

A **LAMSHORE LIMITED AND J.S. KINYANJUI v.
BIZANJE K.U.D.K.**

B HIGH COURT ZANZIBAR
AT VUGA

(Kannyeye, J.)

C CIVIL CASE No. 13 OF 1994

Evidence – Burden of Proof – Duty to prove alleged facts – The duty to prove is on the party alleging – Sections 102 and 103 of the Evidence Decree Chapter 5.

D The second plaintiff is the sole signatory of the first plaintiff company. The parties entered into an agreement which subsequently the defendant did not honour on the claim that the first plaintiff company, with which they had entered into agreement was a non-existent fictitious entity, rendering the agreement *void ab initio*. The claim was based on the purported non-delivery of letters sent by the defendant to the first plaintiff company through the address indicated in the agreement, and also that the plaintiff company was not registered in England as claimed. While no evidence was adduced to show that the company was not registered, there were photocopies of an envelope stamped “return to sender” and a letter to the effect that the address on the agreement was non-existent.

F **Held:** (i) The contract cannot be invalidated on the mere allegation of non-existence of the first plaintiff company without evidence to show the alleged non-existence;

G (ii) The suit cannot fail upon the mere allegation that the plaintiff company is non-existent while the natural person who brought that company into the picture is identifiable and available.

H **Preliminary objection overruled**

Statutory provision referred to:

(1) Evidence Decree, sections 102, 103 and 115

I *Dr Lamwai*, for the Plaintiffs

A **RULING**

(Dated 10 September 1998)

B **KANNOYELE, J.:** A suit based on an agreement executed between a limited liability company (Lamshore Ltd.) and a Trading Company (Bizanje KUDK), which is also a public corporation, was filed by the sole signatory to the contract on the side of the limited liability company. The signatory, James Samuel Kinyanjui, is in the suit the second plaintiff himself, while the company for which he signed is the first plaintiff. The public corporation is sued for breach of the contract.

D The suit is resisted in a preliminary objection on the ground that the plaintiff company is non-existent and fictitious. It is contended that the limited liability company which is the first plaintiff does not exist in fact and for that reason the contract is contended to have been rendered invalid (void) *ab initio*. The alleged non-existence of the company is based upon an alleged false registration and address of the company evidenced by purported abortive search of registration confirmation in England and non-receipt of letters at the given address in Switzerland. It was submitted that efforts to confirm registration of the company in England proved futile. However, there is no certificate or any documentation to confirm the alleged efforts and futility of the results. On false address, it was alleged that a letter sent to the given address in Switzerland was returned to the defendants on an alleged non-existence of such address at the point of destination. Photocopies of the allegedly returned envelope and letter were produced as evidence here for, it being alleged that the originals could not be traced for production as evidence at this trial. Referred for comparison of the address was the said photocopy of the envelope and copy of the contract agreement where in the opening paragraph on the very first page thereof the address of the first plaintiff company is given.

I In reply on this point Dr. Lamwai, for the plaintiffs, referred the court to the plaintiffs' letter written from Nairobi dated 22 February

A 1993 (annex 8) at a street number. The address in the defendant's annexe 1(c) which indeed is a photocopy of the contract agreement bears no street number of the plaintiffs' Swiss address. It was submitted by Dr. Lamwai that it was this omission of the street number in the address which was the cause of non-delivery of the letter and not non-existence of the plaintiff company. He argued that this, therefore, cannot be a sufficient, less still just cause for invalidating the contract. It was, however, also argued that there was no evidence before the court to prove the alleged non-delivery of the letter where only a photocopy of the envelope was produced, leaving behind the original envelope itself and, this, without sufficient explanation to justify it as required by law. The court was accosted not to act on hearsay evidence.

D Counsel for the defendant company also submitted that they made a search to confirm the plaintiff company was indeed a registered company in England. However, they had no certificate to confirm their purported search and the futile results thereof. Wherefore counsel for the plaintiff submitted that in the absence of such certificate from Her Majesty's office in England, the information to that extent should not be acted upon. Moreover, it was argued, a company could have a Certificate of Incorporation in one country with a Certificate of Compliance in another but this could not be evidence of non-existence nor invalidity of the company in the latter.

G The crux of the argument is validity and, therefore, enforceability of the contract. The defendants argue that they were dealing with a fake, but in reality, non-existent company. It is consequently argued that the contract was void *ab initio*, inferrably on account of fraud and/or misrepresentation. On the other hand, the plaintiffs contend that the contract cannot be invalidated on the mere purported non-existence of the plaintiff company, an argument which, however, is not substantiated by any evidence. The more so where the plaintiff includes that second plaintiff whose identity has never been doubted at anyone time, neither at the creation of the contract nor at the stage of execution and less still at the stage of these proceedings. Dr. Lamwai for the

plaintiffs thus prayed the court to hold the suit is competent and the preliminary objection incompetent, to be overruled accordingly. On my part, I concur with Dr. Lamwai, for the plaintiffs, in the entire materiality of his arguments, which is why I overruled the objections at the outset reserving my reasons therefore. I now give those reasons.

In the first place, I do not see any misrepresentation on the part of the plaintiff at the creation of the contract based on identification of the parties and necessary information required for identification of both plaintiffs. I am also satisfied there was no attempt to withhold material information relating to identification and or address of the plaintiffs. If anything, omission of the street number in the plaintiff company's address in the contract agreement was inadvertent but non-fraudulent error which for that reason is negligible to invalidate the whole contract. For, if it were a calculated and designed non-disclosure, the plaintiffs would not subsequently disclose the street number as they do in their letter, annexe 8. Unless there was clear evidence of deliberate concealment, misrepresentation and/or overt act of fraud which, however, there is not, I would hold, as indeed I do, that the defendants are bound by the rules of estoppel (section 115 of the Law of Evidence Decree Chapter 5).

F There was also the question of the plaintiff company not being registered in England. It is the defendants alleging this; they therefore had the duty to prove non-registration of the company in England: he who alleges a fact has the duty to prove it (sections 102 and 103 of the Evidence Decree Chapter 5). The defendants came up with no evidence to discharge this duty. This argument then, be on its own merits or in supplement to any other, would stand to collapse. It is accordingly overruled.

H Lastly, albeit not the least, is on the position of James Samuel Kinyanjui, the second plaintiff in this case. Kinyanjui is the sole signatory on the side of the plaintiff party to the contract agreement. I am of the view that he is entitled in his own right and also on behalf of the company as party to the contract to sue (and/or be sued) in that regard. He was the sole natural person binding to the contract

A the legal person in the name of Lamshore Ltd, as a party of the agreement.
 B On these premises, I concur with Dr. Lamwai, for the plaintiffs, that the suit cannot fall at the mere non-existence of the plaintiff company where the natural person who brought that company into the picture is identifiable and available.

C In the event, there was only one option to me and that was to overrule the preliminary objection and let the suit proceed on merit to its logical conclusion.

D **STEPHEN MASATO WASIRA v. JOSEPH SINDE WARIOBA AND THE ATTORNEY GENERAL**

E **COURT OF APPEAL OF TANZANIA
 AT DAR ES SALAAM**

(Samatta, J.A.)

F **CAT-MZA CIVIL APPLICATION No. 1 OF 1998**

G *Limitation of Time – Consequences thereof – High Court finds that an application filed was time barred – Whether such application may be dismissed or struck out – Section 3(1) of the Law of Limitation Act 1971.*

H *Res Judicata – Issue decided in previous case was whether the first respondent had been served with Notice of Appeal – Issue in subsequent case is whether the applicant honestly believed he had served Notice of Appeal on the first respondent – Whether the matter in the subsequent case is res judicata.*

I *Extension of Time – Grounds for extension of time – Applicant seeking extension of time to file Notice of Appeal after previous notice is struck out for failure to serve it on the respondent – Whether an honest but mistaken belief that he had served that previous notice is a sufficient ground to grant extension.*

A Aggrieved by the decision of the High Court in an election petition, the applicant filed a Notice of Appeal and subsequently lodged his appeal against that decision. The appeal was struck out following a preliminary objection on the ground that the Notice of Appeal had not been served on the first respondent. The applicant applied to the High Court for leave to file a fresh Notice of Appeal and serve it out of time. The High Court held that the application was time barred and struck it out. The applicant then brought this application before the Court of Appeal, to seek extension of time to file a fresh Notice of Appeal and serve it on the respondents. The respondents, besides resisting the application on merit, also raised objections to the application arguing that it was improper for the applicant to bring it to the Court of Appeal because the High Court had not determined the application to it on merit, but had only struck it out and the applicant, therefore, had the alternative of appealing against the said striking out or applying for extension of time to file that same application before the High Court. They also argued that the matter was *res judicata* because the Court of Appeal had rejected the claim that the applicant honestly believed that the first respondent had been served with a copy of the Notice of Appeal.

E **Held:** (i) According to rule 44 of the Court of Appeal Rules, if the High Court refuses an application for extension of time like the one filed there by the applicant, the unsuccessful applicant may file a similar application before the Court of Appeal; the applicant, therefore, was entitled to file this application;

F (ii) Having held that the application before it was time-barred, the High Court had, under section 3(1) of the Law of Limitation Act 1971, only the power to dismiss it and not to strike it out, as happened in this case;

G (iii) The issue in the appeal that was struck out by this court was whether the 1st respondent was served with a copy of the Notice of Appeal while in the present litigation it is whether the applicant honestly believed that the first respondent was served; therefore, the issue in this application is not *res judicata*;

H (iv) The conduct of the applicant was inconsistent with the assertion that he honestly believed that a copy of the Notice of Appeal had been served on the first respondent; the conclusion therefore is that the applicant did not believe that the Notice of Appeal had been served.

Application dismissed