

IN THE COURT OF APPEAL OF TANZANIA
AT ZANZIBAR

(CORAM: OMAR, J.A., RAMADHANI, J.A., And LUBUVA, J.A.)

CIVIL APPEAL NO. 37 OF 1994

BETWEEN

SILIMA VUAI FOUM APPELLANT

AND

- | | |
|---------------------------------------|-------------------|
| 1. REGISTRAR OF COOPERATIVE SOCIETIES | } ... RESPONDENTS |
| 2. ALI MAKAME ALI | |
| 3. KHAMIS MTWANA HASSAN | |
| 4. WADI MACHANO | |

(Appeal from the decision of
the High Court of Zanzibar)

(Dahoma, J.)

dated the 30th day of March, 1994

in

Civil Case No. 7 of 1990

JUDGMENT OF THE COURT

LUBUVA, J.A. :

In Civil Case No. 7 of 1990 before the High Court of Zanzibar, the appellant instituted a suit against the respondents. The background to the suit revolves around the "MAENDELEO STORE" Cooperative Society which was registered under the Cooperative Societies Act No. 3 of 1979 with registration number 55 of 1980. On 20.9.1984, the first respondent, the Registrar of Cooperative Societies cancelled the registration of the said Maendeleo Cooperative Society. Following the cancellation, the appellant instituted a suit before the High Court of Zanzibar against the respondents. Among other reliefs, the appellant sought a declaration that the cancellation of the Cooperative Society (Maendeleo Store) was null and void as it was illegal. The appellant also prayed for the restoration of the Cooperative Society in the Register of Cooperative Societies.

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On 23.2.1994, when the case was called for hearing, the respondents who were represented by Mr. Mbwezeleni, learned counsel and Mr. Uhuru Hemed Halfani, learned State Attorney took a preliminary objection that the suit was time barred. It was the respondents' contention that the suit was time barred because the registration was cancelled in 1984 and the institution of the suit was taking place in 1994, a period long after the time of limitation prescribed under the Limitation Decree, Chapter 12 of the Laws of Zanzibar had lapsed. The learned judge (Dahoma, J.) sustained the objection by dismissing the suit. From the order of the dismissal of the suit, the appellant has appealed to this Court.

At the hearing of this appeal Mr. A. Patel, learned counsel appeared for the appellant who, at the trial before the High Court of Zanzibar was represented by Mr. J. Lipiki. Both counsel Mr. Mbwezeleni and Uhuru Hemed Halfani had filed preliminary objections against the appeal on grounds of non-compliance with the rules governing the processing of appeals before the Court of Appeal. However, Mr. Uhuru for the first respondent withdrew the objection as he did not desire to pursue it any further. For the second, third and fourth respondents, Mr. Mbwezeleni proceeded to argue the preliminary objection. He submitted that the appeal was incompetent because the respondents were not served with the copy of the notice of appeal as prescribed under Rule 77(1) of the Court's Rules of 1979. Mr. Mbwezeleni, learned counsel, urged the Court to strike out the appeal.

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Responding to the preliminary objection, Mr. Patel, learned counsel, said that this aspect had taken him by surprise in that he was not involved in the handling of the appellant's case at the trial. However, he stated that he was given to understand that the appellant had personally effected the service of the copy of the notice of appeal to the respondents and the court timeously on 13.4.1994. He also said that the appellant had paid the requisite fees for the service. In the interest of justice, Mr. Patel, learned counsel, asked the Court to invoke the provisions of Rule 3 (1) of the Court's Rules in order to give him one month's time in which to regularise the position. On 24.11.1994, after hearing these submissions on the preliminary objection, we adjourned the matter to 28.11.1994 for the hearing of the appeal on its merit and reserved our ruling on the preliminary objection until after the full hearing of the appeal. We also ordered the respondents to be served with the record of appeal the same day (24.11.1994).

We wish to deal first with the preliminary objection. On this, it should be observed that on 24.11.1994, in the course of hearing Mr. Mbwezeleni's objection, our attention was drawn to the Zanzibar sub-registry's dispatch book in which it was shown that the respondents had been served by the appellant with the notice of appeal on 13.4.1994 for which the respondents are shown to have signed. We had the advantage of seeing the dispatch book which was also shown to the learned counsel for the appellant and the respondents respectively.

It is curious however, that according to Mr. Mbwezeleni, the respondents still adamantly maintained that they were not served with the copy of the notice of appeal even after they had been shown their names and signatures in the dispatch book. On our part, it is inconceivable that the appellant would go to such lengths in concocting documentary evidence against the appellant if in fact no service had been effected. In the circumstances, we hold that the respondents were duly served with the notices of appeal as evidenced by the court's dispatch book. On the other hand, even if service was not effected as claimed, we are in agreement with the submission of Mr. Patel, learned counsel for the appellant that in the interest of justice, this would be an appropriate case in which we would have no hesitation in invoking rule 3 (1) of the Court's Rules, 1979 in accommodating the appellant's situation. In the result, we overrule the objection.

Next, we turn to the substantive merits of the appeal. Mr. Patel, learned counsel for the appellant had filed three grounds of appeal out of which he withdrew ground three at the hearing of the appeal. It is our view that the essence of the remaining grounds of appeal is that the learned judge erred in law in his failure to frame the issues and in dismissing the suit as time barred. With eloquence, Mr. Patel, learned counsel for the appellant submitted that the learned judge should have first framed the issues at the start of the trial when the preliminary objection was taken.

Elaborating further on this point, Mr. Patel learned counsel, stated that the issues involved were not independent of each other, they were to be considered together. He referred to the 14th Edition of Mulla on Commentaries on Civil Procedure at pages 100 and 1297. Secondly, Mr. Patel, learned counsel, seriously contended that as fraud had been raised in the pleadings, the learned judge should have first investigated into the allegation of fraud. Thirdly, Mr. Patel complained that as fraud was alleged in the plaint and the appellant became aware of the cancellation of the Cooperative Society (Maendeleo Store) in 1989, the period of limitation began to run from 1989 and not 1984, as the learned judge held. For this proposition, Mr. Patel referred to section 18 of the Limitation Decree, Chapter 12 of the Laws of Zanzibar. He prayed the Court to allow the appeal and frame the issues for re-trial before another judge.

Responding to these submissions, Mr. Mbwezeleni, learned counsel for the second, third and fourth respondents and on behalf of Mr. Uhuru, learned State Attorney for the first respondent addressed us on three points. First, Mr. Mbwezeleni contended that the learned judge cannot be faulted in not framing the issues because the preliminary objection had been raised before the stage of framing the issues had been reached. We are in agreement with Mr. Mbwezeleni on this point. From the record, it is clear that after the initial filing of the plaint, statement of defence and replies thereto had been completed, the case was mentioned before the

Deputy Registrar High Court of Zanzibar on 19.1.1994. By consent, 23.2.1994 was set for hearing the preliminary objection raised by Mr. Mbwezeleni. On 23.2.1994, the matter came up before Dahoma J. when the preliminary objection was heard. Mr. Mbwezeleni, learned counsel for the first respondent and Mr. Lipiki, learned counsel for the appellant (plaintiff) addressed the Court. The issue involved was whether the suit was time barred. As already indicated, the Court ruled that the suit was time barred. From the sequence of events as gleaned from the record, we are satisfied that Mr. Patel's criticism against the learned trial judge on this point is, with respect, untenable. The preliminary objection having been raised at that stage, it was proper for the learned judge to hear and determine the objection before framing the issues. This is because, the issue having been raised at that stage, it was imperative for the Court to decide whether or not the suit was properly filed before the Court. Then at the next stage if it was decided that the matter was properly before the Court, the issues would be framed for trial. In the event the Court ruled the suit as time barred, that would be the end of the matter in which case, it would be unnecessary to frame the issues as it happened in this case. We find no merit in this submission.

Regarding fraud and the limitation period, Mr. Mbwezeleni contended that under section 18 of the Limitation Decree, Chapter 12 of the Laws of Zanzibar, fraud could not be taken into account in this case as it had not been shown that it was due to fraud that the appellant was unable to know of the time when the

Society's registration was cancelled. In those circumstances, Mr. Mbwezeleni, learned counsel, submitted, the learned judge was correct in holding the period of limitation to start running from 1984 the time when the registration of the society was cancelled. We are respectfully, in agreement with Mr. Mbwezeleni learned counsel on this submission. The effect of fraud in computing the period of limitation is provided under section 18 of the Limitation Decree, Chapter 12 of the Laws of Zanzibar. It provides:

18. "Where any person having a right to institute a suit has by means of fraud, been kept from knowledge of such right or of the title on which it is founded, or where any document necessary to establish such right has been fraudulently concealed from him, the time limited for instituting a suit (emphasis supplied) -

(a) against the person guilty of fraud or accessory thereto, or

(b) (not applicable)

shall be computed from the time when fraud first became known to the person injuriously affected thereby ..."

From the provision of this section, it is apparent to us that fraud can only be taken into account in computing the

time of limitation in circumstances in which it is proved that by means of fraud, the person instituting the suit was precluded from knowing of the act complained against. In the instant case, allegations of fraud are raised in the plaint in connection with the Co-operative Society's property which would be one of the triable issues at the appropriate stage. But there is no evidence at all to show that the appellant was, due to such fraud unable to know that the Society's registration had been cancelled in 1984. Furthermore, it is our considered view that the appellant has not shown that, for reasons of fraud, it was until 1989 that he became aware that the registration of the Society had been cancelled. We see no evidence at all in support of the appellants claim. In that case, we are firmly of the view that the appellant ought to have known of the cancellation of the Society's registration in 1984. It follows therefore, that section 18 of the Limitation Decree Cap. 12 of the Zanzibar Laws was inapplicable in the circumstances of the case. Under Item 10 of the Schedule to the Limitation Decree, the period of limitation for one year runs from the time the act took place i.e. 1989 and not from the time when the appellant purports to have had knowledge of it. In this case, we are settled in our minds that the learned judge was justified in his conclusion that the suit being instituted in 1994 was time barred as the cancellation of the Society's registration had taken place ten years before (1984).

Finally, we wish to comment on Mr. Patel, learned counsel's prayer that in the event the appeal is allowed, this Court frames issues for re-trial before another

judge. On this, if in this submission, Mr. Patel was alluding to the powers of the Court following on the amendment of the Appellate Jurisdiction Act, 1979 as amended by Act No. 17 of 1993, wherein the Court is vested with the powers of revision, in our opinion, that would still be inapplicable in the circumstances of this case. The reason is simple and that is that, as stated earlier, the stage of framing issues in this case had not been reached when the ruling was delivered. In those circumstances, even granted that we allowed the appeal and remitted it for re-trial as prayed by Mr. Patel, learned counsel the case would be proceeded with from the stage it had ended at the trial court. As indicated, the stage of framing issues had not been reached. It would therefore, be pre-mature for this Court to set upon framing the issues if the determination of the appeal led to that end.

For the foregoing reasons, the appeal is dismissed with costs.

DATED at ZANZIBAR this day of

JUSTICE OF APPEAL

JUSTICE OF APPEAL

JUSTICE OF APPEAL