
BETWEEN : *MOLI LOLO* - Appellant;

AND : *VILIAMI TAUFA* - Respondent.

BEFORE THE HON JUSTICE FINNIGAN

COUNSEL: Mr Veikoso for Appellant,
Mrs Taufateau for Respondent.

Date of Hearing: 31 March 1999

Date of Judgment: 3 May 1999

JUDGMENT OF FINNIGAN, J

This is an appeal against a magistrate's decision. The appellant had claimed \$750 on a contract whereby he had repaired a motor car, and the magistrate disallowed his claim.

THE FACTS

The facts, as explained to me and from the evidence in the court below, are briefly as follows. The centrepiece is the car. It had belonged to the respondent's son. He had been killed in a motor accident, while driving it. The respondent brought the car to the plaintiff for repair and \$750 was agreed as the price. The appellant says it was further agreed that he was not to deliver the car to anybody, and that if the son's widow came for it he would charge her the full amount for the job, which was \$500 plus \$300 for labour. The respondent says that there was a further agreement for refund of his \$750 if the widow came and took the car.

The car was repaired. The appellant says that he delivered the car three times to the respondent, but the respondent each time refused to accept it until his son's widow had transferred the registration to his name. The appellant complained to the police that he had not been paid and the respondent then paid the \$750. The son's widow then complained to the police that the car had not been delivered to her. The police came with the widow and took the car from the appellant.

When the widow came with the police officer, the appellant told them that the car needed a new engine. The widow asked the appellant to replace the engine with another that she bought, and he did so. The widow says he demanded the old engine as payment for the work. In any event she gave him the old engine as payment. The respondent then sued the plaintiff in the Magistrate's Court for return of his \$750. He claimed there was an agreement that if the plaintiff released the car to the widow then the plaintiff would give the \$750 back and claim that amount from the widow. The appellant denied during those proceedings that there was an agreement for a refund. The respondent's claim for refund of his \$750 was allowed.

The appellant thereupon sued the respondent for the \$750, basing his claim on the repair contract. That claim was refused in the Magistrates' Court, and it is the refusal of that claim that is the cause of this appeal.

The ground of the appeal is that the magistrate erred in not giving effect to the repair contract. The appellant claims that he carried out his agreement with the respondent and that the respondent failed to pay because ownership was not transferred to him. He says the engine replacement was a separate contract with the widow. He denies any agreement that he would refund the \$750 which the respondent paid if the widow took the car, he says that money is the payment due to him for the repair work requested by the respondent.

The respondent's first defence in the court below and his submission in the appeal, was *res judicata*. Through counsel he submitted that the issue in this claim was already decided when his earlier proceedings (said to be C49/97) were decided. He said that the time for the present claim was during that case, by way of counter-claim. He submits that since the appellant did not counter-claim, he is now bound by the decision of the plaintiff's claim. I pause to comment however that a claim by a defendant may not necessarily raise the same issue as that in a claim by a plaintiff, it may be a different cause of action arising out of the same fact situation. A defendant is well advised to raise any associated claims he may have, which are part of a plaintiff's litigation, but if his claim is a different issue he is not bound to. He may start separate proceedings, and if these are commenced before the plaintiff's case is heard the two actions may be consolidated. If commenced later, they may be heard later. If by suing later he causes unnecessary trouble and expense, this can be reflected in an award of costs.

Whichever way he proceeds, if his claim raises a separate issue, it cannot be defeated by the doctrine of *res judicata*.

It was part of this *res judicata* defence in the court below that the court in the earlier case had found it was a condition of the initial agreement that the appellant would refund the \$750 and claim it from the widow if she took the car. The respondent submitted that the appellant could not re-litigate that issue. I do not know what were the findings in that case, and I cannot express an opinion about the reasons for the decision in that case, that

decision is not under appeal. What is before me is the appellant's claim, that he has a contract with the respondent for payment by the respondent.

The defence raised to that claim in the court below and on appeal is that the Magistrates' Court has already found in separate proceedings that the appellant agreed with the respondent that he would not claim the debt from the respondent, but would claim it from the widow. If that agreement was made, what was the consideration for it? None is apparent in the evidence before me, but I must presume there was some evidence before the magistrate when he decided there was such a contract in the earlier case. Let us proceed from there. What was to occur if the widow refused? She might well do so, since there was no contract with her. She was no part of the decision to charge her for the work that was agreed between the appellant and the respondent. Neither was there any agreement between appellant and respondent that if the claim on the widow failed, the appellant would not be paid. The money was still owed by the respondent.

Further defences were raised. His next defence is that the widow had paid the money due to the appellant by giving him the engine, and that the appellant was estopped from claiming again. I reject that submission on the evidence.

As well, the respondent submits that equity does not favour the appellant because the widow gave evidence that the appellant demanded delivery of the engine in payment before he would deliver the car, and thus he does not come with clean hands. I pause to comment that this case is a contract case and the principles of equity do not apply. I reject that submission.

He raises also, as an alternative, the argument that the claim for \$750 is excessive, and this Court is invited to reassess quantum on the basis of evidence that the drive shaft fell out of the car. To attempt such an evaluation is well outside the competence of this Court however, because there is no evidence. I reject that submission.

DECISION

The reasons for the magistrate's decision have to be found in what he said. This is what he said (in translation):

An agreement of \$750 to fix a car. If the complainant will take the car then the \$750 is to be returned. The defence gave the plaintiff \$750. The widow went and took the car. The defence submits why have they not made any counterclaim. Therefore judgment is entered for the defence.

Judgement: 1. The defendant is discharged. 2. The plaintiff is liable. Lawyer's fee \$100 to Tu'utafaiva to be paid within 12 months or distress warrant in default.

That by any standards is inadequate. The magistrate failed to decide what was the central issue of the case. This issue was whether there was a contract for the plaintiff to forego

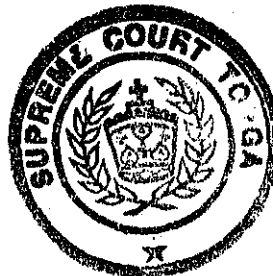
his payment if the widow refused or failed to pay, and there was no evidence on which to base a conclusion that there was.

So far as I can see from the evidence, there were two contracts, one between the appellant and the respondent and a second one between the appellant and the widow. It is clear enough on balance that the two contracts were for different jobs. The first contract, between the appellant and the respondent, was for repairs at \$750. The agreed repairs whatever they were, once done, were to be paid for by the respondent. The second, between the appellant and the widow, was for replacement of the engine.

There was agreement between the appellant and the respondent, for the appellant to recover higher repair costs from the widow if she claimed the car. This however was not a contract that the appellant would abandon his claim on the respondent. He did the work at the request of the respondent. He agreed the \$750 price with the respondent. Not even the respondent, suggested that the appellant agreed to go without his payment if the widow (not unreasonably) refused to pay. He is still liable, and the appellant is at liberty to sue him for the money if the widow did not agree to pay, and in this present action he is entitled to recover.

The decision of the magistrate is inadequate and wrong. It is set aside. Judgment is entered for the appellant, with lawyer's costs of \$100 and court fee of \$21. Costs on the appeal are in the appellant's favour, to be agreed or taxed.

NUKU'ALOFA, 3 May 1999



[Handwritten Signature]
JUDGE