IN THE COURT OF APPEAL OF TANZANIA
AT ZANZIBAR

(CORAM: MSOFFE, J.A., OTHMAN, J.A. And MJASIRI, J.A.)

CIVIL APPEAL NO. 14 OF 2008

KOMBO KHAMIS HASSAN ..... APPELLANT
VERSUS
PARASKEYOULOUS ANGELO ..... RESPONDENT

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

(Mbarouk, J.)

dated the 8th day of June, 2006
in
Civil Case No. 12 of 2004

JUDGMENT OF THE COURT

1 December, 2008 & 7 January, 2009

OTHMAN, J.A.:

The appellant, Kombo Khamis Hassan (DW1) is appealing against the judgment and decree of the High Court (Mbarouk, J., as he then was) delivered on 08.06.2006 in Civil Case No. 12 of 2004 and entered in favour of the respondent, Paraskeyoulous Angelo (PW1).

On this appeal, the appellant was represented by Mr. Ajar Patel, and the respondent by Mr. Mnkonje, learned Advocates.

Briefly, the appeal arises this way. The respondent who was the plaintiff in the High Court sued the appellant (Defendant) and owner of Bopa Modern Industrial Bakery (hereinafter referred to as Bakery) for breach of a contract (Exhibit P/A) signed on 24.12.1996 involving the sale on credit of bakery machinery, equipment and tools (hereinafter referred to as bakery machineries) valued at USD 250,000.00. The appellant did not honour the loan repayment schedule. By mutual accord, the respondent took over the bakery operations from 25.12.1998 to 31.12.2003 as a result of which USD 184,550.00 realised as proceeds went to repay the loan and other expenditures due to the respondent leaving an outstanding balance of USD 110,000.00.

In his pleadings the appellant admitted the sale agreement and the sale price. He denied any breach of contract or a USD 110,000.00 indebtedness. He gave evidence that the Bakery, whose machinery was of industrial capacity, commenced operations in April 1997 with the respondent as expert. He complained that the cost of the Bakery machineries on the proforma invoice was USD 77,263.00.

He counter-claimed USD 184,550.00 being money unlawfully collected by the respondent when he operated the bakery.

In its judgment the High Court held that it had been established that the appellant owed the respondent USD 110,000.00; the loan agreement (Exhibit P/A) was valid; the appellant had taken over the factory by force causing loss to the respondent; that it was right for the respondent to have deducted USD 184,550.00 to set off the appellant's indebtedness to him as per the agreement and that the respondent was entitled to repossession of the bakery machineries until such time as he is paid USD 110,000.00. Dissatisfied, the appellant on 27.11.2007, preferred this appeal.

The appellant having abandoned grounds 1, 2, 5, 6 and 7 of the appeal, it rests for the Court to determine grounds 3, 4, 8, 9, 10 and 11 thereof.

Ground three of the appeal faults the learned judge for not dismissing the suit as it was time-barred. Mr. Patel submitted that under clause 3:0:3 of the agreement the principal amount and

interest payable at the end of the first year, on 24.12.1997, was USD 92,650.00. As this was not paid, the three years limitation period under sections 34 or 37 or 41 of the Limitation Decree, Cap 12 Laws of Zanzibar, had started to run therefrom, rendering the suit time-barred when instituted on 18.03.2004. Alternatively, he put it that even taking the final repayment of USD 101,600.00 scheduled for settlement on 24.12.1999 that was not paid, the three years limitation period calculated therefrom had passed when the suit was filed on 18.03.2004. It ought, he urged, to have been filed latest by 24.12.2002. Furthermore, he submitted that the learned judge had misconceived section 20 (1) of the Limitation Decree, which could only have been relied upon if there was part payment of a debt made within the prescribed time, of which there was none. There was no written acknowledgement of liability by the appellant under section 19 (1) for a fresh period of limitation to have arisen.

Mr. Mnkonje disagreed. He submitted that under section 21 (1) of the Limitation Decree the effect of each part payment of the loan principal sum and interest created a fresh period of limitation. That

following failure by the appellant to meet the repayment schedule under clause 3:0:3 it was orally agreed between the parties that the respondent should deduct the Bakery income towards part payment of the loan. That accordingly, the last cause of action accrued on 31.12.2003, the date of the last payment. The suit filed on 18.03.2004 was within the three years limitation period, which started to run on 31.12.2003. He led the Court through the statement of accounts (Exhibit P/G) wherein it is indicated that the loan was repaid up to 31.12.2003. He submitted that the appellant had admitted, knew and approved that the Bakery proceeds be deducted by the respondent as part payment for the outstanding loan.

The learned judge, in a ruling delivered on 9.02.2005, held that the limitation period did not commence on 24.12.1998. That under section 21 (1) of the Limitation Decree a fresh period of limitation should be computed from the time the appellant made the last part payment.

Having closely considered the matter and account taken of the rival submissions by learned advocates, in our view the question of limitation should be answered in reference to the date when the prescribed period started to run under section 20 (1) of the Limitation Decree dealing with part payments of a debt.

The agreement (Exhibit P/A) was entered into on 24.12.1996. Under clause 3:0:3 containing the schedule of yearly repayments, USD 92,650.00 was payable by the appellant by 23.12.1997, USD 100,300.00 by 23.12.1998 and finally USD 101,600.00 by 23.12.1999. None was paid. Under Item 41 of the Schedule to the Limitation Decree the prescribed period of limitation for goods sold and delivered on credit is three years.

On a close scrutiny of the evidence we would agree with Mr. Mnkonje that the parties had mutually agreed that the respondent could take over the operations of the Bakery and that its proceeds be used by him as part payment of the principal and interest thereof, which stood outstanding. The evidence reveals that the record of accounts, including Exhibit P/G was prepared by both parties. PW2

(Abubakar Yussuf Abdalla) a former employee said it was the appellant who dealt with the accounts. The appellant admitted that the respondent was being paid back the loan as per the agreement through the part payments as deductions. It is plain on Exhibit P/G that the last part payment was made on 31.12.2003, within the prescribed limitation period. These being the circumstances and facts, the irresistible inference is that the appellant must be taken to have duly authorized the part payments, and to be so made by the respondent for the period of limitation under section 20 (1) to have started to run on 31.12.2003. Counting a three-year period therefrom, the suit was not time-barred when it was instituted on 18.04.2004. We find no reason to fault the learned judge's finding on the point and accordingly we dismiss ground three of the appeal.

Ground four of the appeal essentially faults the learned judge for not dismissing the suit on the ground that the respondent, a foreigner, manipulated and ran the Bakery for personal gain rendering the sale agreement (Exhibit P/A) unlawful under section 23 (a) of the Contract Decree, Cap. 149 of the Laws of Zanzibar and

section 2 (d), Restriction Order, The Investment Protection Act, 1986, L.N. No. 28 of 1993 and its performance contrary to section 23 (b) of the Contract Act; and/or opposed to public policy under section 23 (e) thereof.

Mr. Patel submitted that much as initially the respondent sold the bakery machineries to the appellant lawfully, the manipulations later on done by him rendered the agreement unlawful from day one. He indicated that the respondent ran the Bakery for six years, up to February 2004; kept books of accounts; collected and used proceeds to repay the loan. Furthermore, that contrary to section 2 (d) of the Restriction Order, The Investment Protection Act, 1986 which restricts any foreigner investor from investing in a bakery as a matter of public policy, the respondent's investment in the Bakery was also unlawful as a matter of public policy under section 23 (e) of the Contract Decree. That the consideration and objective of the sale agreement were equally forbidden by law under section 23 (a) and of such a nature that if permitted, would defeat the provisions of any law, under section 23 (d) thereof. The respondent, he urged, had as

his only objective, to do anything forbidden by law. Relying on **Mistry Amar Singh v. Serwano Wofunira Kulubya** [1963] EA 408, a decision of the Privy Council, he submitted that the appellant required no aid from the illegal transactions in order to establish his case and that he had the right to possession of the bakery machineries on considerations of public policy.

For the respondent, Mr. Mnkonje submitted that **Mistry Amar Singh's** case was not helpful to the appellant, but the respondent. **First,** that while a true owner of property can recover even where possession by another was in consequence of an unlawful dealing, in the instant case there was no unlawful dealing or illegality in the contract. **Second,** that the respondent as the oppressed party could recover from the appellant, the oppressor. He indicated that the respondent had dealt with the Zanzibar Investment Promotions Agency (Z.I.P.A.) who had advised him to link up with local partners, which he did; that he sold to them bakery machineries on loan, under a valid contract; he took up employment as an expert and even paid

tax (PAYE). That he was a foreign creditor, not a foreign investor and had no share in the Bakery.

During the trial the alleged illegality of the agreement (Exhibit P/A) under section 23 of the Contract Decree and section 2 (b) of the Restriction Order, The Investment Promotion Act, 1986 was challenged by way of a preliminary objection. On 9.02.2005 the learned judge held that the respondent was a foreign creditor, not a foreign investor; that he had given a loan or credit to the appellant and that in so far as loans from foreigners to locals are not prohibited the agreement cannot be said to be void for illegality under section 23 of the Contract Decree or that it contravened section 2 (d) of the Restriction Order.

It is undisputed that the agreement was a valid contract. The difference between the parties is that while the appellant vigorously contends that it was subsequently rendered unlawful, the respondent forcefully asserts that it was lawful throughout.

A close review of the whole evidence, in particular the various acts done by the parties before and during the dispute, shows that the respondent had approached and was advised by Z.I.P.A. before entering into any transaction with the appellant. The appellant also admitted that Z.I.P.A. was informed of the credit extended by the respondent for the Bakery machineries. Upon their sale and delivery, the respondent was recruited as a technical expert. The appellant's former partner, one Mohamed Juma Shaame, had gone with the respondent to a lawyer who drew the agreement (DW1, Exhibit P/A). The Bakery operations officially started in April 1997. Insufficient profits were realized. By 10.02.1998 when the partner pulled out as shareholder, the respondent had not been repaid as per the repayment schedule (Exhibit P/A). Employees salaries were not fully or timely paid (PW1, PW3). By the fourth year of his service the respondent had not received anything as salary (PW1, DW1, Exhibit P.4). Much as the respondent fully took over the Bakery operations on 25.12.1998, between December 1996 and February 2004 the books of accounts were with the Bakery. The appellant acknowledged that sometimes he wrote the accounts. The Bakery

had a bank account and a cheque book. It paid income tax and PAYE was paid by the respondent. It was proved that the respondent was not a shareholder.

In our considered view, when these facts and circumstances are fully appreciated, the learned judge could only but have been correct in holding that the respondent was a foreign creditor and not a foreign investor and that he did not contravene section 2 (d) of the Restriction Order, The Investment Promotion Act. On the whole material, in particular the clear terms of the bargain as disclosed in the clauses of the agreement, in our respectful view, the conclusion is inescapable that there is no foundation for impeaching the agreement on grounds of public policy or unlawfulness under sections 23 (a), (b) and (c) of the Contract Decree.

That said, with respect, we do not think that the appellant can derive any assistance from **Mistry Amar Singh's** case. In that case, the lease agreement between the parties over three plots of land known as "Mailo" involved an illegal transaction. There was no written consent from the authorities. Consideration of public policy

went towards the appellant's ejection. He was in unlawful occupation. In the instant case, the contract was lawful, and in fact no consent was required from Z.I.P.A. as the respondent was not a foreign investor but a creditor, who supplied the bakery machineries on loan. That authority was also appraised of the transaction (PW1, DW1). Furthermore, while the appellant in that case had no right to occupy the land without the authorities written permission, the respondent in this case had a right of repossession on default of repayment under clause 3:0:4 of the contract. When all is considered, we find no merit in ground four.

Ground eight of the appeal is a complaint that the respondent's claim amounting to USD 110,000.00 had not been proved. Mr. Patel submitted that there was no satisfactory proof that USD 250,000.00 was loaned. That there was also none to prove USD 110,000.00 was outstanding. That it was not sufficient to have relied solely on the agreement (Exhibit P/A) and the respondent's oral testimony. He referred to **Wolfgang Dourado v. Tito de Costa**, Civil Appeal No. 102 of 2002 (CA) (unreported).

Mr. Mnkonje responded that on the evidence of PW1 and Exhibits P/A and P/G it was proved that USD 110,000.00 was the outstanding loan. That even the appellant had admitted that following deduction of USD 184,500.00, which he claimed was illegally taken, the remaining balance was USD 110,000.00.

In what appears to us to be a careful assessment of the evidence the learned judge found out in response to the first framed issue that the outstanding loan amounted to USD 110,000.00. The sale price of the machinery was not disputed by the appellant in his pleadings. Clause 2:0 of the agreement is in the following terms:

> *"2:0 That the Creditor and the Debtor covenants that the value of* ***the said machinery and the expenditures*** *connected thereto* ***are United States Dollars Two hundred and fifty thousand (US$ 250,000.00).***" (Emphasis added).

It was fully established that apart from the bakery machineries whose original price was put at USD 77,063.00 (PW1, DW1) there were other expenditures involved which were also borne by the

respondent. They included costs of shipment, customs, installation, repairs and renovations, generator and those of the three technicians from Europe who installed the machineries. Not to mention the interest rates at 9%, 18% and 27%, respectively for the first, second and third years under the repayment schedule of the contract. Of the total amount PW1 expended, i.e. USD 294,550.00 an amount went towards his un-paid salary at between USD 1,200.00 – 1,500.00 per month (Exhibit P.4) which the appellant admitted he had not been paid for four years. On the above therefore, we are satisfied that the learned judge was entitled to hold that USD 110,000.00 was the remaining balance and that the respondent had complied with the loan agreement. We would, on that basis also dismiss ground eight as having no merit.

Ground nine faults the learned judge for not having entered judgment on the counter-claimed sum of USD 184,550.00. Mr. Patel submitted that the respondent admitted taking USD 184,550.00, which were due to the appellant on accounts. They were, he urged, unlawfully taken. On his part, Mr. Mnkonje submitted that no fact

was adduced to entitle the appellant to the counter-claim because it was proved that the money went towards the partial fulfillment of the USD 250,000.00 loan. One cannot, he said, counter-claim for what one is obliged to do under a valid contract.

The learned judge held that the respondent had not unlawfully taken USD 184,550.00 from the proceeds of the bakery as a set off to what the appellant was indebted to him. He reasoned that the parties had an arrangement of recording all that, including the loan deductions standing at when the appellant took over the bakery by force.

This ground of appeal has to a large extent been dealt with earlier when we considered the question of limitation in ground three of the appeal. All the same, on an anxious reconsideration of the matter, we are of the respectful opinion that there is no room to fault the learned judge as it was fully established by the evidence that with the appellant's knowledge and approval that sum went towards the repayment of the loan which was in continuous default as of 23.12.1997. We agree with Mr. Mnkonje that no fact was adduced

by the appellant to entitle him to the counter-claim. That being the situation, ground nine of the appeal has no merit.

The complaint in ground ten of the appeal is that the learned judge wrongly held that the respondent had a right to repossess the bakery machineries under clause 3:0:4 of the agreement. Mr. Patel relying on sections 76 and 77 (2) of the Contract Decree submitted that the agreement (Exhibit P/A) was an outright sale agreement by which the ownership of those machineries passed on to the appellant. That it was not a hire purchase agreement for goods whose ownership was not transferred until the debt was paid for in full. He challenged clause 3:0:4 for being unreasonable, if not unlawful. That the respondent could not have just walked in and repossess the bakery machineries without due process of law. That as its value stood at USD 62,000.00 the High Court should have given judgment only for that amount.

Responding, Mr. Mnkonje submitted that clause 3:0:4 of the agreement gave the respondent a right of repossession on non-payment of the debt. That the bakery machineries were collateral or

security for the loan. He conceded that the agreement was not of hire purchase as the machineries were neither leased nor rented out. That it was valid under the Contract Decree, the terms very reasonable and the parties had even envisaged a likelihood of failure and had provided for the default clause as relief. The respondent, he urged, had a right to repossess the bakery machineries under clause 3:0:4 as well as under section 73 of the Contract Decree.

This issue was posed at the trial as the second framed issue. The learned judge held that the respondent had a right under clause 3:0:4 of the agreement to repossess the bakery machineries, a provision that bounded the appellant. To that end, we find no material on which the learned judge's finding can be assailed. Clause 3:0:4 of the agreement, in our respectful view, is too plain to admit any ambiguity. Thereunder, that right of repossession of the bakery machineries is subject to what is enough to satisfy the remaining portion of the debt not yet paid. It is not an unlimited right to repossess the entire machineries but only what is enough to satisfy

the outstanding portion of the debt. In the circumstances, it cannot be agitated as unreasonable. It served as collateral to the loan.

On a careful reading of the agreement as a whole and giving attention to its plain and unambiguous terms, in our respectful opinion, there is also nothing palpably unfair or unreasonable or even unconscionable therein. Rather, the question of default and its consequences, in particular the eventuality of repossession of the Bakery machineries provided for under clause 3:0:4 must have been in contemplation of the parties when they signed the agreement. Looking at the totality of the evidence, oral and documentary, no showing has been made before us or the High Court that the agreement involved one sidedness or any material inequality in the bargaining power between the parties for the Court to strike out the contractual bargain mutually entered into by them. With respect, for these reasons, we find no merit in this ground of appeal.

Ground eleven of the appeal faults the learned judge in holding that the appellant took possession of the Bakery by force and occasioned some damage to the respondent. Mr. Patel submitted

that this ought not to have been an issue as whatever damage caused was included in the relief granted. That what the appellant had done when he took over the bakery was only to replace the padlocks.

On his part, Mr. Mnkonje submitted that the appellant admitted that he broke the locks by force and took over the bakery. That he had sent a carpenter to do that.

The learned judge, on the evidence of PW2, PW3 and DW3, was of the correct view that it was established that the appellant broke the locks by drilling. Damages, he reasoned, were to be considered in conjunction with other remedies. In our respectful view, there ought not, therefore, to be any cause for complaint.

Having determined all the grounds of appeal argued, there is yet one issue of some significance in this appeal that we are constrained to address. In its judgment and decree the High Court made the following orders:

"(1) ***The Defendant to hand over the bakery machineries and the bakery premises (building) to the plaintiff immediately, until such time when the outstanding loan sum USD 110,000 is paid fully.***

(2) ***The parties to forward and agree before the Registrar High Court on who shall supervise the Accounts of Income and Expenditure and the same be submitted to him on monthly basis. Failure to reach such an agreement, the Registrar, High Court to appoint any private Accounts firm or qualified accountant to supervise the accounts and the same be submitted to him on monthly basis.***

(3) ***After the plaintiff has done the necessary repairs to the machineries, he shall submit the costs of such repairs before this Court for approval first.***

(4) ***Costs of such repairs to be deducted from the proceeds of the sale.***

(5) ***The counter claim is dismissed.***

(6) ***Costs of this suit to be borne by the Defendant."*** (Emphasis added).

Responding to a question by the Court whether or not the above was proper, both Mr. Patel and Mr. Mnkonje were at one that orders 2, 3 and 4 above were not necessary as the respondent did not seek them as prayers in the plaint; that it was for the parties to follow the execution of a decree and not for the Court to be executory; it meant that the Court itself was to oversee execution of its own judgment; there was no forum to challenge the directives given thereunder to the Registrar of the High Court, and there was no provision in the law for the Court to serve as the Manager and Receiver of the property of litigating parties.

With respect, we agree with learned counsel that the High Court was not entitled to mould reliefs 2, 3 and 4 in the manner it did as they had no reference to the respondent's prayer and the pleadings as a whole. Nor was the first order necessary, which ran counter to clause 3:0:4 of the agreement. They were also not incidental to the specific main prayers sought – repossession of the

Bakery machineries or immediate repayment of USD 110,000.00 which the trial Court was expressly invited to grant. It is trite law that as a general rule relief not founded on the pleadings should not be granted – **Mulla on the Code of Civil Procedure,** Vol. II, 15th Ed. p. 1423-1424; **J.P. Aggarwala's Pleadings and Precedent in India,** Vol. I, p. 529-531.

In the final analysis, and for the foregoing reasons save for orders **1 to 4,** which we hereby set aside, we have no reservations in affirming the judgment and decree of the High Court. The respondent is hereby entitled to repossession of the Bakery machineries or repayment of USD 110,000.00. Accordingly, we dismiss the appeal with costs.

DATED at DAR ES SALAAM this 22nd day of December, 2008.

J. H. MSOFFE
JUSTICE OF APPEAL

M. C. OTHMAN
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

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

(P. B. KHADAY)
DEPUTY REGISTRAR