

IN THE COURT OF APPEAL OF TANZANIA

AT ZANZIBAR

(CORAM: KIMARO, J.A., MBAROUK, J.A., And MWARIJA, J.A.)

CIVIL APPLICATION NO. 7 OF 2016

MUNIRA HUSSEIN HAJI.....APPLICANT

VERSUS

WILLIAM CASIMIRO RODRIGUES.....RESPONDENT

(Application for Revision of the High Court Proceedings of Zanzibar)

(Hon. Omar Othman Makungu, C.J)

in

Civil Case No. 48 of 2015

.....

RULING OF THE COURT

6th & 7th December, 2016

KIMARO, J.A.:

Civil Case No. 48 of 2015 was filed in the High Court of Zanzibar at Vuga. The file was placed before the Registrar of the High Court of Zanzibar, Mr. George Kazi. On 15th July, 2015 Mr. Rajab learned advocate appeared for the plaintiff. Mr. Rukazibwa, learned advocate appeared for the defendant. On that day, Mr. Rajab prayed for leave to amend the plaint because it was filed by a layman. Mr. Rukazibwa, learned advocate objected to the prayer for the amendment of the plaint. The Registrar of

the High Court said he had no jurisdiction to deal with the issue related to the amendment of the plaint. He referred the case to the Honourable Chief Justice, Mr. Omar. O. Makungu to assign the case file to a judge for the determination of the issue for the amendment of the plaint. What the Registrar said is:

“Since Mr. Rajab Advocate is wishing to amend the Plaint and since the power to grant leave to amend pleadings is not among the powers vested to the Registrar of the High Court. The case is therefore forwarded to His Lordship Chief Justice for his action to assign to a Judge for the determination the Plaintiff is(sic) prayers for a leave to amend the Plaint.”

On how the Honourable Chief Justice dealt with the matter the record of the proceedings shows that he assigned the case file to **Honourable Lady Justice Fatma H. Mahmoud**. The order he made reads:

“Hon. Lady Justice Fatma H. Mahmoud

This case file is placed before you to deal with the matter in question.

Signed: Omar O. Makungu

Chief Justice

17/07/2015."

When the case went before Hon. Lady Justice Fatma H. Mahmoud on 04/08/2015 the Hon Judge did not deal with the issue she was assigned to determine. The proceedings show that Mr. Masoud Rukazibwa learned advocate is recorded to have entered appearance for the plaintiff and he was assisted by Gloria Shuma, Rashid Ali and Sarrah Katan. Advocate Abdalla Juma is recorded to have entered appearance for the defendant. Whatever the learned advocates submitted in court is not reflected in the proceedings. What is reflected in the proceedings is the order which the learned judge made. The order reads as follows:

"Written Statement of defence to be submitted on 29/07/2015 Rejoinder if any to be submitted on or before 05/10/2015, and this case to be mention.

Signed: Fatma H. Mahmoud

Judge

04/08/2015."

In between, the case went for mention before A.H. Haji, Deputy Registrar of the High Court twice. On 07/01/2016 the case was called again before Hon. Lady Justice Fatma Mahmoud and she remarked as follows:

“The case to be given before his Highness Chief Justice for proceedings.”

Frankly and with respect to the learned judge, we fail to grasp what she had in mind when giving such remarks. When the case file was placed before the Honourable Chief Justice on 09/03/2016, Mr. Abdallah Rajab entered appearance for the plaintiff and Mr. Masoud Rukazibwa for the defendant. Same arguments on amendment of the plaint and written statement of defence were put before the Hon Chief Justice. In his ruling he ordered the written statement of defence to be struck out and the plaintiff was granted leave to amend the plaint.

This prompted Mr. Rukazibwa to file this application for Revision under section 4(3) of the Appellate Jurisdiction Act, [Cap. 141 R.E. 2002] in which he is challenging the legality of striking out the written statement of defence and ordering the plaint to be amended. The grounds he gave are that there are serious irregularities in the proceedings which require

immediate intervention of the Court, he challenges the way the case went to the Chief Justice and to Hon Judge Mahmoud for determination of the same issue. According to Mr. Rukazibwa the Honourable Chief Justice had no jurisdiction to interfere with the orders that were given by Hon. Fatma Mahmoud and he is of the view that it was wrong for the Honourable Chief Justice to strike out the written statement of defence, because they have same jurisdiction.

Mr. Rajab Abdallah Rajab raised a preliminary objection to the application. He had several points of objection. In a notice of preliminary objection filed on 10th May, 2016 the learned advocate contended that the order that was made by the Chief Justice did not finally determine Civil Case No 48 of 2015 and so revision is barred by section 5(2)(d) of the Appellate Jurisdiction Act [Cap. 141 R.E 2002]. The Court lacks Jurisdiction to entertain the matter. The applicant's application is incompetent for failure by the applicant to move the Court properly. On 5th December, 2016, in a supplementary notice of objection he added two other points but he withdrew one of the points and remained with only one. His point is that the notice of motion is incurably defective for contravening Rule 48(2) of the Court of Appeal Rules, 2009 (the Rules).

Making submissions in support of the preliminary objection, the learned advocate for the respondent started with the supplementary notice of objection on non-compliance with Rule 48(2) of the Rules. He said Rule 48(2) of the Rules requires a notice of motion to be drawn in compliance with Form A of the Schedule to the Rules. He mentions several particulars given in Form A which the learned advocate for the applicant has not given. These include indicating whether the application is of a civil nature or criminal, stating correctly the name of the judge who determined the issue that is being challenged, the date of the order or decree and the substance of the order itself, the place of the High Court where the order was made. He also said it was wrong for the learned advocate to mention only Rule 65 without giving specificity of the sub rule of Rule 65. He cited the case of **Bahadhir Sharif Rashid and 2 others V Mansour Sharif and Another**, Civil Appeal No. 127 of 2006 (unreported) to augment his submission.

On the first notice of preliminary objection, the learned advocate for the respondent submitted that the order that was given did not conclusively determine the civil case in question. He said section 5(2) (d) of Cap.141 bars a revision arising from an interlocutory order. He prayed

that the preliminary objection be upheld and the application be struck out with costs.

On his part the learned advocate for the applicant conceded non-compliance with some of the particulars mentioned in Form A of the Schedule to the Rules. However, he urged the Court to exercise power of revision conferred to it by the Rules and correct the irregularities in Civil Case No. 48 of 2015. He was of the impression that the record of the proceedings is not clear on why Hon. Lady Justice Mahmoud returned the case to the Chief Justice after the matter was placed before her. He prayed that the preliminary objection be dismissed and the application be heard on merit.

In a brief rejoinder, the learned advocate for the respondent insisted that the notice of motion is defective. However he admitted that the orders for which a revision is being sought was not conclusive. He also admitted that although the Chief Justice ordered the written statement of defence that had been ordered by Honourable Fatma Mahmoud to be filed be struck out, that did not in any way make the defendant lose the right to file a written statement of defence subsequent to the plaint being

amended. He insisted that the preliminary objection has merit and should be upheld.

We thank the learned advocates for the efforts made in arguing the preliminary objection. Having heard them and thoroughly gone through the record of the proceedings giving rise to this revision, we must say, with respect to the learned advocate for the applicant, that we are satisfied that there was no irregularity. What we may say is that there is a misconception on the part of the learned advocate on what actually happened. As we indicated from the beginning of this ruling, the order that was made by the Registrar was very clear. He rightly said that the Civil Procedure Decree of Zanzibar does not confer power to the Registrar of the High Court to make an order for amendment of the plaint. It was for that reason he referred the case to the Honourable Chief Justice to assign it to a judge for the determination of that matter. The case was, without hesitation by the Chief Justice, assigned to Hon. Fatma Mahmoud, Judge. But as clearly indicated above, she did not do what she was assigned to do and if at all she did, the record does not show what she did in determining the issue that was placed before her. Instead, she returned the file to the Hon. Chief Justice and with respect to her in a vague order.

The Chief Justice, in his wisdom, dealt with the order that had been referred to him by the Registrar and it was at the instance of the learned advocates who appeared before him. They made submissions in respect of the matter that was handled by the Registrar before, and he gave his decision.

An important question we ask ourselves is whether the order made by the Hon. Chief Justice conclusively determined the case? With respect to the learned advocate for the applicant, it did not. What the learned Honourable Chief Justice held after quoting verbatim the provisions of Order 6 Rule 17 of the Civil Procedure Decree, Cap. 8 is:

*"As I take it, the import of the provision under rule 17 of the Civil Procedure Decree above quoted is that though the court has been vested with discretion to grant an amendment as applied for by either, **such discretion may only be exercised where the amendment appears to the court to be necessary for the purpose of determining the real questions in controversy between the parties.**"*

(Emphasis added).

The Honourable Chief Justice after citing the case of **Australian Steam Navigation Co Ltd Vs. Smith and Sons** (1889) 14 A.C at page 319 to support his reasoning said:

*"In the light the pleadings before the Court relating to transfer of money to the defendant, **the intended amendment, in my view can help this court in determining the real question in controversy between the parties. It is therefore one that calls for the amendment of the pleadings as a matter of necessity, for the purpose of determining the real question in controversy between the parties.**"*

Section 5(2) (d) of the Appellate Jurisdiction Act reads:

*"no appeal or application for revision **shall** lie against or be made in respect of any preliminary or interlocutory decision or order of the High Court unless such decision or order has the effect of finally determining the criminal charge or suit"*

See the case of **Dennis Francic Ngowi V Asteria Morris Ambrose** Civil Appeal No. 90 of 2014 (unreported).

Reading from the ruling of the Honourable Chief Justice, he allowed the amendment of the plaint as a matter of necessity, for purposes of making the trial High Court be in a position to determine the **real question in controversy between the plaintiff and the defendant in Civil Case No. 48 of 2015**. As such the order did not conclusively determine the matter in controversy between the parties. Nor does the ruling take away the right of the defendant to file a written statement of defence. The ruling speaks of determining the rights of the parties. Parties to the suit are the plaintiff(s) and the defendant(s). As such the order that was made by the Honourable Chief Justice is interlocutory and hence a party cannot come to the Court to ask for a revision, because that is barred by section 5(2)(d) of the Appellate Jurisdiction Act, Cap. 141.

We uphold the preliminary point of objection with costs particularly on this point of the order being interlocutory and strike out the application for Revision. The file has to be remitted back to the trial High Court so that the proceedings in Civil Case No. 48 of 2015 can proceed to final determination. With great respect to the Honourable Chief Justice, with a

view of maintaining the confidence of the litigating parties, the case should be heard by a judge who had not have the conduct of the matter.

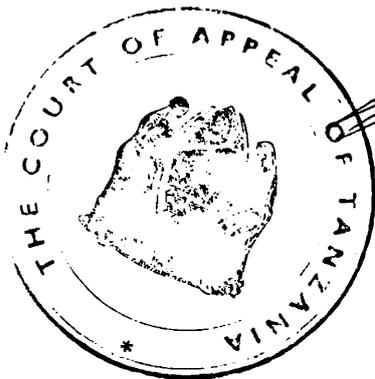
DATED at ZANZIBAR this 7th day of December, 2016.

N.P.KIMARO
JUSTICE OF APPEAL

M.S.MBAROUK
JUSTICE OF APPEAL

A.G.MWARIJA
JUSTICE OF APPEAL

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



E. Y. Mkwizu
E. Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL