

IN THE HIGH COURT OF TANZANIA
AT DAR ES SALAAM

MISC CIVIL APPEAL NO. 11/1993

F.A. JESSA..... APPELLANT

VERSUS

JUMANNE RAMADHANI..... RESPONDENT

J U D G E M E N T

MEMO.J

The Appellant is the plaintiff in Civil Case No.281/93 now pending in Resident Magistrate's Court of Dar es Salaam, at Kisutu, and the suit relates to Motor Vehicle Reg. No. TZ 95514. He claims that the respondent agreed to buy the vehicle for shs. 1,200,000/= but paid shs. 800,000/= for it and did not pay the balance.

During the pendency of the suit the Appellant filed an application in the court below for attachment of the vehicle before judgement under OXXX VI of the Civil Procedure Code, 1966. The application was dismissed by the court but the Appellant was aggrieved. This appeal is from the ruling of the lower court refusing to grant the application.

The respondent had to be served by publication for the his appearance in this appeal. This was so because it proved impossible to serve him in the normal manner. Even with service by publication he did not appear, so the appeal was heard in his absence Mr. Kakoti of Law Associates (Advocates) represents the appellant and he filed written submissions.

One of the respondent's ground's of objections to the attachment of the vehicle before judgement under O.XXX VI CPC was that he was not the buyer of the vehicle but had been a mere witness to the sale agreement between the actual buyer, one OMARI ABDALLAH, and the actual seller whom he said was not the appellant. Another ground was that Omar Abdallah had paid full amount for the vehicle and so there was no need to attach it. Both these grounds were accepted by the trial Magistrate and were the basis for his dismissal of the application.

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fore allow the appeal of the appellant to this court, and with costs, I quash and set aside the ruling of the trial court refusing attachment before judgement I make the following orders also as prayed in the submissions:-

The appellant had complained that the respondent had arranged to sell the motor vehicle to Mrs. Bina M. Georgia before completing payments for it to him. He produced a sale agreement between the respondent and the said Mrs. Georgea,

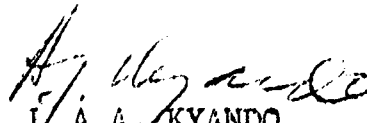
In the sale agreement (Annexure 'A' to the affidavit in support of the application for attachment) the seller of the vehicle is shown to be Mr. F.A. Jessa and the buyer is JUMANNE RAMADHANI DUNDA. F.A. Jessa is the present appellant. In the counter affidavit filed by the respondent he clearly says he is Jumanne Ramadhani Dunda - the names on the sale agreement. There is also a writing by hand, on the "Buyer's signature of the name Jumanne R. Dunda. ~~How~~ does the name Omar Abdallah appear in the agreement. So Jumanne Ramadhani Dunda, was the buyer of the vehicle and not a mere witness to the transaction as he claimed and as the court accepted.

As for the ground that the purchase price had been paid in full, with respect this was to be determined in the suit and not in the application. In paragraph 4 of the plaint in the suit the appellant states that the defendant/respondent has breached the terms of the sale agreement (relating to the suit motor vehicle) "For failure to pay the balance of the purchase price". The respondent's contention therefore that the full price had been paid was only a ^{defence} to the suit and should not have been decided in the application.

With the appellant's well-founded apprehensions that the vehicle was in the process of being sold to a third party before the determination of the suit, I am of the view that he was more than justified in seeking the protection of the law as provided for in O.XXX VI CPC. At the same time, the Magistrate grossly erred in refusing to grant the application. I therefore allow the appeal of the appellant to this court, and with costs, I quash and set aside the ruling of the trial court - refusing attachment before judgement. I make the following orders also as prayed in the submissions:-

1. The suit vehicle to be attached and kept in the appellant's custody pending the determination of the main suit in the lower court.

2. The lower court to now proceed with the hearing and determination of the suit.


I.A.A. KYANDO
JUDGE

DAR ES SALAAM.
12/8/1994.

For the Appellant - Mr. Kakoti
For the Respondent - Absent.

Judgement delivered.