

TANZANIA / JUDGMENT

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IN THE COURT OF APPEAL OF TANZANIA AT DAR ES SALAAM {CORAM: MAKAME, J.A., RAMADHANI, J.A., and MROSO, J.A.} CIVIL APPEAL NO. 54 OF 1999 MZEE SHARBAID SALUM & OTHERS APPELLANTS VERSUS SHERALI M. SHAMPSI RESPONDENT {Appeal from the decision of the High Court of Zanzibar at Vuga) {Dourado, J.) dated the 17th day of March, 1999 in Civil Case No. 14 of 1989 JUDGMENT OF THE COURT 24 October 2001 & 7 January, 2009 MROSO, J.A.: This is an appeal against a decision of the High Court of Zanzibar, Dourado, J., in Civil Case No. 14 of 1989. An amended plaint which was filed on 4th September, 1995 shows that of the 13 plaintiffs, 9 were parties in their respective personal capacity, and of the remaining 4, 3 are shown as minors and the thirteenth plaintiff is shown as the mother of the 3 minors and their representative, probably meaning their next friend. ' . . . J 2 The dispute which was before the High Court related to a house No. 1494/1497 on Tharia Street, Zanzibar which Mzee Sharbaid Salum and one Abdulrahman Khamis Msengesi claimed to have bought in 1977. After the house underwent extensive repairs the owners intended to lease it to the respondent who planned to run a hotel business on the premises. The two co-owners of the house prepared in Kiswahili a draft containing handwritten terms for a lease agreement and handed it to the respondent "for typing and proper recording". For his part, the respondent caused to be prepared a draft tenancy agreement in English which was subsequently signed by the two owners of the property as well as by the respondent. That tenancy agreement was undated and contained a number of terms which were not in the Kiswahili draft for a lease agreement. Significant among such terms were that the tenant was to hold the premises in perpetuity and that the tenant was free to sublet the premises. Although the lease agreement was undated, it is apparent from the Written Statement of Defence by the respondent, and also from I• 3 j his evidence at the hearing, that he took possession of the premises on 1st June, 1980. He then started to make certain renovations which would make the building suitable as a hotel. According to him, the renovations cost Tshs. 5 million. The co-owner of the premises died in 1983, and was survived by eleven children and a widow. Those are shown in the plaint as plaintiffs numbers 2 to 13. So, it would appear that by 1989 when Civil Case No. 14 of 1989 was filed in the High Court, the co-owner of the premises was long dead. The locus standi of the 2nd to 13th plaintiffs before the High Court is not clear from the High Court record because there is no indication they were appointed by a valid authority to be personal representatives of Abdulrahman Khamis Msengesi. Be it as it may. It is stated in paragraph 18 of the Amended Plaint which was before the High Court that between 1985 and 1986

the first plaintiff in the High Court realized that there were significant differences between the Kiswahili draft and the English version of the 4 Lease agreement. He felt he had been cheated by the respondent and brought court action against him, claiming among other things a declaration that the English language lease agreement was null and void. Dourado, J. dismissed the suit with costs, hence this appeal. In the memorandum of appeal before this Court there are three grounds of appeal. In the first ground the appellants complain that the Honourable High Court Judge erred in law and fact in failing to hold that "the English version of the contract was not the contract intended by the Appellants." In the second ground of appeal the complaint is that the learned High Court Judge failed to deliver his judgment which would conform with the issues that had been framed in the case. Thirdly, that the trial judge erred in law and fact in holding that the appellants had agreed to grant to the respondent a lease in perpetuity. At the hearing of the appeal the appellants were advocated for by Mr. Nassar, learned counsel, and the respondent was represented by Mr. Patel, learned counsel. Since the first appellant is said to have -. 5 died on 4th September, 1997 and the appeal was lodged on 30th June, 1999, it is apparent that a duly appointed personal/Legal representative should have appealed in his place. This fact was pointed out by Mr. Patel at the commencement of the hearing of the appeal. Mr. Nassar conceded to that observation and asked for time to have a personal representative appointed. The court ordered that the Secretary of the Wakf and Trust Commission be brought onto the record. At the resumed hearing Mr. Nassar informed the Court that he had found out that Dahoma, J. had appointed the Executive · Secretary of the Wakf and Trust Commission to be the personal representative of the first appellant, Mzee Sharbaid Salum, and that the hearing of the appeal could proceed. The Court obliged but throughout the hearing of the appeal the Executive Secretary of the Wakf and Trust Commission did not appear or make a written representation. Mr. Nassar ostensibly represented the first appellant without indicating who had instructed him to appear for the first appellant. 6 Again, be it as it may. It is now opportune to consider the grounds of appeal. As regards the first ground of appeal, the question at issue is whether the English version of the lease agreement was the contract which was intended by both parties to it. Mr. Nassar argued that since late Mzee Sharbaid did not understand English, he did not know what was contained in the English version, which he signed. The High Court did not make a specific finding on that point but it can be inferred from what Dourado, J. said in his judgment that his finding was that the English language lease agreement was valid. He said, and we quote him - "It has been suggested that the plaintiff/owner did not understand English. So he did not know what he was signing. The Defendant said that Mzee Sharbaid being a Police Officer in Colonial times know (sic) English. In any event, the terms were explained to both owners before they signed 7 the lease. Once a person signs a lease he is bound by the terms thereof." Having said the above words, the High Court dismissed the suit. Unfortunately, none of the two co-owners of the disputed premises, and who signed the lease agreement, · gave evidence at the hearing of the suit. Evidence for the plaintiffs was given on 22 nd February, 1999 by one Yusuf Mzee Sharbaid, the son of the late Mzee Sharbaid. At the time of giving evidence he was of the age of 28 years. That means that in 1980 when the English language lease agreement (termed Tenancy Agreement) was signed, Yusuf was barely nine years old. It is highly unlikely that at that tender age he would know the circumstances in which his late father signed the tenancy agreement which was in

English. He claimed, however, the respondent had told his late father that "the English text (was) the same as Kiswahili." He also claimed that his late father later knew the true content of the English text, and realized that it was materially different from the Kiswahili text. That was when it was explained to the late father at police offices. 8 - The High Court, rightly in our view, found all that evidence to be hearsay. With that finding and since Yusuf Mzee Sharbaid was the sole witness for the plaintiffs at the hearing, it is pertinent to observe that there was practically no valid oral evidence for the appellants' side on the circumstances in which the co-owners of the house signed the lease agreement. On the other hand, the respondent claimed in his evidence before the High Court that Mzee Sharbaid was a police officer and knew English. But that claim apparently was based on mere inference. According to him, Sharbaid was recruited into the Police Force during the Colonial Government era and that, unless he knew English, he would not be employed in the Police Force. That may or may not have been factually true, and such evidence would be inadequate for a finding that Mzee Sharbaid was literate in English and that, therefore, he fully understood the contents of the lease agreement which was in English. . . ., 9 As indicated earlier in this judgment, the High Court made a firm finding that the terms of the lease agreement (in English) were explained "to both owners before they signed that lease". With respect, we have not been able to see the evidence on which such a finding was based. The respondent who was the sole witness for the defence did not say any such thing in his evidence. Considering that the Kiswahili draft of the lease agreement was significantly different from the English version on vital terms, like the clause that the tenancy was in perpetuity and that the tenant could sub-lease the premises, and considering further the letters of protest from Mzee Sharbaid to the respondent after the former realized that the English version was materially different from the Kiswahili draft, it is fair to say that the respondent had tricked the owners of the premises into signing the agreement which they might not have signed had they known fully its contents. Mr. Nasser argued that since there was no clear and reliable evidence that the owners knew and understood the contents of the lease agreement which they signed, the signing was done under a 10 mistake of fact which rendered the lease agreement null and void. He said categorically, and advisedly, that he was not relying on the doctrine of non est factum, which is normally pleaded as a defence. The question, therefore, is whether the law supports Mr. Nasser that the lease agreement was null and void on the basis of mistake of fact. Section 22 of the Zanzibar Law of Contract Decree stipulates as follows - "22. A contract is not voidable merely because it was caused by one of the parties to it being under a mistake as to a matter of fact". It should be underscored that the Kiswahili draft was not a complete draft of a lease agreement but simply a draft containing main terms which, according to the owners of the premises, should appear in a properly drafted lease agreement, whether it would be in Kiswahili or in English. That document was handed over to the respondent who was expected to cause a lease agreement to be 11 properly written and then executed. The respondent chose to have the lease agreement rendered in English because it was "easier to express legal terms", according to him. But it was not merely a choice of language. He put into the lease agreement terms which were not in the Kiswahili document. He called it a counter-offer. Mr. Nassar argued that if it is accepted that the owners of the premises did not understand English, then the provision of section 5 of the Illiterates' Protection Decree, Cap. 151 of the Laws of Zanzibar should have applied. An "illiterate

person" is defined in that law in relation to any letter or other document as "a person who is unable to read and understand the script or language in which the same is written". Section 5 of the decree then says - "5. Every person writing a letter or other document for or at the request of an illiterate person whether gratuitously or for a reward shall - 12 .

- (a) clearly and correctly read over and explain such letter or document or cause the same to be read over and explained to the illiterate person;
- (b) cause the illiterate person to write his signature or make his mark at the foot of the letter or other document ... (c) clearly write his full name and address on the letter or other document as writer thereof;
- (d) (not relevant). A penal sanction is provided in case of non-compliance with those provisions in the Decree. With respect, we do not think the Illiterates' Protection Decree applies in this situation. That decree appears to relate to those who are popularly known as public writers, who write documents as a business, that is to say, mainly for a reward. They are required to be 13 licenced at the discretion of a government official such as a District Commissioner. One of the obligations which are imposed by the Decree is the requirement in section 5 which we have quoted above. We think we should revert to section 22 of the Law of Contract Decree to which we referred earlier. The mistake which was canvassed by Mr. Nassar does not relate to the nature of the agreement which was signed by the parties. Both sides to the tenancy agreement knew that they were entering into a lease agreement. So, if there was any mistake, it was the kind of mistake which the Common Law calls a unilateral mistake as to facts. In discussing this kind of mistake Chitty on Contracts, 28 th Edition at paragraph 5 - 034 says - "A mistake as to terms of the contract, if known to the other party, may avoid the contract". 14 Was there any mistake as to the terms in the signed lease agreement? Let us take the issue of perpetuity, for example. The Kiswahili draft admittedly did not specify the duration of the lease. Was the respondent entitled to fill that lacuna by saying that the lease was in perpetuity? "Perpetuity" is defined in A Concise Law Dictionary by P.G. Osborn, Fifth Edition as - "A disposition of property by which its absolute vesting is postponed for ever. Perpetuities are contrary to the policy of the law because they "tie up" property and prevent its free alienation. The rule against perpetuities forbids any disposition by which the absolute vesting of property is or may be postponed beyond the period of the life or lives of any number of persons living at the time of the disposition " It is the law that in a tenancy agreement one party confers on another the right to the exclusive possession of land, mines or 15 . buildings "for a time which is either subject to a definite limit originally, as in the case of a lease for a term of years, or which, though originally indefinite, can be made subject to a definite limit by either party, as in the case of tenancy from year to year". See Hill and Redman's Law of Landlord and Tenant, 17th Edition, at page 1 on creation of tenancies. The learned author says on the same page - "The two attributes of exclusive possession and a definite or potentially definite time limit are essential to all tenancies" We think, therefore, that the respondent was not entitled to make the lease agreement to be in perpetuity and in doing so he flouted the basics of a tenancy agreement. He had created something which was

not contemplated by the landlord and, in law, not a lease. In a letter the first appellant wrote to the respondent on 16th June, 1986, Annexure 'F' to the plaint, he lamented about having been tricked into signing a lease agreement which contained terms 16 which adversely affected his interests in the property but of which he had not been aware. He said - "Licha ya kuwa umetumia mbinu, ujanja na udanganyifu kututilia sahihi mkataba ambao baada ya kufahamishwa vizuri tumeona sio wa haki na hatuutaki ... " We agree that the first appellant had signed the lease agreement by mistake in circumstances which rendered it null and void. There was no lease agreement in law, therefore. The High Court should have granted the prayers contained in the plaint. We think the third ground of appeal has been answered when discussing the first ground of appeal and we agree with Mr. Nassar regarding the second ground of appeal that the learned High Court judge glossed over the issues which had been framed and did not specifically answer them. 17 The High Court did not make a finding on the counter-claim and there has been no cross-appeal. We allow the appeal with costs. DATED at DAR ES SALAAM this 11 th day of October, 2008. L. M. MAKAME JUSTICE OF APPEAL A. S. L. RAMADHANI JUSTICE OF APPEAL J. A. MROSO JUSTICE OF APPEAL I certify that this is a true copy of the original I' , P.A. LYIMO DEPUTY EGISTRAR

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