

IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: MFALILA, J.A., SAMATTA, J.A. And LUGAKINGIRA, J.A.)

CIVIL APPEAL NO. 54 OF 1996

BETWEEN

ELIBARIKI MBOYA APPELLANT

AND

AMINA ABEID RESPONDENT

(Appeal from the Judgement and
Decree of the High Court of
Tanzania at Arusha)

(Munuo, J.)

dated 28th November, 1994

in

Civil Appeal No. 34 of 1992

JUDGMENT OF THE COURT

SAMATTA, J.A.:

This is a short appeal. It arises from an appellate judgment of the High Court given on an appeal against a judgment of the Resident Magistrate's Court of Arusha. At stake is a wooden house known as House No. 521 situated at Unga Ltd. area in Arusha Municipality. Without intending any disrespect to the parties, we shall hereinafter refer to the house as "the wooden house."

We shall state the facts of the case briefly, for their details do not contribute anything that may be regarded as being material. The appellant successfully sued the respondent in the Resident Magistrate's Court for, among other reliefs, vacant possession of the wooden house. The appellant and his five witnesses satisfied the trial Court that on February 11, 1988, he entered into a written contract with the respondent whereby the

latter sold to him the wooden house for the sum of Shs. 130,000/=. The contract was produced before the court and admitted in evidence as Exhibit "A". The document was not stamped in accordance with the Stamp Duty Act, 1972, hereinafter referred to as "the Act". According to the appellant's testimony, the contract was signed by all concerned and the purchase price paid to the respondent in the presence of the following persons, Nyerere Omari, Hamisi Nino and Thomas Massawe, Following the respondent's refusal to give him vacant possession of the house, the appellant instituted the civil suit before the Resident Magistrate's Court, the decision on which has eventually given rise to the appeal now before us. The respondent, who adduced evidence from six witnesses, emphatically denied to have entered into the alleged contract of sale. She admitted to have thumbprinted Exhibit "A", but she asserted that she did not know what the document was when one Hussein Abdallah (who was PW3 at the trial), one of her neighbours in Unga Ltd. area, asked her to thumbprint it. According to the respondent, the wooden house was the property of her elder sister, one Mwajuma Abedi, eleven grand children and herself, all of them having inherited it from her mother. Narrating before the trial court circumstances under which she said she appended her thumbprint to Exhibit "A", the respondent said:

"I know one person by the name of Hussein Abdallah. We are living nearby. In 1988 the said Hussein had a shop. On 11/2/1988 Hussein Abdallah called me. I was drinking liquor in a bar. It was around ... 10.00 or 11.00 a.m. I was already

drunk. I went because he called loudly there at the bar and he told me that there is a letter here, come and sign. He told me it is a paper from the shop and he took a pen and put some saliva on my finger tip and told me to sign on the paper. I signed, thinking that was a paper. I signed thinking that [it] was a paper for kitenge or sugar."

The trial court had no difficulty in finding, as it did, that the truth in the dispute in this case lay on the appellant's side. It accordingly entered judgment for the appellant. Aggrieved by that decision, the respondent appealed against it to the High Court. Munuo, J., allowed the appeal, holding that, since Exhibit "A" (the contract of sale) was not duly stamped, the contract was not "valid" in law. The learned Judge was of the opinion that omission to have the document stamped offended the provisions of s.5 and 46 of the Act as read together with item 22 of the Schedule to the said legislation, and made the document, under s. 46 (1) of the Act, inadmissible in evidence. Section 5 enacts that every instrument specified in the Schedule to the Act shall be chargeable with a duty specified or calculated in the manner specified in the Schedule in relation to such instrument. Section 46 (1) provides:

"46. - (1) No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive the evidence

or shall be acted upon, registered or authenticated by any such person or by any public officer, unless such instrument is duly stamped:"

At the hearing of the appeal the appellant was represented by Mr. Mwale, learned advocate, while the respondent appeared in person. In his short but interesting submission Mr. Mwale contended, in essence, citing Transport Equipment Ltd. v D.P. Valambhia, Civil Reference No. 7 of 1992, that, having held that, contrary to the provisions of the Act, Exhibit "A" was not duly stamped, the learned Judge should, instead of allowing the appeal, have invoked proviso (a) to section 46 (1) of the Act, dismissed the appeal and proceed to direct that Exhibit "A" be duly stamped. In Transport Equipment Ltd's case supra there was the question, among others, what order this Court could make in relation to an instrument to which the provisions of the Act applied but which, notwithstanding that it was not duly stamped, the High Court acted upon. This Court said it could do what the High Court ought to have done under proviso (a) to s. 46 (1) of the Act. The proviso reads:

"Provided that -

- (a) any such instrument not being a receipt, an acknowledgement of debt, a bill of exchange (other than a cheque or a bill of exchange presented for acceptance, accepted or payable elsewhere than in Tanganyika) or a promisory note shall, subject to all just exceptions, be admitted in evidence on payment of the duty with which

the same is chargeable, or, in the case of an instrument insufficiently stamped, of the amount required to make up such duty, together, with a penalty of a sum of money equal to ten times the amount of the proper duty or deficient portion thereof or four hundred shillings, whichever be the lesser sum of money."

Mr. Mwale urged us to make an order in relation to Exhibit "A" in terms of the proviso we have just quoted and allow the appeal without any order as to costs. The respondent, who, as already pointed out, was unrepresented in this appeal, merely said that she was leaving it to this Court to say whether the appeal has merits.

The pivotal point of this appeal is whether the learned Judge of the High Court was right in law to have allowed the appeal on the ground that, Exhibit "A" having not been duly stamped, the instrument was not valid and should, therefore, have not been admitted in evidence by the trial court. Having given careful consideration of this question, we are of the opinion that the learned Judge reached a wrong decision. In our opinion, she should have held, in conformity with s. 73 of the Civil Procedure Code, 1966 (the Code) that the non-stamping of the instrument did not in law constitute a basis for faulting the decision of the Resident Magistrate's Court. Section 73 of the Code provides:

"73. No decree shall be reversed or substantially varied, nor shall any case be remanded, in appeal, on account of any misjoinder of parties or causes of action or any error, defect or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the court."

This section is in pari materia with section 99 of the Indian Civil Procedure Code. In Muhammad Hussain Khan v Kishva Nandan 1937 All. 655, cited in Mulla on Code of Civil Procedure, 13th ed., Vol. I, at p. 430, the Privy Council, commenting on that section, said:

"... there can be no doubt that the rule embodied in s. 99 proceeds upon a sound principle, and is calculated to promote justice."

Commenting on the same section, in Kiran Singh v Chaman Paswan 1954 S.C. 340 (also cited in the book referred to above), the Supreme Court of India said:

"When a case has been tried by a court on the merits and judgment rendered, it should not be liable to be reversed purely on technical grounds, unless it had resulted in failure of justice."

In his book cited above, at p. 431, Mulla makes the following useful comments on section 99:

"A decree will not be reversed or substantially varied in appeal for admitting a document not properly stamped, or for non-compliance with O. 13, r. 4, in admitting a document in evidence, or for admitting a document declared invalid where the judgment is not based on that document, or because the wrong side was allowed to begin, or because the suit was decided on a Sunday, or because the suit was instituted by an agent under a defective power of attorney [O.3 r.27], or failure to obtain leave under O. 2, r. 4, or because the plaint was signed on behalf of the plaintiff by his wife, and no power of attorney was on record, or because an order allowing execution against the legal representative of a deceased judgment-debtor was made by the transferee Court instead of by the Court which passed the decree. All these are irregularities not affecting the merits of the case or the jurisdiction of the Court and they are cured by this section."

It cannot be doubted that section 73 of the Code is in accord with common sense. It enables the High Court or a subordinate court to do substantial justice, as opposed to justice based on purely technical grounds, when determining an appeal. It would be lamentable to the law if it were competent for such court to reverse or substantially vary a decree of a trial court on the ground not affecting

the merits of the case or the jurisdiction of the court. Subject to the law, justice ought to be administered in a manner that commands the respect of the ordinary man. Section 73 of the Code was, in our opinion, enacted to enable relevant courts to achieve that noble goal. It should also be pointed out, for what it is worth, that that goal is also the spirit underlying section 37 of the Magistrates' Courts Act, 1984.

What does justice demand in this case? We would answer that question by saying that it demands that the appeal be allowed but an order be made, in terms of proviso (a) to s. 46 (1) of the Act, that the duty with which is chargeable to Exhibit "A" be paid. Accordingly, we allow the appeal, set aside the High Court's decision and restore the decision of the Resident Magistrate's Court. The respondent is hereby ordered to pay the duty with which Exhibit "A" is chargeable. We make no order as to costs.

DATED at ARUSHA this 15th day of March, 1999.

L. M. MFALILA
JUSTICE OF APPEAL

B. A. SAMATTA
JUSTICE OF APPEAL

K.S.K. LUGAKINGIRA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.


(A.G. MWARIJA)
DEPUTY REGISTRAR