

TANZANIA / JUDGMENT

arusha planters and traders ltd vs eurafrican bank tanzania ltd 2001 tzhccomd 7 3 august 2001

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TZHCCOMDDECIDED
3 August 2001

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IN THE HIGH COURT OF TANZANIA (COMMERCIAL DIVISION) AT PAR ES SALAAM
COMMERCIAL CASE NO. 58 OF 2001 1.ARUSHA PLANTERS AND TRADERS LTD}

2. JAYANT NARSHIBHAI PATEL }..... PLAINTIFFS
3. ROZINA JAYANT PATEL } VERSUS EURAFRICAN BANK (T) LTD.....
DEFENDANT

RULING

KALEGEYA, J: This ruling is in respect of an application for leave to appeal to the Court of Appeal of Tanzania from the ruling of this Court (Bwana, J i/c) handed down on 30/5/2001 upholding preliminary objections fronted by Defendants. The suit by the Plaintiff was dismissed in entirety. The application was heard exparte as the other party though served did not turn up. First, let us look at the background which led to this state of affairs. On 30/3/2001 the Plaintiff filed in this Division of the High Court a suit praying for:

- (a) A Declaration that the plaintiff's were induced to execute the deed of settlement by coercion/duress and undue influence and that the said deed of settlement is null and void and it be adjudged cancelled.
- (b) A Declaration that the order of settlement given by this court was obtained due to factors in (a) above and fraudulently and be therefore vacated. 2
- (c) An order that Civil Case No. 279 of 1998 may proceed from the stage it had reached before the order of settlement was recorded.
- (d) Further or other relief.
- (e) Costs." This was about 5 Vz months after the same parties and their advocates had recorded a consent settlement order (on 17/10/2000) in Civil Case No. 279 of 1998 filed in the general Registry of this High Court. The present Respondent/Defendant had sued Applicant/Plaintiff for repayment of a specified sum of money arising from an overdraft facility. The consent

settlement order was based on a Deed of Settlement formulated and signed by parties and their advocates before the offices of the Director of Criminal Investigations (DCI). The prayers quoted above are pegged on a body of a plaint which alleges that the Deed of Settlement was fraudulently obtained in that, coercion/duress and undue influence were exerted in its procurement, and that, as a result thereof, when on 17/10/2000 a consent settlement order containing the terms as embodied in the Deed of Settlement was recorded by Court they (plaintiffs) were under great mental and physical distress which made them compel their advocates to sign as well failure of which would have led to their being criminally prosecuted. In their written statement of Defence the Defendants raised the following preliminary objections “ (a) This suit is improperly instituted and is an abuse of the Court process.

- (b) This Court has no jurisdiction to reconsider a deed of settlement already adjudicated upon by the Court with the consent of the parties thereto present and fully represented before the said Court.
- (c) This Court cannot reopen, rescind or otherwise vary its own decision by way of another suit. 3 This Court upheld the objections hence dismissal of the suit in entirety. The Applicant/ Plaintiff are seeking to assail the dismissal order but cannot do so until leave is granted, which in turn can only be given if there is a point of law certified for consideration by the highest Court of the Land - The Court of Appeal of Tanzania. Mr. Mnyele vigorously submitted that there are four points of law to be considered by the Court of Appeal as follows:- “(a) Under what procedure can consent judgement obtained by duress and undue influence and coercion be set aside
- (b) Whether a settlement negotiated in the presence of police officers, parties and advocates is a lawful one.
- (c) Whether the Court was justified to consider merits of the case when considering preliminary objections raised by the other party.
- (d) Whether a consent decree/order which on the face of it does not meet conditions of O. 42 (b) CPC may be subject of review under that order. Backing up his arguments, Mr. Mnyele submitted that the only way through which a judgement obtained by duress, undue influence and coercion can be set-aside is by institution of a separate suit and not by way of review or appeal under O. 42 CPC - citing *Wilbing vs Sunderson* [1877] 2 CH. 532; *Jonesco vs Bird* [1930] AC 298; *Thome vs Smith* [1947] Vol. I. All ER 39 and *Bian Singh vs Amari Kaur* [1966] EA 37; that the DCI's office has no jurisdiction to settle Civil disputes; that the trial judge delved into the merits of the case prematurely, and finally, that O. 42 (b) CPC applied only where new evidence, which was unknown to the Applicant, is discovered or where there is an error on the record, and, for any other reason, which however should be analogous to the two preceding grounds. As was recently restated in (CAT) Civil Application No. 1 of 1999, *Lazaro Mabinza vs The General Manager, Mbeya Cement Co. Ltd (Mbeya Registry, unreported)*, 4 “ ...leave to appeal should be granted in matters of public

importance and serious issues of misdirection or non-direction likely to result in a failure of justice ". Has the present application passed that test? I will venture to answer this question by first putting on balance the four proposed grounds set out by the applicant and as enlisted above. I should outrightly knock off (b) - the lawfulness or otherwise of a Settlement Agreement made by the parties before police officers and their advocates. Why? This is a question which goes into the merits of the matter and was not a component in the preliminary objections raised. On the other hand however ground (c) is not without substance. At pages 3 and 4 of the typed version of the ruling the Court concludes that the settlement order was not induced by undue influence or coercion. Indeed, by thus acting the Court went into the merits of the case. In my view however, this does not create an issue fit to be decided upon by the Court of Appeal in this matter because the ultimate decision of the Court, and which is being challenged - dismissal of the suit - was not based on this in anyway. And this takes us to grounds (a) and (b). The said grounds pose same question - that is how should a consent order allegedly procured through fraud, undue influence or coercion be assailed? They should therefore be considered together. The decision of the Court is that the applicants could only apply before the same Court (judge) for review and not by a separate suit. This is a question of law and there is no specific provision of any statute which prescribes the procedure and neither are the ratio decidendi of the cases referred to by Mr. Mnyele uniform on the matter. The Court made its own interpretation of the provisions of the law relating to the matter, i.e. S.78 and O. 42 CPC. In my view, this is a fit issue upon which a decision of the highest Court of the land should be sought. The Court also based its decision on yet another ground - that instituting the case before the Commercial Court violated O. IV, Rule 3 of the CPC (as amended by GN 140/99) because no suit (of Commercial nature) should be instituted in this Division of 5 the High Court if there is a similar matter pending before another Court or Tribunal of competent jurisdiction. The Court concluded, "It is not in dispute that civil suit No. 279/98 was filed and is still pending before the main Registry ...The parties are the same. The objects are materially the same. Any steps and decisions in the instant case have direct effect on civil case

279/98..... The parties instituted it in the High Court main Registry at Dar es Salaam and it is still pending. The same cannot therefore be instituted and proceed in this Court". Again, in my considered view on this there is a fit point to be decided upon by the Court of Appeal. On 17/10/2000 a consent judgement was entered. At page 3 of the ruling we are informed that, "...currently there is a Ruling pending before Katiti, J. on the Plaintiffs application for postponement of the payment schedule. That ruling is scheduled for 31 July 2001 ". The question is whether Civil Case No. 279/98 is still pending merely because the parties have gone back to Court to recast payment schedule« In conclusion, I certify two points to be considered by the Court of Appeal as follows:

- (a) Whether a consent order/judgement allegedly procured through fraud, undue influence or coercion can only be assailed by way of review and not by a separate suit.

- (b) Whether, where a consent judgement/order has been entered, and subsequently parties approach the Court for the purposes of recasting 6 payment schedule, the relevant suit can be said to pending in terms of O. IV, Rule 3 CPC. L.B. KALEGEYA JUDGE Order: Ruling to be delivered to the parties by the RCC on 3/8/2001 Sgd: L.B. Kalegeya Judge 3/8/2001 Coram: R.A. Teemba - Registrar For Applicants: Mr. Mnyele For Respondent: Mr. Mnyele for Mr. Mponda CC: Ms. Cosmas Court: The Ruling delivered in the presence of Mr. Mnyele who represented the applicants and holding brief for Mr. Mponda for Respondents. Sgd: R.A. Teemba RCC 3/8/2001 £ . e-tUy that t'r's isatrueaa' Corr set * £>a.- c., oaiaufu /— of -

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