

UGANDA / JUDGMENT

The Ex-Officio Agent of the Public Trustees v Fathil (C.A. 10/1930 (Msa.).)

[1930] EACA 127 (1 January 1930)

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COURT

East African Court of Appeal

BEFORE

Thomas, J. (Kenya)

CASE / FILE NUMBER

C.A. 10/1930 (Msa.).

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APPELLATE CIVIL.

Before THOMAS, J.

THE EX-OFFICIO AGENT of the PUBLIC TRUSTEE as Administrator of the Estate of Hamed Bin Lali, deceased

(Appellant) (Original Defendant)

ALI BIN FATHIL

(Respondent) (Original Plaintiff) C. A. \$10/1930\$ (Msa.).

Sheria-Bai Salami-sale of a definite article for cash on the understanding that the article will be delivered after a certain period.

Held: -That the contract cannot be fulfilled by repayment of the sum paid and the purchaser is entitled to receive the article itself or its market value.

In Civil Case No. 97 of 1929 of the Liwali's Court at Lamu the plaintiff sued to recover a sum of Sh. 240, being the price of forty frasilas of copra at the market rate of Sh. 6 per frasila. The plaintiff obtained a decree for Sh. 240 and costs.

Parties absent.

JUDGMENT.—When this appeal was called on for hearing neither the appellant nor the respondent appeared and accordingly under Order XXXIX, Rule 14, the appeal might have been dismissed. I am of the opinion that that would have been the correct course to adopt. I am

informed, however, that there is a local practice, in view of the expense and difficulty in coming to Mombasa from places at a distance like Lamu, for the parties not to appear and for the appeal to be dealt with on the written statements. This course I am therefore adopting with some hesitation in this case.

The plaintiff claimed the sum of Sh. 240, the price of forty frasilas of copra which he claimed to be due by the defendant. That claim was based on two documents which have been exhibited in the case.

The defendant contended that he was only liable to refund the amount originally paid, viz., Sh. 160.

The Liwali of Lamu who heard the case decided that the case was proved, and gave Judgment against the ex-officio agent of Lamu to pay forty frasilas of copra and costs of the action out of the estate of Hamed bin Lali, deceased.

At the hearing before the Liwali the plaintiff and two witnesses were called. The defendant does not appear to have given any evidence.

The documents having been proved there would appear according to English law to have been a sale of thirty-three and seven (together forty) frasilas of copra to be delivered at a future date.

It is not however a question of English law but of the Sheriah. One of the grounds of the appeal is that the case was not dealt with according to the Sheriah.

I have had the advantage of discussing this case with the Chief Kathi. He assures me that the matter has been dealt with by the Liwali according to the Sheriah. Further he says that he has referred to Minhaj, Chapters 1 and 2 (page 147), dealing with Bai Salami which means to sell a definite article for cash but the article to be delivered after a certain period. Such transactions should be recorded or made in the presence of witnesses. On the expiry of the period the article sold should be delivered. The documents stand as an admission by the deceased Hamed bin Lali that he owed to Ali bin Fathil forty frasilas of copra.

After referring to the authority cited I agree with the opinion expressed by the Chief Kathi.

The fifth ground of appeal relates to a decision alleged to have been given by the Kathi of Lamu. There seems to be a practice whereby the ex-officio agent in dealing with matters relating to Mohammedan law seeks the advice of the Kathi. The Kathi appears to hold an informal inquiry and then to advise the ex-officio agent. I see no objection to the ex-officio agent seeking advice, but I consider that the manner in which the inquiry is carried out is open to objection. It has far too much the appearance of being a trial which of course it is not. The decision of the Kathi under such circumstances is no different to an opinion given by counsel or advocate and cannot affect this appeal.

The appeal is dismissed with costs.

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