

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

CIVIL REVISION NO. 1 OF 2014

(CORAM: MSOFFE, J.A., LUANDA J.A., And MASSATI, J.A.)

DINO KATSAPASAPPLICANT

VERSUS

**1. THINAMY ENTERTAINMENT
2. RESORTS WORLD LTD
3. COSTA GINNA KOPOULOS** }**RESPONDENTS**

**(Application from the decision of the High Court of Tanzania
(Commercial Court) at Dar es Salaam)**

(Nyangarika, J)

Dated the 10th day of December, 2013

in

Commercial Application No. 184/2013

.....

RULING OF THE COURT

22nd & 30th September, 2014

MASSATI, J.A.:

In this application, the Court, has, in exercise of its powers under section 4(3) of the Appellate Jurisdiction Act (Cap 141 R.E. 2002) *suo motu*, decided to call for and revise the proceedings, ruling and order of Nyangarika J, dated 10th day December, 2013, in Miscellaneous Commercial Application No. 184 of 2013 at the High

Court of Tanzania, Commercial Division, so as to satisfy itself as to the correctness, legality and propriety of the finding and order and as to the regularity of the said proceedings.

It is not disputed that on 6th December, 2013, the applicant (as he appears in the present proceedings,) instituted Commercial Case No. 171 of 2013 against the respondents (as they appear in these proceedings) in the High Court of Tanzania, Commercial Division. On the same day, he also instituted Miscellaneous Commercial Civil Application No. 184 of 2013, the subject matter of the present revisional proceedings.

The application was instituted by a Chamber Summons under Order XXXVIII (1) (a)(b)(c) and (d) of the Civil Procedure Code (Cap 33 R.E. 2002). Since, it is the bone of contention here, we shall reproduce the Chamber Summons in extenso:-

CHAMBER SUMMONS

***(Under Order XXXVIII (1) (a) (b), (c), and (d) of the
Civil Procedure Code (Cap 33 R.E. 2002)***

LET ALL PARTIES concerned attend the Honourable
Justice Nyangarika in Chambers on 10th the day of

December, 2013 at 9:00 am O'clock in the forenoon or soon thereafter as the Counsel for the applicant can be heard upon an application for orders that:-

- a) The honorable Court be pleased to dispense with the notice to the respondents.*
- b) The honourable Court be pleased to appoint NEHEMIAH NKOKO and ALLY SHEHE BWANGA as joint of LE GRANDE CASINO and PALM BEACH CASINO the properties of the 1st and 2nd respondents/defendants respectively pending the determination of the suit.*
- c) The honorable Court be pleased to give an order removing the 3rd respondent/defendant one COSTA GINNAKOPOULOUS from the possession, custody and management of said properties.*
- d) The honorable Court be pleased to commit the properties to the possession custody and management of the joint receivers.*
- e) The honorable Court be pleased to confer upon the receiver all such powers as would be exercised by the owners of the properties in the cause of managing the said properties*
- f) The honorable Court be pleased to fix a sum of USD 5,000.00 per day to be paid to each receiver as remuneration for services of the receivers.*

g) Incidentals orders as the Court shall deem necessary be made

h) Cost of and incidental to this application be made.

This application has been taken up by M/S RK Rweyongenza & co Advocates and shall be supported by the grounds set forth in the affidavit of DINO KATPAS, the applicant which is appended thereto together with other grounds to be adduced at the hearing hereof.

It was supported by the affidavit of the applicant. Later on the same day the learned judge issued the following orders in chambers in the absence of the parties.

PROCEEDINGS

Date: /12/2013

Coram: K.M. Nyangarika, J

For the: 1st Respondent

For the 2nd Respondent

For the 3rd Respondent

} All are absent

Upon an application being filed under Certificate of urgency, I order as follows:-

(1) As there is certificate of urgency let the application be called in chambers for orders on 10.12.2013 at 9:00 a.m

(2) The applicant be notified

K.M. Nyangarika
JUDGE
6/12/2013

On the 10th December, 2013, pursuant to that order and contrary to the contents of the Chamber summons which starts with "**LET ALL PARTIES**attend", the High Court invited Mr. Rweyongeza learned Advocate for the applicant, and in the absence of the respondents, and heard him. Later on the same day, the learned judge prepared and delivered a 9 page ruling granting the applicant's prayers. We reproduce below the copy of the extracted order of that ruling:-

ORDER

The applicant has filed an application before this court seeking for the following orders:

- (a) The honorable court be pleased to dispense with the notice to the respondents.*
- (b) The honorable court be pleased to appoint NEHEMIAH NKOKO and ALLY SHEHE BWANGA as joint receivers of the LE GRANDE CASINO and PALM*

BEACH CASINO the properties of the 1st and 2nd respondents/defendants respectively pending the determination of the suit.

- (c) The honorable be pleased to give an order removing the 3rd respondent/defendant one, COSTA GINNAKOPOULOUS from the possession custody and management of the said properties.*
- (d) The honorable court be pleased to commit the properties to the possession custody and management of the joint receivers.*
- (e) The honorable court be pleased to confer upon the receiver all such powers as would be exercised by the owners of the properties in the cause of managing the said properties.*
- (f) The honorable court be pleased to fix a sum of USD 5,000.00 per day to be paid to each receiver as remuneration of the services of the receivers.*
- (g) Incidentals orders as the court shall deem necessary be made.*
- (h) Costs of and incidental to this application be made.*

This application coming for orders on this 10th day of December, 2013 before Mr. Justice K.M. Nyangarika, Judge, in the presence of Mr. Richard Rweyongeza, counsel for, the applicant but in absence of the respondents.

THIS COURT DOTH HEREBY ORDERS as follows:

I have formed an opinion that the application must succeed as it is just and convenience that a receiver should be appointed as prayed.

I make order pursuant to rule 1(a)-(d) of order 38 of CPC, that:

- (a) The applicant be and is hereby dispensed with the requirement of notice to the respondents*
- (b) MR. NEHEMIAH NKOKO and ALLY SHEHE BWANGA be and are hereby appointed interim joint receivers of the LE GRANDE CASINO and PALM BEACH CASINO, the properties of the 1st and 2nd respondents now managed by the 3rd respondent and should signify their consent to act as receivers pending determination of these proceedings or until further orders of this court.*
- (c) The 3rd respondent one, COSTA GINNAKOULOUS, be and is hereby removed from the possession custody and management of the said properties.*

- (d) The court do hereby commits the properties to the possession, custody and management of the joint receivers.*
- (e) This court do hereby confers upon the receivers, all such powers as would be exercised by the owners of the properties in the cause of managing the said properties.*
- (f) A sum of USD 5,000.00 per day is to be paid to each receiver as remuneration for services of the receivers.*
- (g) This court make further orders that upon, attending the said casinos businesses, the receivers shall forthwith deliver a copy of this order to any former directors, officers, employees, agents and shareholders present at the suit premises at the time and the delivery of this order by the receivers shall constitute good and valid service of this order.*
- (h) The receivers are directed to seek further directions from the court, if it becomes necessary by reasons of the casinos businesses being jeopardized by an action of the persons purporting to run the business.*
- (i) Cost of this application shall be cost in the main suit.*

Given under my and seal of this court this court on this 10th day of December, 2013.

BY THE COURT

Signed
K.M. Nyangarika
Judge

The respondents were not amused. They unsuccessfully applied for revision of the proceedings in this Court, in Civil Application No. 225 of 2013 which was struck out for incompetency but the injustice caused by the irregularities still cried out too loudly to be left unattended, hence the present proceedings.

When the Court signified to the parties of its intention to revise the proceedings *suo motu*, Ms. Rweyongeza & Company Advocates learned counsel for the applicant, quickly responded by informing the respondents' counsel, and the Court that they did not intend to object to the respondents' complaints, by their letter dated 21st August, 2014. So when the matter was called on for hearing, Mr. Protace Zake, learned counsel instructed by Ms. Rweyongeza & Company Advocates, informed the Court that he had filed a notice of no objection to the application and

had nothing more to say. The respondents were represented by Dr. Masumbuko Lamwai, and Mr. Adronicus Byamungu, learned counsel.

Despite the applicant's stance Dr. Lamwai submitted albeit briefly, that the ex-parte proceedings and consequent ruling and order of the High Court, were highly irregular and illegal and should be quashed and set aside. He also doubted whether the court had jurisdiction to appoint a receiver in respect of the 1st and 2nd respondents who were limited liability companies. He did not press for costs, and, we think, rightly so.

Much as there was no resistance from the applicant to this application, from what Dr. Lamwai submitted we think two issues were raised. The first is whether, the High Court had jurisdiction to issue receiving orders against the 1st and 2nd respondents which are limited liability companies. The second is whether, if it had such jurisdiction, it was proper for the High Court to have proceeded in the manner it did?

Since the first issue was neither raised, argued nor decided by the lower court, and since even before us, Mr. Zake did not address us on this point, we shall, for now, refrain from deciding that issue to

await an opportune time when it shall have received the benefit of exhaustive consideration. With regard to the second issue, we will begin from the wording of Order XXXVIII (1) of the Civil Procedure Code 1966 (the CPC). It seems clear to us that in the context of that provision generally, any court (as defined in the CPC) has discretion and therefore power to appoint a receiver of any property, if it appears to it, just and convenient, before or after decree. According to MULLA: **THE CODE OF CIVIL PROCEDURE** 16th e.d Vol. 4 p. 278, the object of appointing a receiver is to protect, preserve and manage property during the pendency of a suit, so as to prevent the ends of justice from being defeated. But MULLA also goes on to caution (on p. 3789):-

"The appointment of a receiver is a serious matter involving serious consequences and orders for appointment of a receiver should be made in open court, and not in the summary manner in which directions are given in Chambers in commercial causes."

Unlike some other provisions like O XXXVII r 4 or O XXXIX r 5(4) of the CPC, which expressly permit a court to proceed *ex-parte* in certain circumstances, there is no similar provision in O XXXVIII. There

is a strong presumption therefore, that, once an application is filed under this Order, the ordinary due process of service to the opposite party would be followed.

Contrary to law, the appointment of receivers in the present case was made, not only *ex-parte*, but in a summary manner. The reasons advanced by the applicant there and accepted by the court were based on conjecture but on which the trial court could easily have heard the parties. There was no suggestion that the respondents were served and could not be accessed or were avoiding service. This was contrary even to the preamble of the chamber summons itself which required "**ALL PARTIES concerned**" to attend.... The respondents were therefore condemned unheard and thus in breach of their fundamental right to be heard, without any just cause.

We therefore agree with Dr. Lamwai that, since the respondents were condemned unheard, all the proceedings were highly irregular, and the ruling and order of the High Court dated 10th December, 2013 were illegal. So they are accordingly revised and quashed. It is ordered that

the application *inter partes* be heard *de novo*, before another Judge.

There shall be no order as to costs.

DATED at **DAR ES SALAAM** this 25th day of September, 2014.

J.H. MSOFFE
JUSTICE OF APPEAL

B.M. LUANDA
JUSTICE OF APPEAL

S.A. MASSATI
JUSTICE OF APPEAL

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




Z.A. Maruma
DEPUTY REGISTRAR
COURT OF APPEAL