IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM

COMMERCIAL CASE NO. 32 OF 2005

MARK FOLEY.....PLAINTIFF
VERSUS
1. ROBERT THOMSON.....1ST DEFENDANT
2. CONSTRUCTION EQUIPMENT AFRICA LTD.....2ND DEFENDANT

JUDGMENT

Date of Final Submissions – 16/12/2006

Date of Judgment – 5/4/2007

MASSATI, J:

The Plaintiff's case against the Defendants is aptly summarized in paragraph 4 of the plaint:

> *"The Plaintiff's case against the Defendants jointly and severally are for a declaratory judgment and decree that both the Settlement Agreement filed in court in Civil Case No. 127/2004 and subsequent sale of 45% of the Plaintiff's 50% shareholding in the Second Defendant Company are illegal and null and void. The Plaintiff also claims against the First Defendant for a declaration that the latter has not paid for his 50% issued shares in the Second Defendant Company. The Plaintiff further claims for costs of this suit."*

In response, the Defendants filed a joint Written Statement of Defence.

In paragraph 2 of the joint defence, the Defendants state:-

> *"2...the contents of paragraph 4 of the plaint is (sic) denied and the Plaintiff is put to strict proof thereof. The 1st and 2nd Defendant (sic) states (sic) that the Settlement Agreement duly executed by both the Defendants and the Plaintiff and subsequent sale of 98% of the Plaintiff's 50% shareholding in the 2nd Defendant Company are lawful and enforceable as decree of the court. The 1st Defendant further states that he paid for his initial 50% shares in the 2nd Defendant's Company."*

The 2nd Defendant on its part also raised a counterclaim against the Plaintiff for:-

> *(a) A declaration that the Plaintiff has no interest whatsoever in the 2nd Defendant Company save for the 5 shares which are due to be transferred to the 1st Defendant on 31st July, 2005.*

(b) *Perpetual injunction restraining the Plaintiff from interfering with the management and business affairs of the 2nd Defendant's Company.*

(c) *General damages.*

(d) *Costs.*

In a reply to the Written Statement of Defence and Defence to the counterclaim the Plaintiff denies the Defendants' joint defence and insists on the truth of the averments in his plaint, and further disputes the genuineness of Annexure A of the Written Statement of Defence, it being alleged by the Plaintiff as doctored. The Plaintiff also disputes the contents of the counter claim, alleging that The Memorandum and Deed of Settlement was obtained through coercion.

As a result of these pleadings and having failed to reach an amicable settlement the following issues were framed for trial:-

(i) *Whether the Settlement agreement duly executed and performed between the parties hereto and recorded in the District Court of Ilala in Civil Case No. 127 of 2004 is illegal and therefore null and void?*

(ii) Whether the sale of the 50% share holding of the Plaintiff in the Defendant's Company to the 1st Defendant was illegal and therefore null and void?

(iii) Whether the 1st Defendant has not paid for his 50% issued shares in the 2nd Defendant's Company?

(iv) Whether the Plaintiff has illegally interfered with the day to day business activities of the 2nd Defendant?

(v) If issue No. 4 is answered affirmatively, whether the 1st and 2nd Defendants have suffered any damages?

(vi) To what reliefs are the parties entitled?

The trial was ably prosecuted by Mr. Mbwambo, learned Counsel for the Plaintiff, and Mr. Deogratias Lyimo learned Counsel for the Defendants. But before I review the testimonies of the witnesses some insight to the conduct of this trial has to be laid. This trial was conducted by the aid of electronic recording or voice recognition machine. However, not all testimonies were recorded that way. The evidence of PW1, PW2, PW3, was recorded by the machine. But the evidence of DW1, DW2, DW3 and DW4 was recorded by long hand. After completion of the trial, learned Counsel were

ordered to file written final submissions. This, the learned Counsel did.

As I sat to review the evidence of the witnesses in the course of composing my judgment, I learned that only a transcript of examination in chief of PW1, MARK FOLEY was available. Cross examination and re-examination went missing, as I came to learn later, because the hard disc of the computer that recorded that part of the evidence collapsed. Certainly this was a novel and horrifying scenario.

On the date set for judgment, I notified the learned Counsel on the situation and after consultations we settled on recalling PW1 for further cross examination and re-examination under O. XVIII Rule 12 and s. 147 (4) of the Evidence Act 1967. I then set the matter for hearing on 29/3/2007 for re – cross examination. This adjournment was made on 21/2/2007; but on 29/3/2007, Mr. Mbwambo learned Counsel for the Plaintiff informed the court that the witness was in the United Kingdom for treatment. However on 21/2/2007 Mr. Mbwambo informed the court also he had discussed this with his client. I presumed that he was still in the country. But on 29/3/2007 when Mr. Mbwambo revealed that his client was in the U.K., he did not also reveal whether he was also aware of that date of hearing and if so, when and why did he decide to travel. Be that as it may have been, I

adjourned the matter, and bearing in mind that, the deadline for the finalization of the matter was on 5/4/2007. I set that date as the last adjournment.

However, on 4/4/2007 Mr. Mbwambo filed an application for adjournment and for departure from the scheduling order under O. VIII C Rule 6 and O. XVII Rule 1 (1) and (2) of the Civil Procedure Code. Mr. Mbwambo submitted in court that he had advanced sound reasons for PW1's failure to appear and was therefore seeking for departure and for amendment of the scheduling order, and thereafter for adjournment to another date. He submitted that to refuse adjournment would be prejudicial to his client as it was not his fault that the hard disc containing his cross examination collapsed. On the other hand, Mr. Lyimo, learned Counsel for the Defendants submitted that no sound reasons were advanced for departure from the scheduling order and for adjournment. He prayed for dismissal of the application. He further submitted that though it was the Defendants' right to cross examine, he was ready to sacrifice it on condition that PW1's evidence be treated with caution, as he was not available when they were around to cross examine him. In reply, Mr. Mbwambo submitted, that since it was not his fault that the disc collapsed, it would not be fair to treat PW1's evidence with caution, but that the court should accord to it all the weight

and credibility it deserves as by not cross – examining, it remains unachallenged.

After hearing the parties, I dismissed the application for departure and adjournment and promised to give my reasons in the judgment.

As remarked above, this presents a very unique situation, for the reason that both the Evidence Act and the Civil Procedure Code did not contemplate these developments in technology that has led to this. I have read **SARKAR ON EVIDENCE** 15TH Edition and **SARKAR ON THE CODE OF CIVIL PROCEDURE** 10th Ed. Vol. 1. None of their commentaries, contemplate, recalling a witness, whose evidence has been recorded but electronically destroyed. In the circumstances, I have to be guided by ordinary principles of common sense, justice, equity and good conscience.

It is doubtless true that the Plaintiff has a right to be heard. In the circumstances of this case, I think the Plaintiff has enjoyed that right. Although the cross examination and re examination record is missing, there is no doubt that, PW1 had performed his part in the trial. Mr. Lyimo is therefore wrong to ask the court to treat PW1's examination in chief with caution, because, in reality he was cross examined and

no doubt the learned Counsel used part of that record in their submissions.

There is also no doubt that the right to cross examine is reserved to the adversary party; who in this case, are the Defendants. It cannot be reasonable to conclude that the Plaintiff shall have been denied the right to be heard simply because he is not available to be cross examined. If anything, it is the Defendants who should have complained that they were denied that right. In my view, the Plaintiff's right to be cross examined is subordinate to that of the Defendants.

The Defendants have agreed to sacrifice that right on the condition that PW1's examination in chief be taken with caution because they were available when PW1 was not. As rightly submitted by Mr. Mbwambo, that would not be fair, because it was for no fault of his, that the disc collapsed.

As to the reasons for departure from the scheduling order and for adjournment both O. VIII B Rule (4) and O. XVII Rule 1 of the Civil Procedure Code, 1966 require the party seeking such order to demonstrate a sufficient cause. In the present case, according to paragraph 8 of the affidavit of Mr. Mbwambo, which I find material, the reason is:

"8. I communicated with the witness. Unfortunately he is still unable to travel down for testimony on 5/4/2007."

In my view, this paragraph does not have all the answers, for instance, we are not told when did the Counsel communicate with the witness, what reasons are now holding him from traveling down, is it the same illness, or some official business? I am certain that the lack of these particulars render the reasons advanced, insufficient to move the court to exercise its discretion to grant the departure and the adjournment.

It is for all the above reasons that I rejected the application for adjournment. For the purposes of this judgment, I will treat PW1 as a witness, who, for reasons beyond his control, part of his evidence is not on record. With due respect to Mr. Lyimo, such part of his evidence that is available on record, deserves all the respect that it deserves, as pitted against that of the defence. So in this judgment, I will not make reference to any part of cross examination of PW1.

The Plaintiff's case was built up by the testimony of 3 witnesses and 5 documentary exhibits. I will examine more closely the contents of this evidence as I tackle the issues

framed for trial. But in short, P2 KASSIM ZAKARIA and PW3 MICHAEL PETER SHIO, were formal witnesses from the Standard Chartered Bank Tanzania Limited, and their evidence is to the effect that the Second Defendant Company had opened its account with their bank and had applied for a credit facility and that at the request of the Second Defendant, this bank remitted some funds to one of the companies in the UK, called GBK Ltd. On the other hand, PW1, MARK FOLEY's evidence is to the effect that he and the 1st Defendant promoted and formed the Second Defendant Company in December 2000, with 50% shares each. He said through special arrangements with his two Companies in the UK, he was able to prefinance the Second Defendant and initiated its business by supplying to it equipment on credit, of which as at May 2004, the Second Defendant still owed a substantial amount to these Companies. It was his evidence that the Defendants then began to scheme so that he could be booted out of the Company. He cited several overt acts committed by the Defendants as a manifestation of that scheme, including duress which forced him to sign the Deed of Settlement, which as we shall see later, he tendered as Exh.P4. That is why he has decided to file the suit. With that, the Plaintiff closed its case.

On the other hand, the Defendant's case is built on the evidence of 4 witnesses and 19 documentary exhibits. Like in

the Plaintiff's case, I will treat the testimonial and documentary evidence more closely in the course of handling the issues framed for trial.

In summary it is the defence case, that while it was true that the Plaintiff was a founder shareholder in the 2nd Defendant's Company, the Plaintiff did some things which were inimical to the interests of the Defendants, including unauthorized alteration of the Company's Articles of Association. He also procured a breach of contract between the Second Defendant and a number of service providers such as Celtel, thus causing considerable damage to the Second Defendant hence the counter claim. It was the defence case that the Plaintiff also procured some false documents to show that he has paid for all his shares in the Company, which was not the case. On exhibit P4 it was contended that the Plaintiff executed this document on his own free will and there was no duress applied on him. It is on the basis of this and other evidence to be examined in detail later that the Defendants pray for the dismissal of the suit, and judgment on the counterclaim.

On a closer examination, PW1 MARK FOLEY's testimony is that with the aid of his 2 UK Companies namely SINCRO ENGINEERING CO. LTD and BK ARCHITECT LTD, in which he is the majority shareholder, he was able to pay his shares by

supplying equipment and machinery to the Second Defendant Company. After two or three years he had invested an amount equal to USD 1,000,000; which he later capitalized into shares in CONSTRUCTION EQUIPMENT LIMITED. As a result, the Company became successful at his sole expense as Mr. Thomson did not pay for his shares. He even asked him to pay for his shares from earnings by way of commission for the sales of equipment from the UK Companies. That is when Mr. Thomson seemed to have wanted him removed from the Second Defendant Company. PW1 went on to testify that the 1st Defendant even threatened that unless he handed over his shares to them he would ensure that the Company would go into liquidation by declaring a shareholder dispute. He said he was also threatened with fabricated criminal charges. So in order to avert the crisis he had to file a case at Ilala District Court to seek an injunction to prevent him from interfering with the day to day affairs of the Company, but the order of injunction was later set aside; which effectively meant that Mr. Thomson continued to manage the Company. The bank accounts were also frozen and the case was taking too long to finalise at the expense of his UK Companies, as Mr. Thomson would not sign any cheques in favour of his UK Companies thus attempts to ask the Ilala District Court's intervention but it was dismissed. This made the situation in the UK, regarding his Companies, desperate. He was in danger of losing everything including his personal guarantees. This is

what forced the witness to agree with the proposals of Mr. Thomson. That is what made PW1 sign Exh.P4.

In defence DW1, **ROBERT DAVID THOMSON**, informed the court that he came to Tanzania to work for GALLEY & ROBERTS in 1999. He first met the Plaintiff in 1997 in London, when he was procuring some equipment for a friend in Kenya and ignited a business relationship before inviting him to Tanzania in 1999. In December 2000 they incorporated the Second Defendant Company and the Plaintiff and himself were the first directors of the Company with each holding 50% shares.

DW1 said that according to the Memorandum and Articles of Association, at p. 5, it is shown that the shares were allotted. Two years down the road, allotments were made for 200 shares each. The arrangement was that these were treated as loan from the Company payable in 5 years from December 2000 to 2005, which is reflected in the Company's balance sheet and certificates from the Company auditors. He however, finally paid for his shares in September 2004 in terms of the deed of settlement by way of offer of his commission amounting to USD 200,000 after his request was accepted by the Company and after discussing it with the Plaintiff by e mail and other correspondence. He testified that the Plaintiff also paid his shares by offsetting his shares in his

UK Company to buy shares in the Second Defendant Company. This was the sum equivalent to Tshs.120,000,000/= due to P.K. AGCTECH. DW1 produced several emails to prove his point, together with other letters. He was emphatic that he did not force Mr. Foley to sign the deed of settlement. With regard to non payment to PW1's UK Companies, DW1 admitted that the Second Defendant owed to them something between 120,000 – 130,000 USD, but there were other statutory and preferential creditors such as BP, spare parts suppliers and employees salaries and statutory contributions, which together amounted to approximately USD 650,000. He therefore had to arrange for a facility from Standard Chartered Bank and paid all the statutory debts. The invoices from the UK Companies were finally settled through the Settlement Deed. DW1 also said Mr. Foley was part and parcel of the team which negotiated the opening of the account and the processing of the facility from the Standard Chartered Bank, and the money was used for Company purposes.

With regard to the counterclaim, Mr. Thomson said this was necessitated by Mr. Foley's constant interference with the day to day running of the Second Defendant's business, as a result of which the Company suffered loss of business, such as the loss of a contract with Celtel Uganda where they were to supply equipment worth USD 1,100,000. Although Mr. Foley

laid a number of criminal charges against DW1 and other officials, he (i.e. DW1) was never prosecuted. In cross examination the issue of alteration of the Company's articles of association featured prominently. According to DW1, Mr. Foley admitted to have altered the articles at the Company's ordinary board meeting. With regard to payment of his shares DW1 said that he had paid for his shares after the signing of the settlement. He said he injected £.30,000 in cash, and had receipts for the goods he bought for the Company. He denied having paid for his shares from the Company's money. The alleged receipts were however never produced as exhibits.

DW2 MUDASSAR DAWOOD said that he was an accountant with the Second Defendant Company, since 2002. He said that on 26/2/2004 he was visited by Mr. Foley with a letter dated 10/5/2004 (exh.D5) and the latter asked him to sign it. He denied having ever received any payment indicated in the said letter, nor did the Company receive the money. Cross examined, DW2 said that although he knew it was bad to do so, he was forced to obey because Mr. Foley was his boss. He prepared Exh.D.18 to inform Mr. Thomson about what happened.

DW3 RAYMON ORR, is the Director of Finance of the 2nd Defendant since February 2004, and was appointed by both the Plaintiff and the 1st Defendant. Upon his appointment he

became a member of the board of directors. He explained that the shareholders of the Second Defendant Company had 250 shares each, duly paid for and issued. The payment was by way of a loan from the company payable in 5 years. The arrangement is documented in the Company's Annual Reports for 2002, 2003, 2004, as well as the Audited Accounts for those years. However none of those Annual Reports were produced in court. DW3 went on to tell the court that both of them settled their debts on 21/9/2004 through a Deed of Settlement. The amount of the loan was 240,000,000/= Tshs and each, paid it in full by September 2004. He said he was positive DW2 did not receive any money from Mr. Foley in May or June 2004 as payment for his shares. He said Mr. Thomson did not use Company money, but assets due to him to settle his debts to the Company. This included some USD 200,000 which he had earned as commission from the UK Companies owned by Mr. Foley. Mr. Orr further testified that the account at Standard Chartered Bank was opened with the consent of Mr. Foley, and used the amount obtained from the facility offered to pay the debts due to Mr. Foley's UK Companies.

Mr. Orr offered an opinion that articles of association could not be altered without the order of the High Court.

He said on 22/5/2004 there was a board meeting to discuss the altered Memorandum of Association of the Company, but the two agreed that they could no longer work together. One had to give way to the other.

DW3 further informed the court that it was not true that DW1 deliberately refused to pay PW1's UK Companies. He said that at that time the Company was in financial difficulties and on obtaining the facility from the Standard Chartered Bank it was able to pay all its outstanding debts.

DW3 was categorical that Mr. Foley did not invest USD 1,000,000 into the Company. On the counterclaim, Mr. Orr testified that apart from constant harassment to his person, Mr. Foley spread malicious rumors about the Company and its directors and that the Company was about to go bust. He spread such rumors to the Company's customers such as CELTEL Uganda, Tanzania Breweries Ltd, Mobitel, Vodacom. In the case of Celtel Uganda, the Company lost a contract worth USD 2,000,000. In cross examination Mr. Orr admitted that the USD 2,000,000 scare was not reflected in Exh.D17. He also said Mr. Foley's investments to the company were not reflected in the company's books of account. But Mr. Thomson paid Tshs.2,000,000/= from his 4 months' back pay and the balance was paid by way of set off to Mr. Foley's Companies, said Mr. Orr in re examination.

The last defence witness was **SAJJAD JAFFER JUSSA**, who testified as DW4. He said he has an accounting firm called ASSAD ASSOCIATES. One of his clients is the Second Defendant since 2001 or 2002. The essence of his testimony is that the two shareholders had been allotted 250 shares each worth Tshs.120,000,000/= and that this arrangement was reflected in the Company's books of account and the balance sheet. As observed, neither the books of accounts nor the balance sheet were produced in court. He also confirmed that these amounts were paid before March 2005 and reflected in the Company's Statement of account and that DW4 prepared share certificates in April 2004. However in cross examination DW4 admitted that share certificates simply reflect the number of shares held by the shareholder. And that was the close of the defence cases.

After the close of the defence, the learned Counsel embarked on presenting arguments on the strengths and weaknesses of their respective cases. This, they did in writing. So, we shall next examine those arguments on each of the issues. But before we go into that, let me highlight certain established evidential guidelines. The first is that in Civil cases, the burden of proof is on him, who would loose if he does not prove a point on which his claim is based, and secondly, that, except in fraud cases, the standard of proof is

on a balance of probability, whereas, it is higher in fraud allegations.

The first issue is whether the settlement deed is illegal, null and void? The Defendant's argument was simple. It was submitted that the Plaintiff's acts and omissions before, during and after the execution of the settlement deed suggest that Exh.P4 was properly executed, and therefore lawful. In support the learned Counsel referred the court to exhibits P3, P4, D1, D6, D7, D8, D9, D11, D12, D13 and D14 and the evidence of PW1, PW2, PW3 and DW1. On the other hand,Mr. Mbwambo, learned Counsel for the Plaintiff, trenuously demonstrated that through the Defendants' acts the Plaintiff was forced down on his knees, as he realized that his UK Companies were on the brink of liquidation. According to the learned Counsel, the circumstances that the Plaintiff faced amounted to duress because the Plaintiff was induced to enter into the deed of settlement through unlawful or illegitimate form of pressure or an intimidation leading to the formation of the contract. He submitted that duress depends on pressure and absence of practical choice. To illustrate his point, Mr. Mbwambo referred the court to **NORTH OCEAN SHIPPING COMPANY LTD VS HYUNDAI CONSTRUCTION CO. LTD** [1979] Q – B 703. It was further argued that in economic duress it was not necessary to show that the threat was the predominant cause. For that he cited **DIMSKAL SHIPPING**

CO. S.A. VS I TWF [1992] 2 A.C 152. The learned Counsel also referred the court to ss. 14 (1) and 15 (1) of the Law of Contract Act (Cap 345). He also referred to exhibits P1, P3, P4, P5, D1, D6, D11, D12, D13 and D14, as well as the evidence of PW1, PW2, PW3, DW1, and DW3.

The first issue calls on a discussion of fraud. As hinted above this has to be proved to a standard higher than in ordinary cases. I have already reviewed the evidence of all the witnesses. I will now turn to review the contents of the documentary evidence. I will begin with those to which all the parties make a common reference. These are Exhibits P3, P4, D1, D6, D11, D12, D13 and D14.

Exh.P3 is a chamber application filed by the 2nd Defendant in Civil Case No. 127 of 2004 at the Ilala District Court, Samora Machel against the 1st Defendant. The Plaintiff sought to use this exhibit to show that liquidation of his UK Companies was imminent, and to demonstrate what the 1st Defendant did to thwart efforts to pay the Companies. He also sought to use Exh.P3 as a demonstration of an alternative way that the Plaintiff employed to fight the duress and coercion. But using this exhibit the Defendant argued that Exh.P3 only shows that the Plaintiff's UK Companies namely BK Aggtech and Sincro Engineering Ltd had trade invoices against the 2nd Defendant in the sum of Pounds 333,794.08. In my view,

Exh.P3 does not prove what the Plaintiff sought to prove. First this suit was filed by the Second Defendant, and not by the present Plaintiff, although he is the one who took out the affidavit in support of the application. Secondly, the annexures to the chamber application do not in any way, support the Plaintiff's claim that the two companies in UK were on the brink of bankruptcy/liquidation or that any of the Second Defendant Company's accounts were frozen. The annexures simply demonstrate that the Second Defendant owed to the said UK Companies, the sums of £.333, 794.08 (BK AGGTECH) and £.21, 876.15 as at 30th August 2004. In none of these has any of the Companies expressed their inability to pay their debts as they fell due, (which is one legal ground for winding up of a Company) nor has any of them directly expressed or intimated its intention to place the Second Defendant under liquidation.

From this exhibit P3, the threat of liquidation was more imaginary than real. Indeed, the legal action threatened by **SINCRO ENGINEERING LTD**, was the filing of a suit in this court (Commercial Case No. 33 of 2005) as demonstrated by Exh.D16.

The next exhibit is P4. This is the impugned Memorandum and Deed of Settlement which, ironically was jointly drawn by the very learned Counsel who prosecuted the

objection. Neither was DW1 cross examined on its authentiaty or validity.

I think the position of the law is this. Every order, however irregular, is valid, and remains so, until set aside by a superior court. (See **R VS MAHMOUD MOHAMED** [1973] L.R.T 79. Secondly, under s. 46 of the Evidence Act, a party to suit or other proceeding may show that any judgment, order, or decree which is relevant under s. 42, 43 or 44 and which has been proved by the adverse party was delivered by a court not competent to deliver it, or was obtained by fraud or collusion. The third principle is that failure to cross examine a witness on a crucial point may imply acceptance of the truth of the witness's testimony (**R VS HART** [1932] 23 Criminal Appeal R. 202) and such a party may be estopped from continuing to challenge the said point.

In the present case, the Plaintiff is not seeking to nullify the decree of Ilala District Court, but just the Memorandum and Deed of Settlement. In my view, at this stage one cannot separate the Deed of Settlement from the decree of the court. In other words the Memorandum and Deed of Settlement cannot be nullified without nullifying the decree. The Plaintiff does not seek to challenge the decree, and so the decree remains valid until set aside by a superior court. So long as the decree remains intact, and in the absence of any finding

that it was obtained by fraud or collusion, that order remains relevant and no other court can hold trial on that issue again. Its existence is recognized under s. 42 of the Evidence Act. And lastly, as observed above, the Plaintiff did not cross examine DW1 or object to the admission of Exh.D.10. So he is now estopped from challenging it in the final submission.

From my discussion above, it is my finding that backed by Exh.D.10, Exh.P4, is in my view, on firm grounds. Its validity cannot now be shaken.

Exh.D11 collectively are transfer of shares certificates for 245 and 5 shares respectively. They are dated 23/9/2004 and 31/7/2005 respectively in which the Plaintiff has transferred his shares in the Second Defendant Company. Mr. Mbwambo, learned Counsel submitted that Exh.D11, 12, 13 and 14 cannot be taken to prove that the Plaintiff voluntarily executed Exh.P4. On the other hand, Mr. Lyimo learned Counsel for the Defendants submitted that those documents were executed prior to the execution of Exh.P4 and his (i.e. PW1's) subsequent conduct shows that he did so voluntarily.

It must be borne in mind that it is the Plaintiff who alleges duress and so the burden is on him to prove those allegations to a standard higher than on a balance of probability. In my finding above I have found that the

allegation that the Plaintiff was forced to do so to save his UK Companies from liquidation is not supported by evidence on the ground. Therefore the existence of the alleged economic duress was not proved. If it existed, there is no evidence that he was forced to execute the share transfer certificates. If he did, he would have produced the attesting witness for examination by this court. He did not. An adverse inference could therefore be drawn against him. Then there is Exh.D10, a court decree which as I said above remains intact. Any serious litigant would not have left that decree intact if it was obtained by duress. But what is more, if there was duress prior to the execution of Exh.P4 on 14/9/2004, there was no evidence of the existence of a similar force on 31/7/2005 when he signed the second certificate of share transfer almost a year after signing the first certificate of transfer of 245 shares.

Then Exh.D12 collectively consist of, first, a requisition of the holding of an extraordinary meeting of the Company, dated 22/8/2004, signed by the Plaintiff and the 1st Defendant, then, the extract of the minutes of the extraordinary Company meeting also signed by the Plaintiff and the 1st Defendant, then there is a notice of intention to propose a resolution for the appointment of KENNETH THOMSON as Director, and resignation of the Plaintiff as Chairman, Director and employee of the 2nd Defendant Company. All these exhibits

were admitted without objection. Although DW1 was cross examined on other exhibits such as D1, D6, D7 and D17 he was not examined on Exh.D12 or any part thereof. On the principles elucidated above, failure to cross examine on a vital point implies acceptance of that evidence. That the Plaintiff did not deny having appended his signatures in these documents, adds even more weight to this conclusion. The same can be said of Exh.D13 and D.14.

I agree with Mr. Mbwambo, learned Counsel that under s. 14 (1) and 15 (1) of the Law of Contract Act, consent is vitiated by coercion. I further agree with him that economic duress and coercion vitiates a contract, as expounded by the cases of **NORTH OCEAN SHIPPING COMPANY LTD VS HYUNDAI CONSTRUCTION CO. LTD** [1979] QB 703; and **DIMSIKAL SHIPPING CO. S.A. VS ITWF** [1992] 2 A.C. 152 cited by the learned Counsel.

However, in the present case, I find as a fact that there is no coercion or other threat applied on the Plaintiff that would have forced him to execute Exh.P4. If there was, then he has not proved it to the requisite standard, and to cap it all, Exh.P4 is part of the decree in Ilala District Court Civil Case No. 127 of 2004, which to my mind has not been vacated or set aside and cannot be legally separated from the Memorandum and Deed of Settlement. There is, besides, no

prayer in this court for a declaration that that decree was void. These facts were not present in the two cases cited by learned Counsel and it is perhaps, what makes the present case distinguishable from those in the cited cases.

So for the above reasons, that is to say, on the basis of Exh.D10 supported by Exh.D11 and D12 I would find that the Memorandum and Deed of Settlement was voluntarily executed by the Plaintiff and is therefore valid and enforceable. I would thus answer the first issue in the negative.

The second issue is whether the sale of 50% shareholding of the Plaintiff in the 2nd Defendant Company to the 1st Defendant was illegal and therefore null and void? It was pleaded by the Plaintiff that the money used to pay him off from the Company was the Company's money borrowed from Standard Chartered Bank. It was his case that a Company could not in law use its money to buy its own shares. It was argued for the 1st Defendant that he paid for the shares out of his own money. This issue is of mixed law and fact.

Apart from Exh.P4, which I found to have been voluntarily executed by the Plaintiff, the Plaintiff referred to Exh.D2, D3, D4, and also hedged his argument on s. 56 (1) and 2 of the Companies Act, as well as the testimonies of PW1, PW2 and PW3. On the other hand, learned Counsel for the

Defendants submitted that the 1st Defendant used his own money. He relied heavily on Exh.P4, D2, D3 and D4.

First, the position of the law. Mr. Mbwambo learned Counsel has cited s. 56 (1) and (2) of the Companies Act (Cap 212). I have looked at that section in both the repealed and the new Companies Act, and I am aware that the new Act became operative on 1/3/2006 and take judicial notice of it. According to the old s. 56 (1) of the repealed Companies Act it is true that no Company limited by shares and no Company limited by guarantee and having a share capital shall have power to buy its own shares unless a consequent reduction of capital is effected and sanctioned in a manner hereinafter provided. Section 46 (1) of the old law also prohibits the Company from advancing financial support for this purpose. So far as in the present case the cause of action arose in September 2004 before the new Act came into operation, Mr. Mbwambo is right, that at that time, the Company could not have bought its own shares. However under the present Companies Act this is no longer the position, for under s. 57 (4) that restriction is not applicable to private companies which the 2nd Defendant Company is. The old s. 56 (1) is now s. 69 (1) which has no such restriction, which I think is in consonant with s. 57 (4) of the Act.

overdraft facility. The crucial part of Exh.P5 which PW2 tendered is:

> *"On the same note we confirm that the requested telegraphic transfer of GBP 241120 can be affected through overdraft and USD Medium Term Loan facilities."*

This piece of evidence in itself is not conclusive that the facility was utilized by the 2nd Defendant to pay for the Plaintiff's shares. In fact PW3 Michael Shio testified that the money was telegraphically transmitted to BJ Artech Ltd, in UK. These pieces of evidence do not push the Plaintiff's case an inch further.

On the totality of the evidence on record regarding the second issue, I have to find that although in law it was then wrong for a Company to buy its own shares, in fact there is no evidence to that effect in this case in the sale and transfer of the 50% shares from the Plaintiff to the 1st Defendant. It cannot therefore be said that the said transfer was illegal, and therefore null and void. The second issue is thus also answered in the negative.

The third issue is <u>whether the 1st Defendant has paid for his 50% issued shares in the 2nd Defendant Company?</u> This issue is grounded upon the Plaintiff's allegation in paragraph 7

of the plaint that the First Defendant has refused and or failed to pay his issued shares todate. It is purely a question of fact. It was contended for the 1st Defendant that the shareholders were to pay for their shares through a loan agreement/arrangement and through it; the 1st Defendant has paid his shares in full. It was argued for the Plaintiff that whereas Exh.P2 shows that the Plaintiff has paid for his shares; it does not mention anything regarding the loan or the Directors' arrangements. Learned Counsel for the Plaintiff has referred to Exh.P2, P4 and Exh.D19 in answer to this issue as well as the testimonies of PW1, DW1, DW3 and DW4. For the 1st Defendant it was argued that both parties had paid for their shares, and sought to rely on Exh.D4, P4 and Exh.D19, as well as the testimony of DW4 SAJJAD ASAD.

According to the testimony of DW4 **SAJJAD ASAD JUSA,** who is the 2nd Defendant's accountant/auditor; it was his evidence that the two shareholders in the Second Defendant each held 250 shares worth Tshs.120,000,000/=. The Company gave them loans with which to pay for the shares. He said this arrangement is reflected in Exh.D19. He testified further that these amounts were paid in March 2005 and are reflected in the Company's statement of account, and that he prepared share certificates, but the Plaintiff did not collect his.

evidence of PW1, DW1, DW2 and Exh.D17. According to the Plaintiff, the claims are based on a personal vendetta between him and the 1st Defendant. Exh.D17 is also an unfounded/unsubstantiated claim, because no where in Exh. D17 is the one million dollar contract mentioned, nor any evidence of cancellation of the contract. DW1 is on record for testifying that the counterclaim was preferred following Mr. Foley's continuous disruption to the affairs of the Company and harassment to himself and his family and that as a result, the company has since lost business and cited the loss of the 1.1. million dollars with Celtel Uganda. He then tendered Exh.D17. The crucial part of Exh.D17 reads: -

"In the meantime, I would, for your sake, strongly advise you not to place any orders with the said company due to:

(1) The Directors of that Company are currently under criminal investigation for forgery fraud and corruption. I have no doubt this will lead to their conviction for these offences.

(2) The supply line of that Company was (and partially is) Sincro in fact the product you are being offered may have been misappropriated from my stock.

(3) It is highly possible that the assets of that Company are about to be seized.

(4) It is highly possible that any deposit funds that you might pay to that Company will be lost.

These are facts not excuses.
..... Regards
Mark Foley."

The Plaintiff submitted that this was a fair and bona fide comment on the state of affairs of the Second Defendant Company. However, he did not in my assessment, adduce any scintilla of evidence to substantiate those allegations. This is an admission that the Plaintiff did communicate to one of the 2nd Defendant's customers. Another incident cited by the Defendant as interference with the Company's day to day affairs is the filing of the present suit. I do no however think that the filing of a suit is wrongful in itself. It is, I think, a constitutional right of any resident to do so, to vindicate his rights or address wrongs committed to him.

After carefully weighing the rival arguments and the evidence on record I am of the considered view that the Plaintiff's admission to have sent the email to the Second Defendant's Customers with serious allegations against the

Company itself and its director is wrong and unjustified, for, as observed above, none of these allegations have been substantiated, and could do serious damage to the Company's reputation and business. I would thus find the Plaintiff liable for the wrong of interfering with the 2nd Defendant's affairs and that, I think, is actionable per se. However, there is no evidence to show that there were contracts in existence, between, for instance, CELTEL and the Second Defendant, and of any cancellation thereof, apart from the oral testimony of DW1 and DW3 which is not only contradictory with their pleadings, but also among the witnesses (USD 1,000,000 in the pleadings, USD 1,100,000 by DW1 and USD 2,000,000 by DW3), but also there is no prayer for that relief in the counterclaim. I would thus disallow that prayer. But for that wrong the 2nd Defendant is entitled to general damages and declaratory and injunctory reliefs. The counterclaim therefore succeeds to that extent.

The last issue is as to **what reliefs are the parties entitled?** In view of my discussion and findings above, my conclusion is that the Plaintiff has failed to prove his case against the Defendants to the requisite standard. The suit is accordingly dismissed with costs. On the other hand, the Second Defendant has succeeded in proving that the Plaintiff has been illegally interfering with the day to day business of the Company, and by which the Company has suffered

damage. But the specific damage or loss of USD 1,100,000 contract with CELTEL Uganda, has neither been prayed for, nor proved. It is accordingly disallowed. However, the Second Defendant is entitled to general damages In assessing general damages I have taken into account that the Plaintiff is one of the founding directors of the Company, and his personal contribution towards its set up. However, I have also considered the Plaintiff's conduct towards the Defendants which, in my view smells of malice. In the premises, I will assess the damages at shs.30,000,000/= only. This will attract interest at court rate of 7% p.a. from the date of judgment to that of full payment. The Second Defendant is also entitled to a declaration that the Plaintiff has no interest whatsoever in the Second Defendant Company after transferring his remaining 5% shares to the 1st Defendant on 31st July, 2005; and a perpetual injunction restraining the Plaintiff from intermeddling with the management and business of the Second Defendant's Company. The Second Defendant is also entitled to costs on the counter claim.

Judgment is therefore entered for the Second Defendant on the Counterclaim accordingly.

S.A. MASSATI

JUDGE

5/4/2007

8,659 words