IN THE COURT OF APPEAL OF TANZANIA

AT ZANZIBAR

(CORAM: OTHMAN, C.J., KIMARO, J.A., And MUSSA, J.A.)

CIVIL APPEAL NO. 119 OF 2015

EXECUTIVE DIRECTOR GOLDEN SANDS HOTEL LTD ZANZIBAR .....APPELLANT

VERSUS

1. THE ATTORNEY GENERAL ZANZIBAR
2. UNION TRUST RESORT LIMITED .....RESPONDENTS

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

(Mwampashi, J.)

dated the 13th day of August, 2014
in
Civil Case No. 119 of 2015

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JUDGMENT OF THE COURT

30th November, & 11th December, 2015

KIMARO, J.A.:-

The appellant was aggrieved by the decision of the High Court of Zanzibar which revoked the lease she had been granted by the Government over a plot of land described by Site Plan No. 275/97 situated at Matemwa in the Northern Region of Zanzibar. The trial court also found that the appellant was entitled to be paid a compensation amounting to

T.shillings 28,000,000/= which were deposited by Union Resort Trust Limited Bank into the account of the Director General Zanzibar Investment Promotion Authority.

In the trial court the appellant was the plaintiff and she sued the Attorney General of Zanzibar, the Director General Zanzibar Investment Promotion Authority, the Executive Secretary, Zanzibar Tourist Commission and the Union Resort Limited of Zanzibar as the first, second, third and fourth defendants respectively.

Through Zanzibar M.M. Law Chambers Advocates, the appellant filed the following grounds of appeal:-

1. That the honourable judge erred in law in not quashing the new land lease after finding the revocation of the Appellant's land lease improper and void.
2. That the honourable judge erred in law and fact in ordering the Second Respondent to pay compensation of TSh. 28,000,000/=to the Appellant which has no basis in law and fact instead of prayed for compensation which was not opposed or traversed during the hearing.

3. That the honourable judge erred in law and fact in ordering the Appellant and the Government of Zanzibar should sit to agree on who should pay compensation for the new plot to be awarded to the Appellant instead of ordering a new plot of same size and amenities with development equal to those of the Appellant to be given to the Appellant.

IN THE ALTERNATIVE

4. That the honourable judge erred in law and fact in not awarding the prayed for compensation which was not opposed or traversed during the hearing after finding the revocation of the Appellant land lease improper and void.
5. That generally speaking the decision is an attempt to legalize an illegal decision of acquisition of the Appellant plot which is contrary to law and all norms of jurisprudence.

Briefly, the facts giving rise to the dispute between the parties are that; the Government of Zanzibar did on 16th May 1997 grant to the appellant a 33 years lease over piece of land described by Site Plan No. 275/97 situate at Matamwe Northern region of Zanzibar (Exhibit P4). The purpose of the lease was construction of a HOTEL COMPLEX. Prior to the Government granting the lease to the appellant, on 14th April, 1997, the Executive

Secretary, Zanzibar Tourist Commission approved the Appellant's hotel plan project (exhibit P3). Exhibit 3 had ten conditions that the appellant had to comply with. The exhibit specifically mentioned that failure to comply with any of the conditions entitled the third respondent to revoke the project. The appellant failed to comply with the conditions and the third respondent revoked the project approval (exhibit P6). The revocation of the project approval was done on 28th November, 2003. Subsequently, on 24th December, 2003 the Ministry of Water, Construction Energy and Lands revoked the lease agreement (Exhibit P11).

After the revocation of the lease agreement the appellant filed a plaint in the High Court of Zanzibar against the respondents as aforesaid claiming for re-instatement of the project with the site plan no 275/97 plus compensation of T.shs.2, 500,000,000/=. Alternatively, the appellant prayed to be offered an alternative land as instructed earlier by the 1st respondent plus compensation of T.shs. 4,000,000,000/=. In further alternative, the appellant prayed for cash compensation of not less than T.shs. 6,000,000,000/=.

During the trial the parties agreed on the following issues:

1. Whether the revocation of the Plaintiff's lease was valid?

2. Whether the Plaintiff is entitled to any compensation.
3. If the answer to the 2nd issue is in the affirmative then how much?
4. Whether the Plaintiff's project was properly revoked by the third defendant.
5. Whether the conditional promise by the Government to provide an alternative plot to the plaintiff was proper.
6. Whether there were fraudulent, misrepresentations and misstatements on the part of the defendant to the plaintiff.
7. What are the reliefs.

After the trial the learned judge made the following orders:-

a) The revocation of the plaintiff's lease and the project approval license in regard to the suit plot is declared not valid for the failure by the 1st defendant i.e. the Government to follow the laid dowm procedure and the rules of natural justice.

b) Notwithstanding the above declaration, under the circumstances of this suit and the reasons abundantly given in the judgment the plaintiff's lease and the project license are nullified and the lease granted to the 4th defendant in regard to the suit plot is declared valid.

c) The government is ordered to honour its promise by granting another plot of land to the plaintiff.

d) The plaintiff is entitled to T.shs. 28,000,000/=deposited by the 4th defendant into the 2nd defendant's account as compensation for its unexhausted improvements taken over by the 4th defendant.

e) Each party to bear its own costs.

When the appeal came for the hearing, Mr. Salim Mnkonje learned advocate, appeared for the appellant. He was assisted by Mr. Hamidu Mbwezeleni learned advocate. The first appellant was represented by Ms. Hamisa Mmanga Makame, learned State Attorney, assisted by Mr. Mohamed Seleman, learned State Attorney. Mr. Nassoro Hamisi, learned advocate represented the second respondent.

In answering the first issue, the learned trial judge held that the revocation of the appellant's lease was not valid. The first respondent did not to comply with the conditions precedent to the revocation. He said the appellant was entitled as of right to revoke the lease agreement because the appellant failed to comply with the conditions of the lease. It failed to develop the land in accordance with the terms of the lease; that is developing the land within three years of being granted the lease (exhibit P11). But before that right could be exercised, the first Respondent was

required to serve a notice to the requiring her to show cause why the lease should not be revoked. Since that procedure was not followed it made the revocation invalid. To support this holding, the learned judge cited the case of **Mbeya Rukwa Auto-parts and Transport Ltd V Jestina George Mwakyoma** [1998] T.L.R. 101

The learned advocates for the appellant faults this finding in the first ground of appeal. Submitting in support of this ground of appeal, the learned advocate, Mr. Mnkonje said that since the revocation was not valid, it meant that the lease had not been revoked. He said the decision of granting the appellant a relief of allocation of another plot of land as compensation was erroneous because the first respondent created a problem of double allocation. The learned trial judge having found that the lease was not properly revoked; said the learned advocate, he had to declare the reallocation of the plot to the second respondent unlawful. He cited the cases of **James Ibambas V Francis Sariya Mosha**[1999] T.L.R.364, **Shilalo Masanje V Lobulu Ngatenya** [2001]T.L.R. 372, **Rashid Baranyisa V Hussein Ally** [2001] T.L.R. 470 and that of **Colonel Kashimiri V Nagender Singh Matharu** [1988]T.L.R. 163 to augment his submission.

The learned advocate also faulted the learned judge for ordering a compensation of T.shillings 28,000,000/= saying that the basis for so doing is unknown. Citing the case of **Abdulla Ahmed V Khatibu Abdalla Makame** CAT Civil Appeal No. 29 of 1990 Zanzibar (Unreported), the learned advocate said compensation is "*restitutio ad intergrum*". It was therefore wrong, said the learned advocate, for the learned judge to order payment of compensation not agreed and accepted by the appellant on land whose lease was not properly revoked.

The learned State Attorney for the first respondent's answer in reply to the first ground of appeal was that the revocation of the lease was the subject of the contest between the parties. That is indeed a factual matter which led the appellant to file the suit in court against the respondents. She submitted further that the lease was revoked under section 48 of the Land Tenure Amendment Act, No. 12 of 2010 for justifiable reasons. One, the appellant failed to comply with the conditions of the lease agreement. She failed to develop the plot within the required period. The developments for which compensation is being asked for were done after the revocation of the lease agreement. She said the learned judge considered irrelevant matters when he said that the procedure for

revocation was not complied with because that matter did not arise in the proceedings. She said the lease agreement was entered into between the parties in 1997 while the revocation was done in 2003. The developments were required to have been completed within a period of three years. Two, the lease agreement was revoked after the cancellation of the approval license for the hotel project. Regarding the cases cited by the learned advocate for the appellant the learned State Attorney said they are not relevant. On the issue of compensation, the learned State Attorney said the relationship between the appellant and the first respondent started when the lease agreement was executed between the parties and not prior to that period. In any event, said the learned State Attorney, the lease agreement was made between a company and the respondent while the respondent brought evidence showing that prior to that, there was sale of land between individuals which were different transactions. The appellant was not entitled to compensation. She prayed that the appeal be dismissed with costs.

This is a first appeal to the Court. We understand that the appellant is entitled to have the evidence re-evaluated. See the cases of **Pandya V R** (1957) E.A. cited with approval in the case of **Maramo Slaa Hofu V R and others** Criminal Appeal No. 46 of 2011(unreported) and **Deemay**

Daati and two others V R Criminal appeal No. 80 of 1994 (unreported). The cases are criminal in nature but the principle involved applies also in civil cases.

The issue involved in the first ground of appeal is whether the learned judge erred in holding that the revocation was not valid. With respect to the learned State Attorney we do not think that the learned judge erred. Before he dealt with the question of revocation of the lease agreement, he faulted the cancellation of the approval of the project by the Commissioner for Tourism. He said section 9(2) of the Promotion of Tourism Act, 1996 empowers the Commissioner to cancel or suspend a licence. However, section 9(3) requires the Commissioner to give the licensee an opportunity to defend his case before the cancellation is done. Another condition that had to be complied with is in section 9(5). The revocation had to be advertised in at least one national daily paper. The evidence before him showed that the procedure for the cancellation of the approval project was not followed by the third defendant (The Commission for Tourism). Even the revocation of the lease agreement was done wrongly because the respondent though had justifiable reasons for revoking the lease agreement, the learned judge said, the appellant was entitled to be served

with a notice to show cause before the revocation was done. The learned judge observed that:

> *"As observed on the fourth issue, the question of whether the revocation of the plaintiff's company lease was valid or not, does not only depend on the existence of good grounds for the revocation, but also on whether the laid down procedure and observance of the principles of natural justice. The relevant question here is whether the lease was revoked in accordance with the laid down procedure i.e. whether the plaintiff's company was afforded an opportunity to be heard before the lease was revoked. Did the third defendant serve the plaintiff's company with a notice to show cause before revoking the lease?"*

After a thorough analysis of the evidence that was received in the trial, and having made reference to the case of **Mbeya Rukwa Autoparts V Jestina George Mwakyoma** [1998] T.L.R. 101 decided by the Court, the learned judge made the finding that:

"Because the plaintiff's company was not served with the notice to show cause before the lease was revoked, though there existed good reasons for revoking it, there was a breach of a fundamental right to be heard and for that reason it cannot be said that the plaintiff's company lease was properly revoked. The first issue is therefor found in the negative."

In the case of **Mbeya Rukwa** (supra) Court of Appeal of Tanzania held that:

"The judge's decision to revoke the right of M/S Kagera and the appellant, without giving then the opportunity to be heard was not only a violation of the Rules of justice but also a contravention of the Constitution, hence void and of no effect."

The finding of the learned judge was based on the evidence the parties tendered in court when the suit was heard. We do not therefore agree with the learned State Attorney that the learned judge considered the conditions precedent to the revocation of the lease agreement on evidence which was not before him. He analyzed the evidence of Mr.

Babubhai Menham Ladua (PW1), Mr. Said Omar Fakih (DW2) and Haji Juma Ali (DW3) and then made a finding that the procedure of having the appellant heard before the revocation was done was not complied with. We need to emphasize here that the right to be heard before someone's right is determined is a vital component in the administration of justice and rule of law. This right is recognized in the Constitution of Zanzibar 1984, article 12(1). The article says that all persons are equal before the law. This means that someone's right should not be determined without affording him/her an opportunity to be heard on that particular right. It is a universally recognizes right embodied in various human rights instruments. That is why the learned judge said in the judgment at page 534 that:-

> "...*the validity of any decision especially a decision that has an effect of depriving someone's right, it be administrative or judicial, does not only depend on the existence or good grounds or reasons for making such decision but it is also dependent upon the adherence to laid down procedures which are required to be followed before such decision is made.*"

See the case of **Ngassa Kapuli @ Sengerema V R** Criminal Appeal No.160"B" (Tabora) (unreported) among others.

In the case of **Abdulla Ahmed V Khatibu Abdalla Makame**(supra) the Court when considering whether to interfere with the decision of the trial court held that:

> *"The credibility of witnesses is better assessed by the court which hears the witnesses and sees them as they testify than an appellate court which merely reads the transcript of the record."*

From the finding of the learned judge who held the witnesses and assessed their credibility, we have no reason to fault him. The first respondent had justifiable reasons to revoke the lease but the appellant was entitled to be heard on the matter before the first appellant made the decision to revoke the lease agreement.

As regards the complaint by the learned advocate for the appellant that the learned trial judge erred in not declaring the allocation which was made to the second appellant unlawful we are not in a position to say so because of the circumstances of this case. The appellant had genuine reasons for the revocation. The error made was in the procedure for

revocation. The appellant failed to comply not only with the conditions of the approval of the project but also that of the lease agreement. Both parties were at fault. In the amended plaint, the plaintiff/appellant sought to be reinstated at the suit plot. Alternatively, she sought to be granted an alternative Land ("ARDHI MBADALA"). In the memorundum of appeal, she seeks for an alternative plot of the same size and amenities. To avoid proctracted litigation, we order, as sought by the appellant, an alternative plot of a similar size as ordered by the learned trial judge. We do not think that revocation of the allocation of the plot to the second respondent would have been the best remedy to the parties in the circumstances of the case. The Government of Zanzibar made that commitment in exhibit in P14 where the first respondent wrote to the appellant in its letter dated 10th July, 2007 with Reference No. MM/MUN/K.70/30VOL.X1V/105 that it was ready to offer an alternative plot to the appellant. Exhibit P14 is titled and promises that:

> "KUPEWA ENEO MBADALA LA UWEKEZAJI WA MANDARI YA HOTELI YA KITALII NA BURUDANI:- WIZARA YA Ardhi na usajili inakujulisha kwamba ahadi uliyopewa na serikali ya Mapinduzi ya Zanzibar ya kupatiwa eneo mbadala la Uwekezaji wa hoteli bado ipo pale pale".

As ordered by the learned trial judge we confirm his finding that the government of Zanzibar should honour its commitment.

Regarding the alternative grounds of appeal on compensation, the learned judge was clear in his finding that there was no evidence to substantiate the alternative prayer for compensation. As said earlier the acquisition of the land prior to the appellant being granted the lease agreement was made between individuals. The lease agreement is between the government and a legal person who are different entities. We do not think that the suggestion made by the learned judge that the parties should sit together for negotiations on who should pay compensation and to whom and the quantum has any room for discussion. The first respondent has to abide by its promise.

Lastly as submitted by the learned advocate for the appellant, the compensation of Tshs. 28,000,000/= ordered by the learned trial judge to the appellant is unfounded. Page 514 of the judgment of the trial court shows what the prayers for the appellant were. The prayer for payment of the amount of Tshs. 28,000,000/= is not among them. In deciding issues between the parties the learned trial judge was guided by the pleadings of the parties. See the case of **George Minja V The Attorney General** Civil

Appeal No. 75 of 2013 (Unreported). We quash and set aside this finding as there is no evidence to support it.

We partly allow the appeal to the extent that the 1st respondent allocates to the appellant an alternative plot of similar size and with costs to the appellant.

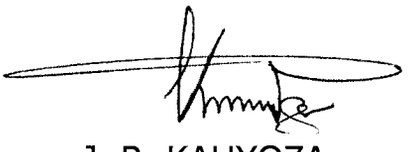
DATED at **ZANZIBAR** this 10th day of December, 2015

M. C. OTHMAN
CHIEF JUSTICE

N. P. KIMARO
JUSTICE OF APPEAL

K. M. MUSSA
JUSTICE OF APPEAL

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



J. R. KAHYOZA
REGISTRAR
COURT OF APPEAL