaration, Exh P 5, was concluded but that is not a proof of joint ownership. We, therefore, allow ground two of appeal and our answer to issue 4 is that the owner of the Plot is Remidius. It

follows then that we allow ground 5 of appeal that the plot is not a joint property.

Issue five posed two questions: Whether there is a breach of the terms of the partnership and who is responsible for the breach? The learned trial judge found that the partnership was breached and that it was Remidius who did that. We agree with him and we need only repeat what Remidius himself stated in the examination-in-chief:

After long discussion and dispute I decided to dismiss him [Christopher] from work.

Yet in cross-examination by Dr. Lamwai, Remidius answered:

This Jambo Inn Migombani is owned jointly with PW 1 [Christopher] and I.

Now, if the business was jointly owned by Remidius and Christopher, and if Remidius then unilaterally dismissed Christopher, it is palpably clear to us that Remidius breached the partnership and we so answer both limbs of issue five. We, therefore, dismiss ground 6 of the appeal which questions the finding of the learned judge that Remidius breached the partnership.

Before we come to the final issue, issue number six, "To what relief(s) the parties are entitled?", there are a number of matters which we have to wrap up.

One, Christopher's prayer (a) in the Amended Complaint is "A declaration that the partnership between the parties is dissolved" Undoubtedly,

the High Court of Zanzibar can give a declaratory judgment but the Court also has powers to dissolve a partnership under section 245 (d) of the Contract Decree:

At the suit of a partner the court may dissolve the partnership in the following cases-

- (d) when a partner, other than the partner suing, is guilty of gross misconduct in the affairs of the partnership or towards his partners;

We have already found in issue five that Remidius terminated the partnership by, according to his own word on oath, dismissing Christopher. We cannot think of a better example of misconduct of one partner against another than that. So, the Court could properly terminate the partnership.

The question is: When did the partnership cease. Certainly it could not have been when the Court made the declaration. According to paragraph 9 of the Amended Plaintiff the partnership came to an end on 19th September, 1993, and the learned trial judge ordered Remidius to render business accounts from that date. Presumably that is the date the learned trial judge found that the partnership came to an end. As Remidius did not deny it, we take it to be so.

The second nagging matter which was not addressed by the learned trial judge is: If the partnership was dissolved on 19th September, 1993, what right does Christopher have to demand business accounts

beyond that date? Can Christopher claim any dividend on business, if any, transacted after that date?

Section 235 of the Contract Decree is pertinent here:

(1) A loan to a person engaged or about to engage in any trade or undertaking, upon a contract with such person that the lender shall receive interest at a rate varying with the profits or that he shall receive a share of the profits, does not, of itself, constitute the lender a partner, or render him responsible as such.

(2) **In the absence of any contract to the contrary, property left by a retiring partner, or the representative of a deceased partner, to be used in the business is to be considered a loan within the meaning of subsection (1).** (Emphasis is ours.)

From the findings we have made we take Christopher to be a retiring partner. We, therefore, have not a flicker of doubt that ground three of appeal must succeed. There was no partnership surviving beyond 19th September, 1993. Therefore, the learned judge was wrong to order Remidius to render accounts of business from 19th September, 1993. Any of Christopher's property left with Remidius after that date was a loan.

The third question is for how long was the hotel partnership business conducted? One could say from 31st July, 1992, when the partnership was registered, to 19th September, 1993, when it was terminated, a period of 1 year, 1 month and 19 days. But the conduct of hotel business does not necessarily follow those two dates. In fact

Christopher in his examination-in-chief said "We conducted business for just 28 days". That then was the life span of the business conducted. It is the profit of the business transacted in those 28 days which is to be divided equally between Remidius and Christopher.

We now go back to the Agreement Exh P 1. Ground one of appeal poses the question: Was Exh P 1 properly admitted since it was not registered?

The Agreement contains the following four matters:

1. In consideration of the contribution made by CHRISTOPHER J. MAKATA towards the construction of the house erected on the plot mentioned above the house shall be co-owned by REMIDIUS E. KISSASSI and CHRISTOPHER J. MAKATA in joint tenancy.
2. REMIDIUS E. KISSASSI shall facilitate the transfer of the property in the Land Register from the name of REMIDIUS E. KISSASSI to the names REMIDIUS E. KISSASSI and CHRISTOPHER J. MAKATA in joint tenancy.
3. The parties hereto shall register a partnership for carrying out business of Hotel, Bar and Restaurant in the said house. In that partnership the parties will joint (sic) their wives namely GRACE KISSASSI and BETTY MAKATA as partners whereby the shares of REMIDIUS E. KISSASSI and CHRISTOPHER J. MAKATA shall be equal and the shares GRACE KISSASSI and BETTY MAKATA shall be equal.
4. The number of shares to be allocated to each category of partners shall be determined at the time of registration of the firm.

Apart from paragraph 1 of the Agreement, which was an acknowledgment that Christopher contributed to the building of the

house on the Plot, the other three paragraphs have not been complied with. There has not been any transfer of property to Christopher. There has not been a registration of a partnership between Remidius and Christopher as one category of partners, joining their wives as a second category of partners. It follows then that there has been no allotment of the number of shares to each of the four partners.

We agree with Dr. Lamwai that it was not necessary to register the Agreement because it was not a conveyance. We certainly, cannot take it to be a conveyance or to create any ownership in property. We, therefore, dismiss the first ground of appeal; the Agreement was properly admitted. It merely acknowledged that Christopher contributed towards building the house on the Plot. But what is the nature of this contribution?

We must admit that here, too, there is a smokescreen and the situation is not as clear as it should have been. The language of that paragraph is "In consideration of the contribution made by CHRISTOPHER J. MAKATA towards the construction of the house erected on the plot mentioned above ..." That shows that: One, there is one house, and two, the house was already built. This is confirmed by the preamble which preceded the four matters agreed:

AND WHEREAS CHRISTOPHER J. MAKATA has contributed in equal shares with REMIDIUS E. KISSASSI in the construction of the **house now**

(Emphasis is ours.)

Christopher, however, in the examination-in-chief, gives a different story. He said:

We agreed that:- The house No. 25 at Migombani **to be built jointly where each party should contribute equally.** (Emphasis is ours.)

Christopher still talks of one house but it would appear that the house has not been built contrary to what was written in the Agreement. But he then went on to say that "Both houses were completed at the same time". So, another house was added.

As for the value of construction Christopher said in the examination-in-chief:

We estimated the construction cost to be about 10,000,000/=. The real cost to construct the said house is about 25,000,000/=. This amount was equally contributed by both of us.

One wonders why they made an estimate of the construction cost if the house had already been built at the time of the Agreement and, so, they exactly knew what each had contributed.

On the other hand Remidius agreed in the written statement of defence that Christopher contributed shs. 4,050,000/= only. That has a ring of semblance to the construction cost of shs 10 million as stated in the Agreement. We, therefore, find that Christopher made a contribution of shs. 5 million as we can deduce from the Agreement.

We have now to dispose off the last ground of appeal, ground seven, that the learned trial judge did not write a proper judgment. We agree with Dr. Lamwai that that is not so. There is a judgment. Admittedly, the learned judge made some errors which we have corrected but that does not mean that there is no judgment. We dismiss this ground.

Now, we have to come to issue six: the reliefs available to the parties. Since the hotel business was for 28 days then Christopher is only entitled to half the profits of those days. Christopher is also entitled to treat his property which he left with Remidius and which was used for business purposes as a loan to Remidius.

However, Christopher, as the plaintiff, did not adduce any evidence to establish those two matters: the profits realized in the business in those 28 days and the property he left with Remidius which could be treated as loan under section 235 of the Contract Decree. Therefore, there are no facts on which to base an order. There is only proof of shs. 5 million contributed towards the construction of the house. We order that Christopher gets that amount with interest at Court's rate from 23rd July, 1992 to the date of full payment. As the appellant has been partly successful he shall have half of his costs.

We may as well observe that there was absolutely no need to include the two wives in these proceedings as we have explained above.

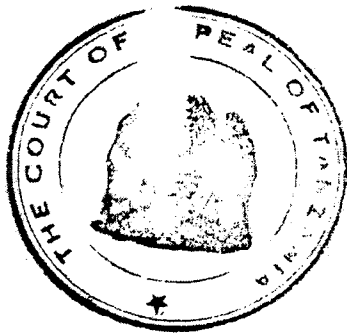
DATED at DAR ES SALAAM this 30th day of June, 2007.

A. S. L. RAMADHANI
JUSTICE OF APPEAL

H. R. NSEKELA
JUSTICE OF APPEAL

N. P. KIMARO
JUSTICE OF APPEAL

I certify that this is a true copy the original.



S. M. RUMANYIKA
DEPUTY REGISTRAR