was filed and was allowed in that behalf. For 21 of the defendants offered no defence so that the testimony of SU1, standing alone, offended the law the consequence of which nullifies the proceedings before the two subordinate courts.

Mr Mushokorwa has also strenuously argued his case, citing several authorities in support of his submissions. By and large, he introduces no new ground. I will, therefore, cover his submissions as I consider the issues that Mr Naali raises in the Memorandum of Appeal. The first issue is whether the respondents are trespassers. It is my considered view, and I so hold, that this contention is untenable. For all indications are that it has been propagated without serious consideration of the evidence on record. I am sure the appellant would have achieved his mission in his attack on the defence if he had advanced grounds at the trial upon which the testimony of (SU3), the CCM District Chairman, could have been impeached. He never attempted it at the trial nor did he do so before the first appellate court. My examination of the record leaves no doubts that the findings of the trial, as well as the first appellate court are founded on strong evidence. It can be said that is is beyond reasonable controversy that indeed it was proved that the rights in the suit land date as far back as the forerunners of the residents of Kyangala and Ilopa villages, all of whom lived in one village. It was also established that Kyangala villagers and Ilopa villagers have their shambas with common borders. That this is so is clearly shown in the trial court's observations as contained in its report of what it saw when it visited the *locus in quo*. The two Lower courts were, therefore, correct in holdings that the respondents had good title to their parcels of land in Kyangala village. As such, a claim by which it is sought to extinguish such rights cannot find favour with the law.

Now Mr Naali submits as if Order 1, rules 8 and 12 of the Civil Procedure Code applied to the defence. That contention is untenable for the reason that the Civil Procedure Code, 1966, is not applicable to proceedings of a civil nature prosecuted in Primary Courts. As Mr Mushokorwa contents Order 1, rules 8 and 12 were cited out of

context. Such proceedings are governed by the Primary Courts Civil Procedure Rules which were made under section 65 of the Magistrate's Courts Act 1963, and which were published as Government Notice Number 310 of 1964. These rules do not make provision for a representative suit. However, where a plaintiff impleads more defendants than one as is the case here, rule 26(1) of those rules provides that:

> (1) Where there are more defendants than one who have been duly served, and one or more of them appear, the hearing shall proceed and the court shall, at the time of giving its decision, make such order as it thinks fit to the defendant who did not appear...

The law is quite clear. It follows that even if SU1 alone had testified, no law would have been breached as contended by Mr Naali. Instead the contrary would have applied if, without sufficient cause, the trial Primary Court had failed to proceed with the trial once it was satisfied that, although only one of the defendants appeared, all of them were duly served. Again this contention would fail. Upon the above considerations the appeal fails and it is dismissed with costs.

LAMSHORE LIMITED AND J.S. KINYANJUI v. K.U.D.K.

HIGH COURT OF ZANZIBAR
AT VUGA

(Kannonyele, J.)

CIVIL CASE No. 13 OF 1994

Contract – Privity of contract – Second plaintiff a shareholder and signatory for and on behalf of first plaintiff company – Whether second plaintiff can sue on the contract in his own name.

International trade – Letters of credit – Opening letters of credit by buyer a condition precedent to seller's taking any step – International sales law.

International sales law – Letters of credit – Opening letters of credit by buyer a condition precedent to seller's taking any step.

International sales law – Proforma invoice – Whether proforma invoice is evidence of purchase of goods.

Arbitration – Arbitration instigated by defendant – Arbitration aborts – Plaintiff incurs costs on the abortive arbitration – Whether such costs recoverable from defendant.

Contract – Damages – Expectation loss – Whether expectation loss is recoverable.

The plaintiff and the defendant entered into an agreement under which the plaintiff was to supply 5 000 metric tons of wheat flour and 3 000 metric tons of sugar. Clause 5.1 of the agreement required the defendant to open letters of credit with the central bank or any internationally recognized bank. The defendant did not open the letters of credit as required. Consequently the sales transaction aborted. However, the plaintiff argued that he had bought the subject goods and produced a *pro forma* invoice as evidence. The plaintiff sued the defendant for breach of contract and claimed damages in the sum of USD 700 000. The agreement contained an Arbitration Clause and the defendant insisted on referring the matter. However, the arbitration aborted after the plaintiff had incurred KSH 767 196-95 for it. The plaintiff claimed recovery of the money incurred on the abortive arbitration from the defendant. The first plaintiff, an offshore company, was all the time acting through one Kinyanjui, who appeared as the second plaintiff. The court considered, *inter alia*, whether Kinyanjui could sue on the contract in his own name, whether there was a breach of the international contract of sale of goods, and damages the innocent party was entitled.

Held: (i) Since it is the first plaintiff company, a legal entity, that entered into the contract with the defendant, the second plaintiff, notwithstanding that he was the sole signatory for and behalf of the first plaintiff, cannot in his own personal capacity sue on the contract in his own name because in that capacity he has no cause of action against the defendant;

(ii) The plaintiff had not actually secured or purchased the foodstuffs but that they had made advanced preparations towards their purchase and that these preparations were necessary;

(iii) Since the defendant had not opened letters of credit, the plaintiffs need not have purchased the commodities;

(iv) Following the defendant's breach and non-performance of an essential part of the agreement, the plaintiff company with its agents would under the circumstances be entitled to a fair compensatory amount of damages;

(v) The plaintiff is entitled to expectation loss of profit amounting to USD 430 000 in addition to overhead costs incurred in the course of fulfilling the contract; Since, but for the defendant's instigation, the plaintiff would not have paid fees for the abortive arbitration; the plaintiff is entitled to recover this loss to be embodied in the Principal Decree of the court.

Order accordingly

Cases referred to:

(1) *Solomon v. A. Solomon and Company Ltd* [1897] AC 22

(2) *W J Allan and Company Ltd v. El Nasr Export and Import Company* [1972] 2 QB 189; [1972] 2 All ER 122

(3) *Hadley v. Baxendale* (1854) 9 Exch 341

(4) *Victoria Laundry (Windsor) Ltd v. Newman Industries Ltd* [1949] 2 KB 540

Dr Lamwai, for the Plaintiffs

Mr Saleh, for the Defendant

JUDGMENT

(Delivered 31 January 2000)

Kannonyele, J.: The first plaintiff, a limited liability company, and a natural person (second plaintiff) filed the suit claiming a principal

amount of USD 700 000 being damages for breach of contract by the defendant, a public corporation operating as a trading company. The plaintiffs have also claimed interest at the bank rate on the principal amount from the date of the contract up to date of judgment and also interest at the court's rate on the decretal amount from date of judgment up to full payment. There is also the usual prayers for costs of the suit and any other relief's as the court may deem proper.

The defendant Bizanje KUDK, initially came up with four Preliminary Objections to the said. However, three of these were latter withdrawn and the fourth one, otherwise the first in the series which alleged that the plaintiff company was fictitious to render the contract void *ab initio* and therefore unsustainable, was overruled by the court.

In its written statement of defence, the defendant contests the claim first on the basis that the plaintiff company was fictitious thereby rendering the contract void and therefore unsustainable *ab initio*. The claim is also contested on the contention that the plaintiff had incurred no expenses in honour of the contract when and if the same is held sustainable. Also the claim is challenged on account of non-compliance of other terms of the contract which article 2.3 is prominent which provides that commodities must be inspected at the port of loading by one SGS who will then issue a certificate as to quality and quantity of goods apparently before they are loaded.

When the matter first came up for hearing, five of what would otherwise have been issues were set up as unopposed. They are as follows:

1. That, the contract existed between the parties under which the plaintiffs, would have supplied to the defendant some 3 000 metric tonnes of standard sugar and 5 000 metric tonnes of wheat backing flour.
2. That, terms of the contract were as per Memorandum of Agreement annexed to the plaint (Exhibit D at stage of application for stap of suit in preference for arbitration alias exhibit P1 at the stage of the trial itself).

3. That the foodstuffs as per contract were not delivered by the plaintiffs to the defendant.
4. That, upon filing the suit the defendant moved the court to order reference of the to submit to arbitration as provided under the contract (article 9.).
5. That, the original consensus by the parties on reference of the matter for arbitration notwithstanding, the defendant subsequently backed down due to lack of funds with which to pay arbitration fees.

This virtually left us with four contested issues re-numbered from the original three as follows:

1. Whether the plaintiffs secured the foodstuffs in honour of the contract and, if so, at what expense.
2. Whether it was necessary for the plaintiff to comply with article 2.3 of the contract before letters of credit were opened in their favour by the defendant.
3. Whether letters of credit were opened by the defendant.
4. To what reliefs are the parties entitled?

As I have hinted above, the issues have been re-numbered so that the present third issue is supplementary and is what was originally the third of the proposed unopposed issues, so re-numbered after the defendant's counsel expressed his resistence to it. Hence what was originally agreed as the third issue is now the fourth in the list above.

In the final submissions, however, the defendant's attorney has categorically stated that after examining the evidence, the defendant will only address the first and the (original) third (now re-numbered fourth) issue, finding that the second issue and, by inference, the re-numbered third issue (*supra*) as well (as to whether letters of credit were opened) to be inconsequental. By the same force of logic, this judgment is written with the court addressing its mind only to the first and the original third (now re-numbered fourth)

by practices and usages of a trade. Consequently, a contract may be subject to terms that are sanctioned by custom although such terms have not been expressly mentioned in the contract.

The appellant is contending under this principle. How does it operate? This principle and its *modus operandi* were enunciated in the case, *Hutton v. Warren* (4) at 475 by Park B:

> It has long been settled, that in Commercial Transactions, extrinsic evidence of custom and usage is admissible to annex incidents to written contracts, in matters with respect to which they are silent. The same rule has been applied to contracts in other transactions of life, in which known usages have been established and prevailed; and this has been done upon the principle of presumption that in such transactions the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but to contract with reference to those known usages.

The usage or custom however must be so well established and notorious that both parties to the contract are either familiar with it or must be presumed to be familiar with it. It is therefore, trite law that in the instant case, implied terms and more particularly, trade usages, must govern the transaction, being an unwritten one.

What then are the trade usages in the instant case? What repairs were undertaken by the appellant? Does servicing of a vehicle amount to "repairing" it for the purposes of this kind of contract? The appellant clearly testified that "I instructed Khamis to service it and I would be responsible for the service charge" on page 6 of the record of Proceedings.

On page 3 of the records, the first respondent/plaintiff stated that "... The second defendant (appellant here) supposed to service the said vehicle. I refused to be given the said car for service. Mr Joseph (appellant) has given that car to the mechanic to service".

More illuminating to me on this issue is the testimony of Khamis Hassan (DW2) on page 4 of the Record of Proceedings "... I instructed the second defendant to service the motor car. The second defendant

told me that because he was very busy I had to find somebody who could service the car. I found the garage to service it. The car was welded and painted". Even under cross-examination by the appellant's counsel; while conceding that he was not present when the agreement was entered into by the parties, he was emphatic in his testimony, "... Yes the second defendant agreed to pay for the service. No, the service charge was not part of the car hire price". It would appear to me that the responsibility for servicing the vehicle was that of the appellant herein (i.e. the hirer of the vehicle) from the aforestated testimonies.

Apart from the issue of servicing the vehicle, which on the preponderance of evidence and custom of the profession the burden is laid on the appellant, I see no clear evidence of expenses for repairs undertaken by the appellant which ought to have been borne by the respondents. That may account for the trial magistrate not dwelling on the issue.

I hold that no evidence of the purported payment made by the appellant has been manifested and thus the issue of an off-set from debt of the appellant does not arise. As I earlier stated, I would take grounds 3 and 4 together, since the intended effect is to reduce the appellants expenses from his indebtedness to the respondents. I agree with the appellant that the sums adjudged to have been paid by him ought to be subtracted from what he is owing.

From the Record of Proceedings and particularly from the trial magistrate's judgment on page 12, where it is stated:

> therefore it is not doubtful that the second defendant hired the said motor vehicle on May 1996 and paid only TZS. 900 000 (being the hire price from May, June and July). It was proved that he paid another TZS. 100 000 before the Police Station and never paid the remaining sum of money to date.

These sums should necessarily have been subtracted by the trial magistrate after the afore-quoted finding.

Additionally, the plaintiff/second respondent here agreed that he was given 2 tyres costing about TZS. 90 000, "... Yes the second defendant gave me 2 tyres costing about TZS. 90 000." I hold that these sums TZS. 100 000 + 90,000 TZS. (190 000) be substrated from the total sum owed by the appellant.

Save this, I see no grounds to tamper with the judgment of the trial magistrate and I consequently uphold the judgment of the trial magistrate

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CHAIRMAN OF KYANGALA VILLAGE *v.* MOSES S/O MWAMALALA AND 21 OTHERS

HIGH COURT OF TANZANIA
AT MBEYA

(Mackanja, J.)

(PC) CIVIL APPEAL No. 8 OF 1999

Civil Practice and Procedure – Representative suit – Whether the statutory provisions for a representative suit apply to the defence – Order I rules 8 and 12 of the Civil Procedure Code 1966.

Civil Practice and Procedure – Representative suit – Law governing proceedings of a civil nature in Primary Courts – Whether that law makes provision for representative suits – Primary Courts Civil Procedure Rules 1964, Government Notice Number 310 of 1964.

Civil Practice and Procedure – Primary Courts – Civil proceedings in Primary Courts – Non-appearance by co-defendants at the hearing – Consequences of such non appearance – Rule 26(1) of the Primary Courts Civil Procedure Rules G.N. 310 of 1964.

The appellant instituted a suit in the Primary Court and lost. His appeal to the District Court was also unsuccessful and he appealed further to the High Court. At the trial, only one out of the 22 defendants gave evidence and on appeal to the High Court it was argued for the appellant that the courts below were wrong to find for the 22 defendants while 21 of them had offered no defence and the first defendant who gave evidence had not obtained or applied for an order to act as legal representative of his co-defendants.

Held: (i) The provisions of Order I, rules 8 and 12 of the Civil Procedure Code 1966 relating to representative suits do not apply to the defence and the Civil Procedure Code 1966 does not apply to proceedings in Primary Courts;

(ii) Civil proceedings in Primary Courts are governed by the Primary Courts Civil Procedure Rules 1964, G.N. 310 of 1964 which make no provision for representative suits;

(iii) According to rule 26(1) of the Primary Courts Civil Procedure Rules 1964, when only one or some of many co-defendants appear at the hearing, the case may proceed to conclusion and the court shall make such order as it thinks fit, provided that all the defendants were served;

(iv) As all the defendants had been served in this case, the trial court committed no error.

Appeal dismissed

Statutory provisions referred to:

(1) Civil Procedure Code 1966, Order I, rules 8 and 12

(2) Primary Courts Civil Procedure Rules 1964, rule 26(1)

Mr Naali, for the Appellant

Mr Mushokorwa, for the Respondents: