

**IN THE COURT OF APPEAL OF TANZANIA  
AT ZANZIBAR**

**ZNZ CIVIL APPLICATION NO. 3 OF 2006**

**SHARIFF AHMED SALIM ..... APPLICANT  
VERSUS  
KULLATEN ABDALLA KHAMIS ..... RESPONDENT**

**(Application for leave to appeal to the Court of  
Appeal from the decision of the High Court  
of Zanzibar at Vuga)**

**(Mbarouk, J.)**

**dated the 17<sup>th</sup> day of July, 2006  
in  
Civil Appeal No. 35 of 2005**

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R U L I N G**

**3 & 17 November 2006**

**MROSO, J.A.:**

On 17<sup>th</sup> July, 2006 the High Court, Mbarouk, J., dismissed the applicant's application for leave to appeal to the Court of Appeal for the reason that the applicant had failed to show in his application any grounds why such leave should be granted. Dissatisfied with the order of dismissal the applicant resorted to this Court by filing a Notice of Motion under Section 5 (1) (c) of the Appellate Jurisdiction Act, 1979.

The applicant was originally the plaintiff in a case which was before the Rent Restriction Board, Case No. 31 of 2004. He lost the case and appealed to the High Court of Zanzibar in Civil Appeal No. 35 of 2005. He lost in the appeal. Not giving up, he sought leave to appeal to this Court and as already pointed out, the High Court dismissed the application.

The application in this Court is supported by the applicant's affidavit which, like the Notice of Motion, is in Kiswahili. Normally such documents should be in English but since the parties are laymen and were unassisted by counsel, I am not making it an issue. The sole reason given for seeking leave to appeal to this Court is gleaned from paragraph 6 of the applicant's affidavit. It is to the effect that this Court should provide legal guidance regarding the rights of a tenant: Whether a landlord can evict his tenant without prior notice or time to prepare to move out of the rented premises.

There is a second prayer in the notice of motion and that is for an order of stay of execution. In order for the Court to

consider such a prayer it has to be moved under the appropriate provisions of the law. Such provision is Rule 9 (2) (b) of the Court of Appeal Rules, 1979. In this application Rule 9 (2) (b) was not mentioned at all and the applicant made no attempt to say under what powers this Court could grant such a prayer. In the case of **Almas Iddie Mwinyi v. National Bank of Commerce and Another**, Civil Application No. 88 of 1998 it was held by this Court that non-citation of the law under which the court is moved renders an application incompetent. Consequently, the prayer for stay of execution would be incompetent. But for reasons which will appear later, I do not need to decide on this point. Now, back to the prayer for leave to appeal to this Court.

I have perused the judgment intended to be impugned in this Court and the question of need for notice to a tenant before he could be evicted was not a ground of appeal to the High Court it. It features only in the submissions. The grounds of appeal to the High Court as can be gleaned from what purports to be the judgment of the High Court read as follows:-

1. The Board Chairperson erred in law in delivering a judgment without even notifying the appellant.
2. The Board Chairperson erred in law in hearing the respondent's defense (sic) in the absence of the appellant.
3. The Board Chairperson erred in law in not considering emergency problem the appellant how that of being be cleaned (sic) in Kenya.

There were two other grounds of appeal which the "High Court" said were a mere repetition of the above listed grounds.

The indication that the applicant complained about being evicted without first having been given notice to vacate can be found in the following words in the judgment. The High Court said

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"However the appellant in his submission, submitted that he is not disporting (sic) very much the subset (sic) entire part of the

Board's decision but he is just complaining as to why the Board heard the case in his absence --- in general the appellant complains about the order of the Board of ordering him to vacate out of the suit premises without giving him time to vacate out of the suit premises ---”

Before considering whether the applicant has raised a legal point fit for consideration by this Court in an appeal, I notice that Appeal No. 35 of 2005 to the High Court was not heard by a Judge of the High Court but by a Regional Magistrate (Yessaya Kayange, RM 1) with extended jurisdiction. The question I ask myself is whether the laws of Zanzibar allow a resident magistrate with extended jurisdiction to sit as the High Court. In other words, the question is whether a Regional Magistrate with extended jurisdiction has jurisdiction to hear appeals to the High Court and give a decision as the High Court.

Section 20 of the Magistrates' Court Act, 1985, No. 6 of 1985, as amended by Act No. 11 of 1986, provides as follows -

“S. 20. The Chief Justice may, by a notice in the Gazette confer extended jurisdiction on a Regional Magistrate or Regional Courts generally”

It will be noted that the section does not say what for the extended jurisdiction will be conferred. That is to say, there is still the question:- the Regional Magistrate is given extended jurisdiction to do what?

Apparently, the Chief Justice has interpreted the section to mean “extended jurisdiction to hear and determine such matters or cases which are triable by the High Court”. Thus, in appointing a Regional Magistrate to exercise extended jurisdiction the Chief Justice proclaimed as follows -

“The Magistrate’s Court Act, No. 6 of 1995.

Extension of Jurisdiction

(Under section 20)

IN EXERCISE of the powers conferred upon me under Section of the Magistrate's Court Act, 1985 (As Amended by section 8 of Act No. 11 of 1986, I HAMID MAHMOUD HAMID, the Chief Justice of Zanzibar do hereby bestow upon (name of Regional Magistrate is stated) Regional Magistrate, extended Jurisdiction to hear and determine such matters or cases which are otherwise determinable or triable by the High Court with effect from (a date is mentioned).

Signed on this (date)  
Hamid Mahmoud Hamid  
Chief Justice of Zanzibar.”

The appointment does not give a clue on the court in which the Regional Magistrate with extended jurisdiction will sit when exercising those powers. Furthermore, neither section 20 of the Magistrates' Court Act, 1985 nor the order or proclamation conferring on a Regional Magistrate extended jurisdiction indicate how the regional magistrate becomes seized of a particular case for hearing or determination. The Chief Justice is left to his own devices.

In Civil Appeal No. 35 of 2005 (the application now before me is based on that appeal) the Chief Justice assigned the appeal to Regional magistrate, Mr. Y. Kayange, in the following manner:-

“Mhe. Y. Kayange, RM Extended Jurisdiction.  
30/9/2005. Ishughulikie rufaa hii ya Extended  
Jurisdiction.

Hamid M. Hamid  
Chief Justice.”

Acting on that assignment, Mr. Y. Kayange, Regional Magistrate with extended jurisdiction, heard the appeal as the High Court. What this implies is that Mr. Kayange was a judge of the High Court, although he had not been appointed a judge of the High Court. But under the High Court Act, No. 2 of 1985 the words “High Court” are defined as “the High Court of Zanzibar as established by the Constitution”.

The High Court of Zanzibar, 1984, (The Constitution). It reads in Kiswahili as follows -



“93. (1) Kutakuwa na Mahkama Kuu ya Zanzibar ambayo itakuwa ndio Mahkama ya kumbukumbu na kuwa na mamlaka yote ya Kesi za Jinai na Hukukia na nguvu nyingine zitazopewa kwa mujibu wa Katiba hii au Sheria nyingine yoyote.”

Sub-section (2) of Section 93 of the Constitution reads -

“(2) Majaji wa Mahkama Kuu watakuwa Jaji Mkuu na Majaji wengine, wasiopungua wawili wataojulikana kama Majaji wa Mahkama Kuu.”

Judges of the High Court are appointed as such by the President, and this is provided for under Section 94 (2) of the Constitution in the following words -

“94 - (1) ---

(2) Majaji wa Mahkama Kuu watateuliwa na Rais kutokana na mapendekezo ya Tume ya Utumishi ya Mahkama.”

Under subsection (6) (a) of Section 94 of the Constitution, the President is empowered to appoint an Acting Judge of the High Court.

Following from those legal provisions, only a Judge of the High Court or an Acting Judge of the High Court can sit as the High Court. Mr. Y. Kayange, Regional Magistrate, does not appear to have been appointed either a Judge of the High Court or an Acting Judge of the High Court. Therefore, he would not have the jurisdiction to sit as the High Court and the powers under extended jurisdiction do not *ipso facto* elevate him to a Judge of the High Court to entitle him to sit as the High Court, as he evidently did. The copy of judgment in High Court Appeal No. 35 of 2005 which was made available to me is entitled -

“IN THE HIGH COURT FOR ZANZIBAR  
HOLDEN AT ZANZIBAR  
CIVIL APPEAL NO. 35 OF 2005  
FROM ORIGINAL DECREE IN CASE

NO. 31 OF 2004 FROM RENT RENT  
(sic) RESTRICTION BOARD

SHARIFF	AHMED	SALIM	.....
APPELLANT			
		(ORG. PLAINTIFF)	
	VERSUS		
KULATEEN	ABDALLA	KHAMIS	.....
RESPONDENT			
		(ORG. DEFENDANT)"	

Then followed the text of the judgment by “Yessaya Kayange, RM 1 with extended jurisdiction”. So, there can be no doubt that the learned Regional Magistrate sat as the High Court where he had no jurisdiction.

I have not been able to find a case from Zanzibar relating to the court in which a Regional magistrate with extended jurisdiction should sit. On mainland Tanzania there are numerous decisions of the Court of Appeal which make it quite clear that a Resident Magistrate with extended jurisdiction (the equivalent of the Regional Magistrate with extended jurisdiction in Zanzibar) when exercising those powers after the High Court has transferred a High Court case to him, be it a trial or an appeal, sits in his court

when hearing such case. Unfortunately also, I have not been able to get any copies of such decisions here in Zanzibar.

The legal position regarding High Court of Zanzibar Civil Appeal No. 35 of 2005 would appear to be that although Mr. Y. Kayange, Regional Magistrate, had been duly conferred with extended Jurisdiction, the Chief Justice should first have transferred the case to the Court of Regional Magistrate. A case file would be opened in that court and would be given a case number of that court. The Chief Justice or other judicial authority designated in that behalf by the Chief Justice would then assign it to Mr. Kayange, Regional Magistrate with extended jurisdiction (or any other such magistrate), to hear it. In the event of an appeal from such decision it would not be from the High Court but from the Regional Magistrate's Court presided over by a Regional magistrate with extended jurisdiction. The Court of Appeal of Tanzania would assume jurisdiction in such appeal under Section 4 (1) of the Appellate Jurisdiction Act, 1979, as amended by Act No. 17 of 1993, which reads as under:-

“4 (1) The Court of Appeal shall have jurisdiction to hear and determine appeals from the High Court and from subordinate courts with extended jurisdiction.”

This issue of jurisdiction was raised by the Court **suo motu**. As both parties to the application are laymen without legal assistance, it would have been futile to ask them to address me on it. It is permissible for the Court to raise the issue of jurisdiction **suo motu**. In **Baig and Butt Construction Ltd v. Hasmat Ali Baig**, (C.A) Civil Appeal No. 9 of 1992 (unreported) this Court raised **suo motu** the question whether a judge of the High Court had jurisdiction to hear a review case regarding an order made by the District Registrar. It said the Judge had no jurisdiction as only the District Registrar could have reviewed the order he had made earlier. So, the review proceedings by the Judge of the High Court were a nullity for want of jurisdiction. This Court set aside the High Court order for being misconceived and incompetent.

In the matter now before me, since the learned Regional Magistrate heard the High Court Appeal as the High Court where he had no jurisdiction the proceedings and judgment he gave would be a nullity. There could not be an appeal against a judgment which was a nullity and, consequently, there would be no need for leave to appeal against that which was a nullity.

But a single judge of this Court has no power to nullify the proceedings and judgment purporting to be of the High Court. Only the full Court has such jurisdiction either in an appeal properly before it or in a revision. All I believe I can do in the circumstances is to strike out the application as incompetent. I so order. The parties may wish to take any appropriate steps, possibly by way of a revision application, to have the proceedings relating to High Court of Zanzibar Civil Appeal No. 35 of 2005 which were before Mr. Kayange, Regional Magistrate with Extended Jurisdiction and what purported to be a High Court judgment expunged. Thereafter, the applicant might wish to prosecute his appeal to the High Court according to law.

Since the issue on jurisdiction was raised **suo motu** by the Court, each party to bear their own costs.

GIVEN at ZANZIBAR this 13<sup>th</sup> day of November, 2006.

J.A. MROSO  
**JUSTICE OF APPEAL**

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

( S.M. RUMANYIKA )  
**DEPUTY REGISTRAR**