

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

(CORAM: MROSO, J.A., NSEKELA, J.A., And MSOFFE, J.A.)

CIVIL APPEAL NO. 86 OF 2006

DR. GABRIEL MICHAEL MUHAGAMA APPELLANT

VERSUS

**1. SALUM ABASS SALUM
2. ABDALLA HIJA SHAMTE
3. ALI SEIF ALI** } **RESPONDENTS**

**(Appeal from the Judgment and Decree of the High
Court of Zanzibar at Vuga)**

(Mbarouk, J.)

dated the 1st day of March, 2006

in

Civil Appeal No. 36 of 2005

JUDGMENT OF THE COURT

10 & 17 November 2006

MSOFFE, J.A.:

This is an appeal from the judgment and decree of the High Court of Zanzibar (Mbarouk, J.) dated the 1st day of March, 2006 in Civil Appeal No. 36 of 2005 allowing the 1st respondent's appeal thereto.

Briefly, in the District Court of Zanzibar at Mwanakwerekwe the appellant sued the 3rd respondent for demolition of a building structure (hereinafter the structure) which, he claimed, the 3rd respondent built on his piece of land. After a trial a decision was given in favour of the appellant on 20/7/2004. The 3rd respondent did not appeal against that decision. Thereafter, the appellant proceeded to execute the decree and the structure was accordingly demolished on 10/12/2004 or thereabout. At the same time the 1st respondent who was not a party to the proceedings in the District Court claimed that he built the structure on a piece of land belonging to him. However, he did not file objection proceedings in the said court. Instead, he filed a suit in the Regional Magistrate's Court at Vuga, Zanzibar, against the appellant, the 2nd and 3rd respondents, claiming a sum of Shs. 12,000,000/= being loss incurred for the demolition of the structure. In a judgment delivered on 29/6/2005 the Court (Kazi, RM) dismissed the suit thereby holding that the land on which the structure was built belonged to the appellant. A decree was accordingly extracted, dated 29th day of June 2005, and signed by Mrs. Rabia Hussein Mohamed, a Regional Magistrate. Dissatisfied,

the 1st respondent preferred an appeal to the High Court of Zanzibar. The High Court allowed the appeal holding that the 1st respondent built the structure on a piece of land belonging to him. The appellant is dissatisfied, hence this appeal. Mr. Mbwezeleni and Mr. Mnkonje from Zanzibar Law Chambers advocated for him. The respondents appeared in person(s).

As already observed, the decree the subject of the appeal to the High Court was not signed by the Regional Magistrate who passed it. Hence, at the hearing of the appeal the following issue was raised. Whether or not in the absence of a signature in the decree by the Regional Magistrate who passed it there was a proper appeal to the High Court. Mr. Mnkonje was of the firm view that under Order XXIII Rule 7 of the Civil Procedure Decree, Cap 8 of the laws of Zanzibar, it was mandatory that the decree in question be signed by the Magistrate who passed it. In the absence of such signature there was no proper appeal to the High Court, he urged citing this Court's decision in **(1) Rashid Abdullah Rashid El Sinani (2) Oman International Club v (1) Mussa Haji Kombo**

(2) **Ali Mohamed Mussa**, Civil Appeal No. 103 of 1998 (unreported).

On the other hand the respondents did not say much on the point. At best, their submission was that, as laymen, there wasn't much they could say on the point. They were of the view that the Court could decide the issue on the basis of the law available on the point.

We think it is pertinent to begin by quoting the provisions of Order XXIII Rule 7 of the Civil Procedure Decree. The Rule reads as follows:-

"7. The decree shall bear the date on which the judgment was pronounced, and, when the **Judge, or, in the High Court**, a Registrar has satisfied himself that the decree has been drawn up in accordance with the judgment, he **shall** sign the decree.

(Emphasis added)

The question we ask ourselves here is whether the judge envisaged under the above provision covers a Regional Magistrate.

Article 134 (1) of the Constitution of Zanzibar, 1984 provides a definition of a judge. It reads:-

"Jaji" maana yake ni Jaji wa Mahkama Kuu na linajumuisha Kaimu Jaji.

The High Court Act No. 2 of 1985 does not define a judge or a Magistrate.

S. 18 (1) of the Magistrates' Court Act No. 6/85 establishes a Regional Magistrates' Court in every Region of Zanzibar. Under S. 2 of this Act a Magistrate is defined as follows:-

"Magistrate" includes a primary court magistrate, district court magistrate, resident magistrate, a civil magistrate and a honorary magistrate.

It seems to us here that a resident magistrate and a regional magistrate in the context of the Act refer to one and the same person.

The Interpretation Decree, Cap 1 of the Laws of Zanzibar, also defines a magistrate. The definition under S. 2 (1) thereto reads:-

"Magistrate" means a person or persons duly appointed to hold a subordinate court.

We wish to point here that we have no doubt in our minds that the Regional Magistrates' Court at Vuga is a subordinate court.

It follows that in the light of the Constitution of Zanzibar, 1984, The Magistrates' Court Act, 1985 and the Interpretation Decree there are clear and distinct definitions of a judge and a magistrate. In our view, to put it very simply, the import of the above definitions underscores the fact that a judge sits in the High Court while a magistrate sits in a subordinate court. If so, the question we pose here is this:- Would it then be fair to say that the word "judge" under Order XXIII Rule 7 of the Civil Procedure Decree covers a Regional Magistrate?

In our considered opinion, the answer to the above question is to be found in the Decree itself. S. 2 of the Decree gives, *inter alia*, the following definitions:-

"court", "**civil court**", the "Courts" and court of justice" mean the High Court **and any subordinate court thereto** other than a district court established under the provisions of the Courts Decree or the British subordinate Courts Order.

(Emphasis supplied)

"judge" means **the presiding officer of a civil court.**

(Emphasis supplied)

In the light of the above definitions it seems to us therefore, that since a subordinate court is a civil court the "judge" mentioned under Rule 7 above includes or covers a Regional Magistrate sitting as a presiding officer of the Civil Court in question. In this sense Mr. Kazi, was a "judge" for purposes of Rule 7.

Our view above is further fortified by the scheme of other provisions of the Decree. For example, Rule 4 of Order XXIII reads in part as follows:-

**"In any case before a subordinate court
the judge may ----"**

(Emphasis supplied)

In the same vein, Rule 5 of the same order also provides:-

**"In any case before a subordinate court
the judge may pronounce ----"**

(Emphasis supplied)

Having said so, the question is whether it was proper for a magistrate other than Mr. Kazi to sign the decree in Civil Case No. 2 of 2005 which was the subject of the appeal to the High Court. Our answer to the question poses no difficulty. The decree was, no doubt, passed by the Regional Magistrates' Court of Vuga in exercise of its original jurisdiction. Therefore, under Rule 7 above the "judge" (Mr. Kazi, RM) was required to sign the decree because he was the one who passed it. After all, the above Rule is couched in mandatory terms! We may add here that there was no room either, for invoking

the provisions of Rule 8 of Order XXIII because there is no evidence that Mr. Kazi had vacated office at the time the invalid decree was signed by Mrs. Rabia Hussein Mohamed.

For the above reason, it follows that the appeal to the High Court was incompetent for want of a valid decree. The question is what happens to an incompetent appeal?

In Robert John Mugo (Administrator of the Estate of the Late John Mugo Maina) v Adam Mollel, Civil Appeal No. 2 of 1990 (unreported) a decree in appeal was signed by a District Registrar instead of the judge who passed it, as required under Order 39 Rule 35 (4) of the Civil Procedure Code, 1966 (which is *in pari materia* with Order 46 Rule 35 (4) of the Civil Procedure Decree).

The Court stated:-

We agree --- that a decree in appeal which is not signed by a judge as required by Order 39 Rule 35 (4) invalidates a decree -----

Therefore, for the reasons stated above, we are bound to sustain the preliminary objection made by counsel for the respondent -----

With that end in view, we hereby direct that the appeal be struck out from the register under Rule 82 with costs. ----"

In the case of **Rashid Abdullah Rashid El Sinani** (supra) this Court, citing the cases of **Robert John Mugo, Dr. Masumbuko R.M. Lamwai v Venance Francis Ngula and Another**, Civil Appeal No. 56 of 1997 (unreported) and **Dr. Fortunatus Lwanyantika Masha v Dr. William Shija and Another**, Civil Appeal No. 43 of 1996, held that there is no difference between extracting an invalid decree, as was the case in the appeal to the High Court in this matter, and failure to extract a valid decree. In all such cases the appeal is incompetent and is struck out.

So what happens to this appeal and the appeal to the High Court the subject of this appeal? In fairness to the appellant, under normal circumstances this would otherwise be a competent appeal because it is based on a properly extracted decree of the High Court.

However, since the appeal to the High Court was based on an invalid decree and hence incompetent, it will follow that this appeal is also incompetent because it has no leg to stand on. Therefore, there is no room for us to determine the appeal on merit. Thus, we declare it a nullity and strike out the proceedings before the High Court. In similar vein, we strike out the appeal to this Court. We make no order as to costs.

If the 1st respondent wishes, he is still free to pursue an appeal to the High Court by filing an application for enlargement of time to file a notice of appeal. He can do so after obtaining a valid decree of the Regional Magistrates' Court at Vuga.

DATED at ZANZIBAR this 17th day of November, 2006.

J.A. MROSO
JUSTICE OF APPEAL

H.R. NSEKELA
JUSTICE OF APPEAL

J.H. MSOFFE
JUSTICE OF APPEAL

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




(S.M. RUMANYIKA)
DEPUTY REGISTRAR