

- A provisions of Order VIIIA and VIIIB of the Civil Procedure Code mandating the use of Mediation are set aside;
- (v) The Bank is at liberty to act on its debenture according to law unless and until The Bank and its debtor companies agree otherwise or
- B the High Court directs otherwise according to law;
- (vi) The records of Miscellaneous Civil Cause Numbers 146 to 155 of 1998 and Civil Case Number 98 of 1998 be placed before a judge in
- C the High Court within 14 days from today for directions as to the future course of these cases, including the fate of the report submitted by the provisional liquidators;
- (vii) No order for costs in this court is made;
- D (viii) Any expenses incurred *bona fide* by the provisional liquidators before their suspension are to be met out of assets of the ten companies.

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ELIBARIKI MBOYA v. AMINA ABEID

F

COURT OF APPEAL OF TANZANIA AT ARUSHA

(Mfalila, Samatta and Lugakingira, JJ.A.)

G

CIVIL APPEAL No. 54 OF 1996

(Appeal from the Judgment and Decree of the High Court of Tanzania at Arusha, Munuo, J., dated 28 January 1994.

- H *Evidence – Documentary evidence – Admissibility of document required to be stamped but not stamped – Contract of sale of a house not stamped – Whether the contract may be admitted in evidence – Sections 5 and 46(1) of the Stamp Duty Act 1972 and section 73 of the Civil Procedure Code.*

I

Stamp Duty – Failure to affix stamp duty on an instrument – Effect thereof – Sections 5 and 46(1) of the Stamp Duty Act 1972.

The appellant successfully sued the respondent in the court of the Resident Magistrate for vacant possession of a wooden house in Arusha Municipality. The appellant testified that he entered into a written contract with the respondent whereby the respondent sold to him the said house for 130,000. The written contract tendered in evidence as exhibit was not stamped in accordance with the Stamp Duty Act 1972. The trial court decided in favour of the appellant. The High Court, on appeal, found in favour of the respondent on the ground that the contract of sale was not stamped and thus could not be admitted as evidence under section 46(1) of the Stamp Duty Act 1972 as to do so would offend section 5 of the said Act. The appellant was aggrieved and appealed to this court.

Held: (i) Failure to stamp the contract of sale was an irregularity not affecting jurisdiction of the court and was cured by section 73 of the Civil Procedure Code, 1966. The respondent is ordered to pay the duty with which the instrument is chargeable.

Appeal allowed.

Cases referred to:

- (1) *Transport Equipment Ltd. v. DP Valambia*, [1993] T.L.R. 91
- (2) *Mohammed Hussein Khan v. Kishua Nandan* [1937] All ER 655
- (3) *Kiran Singh v. Chaman Paswan* (1954) SC 340

Statutory provisions referred to:

- (i) Magistrates Courts Act 1984, section 37 Order 3, rule 2, Order 13 of rule 2, rule 4
- (ii) Civil Procedure Code, 1966, section 73
- (iii) Stamp Duty Act 1972, sections (5) and 46(1)
- (iv) Indian Civil Procedure Code, section 99

Mr. Mwale, for the Appellant

Respondent, in person

A

JUDGMENT

(Dated 15 March 1999)

- B **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 court of the Resident of Arusha. At stake is a wooden house known as House Number 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 11 February 1988, he entered into a written contract with the respondent whereby the latter sold to him the wooden house for the sum of TZS. 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, 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* (1), 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 proceeded to direct that Exhibit "A" be

duly stamped. In *Transport Equipment Ltd's* case (1) 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 section 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 promissory 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.

The pivotal point in 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 section 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 court of the Resident Magistrate. 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.

- A This section is *in pari material* with section 99 of the Indian Civil Procedure Code. In *Muhammad Hussain Khan v. Kishva Nandan* (2), cited in **Mulla on Code of Civil Procedure** (13 ed), Volume I, at page 430, the Privy Council, commenting on that section, said:
- B ... there can be no doubt that the rule embodied in section 99 proceeds Upon a sound principle, and is calculated to promote justice ...
- C Commenting on the same section, in *Kiran Singh v. Chaman Paswan* (3) (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.
- D In his book cited above, at page 431, **Mulla** makes the following useful comments on section 99:
- E A decree will not be reversed or substantially varied in appeal for admitting a document not properly stamped, or for non-compliance with Order 13, rule 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
- F a defective power of attorney [Order 3, rule 2], or failure to obtain leave under Order 2, rule 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
- G 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 jurisdiction of the court and they are cured by this section.
- H 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 purely on technical grounds, when determining an appeal. It would be lamentable to the law if it were competent
- I 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

A 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 court of the Resident Magistrate. The respondent is hereby ordered to pay the duty with which Exhibit "A" is chargeable. We make no order as to costs.

CHARLES MUSSA MSOFFE v. NBC HOLDING CORPORATION

COURT OF APPEAL OF TANZANIA AT ARUSHA

(Mfalila, Samatta and Lugakingira, JJ.A.)

CIVIL APPEAL No. 33 OF 1996

(From the decision of the High Court of Tanzania at Arusha, Munuo, J., dated 11 April 1996, in Civil Case No. 36 of 1995)

Administrative Law – Disciplinary Committee of Parastatal Organ – Decision of, on merits and substance – Whether appellable.

Civil Practice and Procedure – Mediation process - Order for costs may be made against defaulting or unprepared party unless exceptional circumstances exist – Instance of exceptional circumstances. Order 8A, rule 5 – Civil Procedure Code 1966.