I hence believe that second accused person (now appellant) did get the bed from the first person and that the sale of the bed to the second accused by the first accused was treated as secret.

Mr Magongo, learned advocate for the appellant, wonders how the trial magistrate could then proceed to find the appellant guilty of storebreaking and stealing of that same bed. I share the surprise at the strange logic apparent from the trial magistrate's reasoning. Did the appellant become guilty of storebreaking and stealing merely because he bought the bed during a secret sale transaction? It would have been different if the magistrate had reasoned that the appellant was guilty of receiving stolen property. But even a conviction for such an offence would not stand because the available recorded evidence would not sustain it. Surely, if the appellant knew the bed he was buying was stolen he would not have taken the original first accused to the CCM paty Ward Secretary (DW4) to inform him about the sale.

Mr Feleshi, learned state attorney for the Respondent Republic, did not wish to support the conviction. I agree indeed that the conviction of the appellant is unsustainable. His explanation on how he got possession of the bed is convincing and he was supported in material particulars by DW3- Rahel Francis and DW4 Hamza Halfan. The trial court should have acquitted him.

I allow this appeal by quashing the conviction and setting aside the prison sentence of five years. If the appellant is still in prison he should be set free forthwith unless he is held for some other lawful cause.

KHOLE BINTI ALI AND FOUR OTHERS *v.* RAMADHAN MOHAMED ALI AND THREE OTHERS

HIGH COURT OF ZANZIBAR AT ZANZIBAR

(Garba Tumaka, DCJ)

CIVIL APPEAL No. 35 OF 1999

(From Resident Magistrate's Court Civil Case No. 23 of 1994)

Contract – Sale Agreement – Minor's Contract – Validity.

The respondent sued the appellant for a declaration that the sale of the suit premises which belonged to the late Mwashamba Ali was a survey and thus fraudulent. The Resident Magistrate found in their favour and the appellants being dissatisfied with the decision appealed on the following grounds, amongst others: (a) that the Magistrate erred in law and fact in finding that the sale agreement was void for lack of capacity to contract when the issue was not pleaded and argued ;and (b) that the Magistrate should have found that a minor's contract is voidable at the instance of the minor.

Held: (i) Minors are incapacitated to contract save if the contract is for the benefit of the minor and within the power of the guardian, and that the benefit contemplated must be lawful and must proceed from a lawful contract.

(ii) The deed of safe of immovable property to which minors were parties was valid.

Appeal allowed

Cases referred to:

(1) *Ulfat Rai v. Gauri Shaller* (1911) All 657

(2) *Goode v. Harrison* (1821) 5B Ald 147

(3) *Srikakulam v. Rao* (1948) 75 IA; ILR 1949 MAD 141 PE.

(4) *Gujaba v. Nikanth* (1958) 59 BMLR 1123

(5) *Great America Insurance Company Ltd v. Madanlal Sovulal* (1935) 59 BOM 656

(6) *Chappel v. Cooper* (1844) 13 M&W 252

(7) *Nash v. Inman* [1908] 2 KB 1, 12

(8) *Ulfat Rai v. Gauri Shanker* (1911) 33, 657

Statutory provisions referred to:

(1) Evidence Decree, section 91(1)

(2) Penal Decree, Chapter 13, section 306

(3) Civil Procedure Decree, Chapter 8, Order XLVI, rule 2

Mr Mnkonje, for the Appellants

Dr. Lamwai, for the first and second Respondents

Mr Samai, for the fourth Respondent

JUDGMENT

(Dated 27 March 2000)

Garba Tumaka DC.J.: This is an appeal against the judgement of the RM's court in Civil Case Number 23 of 1994, where the respondents sued the appellants for a declaration that the sale of the suit premises, which belonged to the late Mwashamba Ali was a forgery and thus fraudulent. The RM found in their favour and the appellant being dissatisfied with the decision have now filed this Appeal on the following grounds;

(a) That the learned RM erred in law and in fact in finding that the sale agreement was void for lack of capacity to contract, when the issue was not pleaded and argued.

(b) That the learned RM erred in law in not finding that a minor's contract is voidable at the instance of the minor.

(c) That the learned RM erred in law and in fact in not deciding the issues which were before the court.

(d) That the learned RM erred in law in not finding that the plaintiffs had no locus to sue, or in the alternative;

(e) That the learned RM erred in law in not finding that in the absence of fraud, the conveyance was proper;

And prayed that:

(a) Their appeal be allowed

(b) The house be declared the property of the second, third, fourth and fifth appellant

(c) Costs and other matters below be provided

(d) Any other order deemed fit to be issued.

The appellants were here represented by Mr Salum Mkonje, Dr M Lamwai was for the first and second respondents while Mr Samai was for the fourth respondent.

The counsel, with the courts consent, elected to make written representations and consequently filed their submissions. Mkonje, in his submissions, dwelt more considerably on grounds A and B.

On ground A, on the issue of capacity though by minor, the contract was not void for capacity as it was beneficial to the minors and hence fell into the exception to the general rule that minor cannot contract; this general principle is "confined to cases where a minor is charged (*sic*) with obligations and the other contracting party seeks to enforce these obligations against the minor, 'he said, quoting **Artar Singh's Law of Contract,** (2 ed), Eastern Books Company at page 133. He cited other authorities including *Raghava Chariar v. Srinivasa* where the Madras High Court held to the effect that the provision of this law is basically for the minor's protection. In conclusion, he cited Cheshire and Fifoots' **Law of Contract** (8 ed) wherein it is stated that contracts beneficial to minors and contracts for necessaries

are among the exceptions and are thus valid contracts. Things necessary are those without which an individual cannot reasonably exist. In the first place, food, garments, lodging and the like about these, there is no doubt".

There is nothing in the Transfer of Property Act which makes a minor incapable of being the transferee of immovable property. He cannot transfer immovable property it is true, but that is a different thing from recovering as transferee", he said, quoting *Ulfat Rai v. Gauri Shanller* (1). I observed at this point that he did not make any submission on the second leg of this ground, to the effect that the issue was not pleaded and canvassed before the RM.

On the second ground, to the effect that a minor's contract is voidable at this instance, he said these are contracts in which a minor acquires an interest in some subject matter to which continuous or recurring obligations are incidental. The principle, he said, quoting *Goode v. Harrison* (2) at page 169, is that if a minor undertakes such a contractual obligation, "it remains valid until he thinks proper to put an end to it" and gave examples as purchase of land, leases, purchase of shares.

On the third ground that the RM did not decide issues before it, Mkonje did not dwell and on the fourth ground of locus, he said the plaintiffs failed to prove that they were related by blood to the deceased and the only heirs or that they take precedence over other heirs and thus did not have the *locus* to sue.

On the final ground, he contended that the RM erred by not finding that in the absence of fraud, the conveyance to the minor was valid.

He contended that fraud was not proved as the plaintiff's exhibits were merely copies of the fingerprint expert's report and hence of no help to the court.

Dr Lamwai, responding on the first ground of appeal, on the issue of lack of capacity to contract when the same was not pleaded and argued, said all the appellant tried to do was to show that though the

instant contract was made by minors, it fell within the exception to the rule that minors cannot contract. The appellant did not submit on the complaint that the court adjudicated on a matter not pleaded and should consequently be struck out. He was relying on Order XLVI, rule 2 of the Civil Procedure Decree, Chapter 8.

In the alternative, he said the RM was right in finding that the sale deed was a forgery considering the testimony of PW1, Hassan Ramadhan and PW2, Ahmed Abubakar, a police fingerpoint expert both to the effect that an analysis of the fingerpoints of Mwashamba Ali was not genuine.

The appellants did not object to the production of evidence on forgery and even cross-examined on it. On capacity, Dr Lamwai was of the view that since it wasn't raised in the Memorandum of Appeal, additionally, since fraud was proved, the minors could not benefit to the detriment of the lawful heirs.

He contended further that since fraud had been proved, it was not necessary for the RM to find on any other issue, the Sale or Deed having been forged. He said the issue of *locus* was not raised at the appropriate time as per Order 1, rule 13, the appellants were now estopped from raising it and in any event the RM in his judgment had ordered that the said premises, House Number 22/235 being subject to probate proceedings which is where the third respondent will have the right and power to decide the rightful heirs to the disputed estate. In his response to Dr Lamwai submissions, Mkonje sought to re-iterate his earlier submissions.

He stated that his first ground Appeal had been pleaded in paragraphs (A) and (B) of his Memorandum of Appeal hence Order XLVI, rule 2 was inapplicable. On ground 2, he felt that the dispute centred upon the issue of fraud whilst the RM erroneously felt that the issue of capacity was pivotal. He stated that fraud was not proved as exhibit B, whose original was not tendered (only a copy was and PW2 was supposed to have tendered the original and failed to do so) was not compared with any other independent document to confirm its authencity.

As far as he was concerned, the testimonies of the second to the sixth defendants were clear on the intention of the late Bi Mwashamba and how she fulfilled that intention.

Locus, he said, was a very important issue which the RM ought to have made a pronouncement on, as he did on the issue of capacity and since it arose in the course of the proceedings, it was not affected by the provisions of Order 1, rule 13, of Chapter 8.

I would like to start with the issues which were framed before the RM's court for determination as a way of getting a proper understanding of rationale for his findings. The issues were:

(1) Whether the plaintiffs were the only legal heirs of the deceased, Mwashamba Bint Ali

(2) Whether the deceased sold the suit premises to defendants 3, 4, 5 and 6.

(3) Whether there was fraud in the sale of the suit premises

(4) Who had better title to the suit premises

(5) Whether defendants 1 and 2 owed a fiduciary duty to the deceased Mwashamba Bint Ali

(6) Whether there was any claim for compensation or profit which was sustainable; and he found, as per his judgment on pages. 26 and 27 of the Record of Proceedings, *inter alia*, that:

"From the testimonies of the defendants' witnesses, it can be summed up that their testimonies failed to prove that the late Mwashamba Ali did sell her house on her *own volition* as per evidence of DW2, DW3, DD7 and DW8 ... ." Going further he said Mr Mkonje in his submissions laboured on "two main points, which I think were correctly perceived as key in the determination of this suit. The first aspect is on the genuiness of Exhibit D1. The second aspect is on the position of the law as far as minors' contracts as are concerned. I have decided to deal with the question of minors' contracts *as I am of the view that the dispute primarily lies on that aspect...;"* and summed up

Mkonje's argument that specific classes of contracts such as one for necessaries and one for things beneficial to a minor form exceptions to the general rule that minors cannot contract, as in the instant case. He then went on to consider "whether the contract between the deceased Mwashamba Bin Ali and defendants 2-6, who were minors, is valid and binding *inter-partes*" and having gone through the sale agreement "purported" to have been executed between the deceased and the minors, didn't "see anywhere where the minors signed nor was there any signature of any person who would have acted as their representatives.... Now should we not conclude that the agreement was not executed lawfully?" and in consequence found "that the sale agreement was void *ab-initio* for lack of capacity to contract." Because of the foregoing, he did not 'see any need to deal with other issues but order that as no sale had been executed, the disputed house remains the estate of the deceased .... my grouse at this point is with the rather ambiguous " ... I accordingly find that the sale agreement was void *ab-initio* for lack of capacity to contract" when he made no pronouncement on the issue of capacity to contract in the body of his judgement. On the face of the judgement, he didn't see where the minors signed nor signature of any person who acted as their representative, and saw no reason not to conclude that the contract was not executed lawfully.

I would prefer to proceed from the question of capacity to contract and subsequently examine if there was actually any contract (enforceable) entered into or if the contract was vitiated by fraud.

It is a well known principle of law that minors are incapacitated to contract save in exceptional cases. Mr Mkonje gave a plethora of authorities in support of this position. Basically, "if the contract is for the benefit of the minor and within the power of the guardian, then it is binding" according to the Privy Council in the case *Srikakulam v. Rao* (3) and this position was replicated in the case of *Gujaba v. Nikanth* (4).

As earlier stated, the general rule is as provided by Sect II of the Contract Decree Chapter 149, Laws of Zanzibar:

> Every person is competent to contract who is of age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject.

Contracts for the benefit of minors is one of the exceptions to the aforestated general rule and it was well espoused by Beamont CJ of the Bombay High Court in the *Great America Insurance Company Ltd v. Madanlal Sovulal* (5) thus:

> The provisions of the law which make a contract by a minor not binding were no doubt intended for the benefit of the minor, and the courts in this country when faced with a contract which has been carried performance of which by the other party is then resisted on the ground of minority, have struggled hard to avoid holding the contract void to the detriment of the minor.

Similarly are contracts for necessaries. A judicial exposition of "necessaries" was given by Alderson B. in *Chappel v. Cooper* (6).

> Things necessary are those without which an individual cannot reasonably exist. In the first place food, garments, lodging and the like. About these, there is no doubt.

Buckley LJ was also explicit in *Nash v. Inman* (7) "A contract for necessaries is just one of those categories of contracts which an infant is permitted to make.

Most opposite, in my thinking, is the case *Ulfat Rai v. Gauri Shanller* (1); where it was stated that:

> There is nothing in the Transfer of Property Act which makes a minor incapable of being a transferee of immovable property. He cannot transfer immovable property it is true, but that is a different thing from recovering as a transferee" and this was clearly conceded by Dr Lamwai "I concede that under section 13 of the Transfer of Property Decree, Chapter 150, a transfer can be made even to an unborn child".

Furthermore, where an infant acquires an interest in some subject matter of a permanent nature, i.e. a subject matter to which continuous or recurring obligations are incidental, it is voidable at his instance.

The principle is that if an infant undertakes such a contractual obligation, it "remains valid until he thinks it proper to put an end to it" and examples of this include purchase of land, purchase of shares and leases.

Since the laws on infants contracts are designed to protect him against unscrupulous adults, infants are in effect in a privileged position in contractual transactions *vis-á-vis* adults. I therefore disagree with the RM that in the instant case, the contract was "*void ab-initio*" for lack of capacity to contract. I however agree completely with the respondents herein that the benefit contemplated must be lawful and must proceed from a lawful contract and this leads me to the next issue, which is if there was actually any contract legally entered into or if the "contract" was vitiated by fraud.

The position of the courts is epitomised by the maxim "*Ex dolo vhala non oritur actio*" i.e. no court will lend its aid to a man who found his cause of action upon an illegal act if the cause of action appears to arise "*ex turpi causa*" or the transgression of a positive law; there the court says he has no right to be assisted.

Was the Deed of Sale, Exhibit D1 herein genuine or a forgery and hence fraudulent? Fraud is defined by section 17, of the Contract Decree Chapter 149, Laws of Zanzibar, and commences thus:

> ... means and includes any of the following acts committed by a party to a contract or with his connivance, or by his agent, with intent to deceive another party thereto or his agent or to induce him to enter into a contract ...

and goes on to enumerate the acts so constituting in paragraphs (a) to (e) of the section. In concise terms, fraud is, by this definition intentional misrepresentation of facts. The form of fraud alleged to have been perpetrated here was forgery, which section 306, Penal Decree Chapter 13, defines as follows:

> Forgery is the making of a false document with intent to defraud or to deceive and the maker of a false document is one who:

(a) makes a document purporting to be what in fact it is not

(b) alters a document without authority in such a manner that if the alteration had been authorised, it would have altered the effect of the document

(c) Introduces into a document without authority whilst it is being drawn, a matter which if it had been authorised, it would have altered the effect of the document; or

(d) Signs a document:

(i) In the name of any person without his authority whether such name is or is not the same as that of the person signing.

(ii) In the name of any fictitious person alleged to exist, whether the judictions person is or is not alleged to be the same name as the person signing.

(iii) In the name represented as being the name of a different person from that of the person signing it and intended to be mistaken for the name of that person, or

(iv) In the name of the person personated by the person signing the document, and provided that the effect of instrument depends on the identity between the person signing the document and the person whom he professes to be.

For a thing to be forgery, it must have been so arranged in such a manner as to create an erroneous or false inference in the minds of those who may observe them or can be more defined as "the false making of an instrument, which purports on the face of it, to be good and valid for purposes which it was created, with a design to defraud any person or persons".

The appellant's contention is that, there was no forgery or fraud proved before the RM and sought relief on the provision of section 91(1) of the Evidence Decree which precludes proof by evidence of any contract, grant or any other disposition of property if the same has been reduced into the form of a document. This, taken

together with section 79(1) of the same enactment, make Exhibit D1, the sale contract, a genuine document, being as it is, a public document. The presumption of genuineness afforded by this section is definitely rebuttable where it is shown that the document is vitiated in anyone of general circumstances including fraud, illegality, want of due execution, lack of capacity to contract etc. The RM "probably" concluded that the Sales Deed was a forgery because, as earlier stated, he did not "See anywhere where the minors signed nor was there any signature of any person who would have acted as their representatives," and thus" ... should we not conclude that the agreement was not executed lawfully?" The document was not attested to and on the strength of sections 68 and 73(1), independent evidence can be adduced to prove the legality or otherwise of the document.

Section 73(1) and (3) says the signature, finger and thumb impressions in contention can be compared with any other which has been proved to the courts satisfaction to have been made by the same person.

From the Record of Proceedings, Ahmed Abubakar, a fingerprints expert testified and gave his opinion. I went through the testimonies of Def 2 (Khole Ali); DW2, Haji Kheir in whose custody the sale deed was (having been given by the deceased herself); DW3; Mohammed Mussa, a relation who was a confidant of the deceased whose testimony showed that he was fully possessed of the facts and circumstances of the case; Assa Jaffar; representing the Wakf and Trust Property Commission; and Khamis Pandu, called on behalf of the office of the Registrar of Documents, from whose testimony it could be seen that the Sale Deed, D1, was registered in their office following due application and payment of requisite fees. It showed also from their file records that Bi Mwashamba was present in their office and made the thumb impression there at.

His testimony also showed that, the Sales Deed was witnessed by the late Khalfan Ali Khalfan, a *de facto* official of the registration office. He further testified that the application to register a sale, (Ardhilhali) which has Bi Mwashamba thumbprint was filed between

27 November 1985 and 30 November 1985 from the dates on the records. The thumbprint on this application, Exhibit P4, in his opinion, tallied with the one on the sales agreement D1. He conceded that their office is more usually concerned with the signature of the seller than the buyer as any anticipated problem would most likely come from the seller than the buyer.

I am tempted to go back to the evidence of DW3, Assistant Commissioner of Police, Mohammed Mussa, a relation and ward of the late Bi Mwashamba. He testified that Seif Ali, defendant I and himself were brought up by Bi Mwashamba, who approached him with the idea of bequeathing her house to both of them as her only sons, which idea he rejected and advised that it be given to Seif Ali who had no house of his even though he had children. After a while, she came back to him to inform him that though she intended to sell the house to Seif Ali, her intention was to help Seif's children and being a drunkard, Seif may sell off the property and to preclude the children. Subsequently he said, she informed him that she had sold the house to Seif's children and given the Sale Deed to Haji Kheir for safe keeping, which fact he confirmed from Haji Kheir.

As far as he was concerned, there was not any fraud or forgery in the transaction and the sale was carried out by Bi Mwashamba on her own volition. The totality of the evidence, in my opinion, was more in favour of a finding that there was no forgery or fraud.

Additionally, annextures B, C and D which were only provisionally admitted in evidence, being mere copies, didn't have their originals presented as promised. Dr Lamwai in his joint respondent's reply at page 2 said:

> It is, therefore, not surprising that the learned RM found that on the balance of probabilities the Sale Deed was forged.

The learned RM, on perusal of his judgement did not say so nor can it be inferred therefrom and as aforesaid, the preponderance of evidence is in tilted to the contrary.

From the foregoing, I find that the defendant 3, 4, 5 and 6, though minors, had capacity in the instant case to contract, I also find that no fraud or forgery was proved against the said defendants and hold that the Sales Deed, Exhibit D1, was no forgery .

I will at this point comment briefly on both counsel's submissions before me.

Mr Mkonje reiterated his submission before the RM on his clients capacity to contract and gave decided authorities to better his position. He also submitted on his contention that fraud was not proved before the RM against his clients. Dr Lamwai on the other hand contended that Mr Mkonje introduced issues which were not raised at the RM's court and should thus be struck out.

The issue of capacity which he said was not raised in the respondent's Memorandum of Appeal was clearly raised, so I will not go further on it, as Order XLVI, rule 2 of the Civil Procedure Decree, he cited is manifestly inapplicable. The other contentious issue in their submissions was the issue of *locus standi*. Dr Lamwai was of the view that since it was not specifically raised at the appropriate time and are thus now estopped from raising it; as provided by Order I, rule 13 of the Civil Procedure Decree. Mr Mkonje responded that the issue had arisen in the course of the proceeding and was entitled to take it up. On this issue, I am mindful "that the decision of a case cannot be based on grounds outside the pleadings of the parties and it is the case pleaded that has to be found" on the authority of AIR 1953, SC 235 and also "that the court cannot grant relief to the plaintiff for which there is no foundation in the pleading and which the other side was not called upon or had no opportunity to meet" - AIR 1957, 177.

I, on the other hand, also know that "it is trite law that a court can decide on a matter which though not pleaded, was clearly addressed by the Parties". Among the issues framed for determination at the Regional Magistrate's Court, were (1) whether the plaintiffs are the only heirs of the deceased Mwashamba Bint Ali and (2) who had a

better title to the suit premises. Do these not have to do with *locus?* In any event, these issues as earlier stated were not dealt with by the RM.

For the aforestated reasons, I hold that the appeal succeeds and declare the house the property of the second, third, fourth and fifth appellants.

SHILALO MASANJE *v.* LOBULU NGATEYA

HIGH COURT OF TANZANIA
AT ARUSHA
(Msoffe, J.)

CIVIL APPEALS Nos. 42 AND 47 OF 1997

(From Arusha District Court, Civil Appeals Nos. 42 and 47 of 1997, from original Civil Case No. 58 of 1997 in Enaboishu Primary Court)

Land Law – Disputed land ownership – Appellant's case partially established – Respondent never counter claimed for portion of disputed land – Trial court pronounced judgment aimed at bringing harmony between the parties – Whether judgment valid.

Civil Procedure and Practice – Limitation – Point of law raised at appellate level – Whether appellate court competent to determine it.

In the Primary Court at Enaboishu, Arusha, the appellant sued the respondent on claim of a five-acre piece of land. After the trial, the court found that the appellant's case was established only partially. However, during the trial the respondent had not counter-claimed for any portion of the land in dispute. The trial court decreed that both parties were each entitled to half of the land in dispute. Dissatisfied, the appellant appealed to the District Court. The latter court faulted the trial court's decision in as much as it only aimed at bringing harmony between the parties instead of deciding

exactly as to who between the parties was entitled to the disputed land. It accordingly nullified the proceedings in the Primary Court and ordered a retrial. The appellant was dissatisfied, hence, this second appeal.

Held: (i) In the circumstances of this case the proper forum for canvassing the point of limitation was at the Primary Court.

(ii) It was upon the trial court to rule affirmatively as to whether or not the appellant had a valid claim over the whole disputed piece of land.

(iii) It was not upon the Primary Court to decide that each party was entitled to half of the land in issue when it was quite clear that the respondent had not even counter-claimed for a portion of the land.

Appeal dismissed. Retrial ordered

Statutory provision referred to:

(1) The Magistrates' Courts Act, section 25(3)

JUDGMENT

(Dated 29 March 2000)

Msoffe, J.: In the Primary Court at Enaboishu, Arusha, the appellant filed a suit against the respondent in a claim of a five acre piece of land. After hearing the parties and their witnesses, and also after visiting the *locus in quo*, the trial Primary Court was of the unanimous view, and so accordingly held, that the appellant's case was established only partially. It therefore decreed that both parties were each entitled to half of the land in issue. The material part of that court's judgment read as follows:

> Hivyo basi kutokana na ushahidi huu, mahakama inamwona mdai ushahidi wake ni mzito/mwingi kuliko wa mdaiwa kwani wote walikiuka sheria za ardhi na kufanya mauziano yao kwenye bar na bila ushahidi wowote. (Kienyeji) na kwa vile ni ndugu moja wagawane eneo la daawa.
>
> Mahakama kwa kauli ya pamoja inatamka kuwa mdai ni mshindi wa madai yake nusu mdaiwa achukue sehemu ya chini toka Korongoni hadi nyumba