

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

COMMERCIAL CASE NO. 49 OF 2003

ISABELA JOHN.....PLAINTIFF
VERSUS
SILVESTER MAGEMBE CHEYO..... 1ST DEFENDANT
PROVICOM INDUSTRIES LIMITED.....2ND DEFENDANT
NATIONAL BUREAU DE CHANGE LTD.....3RD DEFENDANT

J U D G M E N T

KIMARO, J.

The plaintiff is basically suing for a declaration and damages for alleged misrepresentation and fraud. It is averred at paragraph 5 and 6 of the plaint that:

*“ That in the year 2001 or thereabout the First Defendant, out of misrepresentation, managed to obtain Title Deed No. 23306 the property of the Plaintiff and passed it over to the Third Defendant, whereby, the First and Second Defendants out of connivance it was arranged that the Second Defendant would acquire a bank overdraft from the Third Defendant the security of which was the said Title Deed. Attached hereto and collectively marked **Annexure “A”** are copies of the **Title Deed, Mortgage Deed and Guarantee Deed** forming part of this **Plaint**.*

Particulars of the Misrepresentation:-

- (a) That sometime in the year 2001 the First Defendant, visited the Plaintiff at her place of resident at Masaki, and told her that his company wanted to help her to finish her house situated at Plot No.1037 Msasani Peninsula, so that thereafter the said house could be rented and then the First Defendant could recover its money from the said rent..*
- (b) That since the Plaintiff had no means of finishing the said house, she agreed to what the first Defendant said.*
- (c) That thereafter the First Defendant requested for the original Title Deed and placed before the Plaintiff certain document for her signature. The said documents were both written in English and the First Defendant's Director, Mr. Sylvester Magembe Cheyo, told the Plaintiff that the said documents were just evidence that he had taken the original Title Deed and that the First Defendant's money will be recovered from the rent of the said house.*
- (d) That thereafter, the Plaintiff, an old woman of about 74 years, who to the knowledge of the First Defendant, could neither speak nor read and or understand English language, hence in no position to understand the full purpose and legal implications of the terms and conditions printed in that language without explanation in Swahili,*

signed the said documents relying on the words of the First Defendant.

6. That in the alternative, and without prejudice to what is averred hereinabove in paragraphs 5, the Plaintiff's claim against the First, Second and Third Defendants jointly and severally is for a declaration that the Mortgage and Guarantee arrangements purported to have been entered into between the parties in the year 2001 are null and void because the relative mortgage Deed and Guarantee Deed are either fraudulently signed or not executed by the Plaintiff at all. Leave of this honourable Court is craved for to summon an official from the Criminal Investigation Department for testifying in Court."

All the defendants denied the plaintiff's claim.

All the parties were represented by Advocates. The plaintiff was initially represented by Mr. Mathew Kakamba, Learned Advocate. He withdrew from the case before completion and Mr. Magafu Learned Advocate took over. The first and second defendants were represented by the late Mr. Charles Kalokola Learned Advocate. He gave up when his health became critical and Mr. Malimi Learned Advocate took over. The third defendant remained represented by Mr. Thadeyo Learned Advocate throughout the proceedings.

The issues framed for the determination of the court are:

“ i) Whether the plaintiff guaranteed the loan facility issued by the 3rd defendant to the first and second defendant.

ii) Whether the plaintiff surrendered title deed No. 23306 for the same to be used as security for the loan extended to the 1st and 2nd defendants.

iii) If the answers to the first and second issues are in the affirmative, what are the remedies to which the parties are entitled to.”

The testimony of the plaintiff, an elderly woman of 70 years and above, was that she is the owner of a building at Masaki. The building is not yet completed. It is on plot No.1037 Msasani with certificate of Title No.233066. The plaintiff said that the 1st Defendant (Sylvester Magembe Cheyo) went to her house in 2001. He told her that he had a building company. He offered to complete the construction of the house if she would surrender the Certificate of Title to him. Upon the completion of the building, he would rent the house to off set the construction costs before returning to her the certificate of title. She surrendered her certificate of title to the 1st Defendant and she was given documents to sign. Thereafter she did not see the 1st Defendant again. She notified her daughter and other relatives and they approached a lawyer. She denied having visited any bank or an officer of a bank having visited her for purposes of having sign the guarantee forms. She also said that she did not know the purpose of the forms which the 1st Defendant gave her to sign.

PW2 – Mary Michell corroborated the evidence of PW1 on the visit which PW1 said DW1 made and how PW1 surrendered the certificate of title to DW1 as well as on how the construction costs would be refunded. She also corroborated the evidence of PW1 on when the certificate would be returned. She said she received the information while she was in America. She came to Tanzania and found the house being in the same condition. Then they saw the 1st Defendant who said he was claiming money from PW2. At another time he said he was going to ask for a loan. Later he refuted taking a loan. It was then she went to the Ministry of Lands and upon conducting a search, she found out that there was a mortgage deed and in respect of the certificate of title. It was then she entered a caveat in respect of the property. They asked for copies of the documents and they presented them to their advocate. They were informed that the documents were for a loan. The loan was to be provided by the National Bureau De Change Ltd (3rd Defendant) to Provicom Industries Limited (2nd Defendant). The 1st Defendant is a Director of the 2nd Defendant. PW2 said they filed a suit. As an attempt to settle the matter, the suit was withdrawn but they failed to reach a settlement and that is when this suit was instituted.

Another witness who testified for the plaintiff is an expert in handwriting and that is Inspector Ahmed Abraham (PW3). The testimony of this witness was that his expertise investigations on signatures of PW1 took him to a conclusion that the plaintiff did not sign the mortgage deed and the guarantee forms because the specimen signatures were different from the ones on the guarantee documents.

The testimony of the 1st Defendant on the other hand was that he first met PW2 in the United States in 1999. He met her in another occasion in the same year when they traveled in the same flight from Dar-Es-Salaam to United States. Then in the year 2002, PW2 visited DW1 in his office and required him to assist her to get a loan because she wanted to establish a hospital in the United States. DW1 required PW2 to submit a proposal. The proposal required the 2nd Defendant to finance the project and it would have given the second defendant 10% share of the profit in the business.

DW1 said he became interested because of the share profit. As he had an overdraft facility from DW3, he approached the 3rd Defendant again for an additional loan to cater for what PW2 required. DW1 said that because he was asking for an additional loan, additional security was required. It was in that process that PW2 submitted the Certificate of Title to him. As the Certificate of Title was in the name of PW1, PW2 was required to take PW1 to the office of DW1 and she did so. It was also in that process that PW1 came into the scene. DW1 came to know that the plaintiff was the mother of PW2. Before processing the application for the loan, A memorandum of understanding was prepared. The Memorandum of Understanding is titled MEMORUNDUM OF UNDERSTANDING COOPERATION AGREEMENT. It was tendered and admitted in Court as exhibit D1. The Memorandum of Understanding Co-Operation agreement says that the plaintiff mortgaged right of occupancy certificate of Title No.23306 Land Office No.48652 Plot No. 1037 Msasani Peninsula issued by Isabella John to Provicom Industries Limited as security for overdraft facility with interest extended by National Bureau De Change.

2. Funds from the loan will secure 10% share in CARINGWAYS INC. MENTAL HEALTH CENTER, Batan Rouge, Louisiana extended to Provicon Industries Limited.
3. Once the loan is paid in full, title of the said deed will be transferred back to Isabella John.
4. Validity of this Agreement extends up to the day when all parties mutually consent in writing to end it...

It is signed by Silvester Magembe (1stDefendant) for Proviscom Industries (2nd Defendant), Isabella John (The plaintiff) and Mary Mitchell (PW2).

DW1 said it was after signing exhibit D1 that he processed the application for the loan as requested by PW1 and PW2. DW1 approached the 3rd Defendant. They prepared the guarantee and mortgage deed and took the forms to the office of DW1. DW1 called PW1 and PW2 to their office and they were escorted to the office of DW2 (Advocate Kinguji) where PW1 signed the mortgage deed and the guarantee forms. The guarantee, mortgage deed and the certificate of title were tendered and admitted in court as part of exhibit P4. After the documents were signed, they were returned to the 3rd Defendant. DW1 said before the loan was out, PW2 wanted to go back to the United State of America. DW1 took T.shs 25,000,000/= from their sister company and gave the same her. She also signed in his diary acknowledging receipt of the money. According to DW1, although PW2 said she was leaving for the United States of America to continue with business, he saw

her in Dar-Es-Salaam after two weeks. He was also told that all the travelers cheques issued to PW2 were sold at the Airport, Dar-Es-Salaam.

Later, DW1 received a copy of a letter written by Isabella John to the 3rd Defendant withdrawing the guarantee. The letter was also copied to PW2. The letter was tendered and admitted in court exhibit D3. DW1 said he was also arrested on allegations of cheating an old woman and required to surrender the certificate of title but he refused and required PW2 to refund the money which he gave to her first. This conflict led the plaintiff to file a case indicated earlier in this judgment but it was withdrawn on an understanding of reaching a settlement but a settlement was not reached.

DW2 was Advocate Kinguji Abi Ali. Advocate Kinguji said he attested signatures which PW1 signed on the guarantee forms and mortgage deed. When PW1 went to the office of DW2, she was accompanied by a lady and a young man. The young man was the one who led PW1 and the lady to the office of DW2. PW1 was asked whether she understood the documents and she said she understood them. It was then she signed the documents and DW2 attested them.

The witness for the 3rd Defendant Mr. Gaddi Hiari Mbwilo (DW3) testified that he came to know the plaintiff through documentation when DW1 requested for an enhancement of his loan. An additional security was required. They issued the guarantee and mortgage deed to DW2 and DW1 returned the documents after they were signed and attested before the Commissioner for Oaths. According to DW3 it was not necessary for them to see the owner of the certificates physically, because their major

relationship was with their customer and not the guarantor. This appears to me to be ridiculous and reflects indiligence on the part of the 3rd Defendant. How can they ascertain whether the documents were obtained lawfully if they take no interest in the physical presence of the guarantor? That is exactly what the plaintiff is now claiming. Anyway the question will be determined according to the evidence submitted.

The witness testified further that after the receipt of the documents, DW2 was allowed to use the additional security. When the plaintiff submitted Exh.P3, the 1st Defendant was also notified.

Briefly that was the evidence which was tendered during the trial.

In their summing up submissions, all the defendants said that the plaintiff has not proved misrepresentation and or fraud on the part of the 1st and 2nd defendants and that the plaintiff signed the documents on her own volition much as the plaintiff denied to have done so. The advocate for the plaintiff did not file his submissions and the reasons for his failure have not been communicated to this court.

Essentially, I would agree with the submission by the advocates for the defendants that the plaintiff failed to prove her case because of the following reasons.

The evidence of PW1 and PW2 is contradictory on the sequence of the events which took place and how. While giving evidence in chief PW1 did not tell the court how he came to know DW1. She revealed this fact

during cross examination when she said that it was PW2 who introduced DW1 to her and it was also PW2 who told her that the 1st Defendant was a building contractor. It was the same PW2 who told PW1 that the 1st Defendant would complete construction of the house and then rent it to offset the construction costs. While giving her testimony, PW2 pretended not to be a key player in the whole transaction of how PW1 came to know DW1 and why she surrender her certificate to DW1.

But exhibit D1 contains very clear terms. The exhibit has already been reproduced. It shows that the plaintiff surrendered her certificate of title so as to allow the same to be used as a security for a loan which was to be provided by the 3rd Defendant to the 2nd Defendant so that the second defendant could finance CARINGWAYS INC MENTAL HEALTH CENTER on a consideration of 10% share from the project. Exhibit D1 negates the plaintiffs case totally. I would totally agree with the Advocate for the 1st Defendant and 2nd Defendant that the whole of the plaintiff's case is fabricated. It is built up on naked lies.

DW2 told the court that PW2 signed exhibits P4 in his presences and he attested the documents. The evidence of DW2 shows that the evidence of PW3 that the signatures on exhibit P4 are different from the actual signatures of Isabella John (PW1) is not true. Either it is a deliberate mistatement or negligence of his duties or other unethical conduct. Officers of the Government must always act diligently and should not jeorpiridiced people's rights by taking sides.

The Advocate for the 1st and 2nd Defendant pointed out correctly that where the plaintiff is suing on fraud, the question is whether someone has committed a crime. Such allegations in civil proceedings need to be established on a higher degree of probability than that which is required in ordinary civil cases. The case of **Omar Yusufu V Rahma Abdulkadr** [1987] TLR 169 is relevant on this point.

The analysis of the facts and the evidence brings me to a conclusion that, on the strength of the Memorandum of Understanding Cooperation Agreement Exh.D1 and the guarantee, (Part of Exh.P4) the plaintiff guaranteed the loan facility that was to be issued by the 3rd Defendant to the 2nd Defendant.

As for the second issue, the answer is yes and it is also based on exhibit D1 whose terms are clearly expressed.

As regards the reliefs to which the parties are entitled to – the plaintiff has failed to prove what she has alleged. It goes without say that she loses her case. It is dismissed with costs.

N.P.KIMARO,

JUDGE

16/08/2004

18/08/2004

Coram: N.P.Kimaro, J.

For Plaintiff – Present in person.

For 1st Defendant }
For 2nd Defendant } Mr. Malimi

For 3rd Defendant – Nyangusu

CC: Mr. Mtey.

Court: Judgment delivered today.

Order: The plaintiff's case is dismissed with costs.

N.P.KIMARO,

JUDGE

18/08/2004

2,929 - words

I Certify that this is a true and correct
copy of the original order Judgment Ruling
Sign W. Kimaro
Registrar Commercial Court Dsm.
Date 19/8/04