

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

COMMERCIAL CASE NO. 5 OF 2007

HASSAN ALLY AHMED
Suing as a next friend of
ALLY HASSAN ALLY.....PLAINTIFF
VERSUS
MAZRUI COMMISSION AGENT LTD..... 1ST DEFENDANT
ABDALLAH HEMED SALUM.....2ND DEFENDANT
SAID HEMED SALUM.....3RD DEFENDANT

R U L I N G

Date of final submission March 29, 2007

Date of ruling April 16, 2007.

MJASIRI, J.

The Plaintiff Ally Hassan Ally a (Minor) suing through next friend Hassan Ally Ahmed is claiming from the Defendants jointly and severally for a refund of purchase price of TShs 15,000,000 (Fifteen Million) TShs 18,000,000 (Eighteen Million) spent for constructing the body of the car on account of the sale of a Mitsubishi Fuso Truck with registration No.T115 AFP which was found to be stolen.

The Plaintiff also claims for general damages of TShs 60,000,000 (Sixty million) and Tshs 150,000 (One hundred and fifty thousand) per day for loss of use.

The Defendant denied the claim. The following preliminary objections were raised by the Defendant:

1. *The suit is not maintainable in law as the minor did not have capacity to contract, the vehicle not being necessary for him.*
2. *The second and third Defendants have been wrongfully joined in the suit.*
3. *The said Hassan Ally Ahmed has no locus standi to sue as a next friend.*

The Plaintiff is represented by Mr. Khamis Advocate and the 1st, 2nd and 3rd Defendants are represented by Mr. Mnyele Advocate.

The preliminary objection was argued by way of written submissions.

According to Mr. Mnye Advocate, the Plaintiff's suit is incompetent as the Plaintiff a minor, did not have a capacity to contract.

Counsel cited Section 11 of the Law of Contract Act Cap 345 and the Majority Act Cap 43 R.E. 2002. A cargo vehicle the subject matter of this suit according to Counsel was not necessary for a minor.

With regards to the second preliminary objection Counsel for the Defendants submitted that the second and third defendants were wrongly joined in the suit. The second and third Defendants were directors of the first Defendant. The first Defendant is a limited liability company. Counsel cited the case of **Solomon V Solomon 1897** A.C 22.

With regards to the third preliminary objection Counsel for the Defendants stated that in filing the plaint, the Plaintiff did not comply with the requirement under Order 31 Rule 1 of the Civil Procedure Act 1966. In this case the suit was filed in the name of the next friend instead of the name of the minor.

In view of the preliminary objections raised Counsel for the Defendants asked the court to strike out the Plaint.

The Counsel for Plaintiff in his written submissions conceded on the capacity issue under section 11 of the Law of Contract Act Cap 345 R.E. 2002. Counsel for the Plaintiff further stated in his written submission that section 11 was there to protect infants. Counsel cited various authors on Contract and Mercantile Law whose position is that 'A minor purchaser of property is entitled to a decree for the possession of the property purchased from the vendor'. If he is dispossessed of such property by a third party, the minor can sue successfully. Counsel also cited the case of Kimm Cotton Company Ltd V Dewani 1960 EA 188 on recovery of money passed under an illegal contract.

With regards to the second preliminary objection. Counsel for the Plaintiff cited the provisions of Order I Rule 3.

With regards to the third preliminary objection Counsel stated that the way the title appears is not fatal and the Plaintiff has a locus

standi. What is required is the name of the minor and the next friend to appear in the title.

Upon reviewing the pleadings filed in court and the written submissions filed by learned Counsels, I would like to make the following observations.

With regards to the first preliminary objection, I am inclined to agree with the counsel for the Plaintiff that the provisions of section 11 of the Law of Contract Act are there to protect the interest of the minor.

In Patel V Gajjar 1964 EA 27 an infant claimed against employer for personal services by infant. The validity of the contract was raised and whether the infant was competent to sue for salary. It was held as follows:

"The Respondent though an infant was entitled to recover the agreed remuneration from the Appellant on the basis that the consideration from the Respondent had already passed, leaving to fulfill only the promise of the appellant."

The court followed the decision in Tejura V Bhargwanji Lalji Ltd 1959 EA 109 which was also in respect of employment of a minor, where it was held that;

"the contract was enforceable, the Respondent having performed his part and the contract being for his benefit."

According to Sir Ronald Sinclair P in Patel V Gajjar - Bennet J relied on the following principle in Tejura's case:-

"A minor who gives value, without promising any further performance to a person competent to contract is entitled to sue him for the promised equivalent."

Bhola Ram V Bhagat Ram (3) 1927 A.I.R. Lah 24. This is a case in which two minors carrying on business together sued for the balance due for goods supplied.

According to MC Kuchhal on Mercantile Law (Sixth Edition). "The law acts as the guardian of minors

and protects their rights. Beneficial agreements are valid contracts, and therefore money advanced by a minor can be recovered by him by a suit because he can take benefit under a contract.

In view of what has been stated above the first preliminary point of law is hereby dismissed with costs.

With regards to the second preliminary point of law, I am of the view that Order I Rule 3 of the Civil Procedure Act 1966 is applicable. Order I Rule 3 provides as under:

"All persons may be joined as Defendants against whom any right to relief in respect of or arising out of the same transaction or series of acts or transaction is alleged to exist, whether jointly, severally or in the alternative, where if separate suits were brought against such persons any common question of law or fact would arise."

With regards to third preliminary objection I agree with the submissions of the Counsel for the

Defendants that the Order 31 Rule 1 was not complied with. Order 31 Rule 1 provides as under:

"Every suit by a minor shall be instituted in his name by a person who in such suit shall be called the next friend of a minor."

However in the present suit the suit is in the name of the next friend of a minor. This is contrary to the requirement under Order 31 Rule 1. Though both the names of the minor and the next friend appear, they do not appear in the manner provided under Order 31 Rule 1. However I am of the view this anomaly is curable by way of amendment.

In view of what has been stated hereinabove the preliminary objections are hereby dismissed. Costs will be costs in the cause.

It is ordered accordingly.

Sauda Mjasiri

Judge

April 16, 2007

Delivered in Chambers this 16th day of April 2007
in the presence of Mr. Khamis Advocate for the
Plaintiff and in the absence of Mr. Mnyele Advocate
for the Defendants.

Sgd

Sauda Mjasiri

Judge

April 16, 2007

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I Certify that this is a true and correct
of the original order Judgement Rulling
Sign [Signature]
Registrar Commercial Court Dsm.
Date 21st May - 2007