IN THE HIGH COURT OF TANZANIA
AT DAR ES SALAAM

CIVIL APPEAL NO. 92 OF 1997

(Originating from RM Civil Case No. 232 of 1994 of Kisutu Resident Magistrates Court, Dar es Salaam)

RAJABU MUSSA.....APPELLANT

VERSUS

RAHMA SELEMENI.....DEFENDANT

J U D G M E N T

KALEGEYA, J.

Rajabu Mussa, Appellant, dissatisfied with the decision of the Kisutu Resident Magistrate's Court (Longway, PRM) which upheld Rahma Selemani's claim for delivery and possession of house No. 37 Wailes Street built on plot No. 150 Block 'H', Dar es Salaam, has come to this court armed with 4 grounds of Appeal namely - that there is no agreement showing that he sold the relevant house except that he pledged it as security for shs. 1,000,000/= being the purchase price of a motor vehicle which sum was to be liquidated through collection of house rents; that he had offered the house to the Respondent, Rahma, for shs. 8,000,000/= supplemented with a "Kibanda" somewhere else which have never been given to him; that he didn't know the significance of the signature he affixed on documents at the Chang'ombe Police Station under police duress and that the agreement between them concerned a motor vehicle and not house as exemplified by the fact that the Respondent still possesses the Motor Vehicle Registration card because the debt of shs. 1,000,000/= has not been fully paid. He is surprised that his house has to be possessed by the Respondent when conditions of their agreement have not fully been complied with.

The Respondent sued the Appellant for delivery and possession of house No. 37, erected on plot No. 150 Block "H", which he claimed to have bought from the Appellant on 29th March, 1994 and for which he obtained Title deed No. 43503. When the Appellant was pushed into defence he countered by refuting the existence of any such sale qualifying it however by an explanation that he had bought a KIA m\v Registration No. TSC 2856 from Plaintiff\Respondent at 1,000,000/=; pledged the relevant house as a security and on condition that the monthly rent payment therefrom, to be collected by Plaintiff\Respondent, was to defray such debt until its liquidation. He added however that later he did have some discussion with Respondent concerning the possibility of the latter purchasing the said house upon fulfilment of certain conditions, that nevertheless the transaction never sailed through although at one point he was forced to sign some documents before the police. He insisted that the alleged title deed was a product of fraud and forgery.

In response the Respondent maintained that there were two different agreements between her and Appellant. One concerned a motor vehicle for which the purchase price, shs. 1,000,000/=, was fully and immediately paid after execution, and the other sometime later, concerning sale of the disputed house.

The Respondent\Plaintiff called 2 witnesses apart from herself; Mohamed Ismail, Advocate (PW1) and Fauz Twalib, Advocate (PW3),while the Appellant\Defendant called 3 witnesses, Vincent Chandenda (DW2) and Maulidi Iddi (DW4) both his tenants and Rashid Juma Kahema, his neighbour, apart from himself.

Upon hearing the parties and their witnesses the trial Court believed the plaintiff\Respondent and his witnesses and decided in his favour. The trial court observed and concluded that there were two separate sale agreements between the parties - one tendered as Exh. P1, dated 15th December, 1993, in respect of the

motor vehicle, and unrelated to the other tendered as exh. P2, dated 29th March, 1994, in respect of the disputed house.

Before this court the Appellant defended himself while Mr. Mselem, Advocate, who all along advocated for Respondent, maintained same representative capacity.

The Appellant presented his memorandum of appeal in Kiswahili in the form I have translated and paraphrased above and which he adopted without additions (except answering a question by the court) at the hearing of this appeal, while Mr. Mselem argued that Exh. P2, transfer agreement, was never contradicted, and neither could it be varied by oral agreement as that would be contrary to s. 100 (1) and 101 of the Evidence Act - citing Halfan v Kichwa (1980) TLR, 309; that the credibility of witnesses as found by the trial court cannot be faulted; that Exh. P1 does not refer to any rent or tenants hence was a separate agreement; that the Appellant's 2nd ground of appeal involving shs. 8,000,000/= is an after-thought as it was not included in the pleadings nor was any evidence offered in its regard; that the third ground can't have a base because Appellant did not show any evidence that he was ever arrested by the police nor did he bother to show which of the agreement was he allegedly forced to sign; that if the allegations concerning rent to defray the purchase price were true the Appellant would have disclosed how much so far has been paid; that the Registration card of the m\v is still in the hands of the Respondent because the Appellant refused to take it on second thoughts - calling S. 20 and 30 of cap. 204, Sales of Goods Ordinance, to his aid, and finally, cited Sluice Brothers (E.A. Ltd) vs Mathias and Tawars Kitomali (1980) TLR 294 to support him on the proposition that Appellant did fully understand the contents of the document he signed as the advocates fully explained the same to him.

In reply the Appellant insisted that he did not refuse the card but that Respondent maintained keeping it till full payment of the debt, and that the Respondent lured him into going to the police station.

I have carefully paid due attention to the arguments presented; the evidence tendered and the applicable law and I have but concluded that this appeal has no merit.

I am satisfied that the trial court properly found that there were two different agreements between the Appellant and Respondent as Exhibited in the respective documents, Exh. P1 and P2. I will analyse the grounds of appeal generally and together.

PW1, Mohamed Ismail, an Advocate, deposed how he drew up the two agreements and it is so indicated on each of them. He testified how parties approached him for this and how El Maamry, Advocate, witnessed the signatories regarding Exh. P1. He further deposed how Advocate Fauz Twaib witnessed the same parties executing the 2nd agreement, Exh. P2. The witness showed that Exh. P1 concerned sale of a motor vehicle while Exh. P2 concerned sale of a house. Mr. Fauz Twaib, Advocate, testified as PW3 in support thereof. The said Exhibits support these testimonies. Exh. P1 was executed on 15th Dec. 1993 while Exh. P2 was executed on 29th March, 1994. There is nothing in these documents which suggest the contrary let alone suggesting that they are inter-related. The trial court found these witnesses and Respondent credible and I find no grounds to fault that stand.

Both before the trial court and in his memorandum of appeal the Appellant urges to be believed that Exh. P1 is not telling the truth - that it is supplemented by an oral understanding between the two which had it that the shs. 1,000,000/=, purchase price, was to be paid from the collection of rents from the disputed house which had been pledged as security for the debt.

Apart from being thwarted by PW1 and 2's evidence this argument can't legally stand and neither can it be bought by common sense apart from being buttressed by some contradictions and irreconcilable narrations inherent in his evidence including pleadings.

Legally, as rightly argued by Mr. Mselem starting from the trial court, allowing the alleged oral understanding to creep in the written agreement, Exh. P1, would go counter to ss. 100 (1) and 101 of the Evidence Act. Section 100 (1) provides, in part,

> "when the terms of a contract... have been reduced in a form of a document.. no evidence shall be given in proof of the terms of such contract... except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions herein before contained",

While S. 101 states,

> "When the terms of any such contract.....have been proved according to section 100, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument ..... for the purpose of contradicting, varying, adding to, or subtracting from its term:"

and goes on to provide six exceptions which do not cover the present situation.

Authorities, both foreign and local abound, but a classical example is the Khalfan v Kichwa case cited by Mr. Mselem, Advocate [1980, T.L.R. 309] in which, Lugakingira, J (as he then was), at page 311 of the judgement had the following to say,

> "It is clear from s. 101 that evidence may not be admitted of an oral agreement for the purpose of contradicting, varying, adding to, or subtracting from the terms of a written contract. It follows, on the converse, that evidence may be admitted of such oral agreement if it does not purport to contradict, vary, add to, or subtract from the

written terms of the contract: Century Automobiles vs Hutchings Biemer (1965) E.A. 304. Proviso (b) to the section sets out the matters to be taken into account in admitting such evidence. These are two: first, the oral agreement sought to be proved by such evidence should not be inconsitent with the terms of contract; secondly, regard is to be had of the degree of formality of the document".

Paras 1 and 2 of exh. P1 clearly, and unambiguously state,

"1. The SELLER will sell and THE BUYER will buy the said motor vehicle for a consideration of Tanzania shillings one million only (TSHS. 1,000,000/=) (hereinafter called "the purchase price").

2. THE BUYER shall pay the aforesaid purchase price upon the signing of this agreement".

It is true that PW1, Mohamed Ismail, Advocate, did not witness the money exchanging hands but it is not unusual that parties who have common understanding, in most business transactions, execute documents before whoever is legally and officially allowed to attest, and proceed, at their own pace and in a different area, to transact the exchange of hard cash from one to another. This point was not pursued for clarity but in my view the omission is not fatal to the Respondent's case. That said it stands out clearly that legally the alleged oral agreement can not be imported into exh. P1 as apart from its formality will completely change its import.

That apart, even treading on mere common sense, the allegation as presented by the Appellant, fundamentally material as it would seem, assuming it ever took place, cannot be excluded in any agreement in respect of the transaction of the nature that led to the formation of Exh. P1. Why should it be excluded if that was the understanding between parties? Appellant has not explained why, if true, was it hidden!

Also it is not of insignificance that there are contradictions and inconsistences on the part of the Appellant

regarding the alleged oral agreement supplementing Exh. 1. In his affidavit, for leave to defend the suit, (admitted as Exh. 7) in para. 4, the Appellant stated,

> "Before we entered into the said agreement we had orally agreed that since I did not have the purchase price i.e shs. 1,000,000/= required for the said vehicle I would pledge my aforesaid house as security, and the plaintiff was to receive the rent acruing from the said house until the liquidation of the debt. The rent is shs. 10,000/= per month".

In the written statement of defence, para 2, the Appellants, maintains the same story but goes further and states,

> ".... following the breakdown of the said KIA vehicle the defendant approached the plaintiff to register his dissatisfaction upon which it was agreed that on top of the said vehicle the Plaintiffs would buy the the Defendant a small house in consideration of the Defendant surrendering the suit house to the Plaintiff. The Defendant is still willing to surrender the said house to the Plaintiff upon fulfilment of the aforesaid conditions...".

However, in his oral testimony before the trial court, the Appellant brings in totally a new factor which he maintained before this court in ground two of his memorandum of appeal. He deposed,

> ".....it (mv) worked for one week only. I even told plaintiff that the motor vehicle had ceazed engine. She gave me shs. 350,000/= for repairs. She told me that I should sell her the house. I declined. I told her that I would only sell for 8 million shillings. She said that she would sell her house in town so that she can buy my house. Plaintiff offered me a a banda in Keko or Mtoni Kijichi. I declined. I told her that there was abanda in Tandika going for 1.5 million shillings and I could move there soon I was paid purchase price".

Shortly after this statement he went on to say that he could vacate the disputed house if paid shs. 8 million and given a kibanda worth 1.5 million!

From the above contradictions and inconsistences what he is propounding would naturally revolt against common sense. First, why omit the contents of para. 2 of the written statement of defence from the affidavit (Exh. P7) if at all they were true? Secondly, how do we reconcile the contents of para. 2 of the written statement of defence with the oral testimony in court? Thirdly, does it run with common sense that the Respondent could have parted with shs. 350,000/= for repair of a vehicle she had sold at a price of 1,000,000/= just a week before, a price simply secured by 10,000/= rent; monthly, when, by all means she had not pocketed even a months' rent because a month had not yet lapsed?! What would the shs. 350,000/= be for - a loan, a grant, or what! Would she be buying her own property! Only a deranged being can participate in such transaction.

Fourthly, although blood relations and friendship can lead to soft loans or grants (but no one has suggested the existence of such relationship between the two), is it possible that the Respondent could part with his vehicle, at a purchase price of 1,000,000/= payable in rental collections of shs. 120,000/= a year (10,000/= x 12 months) which transaction would take 8¼ years before the whole sum is liquidated?

Putting all the above aside, while before the lower court the Appellant throughout talked of a monthly rent of 10,000/= from rents, on appeal, while responding to questions by court, he said that it was 15,000/=!

Not only the above, while in his oral testimony Appellant said that after the m\v sale transaction he introduced Respondent to the tenants and the Respondent raised rents to recoup her money quickly, DW2 and 3, who posed as her tenants simply testified to having been told to pay the rent to mama Saidi. Is it possible that none could have testified to such touchy if not

crucial happening on their income? In fact, DW2, deposed, "The rental remained at shs. 2000/= per month", while DW4 said "from 1990 I paid 2000/=.per room. I pay the same to date".

And yet still we have his contradictions regarding the signing of the agreement. In his examination in chief, he said "I had no written agreement with plaintiff for both the house or vehicle.

I did not go to Ismail. I do not know the place. I signed the document at chang'ombe Police under threats. I do not know what the document I signed was about". At the same time, in the same deposition, when shown Exh. P2 he identified it as the one which he signed under duress at the police station. Surprisingly however, in re-examination (the Appellant was then being defended by Mr. Muganda, Advocate) he had the courage of giving the following contrary answer,

> "The signature in Exh. P2 is mine. I signed at plaintiff's house. It was a motor vehicle agreement".

Not of less significance is his denial that he is not Rajabu Mussa but Rajabu Yusuf astriding it as one of the factors that the two advocates (PW1 and 2) didn't know him, but his own witnesses, his tenants and neighbour, DW2, 3 and 4, consistently identified and referred to him as Rajabu Mussa. If Ismail and Twaib did not know him and told lies, concocting everything they said about the agreements including his name how about these close personalities he trusted to the extent of calling them to his aid? Do they also not know the name of their landlord?

As to the question of tenants paying rent to a woman called mama Saidi on behalf of Rahma (Respondent) as narrated by DW2 - 4, even if believed does not affect the Respondent's story. Naturally once ownership changes, the rents had also to change the destination: to Rahma's pulse and not Appellants.

There is yet another contradiction between Appellant and his witness, DW3, Rashid Juma Kahama. This witness deposed that he witnessed an - agreement in respect of a vehicle being signed at Rahma's residence: that he also did sign and so were others present; that he saw Rahma paying Appellant 200,000/= cash with a promise to pay 100,000/= in a week's time and that this money was for repair of the relevant motor vehicle which was parked just outside and which needed repairs to the injector pump, clutch and brakes. On the other hand however, Appellant talked of shs. 350,000/= being repair costs of the vehicle after it had worked for just a week and even then not for the defects explained by DW3 but ceazing of the engine, and inferably not at respondent's place. The trial court rightly found this witness not credible and I have found no clue for arriving at the contrary view.

Regarding the argument that the Reg. card is still in possession of Respondent this has amply been explained by the latter that as the duplicate had been sent to Mtwara and had been in joint name with CRDB which had extended a loan to her it took time to get a duplicate by which time the Appellant had already changed his mind. This also cannot assist Appellant.

I have laboured through the various contradictions for clarity and also to establish the soundness of the trial court's findings on the credibility of witnesses. Although, generally, the trial court is the one best placed to assess the credibility of witnesses who testify before it and rarely should the court on appeal intervene (J. M. Kasuka vs George Humba, Civil Appeal No. 26 of 1996, CA, Mwanza Registry (unreported)) the contradictions exhibited and explained above would have justified this court to intervene and overturn the decision if the said trial court had arrived at an opposite conclusion, for such glaring irreconcilable matters in evidence are the ones envisaged under the exception.

I should make one more observation which somehow has some bearing before touching the Appellant's claim that he was forced to sign Exh. P2 for which Mr. Mselem cited Kitomali case. Appellant did not raise it in so many words but on look of things, today, shs. 700,000/= may seem to be on the lower side regarding value of a house said to have 5 rooms in the main part and seven in the backyard. Appellant may, on second thoughts, have noted that he had not secured the proper value of his house hence the turn round and disputing having sold it. Suffice to say that unless fraud, or absence of free consent to a contract are proved, the adequacy of consideration is not a matter to be decided upon by the courts. This was well argued by Mr. Mselem in the trial court.

S. 25 (1)(a) of our Law of Contract Ordinance Cap. 433 provides;-

> "25(1)(a) An agreement to which the consent of the promisor is freely given is not void merely because the consideration is inadequate".

What the learned author (Dr. AVTAR SINGH in his book, LAW OF CONTRACT 3rd EDITION, 1980 at page 79) observed on a similar provision of the law in India puts our legal stand in a nutshell -

> "Though the Indian Contract Act does not in terms provide that consideration must be good or valuable to sustain a contact it has always been understood that consideration means something which is of some value in the eye of the law. It must be real and not illusory, whether adequate or not.... So long as the consideration is not unreal it is sufficient if it be of slight value today".

and he goes on,

> "If a party gets what he has contracted for and if it is of some value, which may be great or small, the courts will not enquire whether it was an equivalent to the promise which he gave in return. The adequacy of the consideration is for the parties to consider at the time of making the agreement, not for the courts when it is sought to be enforced. (BLACKBURN, J. in Bolton vs Madden, 1873 LR 9 QB. 55)."

The above spills over into yet another argument by Mr. Mselem that the Appellant can't be availed the defence of non-est-factum (where he can say 'the document is not mine') citing Kitomali case. It will be noted that Appellant is a layman and unrepresented in this appeal and that he could possibly have brought out that defence in so many words; nevertheless he is challenging that he was forced to sign Exh. P2 at the police station. I will thus consider whether such defence could be availed to him.

Indeed the defence of non-est factum was detailedly discussed by the Court of Appeal in Kitomali case where the principle pronounced by Lord Denning, M.R. in GALLIC v LEE (1969) 2 CH. 17, was accepted as a true broad principle of the law governing in our jurisdiction as well, that is,

> "Whenever a man of full age and understanding who can read and write, signs a legal document which is put before him for signature - by which I mean a document which, it is apparent on the face of it, is intended to have legal consequences, then, if he does not take the trouble to read it, but signs as it is, relying on the word of another as to its character or contents or effect, he cannot be heard to say that it is not his document. By his conduct in signing it he has represented to all those into whose hands it may come, that it is his document; and once they act upon it as being his document, he cannot go back on it, and say it was a nullity from the beginning".

The court of appeal went on to lay down situations where the principle could be relied upon, and these are enumerated in the head notes to the cited case Kitomali in 1980 TLR,

> "(iii) the plea of non-est-factum is, however, available in a proper case for the relief of (a) PERSONS who for permanent or temporary reasons (not limited to blindness or illiteracy) are not capable of reading the document to be signed and sufficiently understand it, that is understanding it at least to the point of detecting a fundamental difference between the actual document and the document as as the signer had believed it to be.
>
> (b) illiterate or senile persons who cannot read or apprehend a legal document;

(c) Persons who permanently or temporarily are unable through no fault of theirs, to have, without explanation, any real understanding of the purport of a particular document, whether that be from defective education, illness or innate incapacity.

(iv) the respondents who did not, to the knowledge of the company, understand the English language and were, as such, in no position to understand the full purport and legal implications of the terms and conditions printed in that language without explanation in Swahili belong to a class of persons in whose favour the doctrine of non-est-factum would operate.;

(v) although courts will not normally intervene to protect a contracting party against the consequences of his own folly, they will do so where the party seeking equitable relief is a poor and ignorant person who has been overreached in the absence of independent advice.

(vi) The above principle applies to "catching bargains" and in the case of dealing with uneducated, ignorant persons, the burden of showing the fairness of the transaction lies upon the person who seeks to obtain the benefit of the contract;

(vii).....

(viii)....when one of the parties to a very onerous and oppressive contract pleads non-est factum, the clearest evidence is required to show that the disputing party cleary understood the nature of the document he signed.....".

In this Kitomali's case farmers\peasants in what was known as "Growing contracts" were being made to sign on standard contracts already prepared by a Dutch coy, and in English language which they did not understand requiring them to receive 'stock - seeds' for planting on condition that they would sell to the said company the harvested seeds for export. Terms and conditions in the contract simply set out rights of the company on one hand and duties and obligations of the farmer\peasants on the other without imposing obligation or liability on the company or conferring rights on the peasant\farmer. The company had sued the

brother farmers on sums due on the growing contract. Deciding against the company, as summarised in the head notes, the Court of Appeal held,

> "The 'Growing Contract' in this case is an unconscionable bargain, falling within the category of 'catching bargain', in which unconscientious use was made by one side of the the power arising out of the contracting weakness of the other side, which the court should refuse to enforce on equitable ground",

and, clarifying the CJ observed,

> "It is apparent from the 'Growing Contract' that the undetaking was a common venture of both parties, as the respondent growers were to be paid only if the farming venture made a profit, and it would be unconscionable to hold only one party liable for the risks and losses of the common venture".

I consider the two cases to be different in their entirety. In Kitomali case the defendants\Respondents did not dispute the signing of the contract neither did they allege that they did so under duress. The court was mainly concerned with the unequal bargaining power of the parties. In the case at hand however, the Appellant disputes having signed the contract, and, argues that, if he did it was done under duress, propositions which are not supported and are contradicted by evidence as already found. The contracts (Exh. P1 and 2) are simple contracts concerning sale of a motor vehicle and a house; PW1 and 2. Advocates who have been found very credible by the trial court and this court as well, in their testimonies they deposed how they explained in Kiswahili the contents of these contracts to all parties before execution. The claim of having signed the contract (Exh. P2) at the police station militates unreservedly against the weight of the evidence and cannot stand. Thus the facts do not bring this case under the principle of non-est factum.

For reasons discussed above the appeal stands dismissed in its entirety.

(L. B. Kalegeya)

JUDGE

Delivered on 6th August, 1998, in the presence of Mr. Mselem and absence of Appellant

Deputy Registrar
High Court of Tanzania
Dar-es-Salaam

I certify that this is a true and Correct of the Original Order/Judgment/Ruling.

JUDGE Deputy Registrar
High Court of Tanzania
Dar es Salaam

Date

Dated 6/8