

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

CIVIL APPEAL NO. 27 OF 2013

(CORAM: MBAROUK, J.A., LUANDA, AND J.A. And JUMA, J.A.)

HOTELS AND LODGES (T) LIMITED..... APPELLANT

VERSUS

**1. THE ATTORNEY GENERAL }
2. CHAPWANI HOTELS LIMITED } RESPONDENTS**

**(Appeal from the judgment of the High Court of Zanzibar
at Vuga)**

(Mwampashi, J.)

dated 15th day of February, 2013

in

Civil Case No. 32 of 2011

JUDGMENT OF THE COURT

3rd & 10th December, 2013

JUMA, J.A.:

This appeal lodged by Hotels and Lodges (T) Ltd is directed against the Ruling and Drawn Order dated 15th February, 2013 delivered by the High Court of Zanzibar at Vuga in Civil Case No. 32 of 2011. After hearing the preliminary objection raised by the 2nd respondent Chapwani Hotels Limited, Mwampashi, J. sustained the objection and dismissed the appellant's suit. In his Ruling, the learned Judge concluded that the

appellant company was non-existent under the Companies Decree of Zanzibar, and as such, the appellant could not in law have been granted lease by the Revolutionary Government of Zanzibar.

Appellant's Memorandum of Appeal discloses the following grounds:

- 1. That the Honourable trial Court erred in law and in fact when it entertained a substantial issue that would require presentation of evidence and detailed submission, through a point of preliminary objection and therefore its subsequent dismissal of the suit based on that point was erroneous or based on erroneous procedure in law.*
- 2. That the Honourable trial Court erred in law in holding that section 359 of the Companies Decree-Chapter 153 of the Laws of Zanzibar, renders the appellant not able to hold land in Zanzibar while the provision neither restricts holding of land by a foreign company nor affects the rights to hold land by a non-Zanzibari person.*
- 3. That the Honourable trial Court erred in law and in fact in failure to consider and give effect to section 46 of the Land Tenure Act No. 12 of 1992 (as amended) in so far as land lease to non Zanzibari persons is concerned.*

The three grounds of appeal in essence contend that the preliminary objection by the 2nd respondent did not raise pure points of law to warrant the dismissal the suit without hearing evidence from the parties.

The background to this appeal can be traced back to the 2nd November, 2009, when the appellant and the Revolutionary Government of Zanzibar signed a land lease agreement. Under this agreement the appellant rented a 0.13 Hectares of land at Forodhani for purpose of building a restaurant. Rent was paid quarterly at the rate of USD 3000 to the account of Stone Town Development and Conservation Authority. Two years into the agreement problems emerged when sometime in April 2011 the appellant was informed that the Revolutionary Government of Zanzibar had decided to cancel the land lease agreement with the appellant. The appellant was also informed of the Government's intention to enter into a new lease agreement with the 2nd respondent over same parcel of land. Aggrieved by the turn of events, the appellant instituted Civil Case No. 32 of 2011 in the High Court of Zanzibar against the Attorney General of Zanzibar (Chief Legal Advisor of the Government of Zanzibar) and the 2nd respondent herein. The appellant asked the High Court of Zanzibar to

declare valid, its lease agreement with the Government of Zanzibar. The appellant also urged the trial High Court to invalidate the lease agreement which the Government of Zanzibar had purportedly signed or intends to sign with the 2nd respondent. The appellant had alternative prayer urging the High Court to oblige the Government of Zanzibar to pay the appellant a sum of Tshs. 1,764,000,000/= as compensation for loss of the income which the appellant had anticipated for the 49 years of lease.

Through its Written Statement of Defence to the Amended Plaint, the Attorney of Zanzibar did not deny the fact that the appellant and the Government of Zanzibar, had on 2nd November, 2009, signed a land lease agreement. But, the Attorney of Zanzibar was quick to point out that the lease agreement between the Government of Zanzibar and the appellant was void because there was an earlier lease agreement between the 2nd respondent and the Government of Zanzibar which was still valid.

In its own statement of defence, the 2nd respondent included preliminary points of objection which were sustained by the trial court, precipitating this appeal. The trial High Court considered the objection contending that the appellant company had not complied with legal

requirements to enable it to trade and own land in Zanzibar. The trial court also considered the objection contending that the Government of Zanzibar could not enter into the lease agreement with non-existent company like the appellant was. In his Ruling, the learned trial Judge sustained the preliminary objection and held that the Government of Zanzibar had granted lease over land to a company that did not exist in Zanzibar, but also to a company that was carrying its business in Zanzibar illegally. To the learned trial Judge, the appellant company had no case and at very least its case was hopeless.

At the hearing of the appeal the appellant was represented by Mr. Walter Chipeta, learned Advocate. The 2nd respondent was represented by two learned Advocates, Mr. Hamid Mbwezeleni and Mr. Salim Mkonje. The appellant, through the services of Mr. Chipeta, and the 2nd respondent through Mr. Mbwezeleni, filed their respective written submissions and list of authorities based on three grounds of appeal. Mr. Ali Ali Hassan the learned Senior State Attorney who appeared on behalf of the Attorney General of Zanzibar did not file any written submissions. He, therefore, prayed and the Court obliged that the substantive hearing of this appeal

should proceed *ex parte* as against the Attorney General of Zanzibar under Rule 106 (10) of the Tanzania Court of Appeal Rules, 2009.

The gist of the appellant's written submissions and oral elaboration thereof by Mr. Chipeta is that the learned trial judge should not have sustained the preliminary points of objection over disputed substantive issues of fact thereby infringing the settled principle that for the preliminary points of objection to be sustained, the pleadings must raise pure points of law. Mr. Chipeta pointed out that instead of basing his Ruling on pleadings (Amended Plaint and Defendants' Written Statements of Defence) before him; the learned Judge erred in law by taking into account the oral arguments which two learned Advocates (Mr. Omar Mmadi and Mr. Mulamula) respectively made at the hearing of the points of objection. According to Mr. Chipeta, the learned trial Judge should not have allowed Mr. Mmadi to tender a letter purporting to be from the Registrar of Companies as evidence tending to prove that the appellant company was not incorporated under the Companies Decree of Zanzibar. Similarly, Mr. Chipeta faults the learned trial Judge for regarding as evidence the oral argument of Mr. Mulamula wherein he had suggested

that the appellant company may not have been registered under the Companies Decree of Zanzibar.

On his part, Mr. Mkonje opposed this appeal and wholly supported the Ruling of the learned trial Judge's decision to dismiss the appellant's suit on preliminary points of objection. Mr. Mkonje contended that the trial judge was entitled as he did, to ask Mr. Mulamula whether the appellant company was in fact registered in Zanzibar. According to Mr. Mkonje, since Mr. Mulamula had conceded that the appellant company was not registered under the Companies Decree of Zanzibar, the learned trial Judge was entitled to not only sustain the objection on the ground that appellant did not exist in Zanzibar, but also to conclude that the appellant company could not enter into any valid lease agreement with the Government of Zanzibar. Mr. Mkonje believed that Order XIV Rule 6 of the Civil Procedure Rules, Cap. 8 of the Laws of Zanzibar permitted the learned trial Judge to rely on the "evidence of admission" which Mr. Mulamula made during the hearing of the preliminary points of objection.

We have considered the submissions of the learned counsel for the appellant and for the 2nd respondent, and examined the Ruling of the High

Court subject of this appeal. In the course of our determination of this appeal we have taken note of the fact that the evidence, which the learned trial Judge relied upon in his Ruling, was obtained from oral arguments of the learned counsel during the hearing of the points of objection.

It seems to us that the main issue outstanding for our determination is whether the learned trial Judge was correct to determine the preliminary points of objection by looking for "evidence" that was obtained outside the parameters of the pleadings. We think that pure points of law for the purposes of determination of preliminary objections arising from suits must be found strictly within the parameters of the pleadings. This has been the position taken by this Court ever since the decision of the Eastern African Court of Appeal in **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696**. This Court has determined the existence or otherwise, of pure points of law by looking at what the parties have stated in their pleadings and not from any other matters that are outside the parameters of the pleadings. (See- **Shahida Abdul Hassanali Kassam v. Mahed Mohamed Gulamali Kanji**, Civil Application No. 42 of 1999 and **Hezron M. Nyachiya vs. 1. Tanzania Union of Industrial**

and Commercial Workers 2. Organization of Tanzania Workers Union, Civil Appeal No. 79 OF 2001 (both unreported).

In **Mukisa Biscuit Manufacturing Co. Ltd** (supra) the Eastern African Court of Appeal, Law J.A., at page 700, stated the essence and strict parameters for determination of pure points of law:

*"...So far as I am aware, a preliminary objection consists of a **point of law which has been pleaded** or **which arises by clear implication out of the pleadings**...Examples are an objection to the jurisdiction of the Court, or a plea of limitation..."*[Emphasis added].

Pure point of law must be elicited from what has been pleaded or must be implied from reading the pleadings. We think that the law is now settled that the parameters for determination of pure points of law for purposes of preliminary objections are restricted within the confines of the pleadings. For the purposes of present appeal, the pleadings consist of the amended Plaintiff and amended Written Statements of Defence. Looked at closely, these pleadings show that the question whether the appellant company was registered in Zanzibar is disputed. Similarly, the question whether the appellant company was a registered investor in accordance

with the Zanzibar Investment Promotion and Protection Act No. 11 of 2004, is by implication disputed by the parties in their respective pleadings. In the very first paragraph of its amended plaint, the appellant asserts that *"...the Plaintiff is a limited company incorporated in Zanzibar..."* In our view, this paragraph implies that the appellant would bring evidence during the hearing of the suit to prove the fact that it was incorporated in Zanzibar. The implication of this assertion is that the appellant has the requisite legal capacity to enter into the lease agreement with the Government of Zanzibar.

The assertion by the appellant is disputed by the 2nd respondent. In the second paragraph of its Written Statement of Defence, the 2nd respondent suggests that during the hearing of the suit, it will bring evidence to prove that the appellant had been incorporated in Dar es Salaam, but not in Zanzibar. By implication of this assertion, the 2nd respondent is suggesting that the appellant could not have entered into any valid Lease Agreement with the Government of Zanzibar:

*"2. That paragraph 1 of the Amended Plaint is admitted on the address for service but is denied on other averments and the Plaintiff is put to strict proof. **It is stated that the***

Plaintiff is incorporated in Dar es Salaam and has not complied with the legal requirement to enable it to trade in and own land in Zanzibar. [Emphasis Added].

It seems to us that in as much as question whether the appellant was a company incorporated in Zanzibar or not is still disputed under the pleadings, no pure points of law can arise. Upon our opinion that pure point of law must be determined from pleadings and not outside the pleadings, we failed to grasp the rationale in Mr. Mkonje's argument that Order XIV Rule 6 of the Civil Procedure Rules provided a window to the trial court to receive the "evidence of admission" from Mr. Mulamula and "evidence of the letter from the Registrar of Companies" through Mr. Mmadi. Pages 167 to 171 of the record of proceedings at the High Court do not support Mr. Mkonje's argument that on 26th November, 2012 when the trial court sat to hear the preliminary points of objection, it also sat to receive evidence of admission from the parties under Order XIV of the Civil Procedure Rules. Order XIV allows parties to give notice to the other requiring the opposite party to admit the truth of any part of the case of the other party. Order XIV Rule 6 which Mr. Mkonje cited states:

6. Any party may at any stage of a suit, where admissions of fact have been made, either on the pleadings, or otherwise, apply to the court for such judgment or order as upon such admissions he may be entitled to without waiting for determination of any other question between the parties, and the court may upon such application make such order, or give such judgment, as the court may think just.

There is nothing in the Ruling of the trial court to suggest that the learned trial Judge invoked the Order XIV Rule 6 as alluded to by Mr. Mkonje. It is unfortunate that in his Ruling, the learned trial Judge relied on the "evidence of admission" by Mr. Mulamula, to conclude that the appellant company was not a registered company under the laws of Zanzibar and the company was as a result operating in Zanzibar illegally. With respect, what Mr. Mulamula submitted on page 169 to 170 of the record of appeal does not amount to unequivocal admission that the appellant was not registered in Zanzibar. Mr. Mulamula stated:

*"...The second point of objection on the question that the plaintiff's company is not incorporated in Zanzibar **we do argue that the suit whether the company is incorporated and allowed to do business in Zanzibar or not is the question to be raised in the trial and not***

***as points of objection.** I would however admit that the plaintiff's company is not registered in Zanzibar but as I have hinted above this alone is not a good ground of denying the company her right to sue for damages and compensation."*[Emphasis added].

We also think that the learned trial Judge erred in regarding the oral arguments of the two learned counsel (Mr. Mmadi and Mr. Mulamula) during the hearing of preliminary points of objection, to be evidence of proof of lack of registration of the appellant company in Zanzibar. We also think that the learned trial Judge erred in law in allowing Mr. Mmadi to tender as evidence, a letter from the Registrar of Companies to prove to the trial court that the appellant company was not registered in Zanzibar. The learned trial Judge should have restricted himself to the pleadings when determining preliminary points of objection.

The learned Judge was evidently and wrongly influenced by the evidence from the bar when he suggested that:

*"...the trial court could not wait to receive evidence regarding the legality of the lease to the appellant company **because there is admission and enough evidence that the appellant company was in fact carrying its business illegally.**"*

Apart from bringing in matters that are outside the parameters of pleadings while considering the preliminary objection, the procedure the trial court adopted to receive "evidence" from the bar contravenes Order XXI rules 7 and 8 of the Civil Procedure Rules, Cap. 8 of the Laws of Zanzibar which are couched in mandatory language on how evidence shall be taken in Zanzibar:

*7. Save as otherwise provided in this Order, the evidence of the witnesses in attendance **shall** be taken orally in open court, or, with the consent of all parties, in chambers, in the presence and under the personal direction and superintendence of the Judge.*

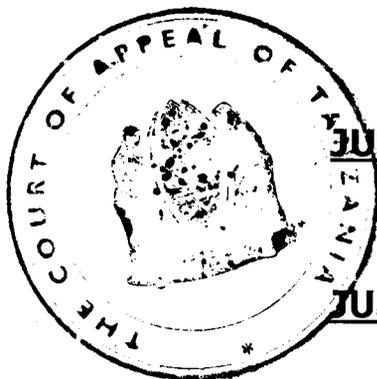
*8. In all civil cases, save such cases as fall within the provisions of rule 18, **the evidence of each witness shall be taken down in writing**, in the language of the court, by or in the presence and under the personal direction and superintendence of the Judge, not ordinarily in the form of question and answer, but in that of a narrative, and, if so required by the witness or by either party, such evidence shall be read over in the presence of the Judge and of the witness, and the Judge shall, if necessary, correct the same, and shall sign it. [Emphasis added.]*

There is nothing on record to show that when Mr. Mmadi and Mr. Mulamula made their submissions during the hearing of the preliminary objection, they did so as witnesses envisaged under Order XXI rules 7 and 8. This Court has in an occasion provided in Civil Appeal No. 42 of 2010, **1. Abdul Hamad Mohamed Kassam 2. Abdulatiff I. Murukder vs. Ahmed Mbaraka** (unreported) dealt with a question whether legal arguments (submissions) by the learned counsel can take the place of evidence of witnesses for purposes of proof. In **Abdul Hamad Mohamed Kassam** (supra) "*the parties persuaded the trial court, and it accordingly agreed, that the "the suit could be disposed of by legal arguments only without the necessity of calling witnesses."* On appeal to this Court, we asked ourselves whether it was sort of case that could safely be disposed of by legal arguments without calling for oral evidence. We found that since there were some disputed matters, which were not matters of pure law, we concluded that these mixed law-facts matters could not have been decided without resorting to evidence of some sort.

In so far as the present appeal before us is concerned, submissions made by Mr. Mmadi and Mr. Mulamula before the High Court of Zanzibar was not evidence for purpose of proving anything.

The result is that we hereby allow this appeal, quash the Ruling and set aside the Drawn Order of the trial High Court dated 15th February, 2013, and send the case back for trial on the merits by another Judge. Appellant is awarded costs.

DATED at **ZANZIBAR** this 5th day of December, 2013.



M. S. MBAROUK
JUSTICE OF APPEAL

B. M. LUANDA
JUSTICE OF APPEAL

I. H. JUMA
JUSTICE OF APPEAL

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

A handwritten signature in black ink, consisting of several overlapping loops and curves.

Z. A. MARUMA
DEPUTY REGISTRAR
COURT OF APPEAL