IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CIVIL CASE NUMBER 145 of 2006

AGRO IMPEX (TANZANIA) LTD..... PLAINTIFF

VS

RIYAZ GULAMANI .....1ST DEFENDANT

YOGESH MANEK .....2ND DEFENDANT

EXIM BANK (T) LIMITED.....3RD DEFENDANT

Last Order: 05-10-2011
Judgment: 15-11-2011

JUDGMENT

JUMA, J.

The Plaintiff, a limited liability company filed this suit on 28th September, 2006 against Riyaz Gulamani (First Defendant), Yonesh Manek (2nd Defendant) and the Exim Bank (T) Ltd (3rd Defendant). The Plaintiff contends that the Judgment of this Court (Civil Case No. 339 of 1999) and its subsequent Decree dated 3rd August 2004 were obtained by fraud and collusion. The Plaintiff is claiming that Defendants are preventing him from realising the fruits of the judgment and decree of this Court in the Civil Case No. 121/2005 which he had initiated and won on 7th October 2005 against Agro Marketing (T) Ltd (1st Defendant therein), FINTRUST

(T) Ltd (2nd Defendant therein) and Riyaz Gulamani (3rd Defendant therein). In that lawsuit the Plaintiff had claimed TZS 563,907,654.00 which arose out of a dishonoured cheque. Further, the present Plaintiff claimed TZS 4,478,617,650/48 as accumulated interest calculated from September 1999 to August 2005.

The Plaintiff followed up his court victory with a letter he wrote on 9th March 2006 to the Registrar of Companies requesting to know the status of the shares held by Riyaz Gulamani (1st Defendant herein) at the EXIM Bank (3rd Defendant herein). On 24th March 2006 the Registrar of Companies replied to inform the Plaintiff that the 1st Defendant had been a shareholder of the EXIM Bank since 23rd August 1993 but he transferred his 280,000 ordinary shares to Azim Kassam in compliance with a court Decree in Civil Case No. 339 of 1999 dated 3rd August 2004.

The Plaintiff further contends that upon his perusal of the records of this Court he found that one Yogesh Manek (2nd Defendant herein) was the Plaintiff in the Civil Case No. 339 of 1999, and defendants were- Riyaz Gulamani (1st Defendant herein), Exim Bank (T) Ltd (3rd Defendant herein) and Bank of Tanzania. The Plaintiff herein believes that since Mr. Yogesh Manek and Riyaz Gulamani were both Directors in Exim Bank

there must have been some collusion between the two directors of Exim Bank to defeat an earlier restraint order of this Court (Civil Case No. 342 of 1999) prohibiting any transfer of shares belonging to Riyaz Gulamani from Exim Bank.

The Plaintiff therefore sought a declaration of this Court against the defendants, jointly and severally, to the effect that the transfer of the 1st Defendant's share from the 3rd Defendant's bank to the 2nd Defendant was void and ineffectual. The Plaintiff Company also wants this Court to grant him specific damages (TZS 6,605,708.48) as well general damages (TZS 1,200,000,000.00). The Plaintiff finally wants to be awarded costs and interests.

In their joint written statement of defence which they filed on 3rd November 2006, the 2nd and 3rd Defendants denied liability and asked this Court to dismiss the suit with costs because the reliefs sought are without any basis. The 1st Defendant never filed his Written Statement of Defence nor did he make any appearance even after a substituted service had been carried out. On 28 July 2008 this Court granted the Plaintiff leave to prove his case *ex parte* against the absenting 1st Defendant.

This Court heard two opposing versions of evidence in support of the Plaintiff's and the Defendants' positions. The Plaintiff brought only one witness Mr. Parvez Vira (PW1) - its managing director. PW1 testified in support of the first version to claim that Defendants perpetrated fraud and collusion to the disadvantage of the Plaintiff. According to PW1, the Plaintiff Company had instituted the Civil Case Number 121 of 2005. Parties to this suit were the Plaintiff against Riyaz Gulamani and two others. On 25th October 2005, the Plaintiff herein won that CC No. 121/2005 and its decree.

The next step which the Plaintiff took with respect to the decree it had won in the CC No. 121/2005 was to establish from the Registrar of Companies the status of shares which Riyaz Gulamani had in the EXIM BANK. That PW1 received a response from the Registrar of Companies vide a letter dated 24th March 2006 informing him that Riyaz Gulamani had been a shareholder and a Director of Exim since 23rd August 1993; and that he had transferred his shares to Azim Kassam in compliance with court order (HC CC No. 339/1999) dated 3rd August 2004. Parvez Vira insisted that the restraint order arising from Civil Case Number 342 of 1999 came out earlier on 17th September 1999 than the

Decree arising from Civil Case Number 339 of 1999 which is dated 3rd August 2004 in favour of Yogesh Manek.

The second version of evidence; begun with the evidence of Yogesh Manek, who testified as DW1 to deny that he obtained Civil Case Number 339 of 1999 by fraud. According to DW1, when Mr. Gulamani (1st Defendant) failed to honour his debt to him he (DW1) instituted Civil Case No. 339/1999 against the three defendants i.e. Mr. Gulamani, Exim Bank (T) and the Bank of Tanzania. Through this lawsuit DW1 was exercising his first and specific charge over Mr. Gulamani's shares. The judgment dated 29th July 2004 went in his favour and he proceeded to enforce it to recover his debt by selling the shares which belonged to 1st Defendant. DW1 maintains that he was not aware of any order of any court that would made the High Court in Civil Case number 339 of 1999 prevent him from exercising his first and specific charge over Mr. Gulamani's shares.

DW1 gave two basic reasons why he could not through Civil Case Number 339 of 1999 have committed any fraud against anybody. As his first reason, DW1 pointed out that he could not commit any fraud because the decree in Plaintiff's favour (in Civil Case Number 121 of 2005) was given in 2005 whereas the final

decision that went in DW1's favour (i.e. Civil Case number 339/1999) was given much earlier in 2004. As his second reason, DW1 noted that the order under the Civil Case Number 342 of 1999 which the Plaintiff alleges to have restrained Defendants herein expired on 28th September 2000 the date when that Civil Case Number 342 of 1999 was marked settled by this Court. DW1 in other words contended that the order of permanent injunction restraining the 1st Defendant (Riyaz Gulamani) from transferring his shares was not enforced since it had expired with the settlement of the Civil Case Number 342 of 1999 on 28th September 2000. According to DW1, by 2006 when the Plaintiff filed this present suit, the Plaintiff had no basis for lodging any claim against the Defendants because the Civil Case Number 342/1999 had been settled and the 1st Defendant was no longer a shareholder in the Exim Bank.

Mr. Yogesh Manek's version of evidence was supported by Ms Sabetha James Mwambenja who testified as DW2. DW2 had been a Director of Exim Bank till on 31st December 2010 when she retired. According to DW2, Mr. Gulamani (whom she described as a pioneer Director and shareholder of Exim) ceased to be a shareholder in March 2005 when his shares were transferred in

compliance with a Court Order in Civil Case 339 of 1999. DW2 strenuously denied that the Exim Bank defrauded the Plaintiff. DW2 became aware of the restraining order (i.e. Civil Case No. 342/1999) that was issued by Chipeta, J. in 2006 that restraining order was appended to the plaint in this Civil Case Number 143 of 2006. DW2 maintains that the restraining order that was issued by Chipeta, J. was never served on Exim Bank. When the decree in cc 121/2005 was issued on 21st October 2005 in favour of the Plaintiff herein, Riyaz Gulamani was no longer a shareholder in Exim Bank. This is because his shares had already been transferred earlier in March 2005.

From the foregoing, a number of principles shall guide my determination of the issue whether the Plaintiff has to the satisfaction of this Court proved fraud or collusion by the Defendants. The first principle is the duty which law imposes on the Plaintiff to particularize fraud and collusion he has alleged. Rule 4 of Order VI of the **Civil Procedure Code, Cap. 33** oblige Plaintiffs to give particulars of fraud and collusion they allege. This Rule reads:

> ***4.*** *In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, willful default, or undue influence and in all other case in*

which particulars may be necessary to substantiate any allegation, such particulars (with dates and items if necessary) shall be stated in the pleading.

The Plaintiff in paragraph 12 of his Plaint has in my opinion complied with Order VI Rule 4 of the **CPC** by particularising the basis of his belief that there was collusion and fraud. Plaintiff has particularised that the Defendants herein who were all parties in civil case No. 339 of 1999 fraudulently concealed the existence of the High Court Order that was issued on 17th September 1999 under Civil Case No. 342 of 1999 to restrain the transfer of the 1st Defendant's shares from the 3rd Defendant and several other companies. The Plaintiff has also particularised his belief that the High Court's order of 3rd August 2004 in Civil Case Number 339 can in no way contravene and/or out-rule the High Court order issued on 17th September 1999 (Civil Case No. 342 of 1999) since the latter was the first to be pronounced and was still subsisting by the time the order of 2004 was decreed.

Finally, the Plaintiff has particularised his belief that there was a deliberate concealing of material fact in court's proceedings thereby vitiating the outcome of the case since cheating and defrauding the court renders the consequent orders a nullity.

The second principle that will determine my decision is with regard to the nature of the burden of proof on a party who alleges and particularizes fraud in his pleadings. The law is now well settled on the principle that the one who alleges must prove. The burden to prove whether the Judgment of this Court in Civil Case No. 339 of 1999 and its subsequent Decree dated 3rd August 2004 were obtained by fraud rests on the Plaintiff. There are several persuasive decisions that emphasize that fraud cannot be proved by merely particularising or by inferring fraud from the facts. Available persuasive authorities insist that allegations of fraud must not only be distinctly alleged, they must also be distinctly proved. One such persuasive decision is that of the Supreme Court of Nigeria in the case of **Alhaji Nurudeen Olufumise vs. Mrs. Abiola Labinjoh Falana, SC 137/1987**, **where** Justice Andrews Otutu Obaseki, the Acting Chief Judge of Nigeria cited with approval the law as restated in **Halsbury Laws of England 2nd Edition Vol. 22 page 790, *paragraph 1669***:

> *...it is not sufficient merely to allege fraud without giving any particular, and the fraud must relate to matters which prima facie would be reason for setting the judgment aside if they were established by proof and not to matters which are merely collateral. The court requires a strong case to be established before it*

will allow a judgment to be set aside on this ground, and, unless the fraud alleged raised a reasonable prospect of success and was discovered since the judgment complained of, the action will be stayed and dismissed as vexatious.

I am also persuaded by statements of law which Jenkins, C.J. made in an old case from India: **Nanda Kumar Howladar vs. Ram Jiban Howladar (1914) ILR 41 Cal 990**:

> *.....A prior judgment, it has been said, cannot be upset on a mere general allegation of fraud or collusion; it must be shown how, when, where, and in what way the fraud was committed: [Citing the case of* ***Shedden v. Patrick et Al. (1854) 1 Macq. 535]****.*
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> *..... "the fraud must be actual positive fraud, a meditated and intentional contrivance to keep the parties and the Court in ignorance of the real facts of the case and obtaining that decree by that contrivance: [Citing* ***Sir John Rolt L.J. in Patch v. Ward (1867) L.R. 3 Ch. Apn. 203].***
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> *.....that a judgment, "like all other acts of the highest judicial authority, is impeachable from without; although it is not permitted to show that the Court was mistaken, it may be shown that they were misled: [citing* ***Lord Selborne, in Ochsenbein v. Papelier (1873) L.R. 8 Ch. App. 695, 698 quotes as sound law the dictum of***

Chief Justice De Grey in the Dutchess of Kingston's Case (1776) 2 Sm. L.C., 11th Ed., 731]

From the totality of persuasive decisions, I should perhaps point out that allegations of fraud and allegations that a judgment of this Court was obtained by fraud is a serious allegation which this Court has given a serious consideration. Although the standard of proof in civil cases is on balance of probability, I am prepared to hold that allegation that a judgment of this Court was obtained by fraud requires a higher level of probability than the traditional standard of balance of probability. In the above-cited decision of **Patch v. Ward (1867) L.R. 3 Ch. Apn. 203]** Sir John Rolt L.J. emphasized that fraud must be actual positive fraud, a meditated and intentional contrivance to keep the parties and the Court in ignorance of the real facts of the case and obtaining that decree by that contrivance.

In my opinion, although no particular number of witnesses shall in any case be required for the proof of any fact albeit fraud or collusion, I was not convinced that evidence of Parvez Vira was on balance of probability sufficient to prove that the judgment and decree of this Court in Civil Case Number 339 of 1999 was obtained by fraud. Records show that the judgment of this Court

in Civil Case Number 339 of 1999 was composed by Msumi, JK (as he then was) who was at that time a Principal Judge of this same Court. The Decree from his judgment is dated 3rd August 2004 and cites Yogesh Manek (as Plaintiff), Riyaz Gulamani (as 1st Defendant), Exim Bank (T) (as 2nd Defendant), Bank of Tanzania (as 3rd Defendant) and Azania Bancorp Limited as an Intervenor to this Decree. The Decree in addition states that the judgment was delivered by Honourable A.A.M. Shayo (Senior Deputy Registrar) in the presence of Mr. Chipeta (learned Counsel for the Intervenor) and Mr. Mrema (the learned counsel for the Plaintiff). Whereas for the Yogesh Manek has testified as DW1 and Ms Sabetha James Mwambenja who testified as DW2 on behalf of the Exim Bank, other persons involved were not called to testify.

From the nature of this case proof of fraud on higher standard of probability required the Plaintiff to specifically show how, when, where, and in what way the Civil Case Number 339 of 1999 was procured for fraudulent purposes of defeating the restraint order and deny the Plaintiff fruits from Civil Case Number 121 of 2005. Plaintiff has not shown how the Defendants herein pondered over a plan to defraud, how they carried out the pondered plans to keep the Plaintiff herein and the Court in CC

339/1999 in ignorance of their intention to defraud. In the circumstances, this Court cannot rely on tenuous allegation of fraud made by the Plaintiff's only witness.

The Plaintiff's case is also founded on the premise that had the Defendants complied with restraint order made under Civil Case Number 342/1999, the Plaintiff would have realized the fruits from the judgment in Civil Case Number 121/2005 which was delivered on 7th October, 2005. Defendants have responded by contending that by the restraint under cc 342/1999 lapsed on 28 September 2000 when that suit was marked finally settled. And this was well before the Plaintiff filed this present suit on 27th September 2006. Further, Defendants pointed out that since the cc 342/1999 was settled in 2000, it was obviously not subsisting on 25th October 2005 when a decree in cc No. 121/2005 became ready for execution by the Plaintiff.

In my opinion, after evaluating and weighing the two opposing versions of evidence, defendants' version provides an acceptable explanation that Defendants did not commit any act intentionally designed to defraud the Plaintiff of his judgment and decree arising from CC 121/2005. The Plaintiff was not a party to the civil case number 342/1999 (admitted as Exhibit P4) which had

initially restrained the 1st Defendant's shares. Parties to that restraint order were Mohamed Enterprises (T) Limited (as Plaintiff therein) and Exim Securities & Investment (1st Defendant therein) and Riyaz Gulamani (2nd Defendant therein). The Plaintiff herein has not fully explained how shares that were restrained under cc 342/1999 for the benefit of Mohamed Enterprises (T) Ltd were also to satisfy the judgment which was to be entered later in his favour in the civil case Number 121 of 2005.

It is clear that the Plaintiff has failed to prove even on the balance of probability that the judgment and decree arising from civil case number 339 of 1999 were obtained by fraud as alleged. Neither has the Plaintiff proved to the satisfaction of this Court that the restraining order arising from civil case number 342 of 1999 subsisted beyond 28th September 2000 when it was marked as settled.

I hold that the plaintiff has not proved his case against any of the three defendants. I hereby dismiss the suit, and order that the Plaintiff shall pay the costs of 2nd and 3rd defendants. It is so ordered.

I.H. Juma
JUDGE
15-11-2011

Delivered in presence of Mr. Mbugha, Advocate (who holds Mr. Lyimo's brief) for the Plaintiff and Ms. Aisha Sinda, Advocate (for the 2nd and 3rd Defendants).

I.H. Juma
JUDGE
15-11-2011