

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

(CORAM: RUTAKANGWA, J.A., MJASIRI, J.A., And MUSSA, J.A)

CIVIL APPLICATION NO. 237 OF 2013

**1. MOTOR VESSEL SEPIDEH
2. PEMBA ISLAND TOURS & SAFARIS APPLICANTS**

VERSUS

**1. YUSUF MOHAMED YUSSUF
2. AHMAD ABDULLAH ALIRESPONDENTS
3. KHAMIS RASHID KHAMIS**

**(Application for Revision of the proceedings, Ruling and Orders of
the High Court of Zanzibar at Vuga)**

(Abdulhakim, J.)

dated the 21st day of June, 2012

in

Civil Case No. 31 of 2011

RULING OF THE COURT

25th March & 1st July 2015

MJASIRI, J.A:-

This is an application moving the Court to exercise its revisional jurisdiction to revise the decision of the High Court of Zanzibar. (Abdulhakim J.) dated June 21, 2012 in Civil Case No. 31 of 2011 on the following grounds:

- (i) The compromise agreement was illegally recorded as a decree of the Court on June 21, 2013 while the applicants' preliminary objections raised in their written statement of defence were yet to be decided by the Court.
- (ii) The applicants were not given an opportunity to comment and to say whether they agree to have the compromise agreement recorded as the decision and decree of the Court, particularly when such compromise agreement was drawn by the respondents' advocates in the absence of the advocates for the applicant.
- (iii) The applicants being laymen were not given an opportunity to find a counsel particularly when the compromise agreement was to be recorded as a decree of the Court, thus applicants were denied representation by an advocate.
- (iv) The Deputy Registrar of the High Court of Zanzibar heard and determined the applications in the case when he had no powers to do so as the power have been reserved by law to the Judges of the High Court of Zanzibar.
- (v) The 1st applicant, **Motor Vessel Sepideh** which was later sold, being a property was wrongly sued instead of its owner.

The first two respondents namely Yusuf Mohamed Yusuf and Ahmad Abdullah Ali were the plaintiffs in the High Court. The third respondent Khamis Rashid Mussa was not a party to those proceedings. He has been joined as a party for the reason that he will be affected by the outcome of the application having purchased **M.V. Sepideh** at an auction. The following order was made by the High Court after the execution of the compromise agreement between the parties. It is reproduced as under:-

- "1. The compromise agreement filed by the parties on June 21, 2012 has been received in court and recorded as an order of the Court.*
- 2. The disputes between the parties are marked settled once and for all and the parties are bound by the terms and conditions of the compromise agreement."*

At the hearing of the application, the applicants were represented by Mr. Daimu Halfani, learned advocate while the first and second respondents were represented by Captain Ibrahim Bendera learned advocate. The third respondent had the services of Mr. Ussi Khamis Haji learned advocate.

We will commence with the preliminary objection. The counsel for the third respondent raised three grounds of objections, a notice of which was filed earlier under the Rule 4(2) (a) of the Tanzania Court of Appeal Rules 2009. However at the hearing of the application, counsel for the third respondent decided not pursue the first and second grounds of objection and proceeded with only the third ground of objection. It was also agreed by counsel that the Court shall proceed with the preliminary objection as well as the main application for revision.

Ground No. 3 of the preliminary objection provides as under:-

The notice of motion is bad in law for not having been accompanied/supported by the copies of the decrees and or the orders sought to be revised more so those relating to the 3rd respondent if any.

This ground of objection needs not detain us. *The compromise agreement* dated 20th June, 2012 and the decree of the High Court dated 21st June 2012 are attached to the notice of motion and marked annex "H" & "I" respectively. It is evident that the point of objection has no basis. There are no orders as against the 3rd respondent simply because he was not a party to the suit.

In the course of hearing the main application, Mr. Halfani, learned advocate decided not to pursue grounds No. 4 & 5 set out in the notice of motion given the position of the Laws of Zanzibar relating to the powers of the Registrar, and the legal status of **M.V. Sepideh**.

In relation to the application for revision, the main issue for consideration and determination is whether or not the *compromise agreement* was illegally recorded by the High Court rendering the agreement invalid.

In Black's Law Dictionary (10th Edition) *compromise* is defined as under:-

"An agreement between two or more persons to settle matters in dispute between them; an agreement for the settlement of a real or supposed claim in which each party surrenders something in concession to the other – also termed compromise and settlement"

Order 27 Rule 3 of the Civil Procedure Decree, Cap 8 of the Laws of Zanzibar, which is similar to Order 23 Rule 3 of the Civil Procedure Code

Cap 33 of the Laws of Tanzania and Order 23 Rule 3 of the Indian Civil Procedure Act 1908, provides as follows:-

"Where it is proved to the satisfaction of the court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it related to the suit."

Upon reviewing the record of the High Court, it is crystal clear that the parties entered into a compromise agreement, the same is signed by the parties and a decree was issued by the High Court in terms of the compromise agreement. The relevant part of the record is reproduced as under for ease of reference.

"Date: 21/6/2012

Coram: Abdulhakim A. Issa, J

Plaintiffs (Pres) are represented by Captain Ibrahim Bendera (Advocate) Mr. Mussa Shaali (Advocate) is holding his brief.

Defendants are represented by Mr. Naufal Bakari (Operation Manager)

C/C Abdi Suleiman

Mr. Shaali

Your Honour, the AJM Solicitors have withdrawn defending the Defendant. I would like to inform the Court that the parties have reached a compromise agreement and we would like it to be recorded as the order of the Court.

Sdg: Abudulhakim A. Issa J.
Judge
21/06/2012

RULING

The compromise agreement filed by the parties on this 21st day of June 2012 has been received on Court and is hereby recorded as an order of the Court.

The disputes between the parties are marked settled once and for all and the parties are bound by the terms and conditions of the *compromise agreement*. It is so ordered.

Sdg: Abudulhakim A. Issa J.
Judge
21/06/2012"

In view of the consent order entered by the High Court on June 21, 2012 in terms of the *compromise agreement*, the suit was finalized.

Mulla on the Code of Civil Procedure Act of 1908 (14th Edition) on page 1828 defines the scope of Order 23 Rule 3 of the Act as follows:-

"The rule gives a mandate to the Court to record a lawful adjustment or compromise and pass a decree in terms of such compromise or adjustment. Such a consent decree is not appealable because of the bar in section 96 (3)

When the agreement relates to the whole suit, the Court must on being invited by parties, record the agreement, and pass a decree in accordance with the agreement and the suit stops there."

According to **Mulla**, where there is a lawful agreement or compromise the court is bound to record a settlement once it is arrived at by the parties.

*"Where both parties to a suit apply to the Court under this rule to pass a decree in accordance with the compromise arrived at between them, the Court has no power to refuse to pass the decree, on the ground that it considers the compromise to be too favourable to one of the parties. **The Court is bound to record a settlement once it is arrived at by the parties even if one of its terms is that if any one of them does not carry out certain things he would be liable for all damages.**"*

(Emphasis provided.)

The legal position in Tanzania is not different from that advanced by **Mulla**.

In **Flora Wasike v Destino Wamboko** (1988) I KAR 625 it stated thus:-

"It is now settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside."

In Brooke Bond Liebeg (T) Ltd v Mallya (1975) EA 266 it was stated as under:-

"The compromise agreement was made an order of the court and was thus a consent judgment. It is well settled that a consent judgment can be set aside only on the ground of fraud or collusion, that there was no consensus between the parties, public policy or for such reasons as would enable a court to set aside or rescind a contract."

The court followed the decision in **Hirani v Kassam (1952) 19 EACA 131.**

It was stated thus:-

"A consent judgment may only be set aside for fraud, collusion or for any reason which would enable the court to set aside an agreement."

When the consent order was made, the applicants' Operations Manager was duly present in Court and no objection was raised by him.

Prior to that, the advocates for both parties requested for time to settle the

matter out of Court. Given the circumstances, we are inclined to agree with Mr. Bendera, learned advocate for the 1st and 2nd respondents that the consent order was lawful in the absence of fraud, mistake and or collusion. The compromise agreement was a lawful agreement and the consent order is therefore valid. Therefore we find no basis in faulting the High Court Judge.

In view of the reasons stated hereinabove, we find no merit in the application. The application is hereby dismissed with costs to all the three respondents. It is so ordered.


DATED at DAR ES SALAAM this 19th day of June, 2015.

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

K.M. MUSSA
JUSTICE OF APPEAL

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


E.F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL