

**IN THE COURT OF APPEAL OF TANZANIA  
AT DAR ES SALAAM**

**(CORAM: MROSSO, J, A, MUNUO, J, A, AND KAJI, J, A,)**  
**CIVIL APPEAL NO. 18 OF 2001**

**REGISTERED TRUSTEES OF THE CASHEWNUT  
INDUSTRY DEVELOPMENT FUND.....APPELLANT**

**AND**

**CASHEWNUT BOARD OF TANZANIA.....RESPONDENT**

**(Appeal from the Judgment and Decree of the High Court of  
Tanzania at Dar es Salaam)**

**(Msumi, J.K.)**

**Dated 22<sup>nd</sup> day of December, 2000**

**In**

**Civil Case No. 204 of 1999**

**JUDGMENT OF THE COURT:**

**27<sup>th</sup> Nov. & 1<sup>st</sup> Dec. 2006**

**MUNUO, J, A.:**

The appellants, the Registered Trustees of The Cashewnut Industry Development Fund, instituted an action for conversion, and, or money had and received in Civil Case No. 204 of 1999 in the High Court of Tanzania at Dar es Salaam, claiming the sum of Tsh. 1,887,590,526/= withheld by their purported agent, the respondent,

the Cashewnut Board of Tanzania. The learned trial judge, Msumi, J.K, as he then was, dismissed the suit with costs giving rise to this appeal.

As pleaded in the plaint, the appellant is a non-governmental organization and a body corporate, incorporated in Tanzania under the Trustees Incorporation (Ordinance, No. 18 of 1956 T.R.L. Cap 375). Narrating the background of the appellant, Professor Fimbo, learned advocate for the appellant, stated that the objectives of the appellant, include:

- a) facilitating research and development activities of cashewnut production in Tanzania, and*
- b) facilitating local cashewnut processing with a view to export value added cashewnut kernels.*

According to the pleadings and the submissions by counsel for the appellant, the latter was established by the Cashewnut

Association of Tanzania (CAT), a non-governmental association which is also incorporated under the Companies Ordinance, Cap 212.

The respondent is a statutory body established by the Tanzania Cashewnut Marketing Board Act, Cap 203 R.E. 2002.

The parties concede that sometime in 1996, by a mutual agreement, the respondent undertook to collect an export levy from the cashewnut exporters and remit the same to the appellant. It was agreed that the export levy would be 3% of F.o.b value of cashewnut exports. 2% of the deducted money would then be remitted to the appellant. The respondent would retain 1% for administrative expenses. The parties further concede that the respondent remitted to the appellant, the sum of Tsh. 1,735,740,135/=. In the course of auditing, the Tanzania Audit Corporation queried the deduction and payment of the cashewnut export levy to the appellant; the payment was thence suspended, pending investigations and directions from the Ministry of Agriculture. It is the case of the appellants that the respondent collected but did remit a total of Tsh. 1,887,599,526/=: the subject matter of this appeal. The High Court dismissed the suit

with costs as already mentioned. The appellants then lodged the present appeal seeking a reversal of the decision of the High Court.

As stated above, Professor Fimbo, learned advocate, represented the appellants. The respondent was represented by Mr. Kilindu, learned advocate. The appellants filed 11 grounds of appeal to the effect that –

1. *the learned judge erred in law in holding that the 3% F.o.b export levy is a statutory export levy by the Minister of Agriculture under Government Notice No. 369 of 1996 so it was not a voluntary contribution of the exporters.*
2. *The learned judge erroneously held that the Regulations in Government Notice No. 369 of 8.11.1996 were made by the Minister of Agriculture*

*whereas they were made by the respondent, the Cashewnut Board of Tanzania, under the provisions of Section 27 of Act No. 21 of 1998 with the approval of the Minister for Agriculture.*

*In the alternative, the trial judge ought to have held that the Cashewnut (marketing) Regulations, G.N. 369 of 1996 are ultra vires the Principal Act, the Tanzania Cashewnut Marketing Board Act, No. 21 of 1984.*

3. With regard to grounds 3 to 8 of the appeal, the appellants contended that the learned judge should have held that the respondent collected the claimed money as agent of the appellants so the same should have been remitted to the appellants

[principal] or else the respondent should be held liable for conversion.

4. In grounds 9 and 10, counsel for the appellants contended that to date the Ministry of Agriculture has not withdrawn its directive requiring the cashewnut export levy to be remitted to the appellants so the respondent should be ordered to remit the claimed cashewnut export levy to the appellants.
5. In ground 11, counsel for the appellant maintained that the trial judge erred in law in holding that the appellants have suffered damages on account of the omissions and actions of the respondent and hence allow the action.

Furthermore, counsel for the appellant submitted that the trial judge rightly held that under Article 138 (1) of the Constitution of the United Republic of Tanzania, no taxes can be levied against the cashewnut exporters except by law, and that as G.N. 369 of 1996 was not taxation law enacting the cashewnut export levy, the said levy was not tax. Counsel for the appellants had referred us to a text book (which counsel for the respondent also adopted) – Revenue Law – Principles and Practice, 11<sup>th</sup> Edition by Chris Whitehouse, ButterworthsLoyd - Butterworths London, Dublin, Edinburg 1998 at Pages 5 to 6 in which the word tax is discussed:

2. *What is tax?*

*The basic features of a tax may be simply stated. First it is a compulsory levy. Secondly, it should be imposed by government or, in the case of council tax, by a local authority. Finally, the money raised should be used either for public purposes or, if the purpose of the tax is not*

*to raise money, it should encourage social justice within the community.....*

The learned author continues:

*3. The purpose of taxation. The primary object of taxation is, and always has been, to raise money for government expenditure.....*

Counsel for the respondent conceded that this is correct concept of tax. On our part, we are satisfied that in the light of the above text on tax, the cashewnut export levy was not tax because it was not initiated by a tax legislation, by-law or by a gazetted tax order. In that regard, we have no difficulty holding that the cashewnut export levy was not tax because it was not enacted by the government to raise money for public expenditure.

Counsel for the appellants asserted that the cashewnut export levy money falls into the category of money had and received which money the respondent unjustifiably withheld instead of

remitting the same to the principal, the appellants. He referred us to a text book titled, Principles of **The English Law of Contract and Agency In Relation to Contract** by Sir William Anson, 22<sup>nd</sup> Edition by A.G. Guert, M.A., The English Language Book Society and Oxford University Press, Chapter XIX at Page 537 wherein the learned author states that –

*If the agent fails in his duty, the normal remedy of the principal is to bring an action for damages; but where the breach consists of a failure to pay across money received on behalf of the principal, he may also bring an action for money had and received, or an action for an account.*

It is the prayer of counsel for the appellant that the respondent be ordered to remit the claimed money to the appellants, the owners thereof.

Counsel for the respondent admitted that the cashewnut export levy was duly collected by the respondent. He stated that the respondent complied with the auditor's query and directive not to remit the levy pending directions from the government. It appears the Ministry of Agriculture has not yet resolved the matter which is what prompted the appellants to sue for the recovery of money had and received by the respondent. Mr. Kilindu noted also that the cashewnut export levy has been in effect since the 3<sup>rd</sup> January, 1993, long before the enactment of G.N 369 of 1996 so the appellant should not purport to monopolize the levy in question. He, furthermore, observed that following the auditor's recommendation, the respondent retained the cashewnut export levy pending directives from the government so the respondent should not be held liable for conversion. The cases of **Manyara Estates Ltd. versus N.D.C.A [1970] E.A. 177; and Barker versus Funlong [1891] Ch.D. Page 72** which were cited by counsel for the appellants are distinguishable and not applicable in this case, counsel for the respondent contended.

The issue before us is whether there was a principal – agent relationship between the parties to the suit.

On this, the learned judge held that –

*.....The whole 3% export levy is a public fund collected under the statute. Therefore,..... it remains to be the property of the government. The defendant as a public body is collecting the levy on behalf of the government. At most, the plaintiff is one of the beneficiaries of the levy on behalf of the government. In other words the plaintiff's beneficiary interest on this portion of the levy is subject to the overriding proprietary right of the government over the whole levy.*

The learned judge further held that –

*Since it is public revenue, the manner in which the levy may be used can only be determined by the government. With these observations, therefore, the finding on second and third issues is that the money in dispute has been collected and received by the defendant as agent of the government and not as agent of the plaintiff.*

We revisited Anson on **The Principles of The English Law of Contract and Agency in Its Relation to Contract** which is referred to supra. At Page 536, the learned author states that –

*The relations of the principal and agent inter se [between or among themselves] are made up of the ordinary relations of employer and employee, and of those which spring from the special business of an agent to bring two parties together for*

*the purpose of making a contract – to establish privity of contract between his principal and third parties. The rights and duties of the principal and agent depend upon the terms of the contract, whether express or implied, which exist between them. But in addition to these specific provisions, the mere existence of the relationship raises certain rights and duties on both sides.....the rights of the principal against the agent, and then the rights of the agent against the principal.*

In the present case, there was no employer – employee relationship between the parties to constitute an agency relationship. Nor was there a special agency for the purpose of making a contract. All there was, was that the appellant was a beneficiary, and, therefore, at the receiving end of the cashewnut export levy. In that regard, the appellant was not a principal so the respondent was not his agent. That being the position, we are satisfied that there was no

agency relationship between the parties. We held, earlier on, that the cashewnut export levy was not, and is not, a tax because no tax law or authority initiated it. It was enacted under Rule 21 (1) of G.N. 369 of 1996 which provides, inter-alia:

*21 (1) The exporter shall, prior to making shipment of each export consignment, observe quality standards specified in the relevant sales contract and pay export levy applicable.*

Rule 23(1) imposes a penalty on those who default in paying cashewnut export levy. Rule 23 (1) of G.N. 369 of 1996, Cap 203 R.E 2002, states verbatim:

*23 (1) any person who contravenes or fails to comply with any of these Regulations commits an offence against these Regulations and shall be liable on conviction to a fine not exceeding one*

*hundred thousand shillings or to imprisonment for a term not exceeding three years or to both.*

*(2) where the contravention is in respect of any of the provisions of Part V of these Regulations the Board may opt to revoke or suspend the licence in lieu of the fine or a term of imprisonment.*

*Provided that nothing shall render it unlawful for the Board to revoke or suspend the licence in addition to a fine or a term of imprisonment imposed thereto.*

We find merit in counsel for the respondent's contention that neither the respondent nor the Minister of Agriculture enacted the cashewnut export levy on cashewnut exporters for the benefit of the appellant. One, Section 8 of the Cashewnut Board of Tanzania Act, Cap 203 R.E. 2002 gives the Minister for Crop Marketing power to impose levy on cashewnuts, produced, and, or processed in the

United Republic of Tanzania, by an Order published in the Gazette. In this case, no such order was made and published in the Gazette by the Minister. Secondly, although Section 29 of The Cashewnut Board of Tanzania Act, Cap 203 R.E. 2002 vests in the Board power to make regulations for the production, grading, sale, storage and all matters related to cashewnut production and business, power to impose levy is not listed under the provisions of Section 29 (1) (a) to (j) of Cap 203 R.E. 2002 which means the respondent had no power to impose the export levy in dispute.

G.N. 369 of 1996 vaguely defines the word levy as –

*"levy" means levy imposed under  
the provisions of this Act.*

However, Black's Law Dictionary Seventh Edition, West Group, at Page 919 defines the word levy –

*"levy" – 1. The imposition of a fine or  
tax, fine or tax so imposed.....To impose*

*or assess (a fine or a tax) by legal authority.....*

In view of the above, we are satisfied that the trial judge rightly held that there was no agency relationship between the parties. We are, furthermore, satisfied that since the cashewnut export levy was not a tax, and as the government or tax authority did not legislate for such tax at all, there was also no agency relationship between the government and the appellant. Whatever the case, the cashewnut export levy money was not revenue from taxation so it was not, and is not government revenue. Ordinarily the money would belong to the cashewnut farmer.

In the light of the above, the appeal is lacking in merit. We accordingly dismiss the appeal with costs.

Dated at Dar es Salaam this 1<sup>st</sup> day of December, 2006.

**J. A. MROSSO**  
**JUSTICE OF APPEAL**

**E. N. MUNUO**  
**JUSTICE OF APPEAL**

**S. N. KAJI**  
**JUSTICE OF APPEAL**

I certify that this is a true copy of the original.



  
**N. P. Z. CHOCHA**  
**Aq. DEPUTY REGISTRAR**