IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CIVIL CASE No.460 OF 2002

MRS NURU MWINCHUMU as an
administratrix of the Estate
of the Late OMAR MWINCHUM - PLAINTIFF

VERSUS

RUDOLF M. KLOEG - DEFENDANT

R U L I N G

MASSATI, J.

The Plaintiff, through her lawful attorney, YAHAYA OMARI KIMBWE, has filed a suit in this court against the Defendant RUDOLF M. KLOEG, through his agent TIMOTHY SELEMAN KEREMIE. The reliefs sought are :-

(a) The judgment pronounced on 22/3/2002 and the decree thereof, in Civil Case No.215/1998, be set aside

(b) If it is found that the plaintiff is liable to the defendant on the principal sum, an order that the commercial rate of interest on a US Dollar claim is not more than 2% per annum and the court's rate of interest on US Dollar decretal amount is not more than 7% per annum, and that the amount law fully owing and due from the plaintiff to the defendant is US Dollars 16,892 only.

(c) The defendant to pay the costs of this suit and an order for any other or further relief.

The Plaintiff employed the services of M/S MARANDO, MNYELE & COMPANY, ADVOCATES learned counsels.

The Defendant engaged the services of M/S MAIRA AND COMPANY, ADVOCATES learned counsels, The learned defence counsels filed a written defence, not only denying liability but also raised a number of preliminary objections on points of law, to the effect, following:-

(a) That a suit between the same parties and on the same issue has been heard and determined in the court of competent jurisdiction.

(b) This is a black suit intended to extract a favourable relief for failure to appear and defend the earlier mentioned suit.

(c) The plaint is bad in law as it violates the provisions of Part One of the Civil Procedure Code, 1966.

The Defendant therefore urges this court to strike out the suit with costs. On 19/2/2004 I ordered that the said preliminary objections be disposed of by way of written submissions. Now that the parties have filed their submissions, I will turn to consider them.

Before turning to the preliminary objections however, a background to the suit would not be in appropriate

From the pleadings, it appears there is no dispute that the Defendant had initially instituted in this court Civil case No.215 of 1998 against the Plaintiff herein to claim a total of USD 15,000 being the balance of the purchase price for some motor vehicles, interest thereon at 40% per annum for July 1996 to the date of judgment, 12% interest on the decretal sum. On 22/5/2002. CHIPETA,J. granted judgment as prayed upon the Plaintiff herein failing to file an ammended written statement of defence and also for non appearance on the date of hearing. There is no record on any attempt to set aside the exparte judgment. On 19/7/2002 the decree holder filed an application for execution to recover the decretal sum, which had now swollen to USD 49,490. The application was granted by Tsoka, J. on 25/9/2002 but could not proceed further. Then on 20/12/2002, the present suit was filed, along with an application for stay of execution of the decree in the former suit. The application for stay of execution pending the disposal of this suit was granted on 15/4/2003 by KHEMA, J. Against this background, I will now consider the preliminary objections.

Mr. Maira, learned counsel for the Defendant has hedged his objection principally on the provisions of Section 9 of the Civil Procedure Code, 1966. He submitted that as the former suit (i.e. Civil Case 215 of 1998) was between the same parties and substentially on the same issues had finally disposed of the matter, the present suit was res judicate to the former one and therefore incompetent. He prayed for the dismissal of the suit with costs. Whether by design or overright, Mr. Maira did not submit in ellaboration of his remaining objections as per his notice in the written Statement of Defence.

Mr. Marando, learned counsel for the Plaintiff submitted in response, that as there are allegations that the said judgment was obtained by fraud, Section 9 of the Civil Procedure 1966 was not applicable because the said decree was null and void. He cited the decision of SAIDI SALIM BAKHRESSA & CO. LTD v VIP ENGINEERING AND MARKETING CO LTD (1996) TLR 309 to buttress his argument that a judgment obtained by fraud was null and void. He also referred this court to a passage from MULLA, CODE OF CIVIL PROCEDURE (15th ed) at p.64 for the proposition that a judgment obtained by fraud or collusion cannot operate as res judicate. He also referred this court to SARKAR ON EVIDENCE for the same statement of law. He also referred this court to a book BULLEN AND LEAK AND JACOBS PRECEDENTS OF PLEADINGS, (12TH EDITION) for the preposition that filing a new suit was the proper method of impeaching a judgment obtained by fraud.
Mr. Marando, finally submitted that since the particulars of fraud listed in the plaint are matters of evidence, the suit should not be decided on a preliminary objection. He therefore prayed that the preliminary objection be dismissed and the suit be let to proceed to hearing.

In his brief rejoinder, Mr. Maira, learned counsel for the Defendant maintained his stance. Quoting a passage from SARKAR ON EVIDENCE at p. 762 per PETHERRAM C.J. in MD GOLAB v MD SULLIMAN, 21C612 at 619, he submitted that the principle does not apply where the other party merely alleges perjury by the person in whose favour the judgment was given. He said to do so, would be to allow defeated litigants to avoid the operations of the law, and the operation of res judicata.

The plea of res judicata is formulated in Section 9 of our Civil Procedure Code 1966. This Section reads as follows :-

> " No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim litigating under the same title in a court competent to try such subsequent suit the suit in which such issue has been subsequently raised and has been heard and finally decided by such court."

The leading principles, of the doctrine were echoed in an old English case of the DUCHESS OF KINGSTONE' & 2 SMITH'S L.C 13TH ED.644,645. They are summerised in MULLA- CODE OF CIVIL PROCEDURE (15TH EDITION) at p.94 as follows:

> "First, judgment of a court of concurrent jurisdiction, directly upon the point is, as a plea, a bar or as evidence conclusive, between the same parties;upon the same matter directly in question in another court. Secondly, judgment of a court of exclusive jurisdiction, directly on the point, is in like manner conclusive between the same parties, coming incidentally in question in another court, for a different purpose.

It has been held that this provision is mandatory, and concerns the jurisdiction of the court, and once the plea succeeds it ousts the jurisdiction of the court. The only grounds of avoidance of the section are fraud and collusion (MULLA: CODE OF CIVIL PROCEDURE (op cit) at p.95.

The learned author also goes on to define what is fraud: at p.165.

> " Fraud is an extrinsic collateral act which vitiates the most solemn proceedings of courts of justice ....
> Where a decree is impeached on the ground of fraud, the fraud alleged must be actual positive fraud, a deliberated and intentional contrivance to keep the parties and the court in ignorance of the real facts of the case, and the obtaining of the decree by the contrivance. There mere fact that a decree has been obtained by perjured and false evidence is no ground for setting it aside on the ground of fraud".

Of particular relevance also is a passage relating to ex parte decrees, because, in the present case, the decree in the former suit was also obtained exparte. At p.109, the learned author comments:

" In order that an exparte decree might be resjudicate, it is necessary that the opposite party should have express notice from the proceedings and the prayer that the particular issue or matter would be decided"

From the pleadings and submissions of the parties there is little dispute that but for the allegation of fraud the plea of rejudicate would appear to be valid, I must also hasten here to add that I agree with Mr. Maira that perjured evidence would not in itself be a ground for setting aside a previous judgment on the ground of fraud. This position was reiterated by this court in RAMDEV MALIK v LIONEL ALBERT CALLOW (1958) EA 99. The issue of setting aside a previous judgment on ground of fraud also came up in that case. CRAWSHAW J. (as he then was) revisited various ... Indian authorities on this matter, but, I think, the following passages offer useful guides: In BHIKAJI MAHADEN GUND v BALVANT R. KULKARN (7) 1927 A.I.R. Bar 510, the following passage in the judgment of MARTEN C.J.:-

"....the authorities show, ...that if the case merely turns on in effect, a rehearing of the previous suit on substantially the same evidence then the court, will not hear the second suit. On the other hand..... in a proper case the court has jurisdiction to set aside a decree which has been obtained by fraud practiced on the court; ...if for instance, the existence of certain evidence has been strongly denied by one party and the court has been induced to issue its decree on the basis that that evidence did not exist, then if that evidence is afterwords discovered, and it is of such a notice that if it had been before the first court, the probabilities are that the court would have arrived at a different conclusion, then, it may be, when all the circumstances are looked at, that in that case the court would set aside the original decree."

And from L. CHINNAYA v K. RAMMANA (1915) 38 Mad . 203 the following passage is quoted:-