IN THE COURT OF APPEAL OF TANZANIA

AT ZANZIBAR

(CORAM: RUTAKANGWA, J.A., MBAROUK, J.A., And BWANA, J.A.)

ZNZ CIVIL APPLICATION NO. 3 OF 2012

1. ALPITOUR WORLD HOTELS & RESORTS S.p.A.
2. KIWENGWA STRAND HOTEL LIMITED } **..... APPLICANTS**
3. JUMBOTURISMO S.A

VERSUS

KIWENGWA LIMITED ..... RESPONDENT

(Application from the Ruling and Order of the High Court of Zanzibar Holden at Vuga)

(Mwampashi, J.)

Dated the 25th day of July, 2012
in
Civil Case No. 16 of 2011

RULING OF THE COURT

5th & 11th December, 2012

RUTAKANGWA, J.A.:

The Applicants herein **were** Plaintiffs in Civil Case No. 16 of 2011 (the suit) in the High Court of Zanzibar, at Vuga, in which the Respondent **was** the Defendant. We have used the words "were" and "was" advisedly for reasons which will shortly become obvious.

The Respondent, through a notice of preliminary objection, moved the High Court to strike out the plaint for want of cause of action and proper verification. The Applicants did not concede the points of objection. The parties, through their counsel, lodged written submissions in support of their respective positions on the issues of law raised. Mr. Rosan Mbwambo, learned counsel, advocated for the Applicants/Plaintiffs, while Mr. Nassor K. Mohamed, learned counsel, advocated for the Respondent/Defendant.

In his considered ruling the learned trial High Court judge found the raised two points of law to be wanting in merit. He accordingly dismissed the preliminary objections. All the same, the learned judge found it worthwhile to, **suo motu**, go further and determine whether or not the suit had been properly jointly instituted by the three Plaintiffs. We give him the liberty here to tell it himself. In his determination, he said:-

> *"Notwithstanding the above findings upon a thorough perusal of a 33 paragraph plaint and in consideration of the fact that the plaintiffs' rights and reliefs appear not to arise from same acts or transaction, it has come to a*

considered view of this court that the dispute between the parties can be efficiently tried if each of the plaintiffs brings her own separate suit against the defendant. The joinder of Plaintiffs in this suit will not only delay the trial of the suit but it will also make it more complex. It is a settled view of this court that from the nature of the suit separate suits will not simplify the trial but will also do away unnecessary delays."

He accordingly ordered each Plaintiff to "file her own separate suit against the Defendant and no fees for the new separate suit (sic) to be paid."

The learned judge's order aggrieved the applicants/plaintiffs, hence this application for revision. The application has been instituted by notice of motion under section 4(2) and (3) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2002 and Rules 48, 49 and 65 of the Court of Appeal Rules, 2009. The competence of the application has not been challenged and we have located no reason for doubting its competence.

In the notice of motion and its supporting affidavit, the applicants have cited several grounds upon which this Court may predicate its

discretion to revise and quash the order of the learned High Court judge. For our present purpose we have gleaned therefrom two crucial grounds. These are:-

> *(i) That the Applicants were deprived of an opportunity to be heard when the learned judge,* ***suo motu*** *raised, considered and resolved the issue as to joinder of Plaintiffs and the applicability of the provisions of Order 1 rule 2 of the Civil Procedure Decree, Cap 8 of the Laws of Zanzibar and;*
>
> *(ii) That the High Court while ordering the three Plaintiffs to file separate suits did not make any order on the status of the suit.*

The parties in these proceedings were represented by the same counsel as in the High Court. Both counsel lodged written submissions which they adopted on the date of hearing without further oral submissions. We genuinely acknowledge with gratitude their industry and their help to us. Given the limited scope of our ultimate order we, unfortunately, do not intend to canvass every point raised by them in their

instructive submissions. We are of the considered opinion that if we uphold the first ground of complaint listed above, then the suit, which is definitely languishing in limbo, will be given back its life and the other issues will be raised and canvassed by the parties in and decided by, the same trial High Court.

The submission of Mr. Mbwambo on this crucial issue was brief but focused. He is contending, and he has not been contradicted on this, that the issue of misjoinder of the plaintiffs was not one of the objections raised by the defendant to be determined by the High Court. It was his strong submission that the learned trial judge having noted that there was a legal issue of misjoinder of plaintiffs, he should have requested the parties to address him on it before determining it. By proceeding to determine the issue without affording them opportunity to be heard, he violated their natural right to be heard.

We have also gathered from the affidavit that had the learned judge heard the applicants, they:-

> *would have seized the opportunity to show...the existence of sisterhood relationship*

between the Applicants on the one hand and the prior relationship between the Applicants and the Respondent.

It is further averred in the said affidavit that had the Applicants been heard by the learned judge, they would have demonstrated that the joinder of the Plaintiffs was the most convenient mode of prosecuting their claims and would in no way have caused any delay, embarrassment or complexities in the trial of the suit. These averments were not denied by the respondent at all. The Applicants are also claiming that they were denied of their legal right to elect "as to which of them would proceed with the suit or to file a separate suit."

Neither, in the counter-affidavit nor in the written submissions, does Mr. Nassor dispute the fact that the learned judge decided the issue raised **suo motu** without, at least, affording the Applicants a hearing on the issue. He equally does not dispute that this was a violation of the cardinal principle of natural justice that no one should ever be condemned unheard. He contented himself with his uncontested assertion, that the learned judge had a discretion under the law, to order separate trials.

The crucial issue we have to determine here, is whether or not the learned trial judge acted fairly to the applicants, at least, in raising the pointed out issue **suo motu** and proceeding to determine it to their prejudice, without hearing them. In approaching this issue, we are comforted by our realisation that it ought not to detain us much as the law governing it is well settled, as we shall presently demonstrate.

In the case of case **Abbas Sherally and Another v. Abdul Sultan H. M. Fazalbay**, Civil Application No. 23 of 2002 (unreported), this Court thus succinctly held:-

> *the right of a party to be heard before adverse action or decision is taken against such a party has been stated and emphasized by the Court in numerous decisions. The right is so basic that a decision which is arrived at in violation of it will be nullified even if the same decision would have been reached had the party been heard because the violation is considered to be a breach of natural justice.*

See, also, **Meis Industries Ltd v. Mohamed Enterprises (T) Ltd**, Civil Reference No. 2 of 2011 (unreported).

After giving due consideration to the affidavits before us as well as learned counsel's submissions and Order 1, rule 2 of the C.P.C., we are satisfied that the learned High Court Judge was perfectly justified in raising the issue of misjoinder of plaintiffs even at the stage of composing his ruling. That is, however, the furthest we could afford to go along with him. That said, we respectfully hold that after opining that there was a crucial issue to be resolved in the case, he ought to have given the parties opportunity to be heard before proceeding to render his decision thereon, a decision which has apparently adversely affected the applicants. This, then, was a clear breach of one of the cardinal rules of natural justice as adamantly stressed by the Applicants and not disputed by the Respondent: see also, **Raza Somji v. Amina Salum** [1993] T.L.R. 208 on this.

In view of the above findings, we find ourselves constrained to grant this application. We accordingly revise, quash and set aside that part of the impugned ruling ordering the plaintiffs to file separate suits. The suit of the

plaintiffs which had in effect ceased to exist is hereby given a fresh lease of life. The High Court should proceed with the suit from the stage of the ruling in respect of the preliminary objections as modified by this order. It may pursue the issue of misjoinder of Plaintiffs, so long as the parties are heard on the issue. The Applicants to have their costs in these proceedings.

DATED at **ZANZIBAR** this 7th day of December, 2012.

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

M.S. MBAROUK
JUSTICE OF APPEAL

S.J. BWANA
JUSTICE OF APPEAL

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

Z.A. MARUMA
DEPUTY REGISTRAR
COURT OF APPEAL