IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[ARUSHA DISTRICT REGISTRY]
AT ARUSHA

DC CIVIL APPEAL NO. 3 OF 2020

(Originating from the RM Court of Arusha at Arusha, Civil Case No. 31 of 2018)

HUMPHREY SILIYO PALLANGYO ..... 1ST APPELLANT

OUTDOOR EXPEDITIONS AFRICA ..... 2ND APPELLANT

Versus

HARUNA IDD MWIRU ..... RESPONDENT

JUDGMENT

21st October & 16th December, 2020

Masara, J.

In the Resident Magistrate's Court of Arusha ('the trial Court'), the Respondent sued the Appellants herein seeking declaratory orders to the affect that the agreement signed by him and the first Appellant dated 17/6/2014 was null and void. He also claimed a refund of money pad thereof to the Appellants and that the Appellants pay him specific and general damages. The Appellants had also preferred a counter claim.

Before delving into what was decided by the trial court and the substance of the appeal backed up with the parties' arguments, it is desirable to recount facts leading into the appeal, albeit briefly. The second Appellant is a company registered under the laws of Tanzania, and it is owned by the first Appellant. On 22/5/2014 in the midnight, the Appellants' motor vehicle make Land Cruiser with Registration Number T 760 AFJ was stolen from his premises at Ndatu Village, within Usa river Arusha. The theft was reported

at the Police Station whereby a search for its whereabouts was initiated. On 7/6/2014, the first Appellant was phoned by police officers in Singida to go and identify a car which was apprehended there. He went to Singida and managed to identify the car which was found in possession of the Respondent. The Respondent admitted to have bought it from PW3, John Karia on 28/5/2014 at a price of Tshs 25,000,000/= and they signed a contract which was admitted as exhibit P2.

The first Appellant along with Hamad Abdallah Kanama(PW2) and John Thadeus Karia (PW3) were arrested and taken to Kikatiti Police Station. On 17/6/2014, the first Appellant assisted by some police officers and a State Attorney by the name of Fortunatus Muhalila went there and made the Respondent and his colleagues to agree to pay $18,000 as costs for repairing the motor vehicle and $ 12,000 being costs incurred in tracing the motor vehicle. According to the Respondent and his witnesses, he was threatened that in case he did not pay the money and sign the contract (exhibit P1) he would be implicated in a fabricated murder case. In fear, the Respondent issued a cheque of Tshs 10,000,000/= which was brought to him by his young brother, Juma Idd Mwiru, to the Appellants. In addition to that, he borrowed Tshs 11,500,000/= from his fellow businessman, Ndesia Munisi (PW4), making it a total of 21,500,000/=.

Since the Respondent was in police custody, it was Mr. Munisi who assisted in depositing the money to the first Appellant's Barclays Bank account. The contract was signed on 17/6/2014 by the Appellants, the Respondent and

his co-accused persons, Mr. Munisi, Idd Mwiru and the State Attorney. The Respondent paid to the Appellants Tshs 21,500,000/= which was paid in terms of USD, equivalent to $ 12,000. The Respondent and his co-accused were prosecuted in Criminal Case No. 1355 of 2014, but they were later discharged. The Respondent later sued the Appellants in the Resident Magistrate's Court as already stated.

In their Written Statement of Defence, the Appellants raised a counter claim of US$18,000 from the Respondent being the unpaid amount which was the costs for repairing the stolen motor vehicle. They alleged that the Respondent had paid U$11,500 equivalent to Tshs 21,000,000/= which was the costs for tracing the lost motor vehicle. The Respondent was indebted the remaining US$18,000 for repairing the motor vehicle which was supposed to be paid within 2 to 4 weeks as per the agreement. The Appellants claimed that they spent Tshs 27,000,000/= to repair the motor vehicle. According to the first Appellant, it was agreed by the second Appellants' lawyer, Young Saviour, and the Respondent's relatives and the agreement was prepared by the Respondent's relatives in collaboration with the Appellants' lawyer and the money was deposited in the first Appellant's account by Mr. Munisi. The first Appellant therefore refuted the Respondent's claim that the contract was a legal one, as it was initiated by the Respondent's relatives and was signed freely.

In its judgment, the trial Court declared the contract between the first Appellant and the Respondent dated 17/6/2014 to be null and void. She

further ordered the defendants to refund the Respondent a total of Tshs 21,500,000/=, the money he had paid to them illegally. The Appellants were further ordered to pay the Respondent a total of Tshs 5,000,000/= as general damages. The trial court dismissed the counter claim. The Appellants were aggrieved, they have preferred this appeal on three grounds as reproduced verbatim:

a) *That, the trial Magistrate erred in law and fact to hold that the contract between the plaintiff and the defendants was null and void ab initio;*
b) *That, the trial court erred in law and fact for failure to properly evaluate the evidence available on record before making the decision; and*
c) *That, the trial court erred in law and fact for failure to decide in favour of the defendant/counter claimant in counter claim (sic) while there was ample evidence on record which prove (sic) their case on the balance of probability.*

Basing on the foregoing grounds, the Appellants pray that the appeal be allowed and the decision of the trial court be quashed and set aside.

When the appeal came up for hearing, the Appellants entered appearance through the services of Mr. Jeremiah Mjema, learned advocate while the Respondent enjoyed the services of Mr. John Mseu, learned advocate. It was resolved that the appeal be argued through filing written submissions. I commend the counsel for the parties for filing their submissions as scheduled.

Submitting in support of the first ground of appeal, Mr. Mjema contended that had the trial magistrate looked at the evidence available on record, she would have found that there was no any threat or inducement on the

Respondent to enter into the agreement. According to Mr. Mjema, neither the Respondent nor Mr. Munisi revealed the name of the policeman who threatened him. It was Mr. Mjema's view that in case the Respondent was threatened as alleged, he would have reacted immediately after being released from police custody. The fact that the Respondent waited for four years to institute his claim, the same is rendered frivolous and vexatious. Mr. Mjema fortified that the Respondent did not bring any RB, nor mention a police officer who dealt with the matter as a proof which makes the court's findings to be allegations or fabrications.

Mr. Mjema cited section 101 of the Evidence Act, Cap 6 [R.E 2019] which provides that no oral evidence/statement shall be admitted to controvert written contract. He also cited section 110 of the same Act, which provides the standard of proof in Civil Cases to be on the balance of probability. To support his argument, the learned advocate cited the case of ***Miller Vs. Minister of Pensions*** [1937] All ER 372. On the same argument, Mr. Mjema also referred the court to a book titled ***Sarkar's Law of Evidence, 18th Edition M.C Sarkar, and P.C Sarkar***, published by Lexis Nexis at page 1896. Mr. Mjema concluded that since the burden of proof was on the Respondent, unless and until he had discharged his duty, the call upon the Appellants to controvert the Respondent's testimony was irrelevant.

Arguing the second ground of appeal, Mr. Mjema submitted that evidence was not properly evaluated leading to a wrong decision by declaring the contract void *ab initio*. That the Respondent's representative, Mr. Munisi

admitted that he moved from Usa River to Barclays Bank to deposit the money without being forced, threatened or being under police escort but complying to the terms of the agreement. The learned advocate implored the Court to re-evaluate the evidence relying in the decision of ***Martha Wejja Vs. Attorney General and Another*** [1982] TLR 35 which held that the first appellate court is empowered to re-evaluate the evidence and come up with its own conclusion.

Submitting on the last ground of appeal, the learned counsel contended that the trial magistrate never evaluated the evidence of the counter claim. It was Mr. Mjema's view that the trial court failed to make a decision with respect to the counter claim. He implored this Court to re-evaluate the evidence regarding the counter claim and make its own findings.

Contesting the appeal, Mr. Mseu contended that it was uncontested by the Appellants in the trial court that the Respondent was forced to sign the contract (exhibit P1) while under police custody and was threatened to be charged with murder case in case he did not do so. He was of the view that the trial court was justified to find the contract void *ab initio* as it did not contain requisite elements of a valid contract, citing section 10 of the Law of Contract Act, Cap 345 [R.E 2002] in his aid. Mr. Mseu demonstrated that the contract was void *ab inito* because it was prepared without the consent of the Respondent, the terms and mode of payment were not communicated to the Respondent before drafting the contract and that the Respondent was not allowed to read the contents of the contract. He further propounded that

the contract was prepared while the Respondent and his colleagues were in police custody and the Respondent was not allowed to get out of the police custody in order to pay the contractual sum. He further stated that the contract was prepared by a State Attorney who in turn prosecuted them in criminal case on behalf of the Republic.

Mr. Mseu also argued that section 101 of the Evidence Act does not support the position at hand. The alleged contract was made under coercion and undue influence therefore did not comply with sections 13, 14, 15 and 16 of the Law of Contract Act. According to Mr. Mseu, the trial court failed even to prove whether the motor vehicle with registration No. T. 760 AFJ alleged to have been stolen is the same motor vehicle with registration No. T. 802 AAE which was purchased by the Respondent.

Responding to the second ground of appeal, Mr. Mseu submitted that the trial court evaluated the evidence, including making an evaluation of each document before entering the verdict. The learned advocate for the Respondent contended that the Respondent summoned Mr. Munisi that he could assist in making the payments because the police refused to release him from custody so. The learned counsel submitted that Mr. Munisi paid the money to save his friend from police custody, therefore it cannot be termed as business as he was not a free agent. The learned advocate added that the Respondent was forced to pay the money alone since the others had no money. He averred that the case of ***Martha Wejja*** (supra) cited by Mr.

Mjema is distinguishable as there is no piece of evidence which was not evaluated by the lower court.

Submitting against the third ground of appeal, the Respondent's counsel fortified that exhibit P1 was tendered by the Respondent and the first Appellant in the counter claim and it was the basic document in the trial, therefore its validity was subject to close scrutiny. According to Mr. Mseu, the Appellant's counsel did not point out specifically the piece of evidence which was left unevaluated which might have resulted into injustice on their part. On the basis of his submission, Mr. Mseu implored the court to dismiss the appeal with costs.

In a rejoinder submission, Mr. Mjema stated that the Respondent did not substantiate the steps he took after he was released from custody, as the matter was not reported anywhere. He added that the records of the lower court speak for themselves that the Respondent initiated the negotiations which led to the formation of the contract and signing of the same and that the contention by the Respondent's counsel that it was not out of his free will is not supported by any piece of evidence in the entire proceedings of the lower court or in the learned counsel's reply submission. In that view, Mr. Mjema reiterated his prayer that the appeal be allowed with costs.

I have dispassionately gone through the trial court record, the memorandum of appeal and submissions of the advocates for and against the appeal. It is this Court's view that this appeal will be determined on issues obtained from

each ground of appeal as presented. I will adopt the course taken by the learned counsel for the parties herein in determining the grounds of appeal.

Regarding the first ground of appeal which is whether the trial magistrate was proper in declaring the contract dated 17/6/2014 (exhibit P1) *void ab initio*, it was Mr. Mjema's contention that the agreement was freely signed as the Respondent initiated the negotiations leading to the signing of the agreement. Mr. Mseu did not support this line of argument. To the contrary, he was of the view that since the Respondent was in police custody, and since he was forced to sign the contract in lieu of being implicated in a murder case, he the contract was not freely signed.

A thorough examination of the trial court record reveals that on 17/6/2014, when exhibit P1 was signed by the parties herein, the Respondent, PW2 and PW3 were in police custody facing a criminal charge of being found in possession of a stolen car. This fact was admitted by the first Appellant in both his defence and in the counter claim. The task this court is enjoined is to determine whether the consent of the Respondent during the signing of exhibit P1 was given freely.

I will begin with the meaning of what a contract is. Considerably, all agreements are contracts if they have all the essential elements of a valid contract. This is provided under section 10 of the Law of Contract Act, Cap. 345 [R.E 2019] which provides:

"All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void:"

To determine whether the consent was given freely in a contract, recourse should be had on the nature and status of the parties at the time of signing the contract. Free consent is defined under section 13 of the same Act. The law provides that for consent to be valid, it has to be freely given. It is freely given if it is not induced by coercion, fraud, undue influence or the like. For the purpose of this appeal, I will deal with coercion and undue influence because the Respondent as well as the trial magistrate, to a large extent, relied on them in arriving at the decision. Section 14 of Cap 345 provides:

"(1) Consent is said to be free when it is not caused by-
(a) ***coercion****, as defined in section 15;*
(b) ***undue influence****, as defined in section 16;*
(c) fraud, as defined in section 17;
(d) misrepresentation as defined in section 18; or
(e) mistake, subject to the provisions of sections 20, 21 and 22.

(2) Consent is said to be not free when it would not have been given but for the existence of such coercion, undue influence, fraud, misrepresentation or mistake"(emphasis is mine)

Coercion is defined under section 15 of the said Act to mean:

"(1) ... the committing, or threatening to commit, any act forbidden by the Penal Code, or the unlawful detaining, or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement.
(2) ..... N/A"

While "undue influenced is covered under Section 16 of the said law in the following terms:

"(1) A contract is said to be induced by 'undue influence' where the relationship subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.
(2) In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another-
(a) where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other; or
(b) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.
(3) Where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other."

It is therefore the task of this Court to test if the above elements exist in the case under consideration as contended by the Respondent's advocate. It is on record as testified by the Respondent, PW2, PW3, PW4 and the first Appellant that at the time the contract was signed the Respondent, PW2 and PW3 were in police custody at Kikatiti Police Station. The testimonies of the Respondent, PW2 and PW3, who were all involved in the criminal charges, are that the Respondent was forced to sign exhibit P1 lest he would be implicated in a murder case. Furthermore, the first Appellant admitted that the costs for tracing the car which amounted to $ 12,000 was paid in his account by Mr. Munisi on behalf of the Respondent.

This Court is aghast to note that the first Appellant demanded costs for tracing the motor vehicle from the Respondent while the Respondent was in police custody awaiting trial. Since the Respondent was in police custody, and the costs were paid despite being in custody, I agree with Mr. Mseu that the signing of the contract and the payments made thereunder were induced with coercion and undue influence. I say so because the Respondent was not free to make rational judgment while being in police custody. **Professor N. N. Nditti** in his book titled ***"General Principles of Contract Law in East Africa"*** First Edition Published by Dar es Salaam University Press, reprinted in 2017, had the following to say at page 136 regarding undue influence:

> *"Cases involving unconscionable bargains and inequality of bargaining power or economic duress gives rise to the presumption. Unconscionable bargains is that bargain which is unfair. Where one of the parties to a contract is in a position to dominate the will of another and the contract is apparently unconscionable the law will presume the consent was obtained by undue influence."*

Since the Respondent was in police custody when the payment arrangements were made, it cannot be safely said that the arrangements were made without the knowledge of the police officers in the Police Station. The fact that the signing of the contract and payments were supervised by police officers and a State Attorney, it is safe to say that it was equally induced by undue influence contended by the Respondent's counsel above. I hold this view because the police officers and the State Attorney were in a position to dominate the Respondent's consent. Therefore, the Respondent's consent to pay the money and in signing exhibit P1 was not freely given. It

was induced. This is what the trial court decided, which I find no good reason to depart from.

The contention by first Appellant that it was the Respondent' relatives and the second Appellant's lawyer who prepared the contract was not proved as the said lawyer was not brought in court to testify. Courts have time and again held that in order for the court to rely on a contract, the attesting officer must be called to testify on such contract. This was the holding of the Court of Appeal in the case of ***Asia Rashid Mohamed Vs. Mgeni Seif***, Civil Appeal No. 128 of 2011 (unreported) where it was stated:

> *"In the absence of the evidence of the attesting witness, and without any explanation from the Appellant on Mr. Msuya's failure to attend court to testify, the evidence in exhibit P1 was incompetent evidence in the absence of Mr. Msuya's testimony, in terms of section 70 (supra)."*

In the same vein, the first Appellant's contention that the contract was made by the second defendant's lawyer (Young Saviour), and failure to bring the said lawyer who attested the contract, discredits the evidential value of exhibit P1.

Since the Respondent and all his witnesses testified that the contract was prepared by a State Attorney on instructions of the first Appellant, and since the said contract was signed by a State Attorney (by the name of Fortunatus Muhalila) as per the records, who also stamped the same with a stamp from the Attorney General's Chambers, the Respondent's claim that there was an ill motive between the Appellants, the police and the State Attorney is highly

convincing. I hold this view because at the end the Respondent and his co-accused persons complained that it was the same State Attorney who prosecuted them in the criminal case.

Having pointed out the above ailments in process of signing the contract, I once again state that I agree with the counsel for the Respondent that the consent of the Respondent was not freely given. Since the consent was not freely given, the contract cannot be said to be a valid one as all the elements of a valid contract are not apparent. I subscribe to the decision in ***Merali Hirji and Sons Vs. General Tyre (E.A) Ltd*** [1983] TLR 175 which was relied by the trial court in which the Court stated:

> *"For there to be a valid contract, parties must comply with the essential elements of a valid contract as provided under the law of Contract"*

I uphold the position presented by Mr. Mseu that Mr. Munisi supervised and executed the payments with a view of assisting the Respondent who was in police custody and therefore was not free to execute the contract. I also agree that section 101 of Cap. 6, relied on by the Appellants' counsel, is inapplicable since the said section is applicable where the law provides for the contract to be mandatorily reduced in writing. In such a scenario, no evidence shall be given in proof of the terms of such contract, grant, or other disposition of property, or of such matter except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible. In the appeal under consideration, it is not mandatorily provided that the signed contract must be compulsorily in writing. As intimated earlier on, the Respondent's consent was not freely given. It was therefore proper

for the trial court to find that the contract was void *ab initio* for lacking requisite elements of a valid contract as provided by law. The first ground is therefore resolved against the Appellants.

The second and third grounds of appeal will be determined together since they are interrelated. I agree with Mr. Mjema that a second appellate court is at liberty to re-evaluate the evidence and come up with new findings. This was reiterated by the Court of Appeal in ***Swalehe Wadi Salum Vs. Republic***, Criminal Appeal No. 206 of 2010 (unreported), where the it held:

> *"Given the special circumstances surrounding this matter and being a first appellate court, we are of the considered view that we are entitled to look at the evidence, particularly that of PW1, and make our own finding of fact."*

See also ***Mdizu Nuasa V. Masisa Magasha*** (1999) TLR 202; ***Mwasuma Mbegu Vs. Kitwana Amani***, (2004) TLR 410; ***Makuru Jumanne and Another Vs. Republic***, Criminal Appeal No. 117 of 2005; ***Patric Jeremiah Vs Republic***, Criminal Appeal No. 34 of 2006 (both unreported).

It was Mr. Mjema's view that as the trial court did not evaluate both the evidence in the main case and the counter claim, this court has to re-evaluate the evidence and come out with its own findings. I decline the invitation for the following reasons. First, this court is of the considered view that the trial court made a thorough evaluation of the evidence in both the main suit as well as the counter claim. I do not find reasons to interfere with its findings. In any case, the evidence given in the main case and that in the counter claim appear to be the same. As correctly submitted by Mr. Mseu, exhibit P1

was the centre of both claims. This exhibit was critically scrutinized at pages 8, 9 and 10 of the typed judgment. Second, I did extensively discuss the evidence of the parties while determining the first ground of appeal, which I find no reasons to reiterate. For those reasons, the second and third grounds of appeal are dismissed.

In the event, for the reasons stated above and the authorities cited, the appeal is wanting in merits. It stands dismissed in its entirety. The trial Court's decision is hereby upheld. Costs shall be borne by the Appellant.

It is so ordered.

Y. B. Masara
JUDGE

16th December, 2020