

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

(CORAM: OTHMAN, C.J., MSOFFE, J.A., And MBAROUK, J.A.)

CIVIL APPEAL NO 98 OF 2011

- 1. THABIT RAMADHAN MAZIKU**
- 2. KISUKU SALUM KAPTULA..... APPELLANTS**

VERSUS

- 1. AMINA KHAMIS TYELA**
- 2. MRAJIS WA NYARAKA ZANZIBAR..... RESPONDENTS**

**(Appeal against the Judgment and Decree of the Regional Court of Zanzibar
with extended jurisdiction
at Vuga)**

(George J. Kazi, (RM,Ext.J.))

dated the 6th day of June, 2011

in

Civil Case No. 24 of 2009

JUDGMENT OF THE COURT

30th November & 7th December, 2011

OTHMAN, C.J.:

Thabit Ramadhani Maziku and Kisuku Salim Kaputa, respectively the 1st and 2nd appellants, appeal against the judgment of the Regional Court of Zanzibar (Kazi, Resident Magistrate with extended jurisdiction), which, *inter alia*, decreed that registered sale deed No 295 of 2008 be deleted

from the Land Registrar Book Vol II A-2 held by Mrajis wa Nyaraka, Zanzibar (i.e. Registrar of Documents) the 2nd respondent.

At the hearing of the appeal, on 30/11/2011, the appellants, unrepresented, appeared in person. The respondents, who were duly served did not enter appearance and so the Court proceeded under Rule 112(2) of the Court of Appeal Rules, 2009.

In summary, on 21/10/2009 at the Regional Court of Zanzibar with extended jurisdiction at Vuga, Amina Khamis Tyela, the 1st respondent (plaintiff) instituted a suit against the appellants and Mrajis wa Nyaraka, Zanzibar who was impleaded as the 3rd defendant. On 5/11/2009, the appellants filed their written statement of defence. The trial court framed issues for its determination on 20/11/2009. Hearing of the parties' evidence commenced on 20/11/2009 and the judgment in favour of the 1st respondent was delivered on 6/6/2011. Aggrieved, the appellants preferred this appeal.

Having closely examined the record and account taken of the submissions by the appellants, we are of the considered view that ground 2 of the appeal is sufficient to dispose of the appeal. It reads:

"That the Honorable Resident Magistrate with extended Jurisdiction erred in law and facts in giving judgment on failure to give ruling for the raised preliminary objection."

The appellants, lay persons, were emphatic that the learned Resident Magistrate with extended jurisdiction had committed an appealable error by pronouncing the judgment in the case before giving his ruling on the preliminary objection they had raised.

Having carefully scrutinized the entire record, it is plain therein that the appellants in their written statement of defence had raised a preliminary objection, containing four points, namely: (a) the inadmissibility of certain annexures to the plaint, (b) the court's lack of jurisdiction under the Land Tribunal Act, 1994 to entertain and determine the suit, (c) limitation of the suit and (d) the 1st respondent's *locus standi*.

Hearing of the preliminary objection took place on 3/9/2009. The learned Resident Magistrate with extended jurisdiction reserved his ruling for 16/9/2009. The record is silent as to what, if anything, transpired on that day. None of the parties were present in court on 5/11/2009 when it next resumed. On 20/11/2009, the court framed issues for its

determination and immediately began to hear the 1st respondent's case. The trial continued until delivery of the judgment on 6/6/2011.

The law is well established that a Court seized with a preliminary objection is first required to determine that objection before going into the merits or the substance of the case or application before it. In **Bank of Tanzania Ltd V. Devran P. Valambia**, Civil Application No 15 of 2002 (CAT) (unreported) the Court observed:

"The aim of a preliminary objection is to save the time of the court and of the parties by not going into the merits of the application because there is a point of law that will dispose of the matter summarily."

Furthermore, given that one of the points raised in the preliminary objection concerned the court's jurisdiction, it was therefore even more imperative for it not only to be heard, but also to be determined fully by the trial Court before continuation of the trial of the main suit. An issue of jurisdiction on a preliminary objection has always to be determined first (See, **Shahida Abdul Hassanali V. Mahed Mohamed Gulamali Kanji**, Civil Application No. 42 of 1999 (CAT) (unreported)).

With respect, therefore, the failure by the learned Resident Magistrate with extended jurisdiction to deliver the ruling on the preliminary objection which he scheduled on 16/9/2009 constituted a colossal procedural flaw that went to the root of the trial. It matters not, whether it was inadvertent or not. The trial court was duty bound to dispose of it fully, by pronouncement of the Ruling before dealing with the merits of the suit. This it did not do. The result is to render all the subsequent proceedings a nullity. Accordingly, we find merit in ground 2 of the appeal, which as we stated earlier is sufficient to bring this appeal to a close.

Before concluding and as the appeal is before us, there is an important matter that drew our attention as it relates to the pleadings and the conduct of the trial. As we had stated earlier, in "Marekebisho ya Madai" filed by 1st respondent at the Regional Court of Zanzibar at Vuga on 21/10/2009, Mrajis wa Nyaraka, Zanzibar (2nd respondent) was impleaded as the 3rd defendant. The prayer therein sought the court's order for it to cancel sale deed No 295 registered on 18/6/2008 and for it to issue a new one in the 1st respondent's name. The main issue framed by the court for trial was whether or not the sale deed registered and issued by the 2nd

respondent was issued against the law regulating the registration of documents.

From the record, we could not trace any written statement of defence filed by the 2nd respondent. This notwithstanding, it participated in the trial by cross-examining both the 1st respondent's witnesses (PW1 and PW3) as well as the 1st appellant (DW1). On 11/04/2011, the trial court ordered the same 2nd respondent to be summoned as a court witness. Shabi Foum Haji (CW1) testified on 27/04/2011. The decree ordered that the sale deed be deleted from the Register held by the 2nd respondent.

With great respect, not only were the pleadings incomplete, but the whole procedure that was followed thereafter in which the 2nd respondent was involved in the case was highly irregular. No written statement of defence by the 2nd respondent is on record. Reading the plaint as a whole, it was a necessary party. Without having filed its written statement of defence, we are at a loss how it could have been allowed to participate in the trial as a party and accorded the right to cross examine witnesses. Furthermore, even assuming that it was a necessary party, properly on record, we do not see how it could, in another capacity, have been summoned to testify as a court witness. These serious irregularities dent

the propriety and correctness of the conduct of the trial proceedings. They are sufficient for us to declare them a nullity, but as we have already done so in respect of ground 2 of the appeal, it would be redundant for us to do so again. In the interest of a fair trial and given the directions we are about to give, we considered it important to point out these serious irregularities. We wish to emphasize that in the trial of the suit, it is essential that all the procedural requirements clearly spelt out in the Code of Civil Procedure Decree, Cap 8 of the Laws of Zanzibar be scrupulously observed.

In the final analysis and for the forgoing reasons, we are compelled to exercise this Court's revisional jurisdiction under section 4(2) of the Appellate Jurisdiction Act, Cap 141 R.E. 2002 which we hereby do, to declare a nullity and to quash all the trial proceedings and orders with effect from 5/8/2009. Accordingly, the judgment and decree are set aside. We direct that the preliminary objection be expeditiously heard *de novo* before any Resident Magistrate with extended jurisdiction. In the circumstances, there shall be no order as to costs. The appeal is allowed.

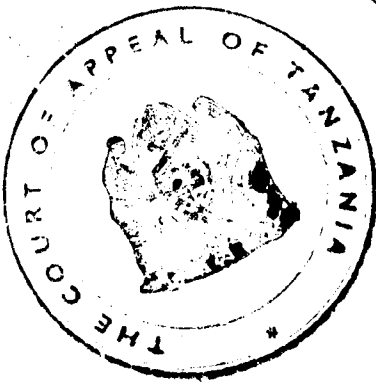
DATED at **ZANZIBAR** this 2nd day of December, 2011.

M. C. OTHMAN
CHIEF JUSTICE

J. H. MSOFFE
JUSTICE OF APPEAL

M. S. MBAROUK
JUSTICE OF APPEAL

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



M. A. MALEWO
DEPUTY REGISTRAR
COURT OF APPEAL