IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MASSATI, J.A., MWARIJA, J.A., And MZIRAY, J.A.)

CIVIL APPLICATION NO. 1 OF 2015

1. IVAN KODEH
2. DEVA MAHREZ
3. I.D.U. LIMITED
4. CHRYSOGONOUS INVESTMENT LTD ..... **APPLICANTS**
5. MICHAMVI GOLF AND RESPORT LTD
6. I.T.D. POWER LIMITED

VERSUS

1. SARDINIUS INVESTMENT LIMITED
2. ARNAUD TUAL
3. XAVIER DESPRINGRE ..... **RESPONDENTS**
4. LIONEL SONIGO

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

(Mkusa, I. Sepetu, J.)

Dated the 20th & 30th January, 2015
In
Civil Case No. 4 of 2015

RULING OF THE COURT

2nd & 30th March, 2016

MZIRAY, J.A.:

This is an application by Notice of Motion made under section 4(2) and (3) of the Appellate Jurisdiction Act, 1979 [Cap 141 R.E. 2002], Rules

4(2) (a) and (b) and Rule 48(1) and (2) of the Tanzania Court of Appeal Rules, 2009 – GN 368 of 2009, moving the court to exercise its revisional Jurisdiction to revise the proceedings and the subsequent orders of the High Court of Zanzibar in Civil Case No. 4 of 2015 dated 20th and 30th January, 2015, in which the trial judge among others things issued an order for production and attachment before judgment the titles owned by the 3rd, 4th, 5th and 6th applicants who were not parties to the case and an order freezing the 3rd applicant account No. 037938 held at FBME Bank. Also an interim Ex parte order of injunction ordering the 1st and 2nd applicants to deliver passwords for Crystal Resort Hotel domain, emails and websites and also an order allowing the respondents to inspect the 1st and 2nd applicants' emails account, bank accounts and offshore accounts.

These are the orders against which the applicants moved this Court to exercise its revisional jurisdiction conferred by the law. The following are the grounds advanced for revising the complained orders;

(i) The orders of 20th January, 2015 in Civil Case No. 4 of 2015 was made without according the 3rd, 4th , 5th and 6th applicants the

fundamental right to be heard either in favour or in opposition to the order.

(ii) *The High Court granted an attachment before judgment by way of an interim ex parte order.*

(iii) *The High Court granted final judgment by way of an interim ex parte order.*

(iv) *The orders of 20th January, 2015 are so wide to render them vague and uncertain therefore unenforceable.*

(v) *The order of 30th January, 2015 contained an Anton Piller orders which did not form part of the application made on 19th January, 2015.*

(vi) *It was wrong for Hon Mkusa I. Sepetu, J. to hear and determine and grant orders against the applicants when he was presiding in Civil Case No. 59 of 2014 between Crystal Resort Limited, the 1st and the 2nd applicants and the 2nd respondent in which 1st and 2nd applicant were seeking to declare actions of the 2nd respondent in relation to taking possession of the Hotel premises to be unlawful.*

At the hearing of the revision proceedings Mr. Gaspar Nyika, learned counsel, represented all applicants while Mr. Salum Hassan Bakari Mkonje learned counsel appeared for and on behalf of the respondents. Both learned counsels were invited to address the Court on the matter. In his address, Mr. Nyika abandoned the 5th ground. He only argued the remaining five (5) grounds.

As to the 1st ground of complaint, Mr. Nyika submitted that the respondents instituted a suit – Civil Case No. 4 of 2015 against the 1st and 2nd applicants. He submitted that upon the respondents' application, the trial court on 20th January, 2015 issued an interim e*x parte* order of attachment before judgment requiring production of title deeds owned by the 3rd, 4th 5th and 6th applicants and in addition to that the trial court issued an order freezing the 3rd applicant's Account No. 037938 held at FBME Bank. The 3rd,4th, 5th and 6th applicants were not parties to the trial court proceedings from which the order was issued. The learned counsel contended that failure of the court to summon the 3rd, 4th,5th and 6th applicants in the court violated their basic right to be heard which rendered the proceedings null and void. It was against the principle of natural

justice, he argued. The learned counsel in his submission maintained that it is a fundamental principle of law that a person must be accorded an opportunity to be heard before a decision is made against him. The learned counsel made reference to numerous decisions to include ***Civil Application No. 20 of 2003 between Khalifa Seleman Saddot and Yahya Jumbe and Others (unreported), Civil Application No. 103 of 2005 between Citibank Tanzania Limited and Tanzania Telecommunication Company Limited (unreported), Civil Application No. 72 of 2002 between Chief Abdallah Said Fundikira and Hillal L. Hillal [unreported]*** which cited with approval the cases of ***Attorney General V. Maalim Kadau and 16 Others [1997] TLR 69*** and ***Cooper v. The Board of Works for Nandsworth District (1863) 14 CB (US) Services*** and ***National Bank of Commerce v. Dar es salaam Education and Office stationary*** [1995] TLR 272 which held among other things that Orders cannot be issued against strangers to the suit.

The learned counsel however argued that it is established principle of law that the only remedy by a party whose interests have been affected by

a decision that was made in which he was not a party is to file a revision against the said decision just like in the case at hand in which the 3rd, 4th,5th and 6th applicants were not parties to the proceedings in Civil Case NO. 4 of 2015. To substantiate his argument, the learned counsel referred us the cases of **Deo Shirima and Others v. Scandinavian Express Services Limited**, Civil Application No. 34 of 2008 [unreported]; **Chief Abdallah Fundikira and Hillal L. Hillal** (supra), and that of **Khalifa Seleman Saddot and Yahya Jumbe and Others** (supra) in which, in all the cases cited, this Court proceeded to quash and set aside the orders that were made against a person that was not a party to the proceedings because the same is in breach of natural justice, the right to be heard.

Arguing the 2nd ground of complaint, the learned counsel contended that an *ex parte* application for attachment sought by the respondent on 19/1/2015 was made under Order XLIII Rule 5 of the Zanzibar Civil Procedure Decree, Cap 8 and followed by an attachment order without asking the applicants to furnish security before the issuance of attachment orders against their properties. That was an error, he argued. He pointed out that Mulla in The Code of Civil Procedure Vol. 4 16th Edition at Page

3672 when commenting on Order XXXVII Rule 5 of the Indian Code of Civil Procedure which is in pari – materia to Order XLIII Rule 5 of the Zanzibar Civil Procedure Decree, Cap 8 stated that;

> *"The Order that is contemplated by this rule is not unconditional one directing attachment of property, but one calling upon the defendant to furnish security or to show cause why security should not be furnished. Where therefore the defendant offers to give security, the court should go into the question of its sufficiency before issuing final order of attachment".*

Based on Mulla's commentary, the learned counsel argued that an order for attachment before judgment can only be made after the defendant fails to show cause why he should not furnish security. The learned counsel however, quoted the provision of Order XLIII Rule 6(1) of the Civil Procedure Decree, Cap 8 which provides:-

> *"Where the defendant fails to show cause why he should not furnish the security, or fails to furnish the security required, within time fixed by the court; the court may order that the property specified or*

such portion thereof as appears sufficient to satisfy any decree which may be passed in the suit be attached."

To cement further his argument, the learned counsel referred this Court to the decision in the case of **Kanyoko Amigos Bar and Restaurant v. Nderu and Others** (1986-1989)1 EA 237 in which it was held that:-

"The party seeking attachment can only discharge the burden of proving the necessity of granting the order after the court's tests rival averments by evidence. It is therefore very clear that a court is required to look into facts deposed in the affidavit by both parties before an order for attachment can be made".

In view of the preceding authorities cited, the learned counsel concluded that it was an error for the trial court to grant attachment order before judgment without according the applicants an opportunity to show cause why they should not furnish security as required by the law; which omission rendered the trial court proceedings and its subsequent orders a nullity.

As to the 3rd ground of complaint, the learned counsel submitted that the court's orders complained of ordering the 1st and 2nd applicants to deliver passwords for Crystal Resort Hotel domain, emails and websites and the order allowing the respondents to inspect the 1st and 2nd Applicants' emails accounts, bank accounts and offshore accounts were the same orders sought in the suit particularly under reliefs (g) and (r) of the plaint which had the effect of conclusively determining the matter. The learned counsel contended that, that could not be the aim of injunctive Orders. He pointed out that the object of Interim injunctive Order is to preserve the status quo pending determination of the rights of the parties. He cited the case of **Deo Shirima and Others v. Scandinavian Express Services Limited** (supra) and that of **Tanzania Electric Supply Company Limited and Independent Power Tanzania Limited and Others**, Consolidated Civil Application No. 19 of 1999 and 27 of 1999 [unreported] as authorities to that effect. On that basis therefore, the learned counsel was of the view that the trial court erred to grant final reliefs under the umbrella of interlocutory orders before the suit was conclusively determined.

With regard to the 4th ground of complaint, the learned counsel pointed out that the orders given by the trial court were vague and uncertain. He stressed that the orders given on 20th and 30th January, 2015 allowing the respondents to inspect the applicants' email accounts, bank accounts, offshore companies accounts and true details were vague and uncertain in the sense that the same do not specify what email accounts and which bank accounts need be inspected as well as the offshore companies.

Since the email accounts, bank accounts and the offshore companies to be inspected were not specified in the orders, then those orders were vague and uncertain for which, consequently they are unenforceable. He again referred the Court to the case of **Deo Shirima** on which the Court proceeded to nullify an order of injunction that was ambiguous and did not make clear what status quo was being referred to.

Arguing the last ground of complaint, the learned counsel submitted that the trial judge was wrong to preside over Civil Case No. 4 of 2015 as doing so pre-determined the fate of Civil Case No. 59 of 2014 which was pending before him because the orders sought by the applicants in the case were the same as those sought in Civil Case No. 4 of 2015.

On his part Mr. Salum Hassan Bakari Mkonje, learned counsel submitting in reply to the first ground of complaint, contended that the law under the provisions of section 70(1) (c) and (e); Order XVIII Rule 3, Order V Rule 20(1), Order XLIII Rule 5(1) (a) (b); 5(2) 5(3) and Order XLIV of the Civil Procedure Decree Cap 8 of the Revised Laws of Zanzibar allows the High Court to grant the Orders sought for in the *ex parte* application pending *Interparte* hearing.

The learned counsel argued that since the law allows the same, there is nothing incorrect, illegal, and irregular to justify this Court to invoke its revisional jurisdiction. To cement his argument Mr. Mkonje strongly relied on the following cases:

1. **Sgs societe Generale De surveillance S.A. vs VIP Engineering and Marketing Limited** [2004] TLR 135.
2. **Augustino Lyatonga Mrema v. Republic and Dr. Masumbuko Lamwai** [1999]TLR 273
3. **Transport Equipment Ltd v. Devram P. Valambia** [1995] TLR 161
4. **National Bank of Commerce v. Sadrudin Meghji** [1998]TLR 503 and;

5. Blass Michael v. Said Selemani [1999]TLR 260

Responding to the second ground of complaint, the learned counsel argued that the provisions of Order XLIII rule 5(1) (a) (b) and 5(2) of the Civil Procedure Decree Cap 8 give the High Court power to make orders of attachment before judgment when the property is about to be disposed of or the property is about to be removed from the local limits of the Court. The learned counsel however stressed that as the first and second applicants fraudulently transferred their shares to offshore companies then the trial court had the mandate to issue such an order without the need of furnishing security in terms of Order XLIII Rules 1,2,3, and 54 of the Civil Procedure Decree, Cap 8 of the Revised Law of Zanzibar.

With regard to the 3rd ground of complaint, the learned counsel submitted that the prayers contained in the application were interlocutory and were intended to have the new management operate the Hotel and stop injuries arising from not having the passwords for assessing hotel email accounts and websites. He however pointed out that the prayers sought in the application were quite different from those embodied in the plaint and the orders given, which orders are now being complained as

they do not have the effect of giving a final judgment as alleged since the parties to the suit still have time to argue their cases *inter – parties.*

Arguing in reply to the 4th ground of complaint, the learned counsel simply stated that the orders made on 20th and 30th January, 2015 were specific, clear and certain contrary to what is being alleged. He pointed out that the orders among other things were specific to FBME Bank which was/is an agent of the 1st and 2nd applicants.

Submitting in reply to the 6th ground which is the last ground of complaint, the learned counsel contended that there is no law which bars a judge to hear two suits between the same parties but different subject matters. The learned counsel pointed out that since the prayers in the application were quite distinct from the prayers embodied in the plaint then there was nothing wrong for the judge to entertain the application.

Having keenly listened to the arguments advanced by the two learned counsel in their rivalry submissions, we think that it was imperative first to determine a pertinent issue of fraud raised by Mr. Mkonje learned counsel in his submission, before we embark on the five grounds of complaint which the applicants advanced to move this Court to exercise its

revisional powers. Apparently this issue of fraud did not feature in the pleadings. It is not disputed by the parties that the respondents were entitled to be heard as a right before the orders sought were issued. However, Mr. Mkonje, learned counsel for the respondents has tried to justify that the trial judge had to give the orders *ex parte.* He argued that it was necessary to do so because the matter involved issue of fraud and that in any case the orders were interim.

We do not with respect purchase those arguments because they are not borne out by the record or the ruling of the learned trial judge. Even if that was so, it does not explain why the orders were issued against persons who were not parties to the suit. On the contention that the Civil Procedure Decree allows issue of *ex parte* order of temporary injunction, certainly there are conditions to be complied with first before such an order is issued. One of the conditions is clearly spelled out under Order XLIV (3) of the Code which states:-

> *"The Court shall in all cases, except where it appears that the objection of granting the injunction would be defeated by the delay before granting an*

injunction, direct notice of the application for the same to be given to the opposite party."

The ruling of the learned trial judge did not show that the above condition was complied with before the interim orders were made. In the circumstances, we are convinced that there was no justification for the trial judge to proceed *ex parte* and grant the interim orders.

Coming now to the first ground of complaint that the order was made without according the 3rd, 4th, 5th and 6th applicants a hearing, it is settled law that *"no decision must be made by any court of justice, body or authority entrusted with the power to determine rights and duties so as to adversely affect the interest of any person without first giving him a hearing according to the principle of natural justice".* (See **IPTL vs Standard Chartered Bank (Hong Kong) Ltd,** Civil Revision No. 1 of 2009 [unreported].

In the case at hand it is an undisputed fact that the 3rd ,4th, 5th and 6th were not parties to the trial court proceedings from which the orders

dated 20th and 30th January, 2015 were issued. The Court's orders dated 20th January, 2015 read:-

"1. This Court doth order and issue an order of an interim order injunction to stop the respondents, their agents and workmen and any other person from continuing any acts which are injurious to the applicants rights and the Management of Cristal Resort Hotel until the hearing of the main application for temporary injunction is completed and determined.

2. That this Honourable court doth order and issue an order of interim attachment before Judgment compelling the respondents, their agents and workmen and any other person acting under their instruction and authorization within two days to produce and place at the disposal of the court all titles of movable assets and immovable assets including:-

i) Plot of land and construction at Paye Zanzibar owned under a Government Land Lease with site plan 1162/2012 in the name of I.P.U Limited (Zanzibar)

ii) Plot of Land at Michamvi Kae, Zanzibar under Government Land Lease with site plan 1174/2012 in the name of Chrysogonous Investment Limited (Cyprus) and/or Michamvi Golf and Resort Limited (Zanzibar)

iii) Plot of Land at Michamvi Kae, Zanzibar under a Government Land Lease with site Plan 1175/2012 in the name of Chrysogonomy Investment Limited (Cyprus) and/or Michamvi Golf and Resport Limited (Zanzibar).

iv) All shares of the respondents in Cristal Resort Limited (Zanzibar), I.D.U. Limited (Zanzibar), scessinia Investments Limited (Zanzibar), Chrsonogous Investment Limited (Cyprus) and I.T.D power Limited (Seychelles).

v) All shares of the respondents in Zanzibar companies Cyprus companies and offshore companies where the respondents are shareholders or the Beneficial owners.

3. This court doth order and issue an order of an interim order of Injunction freezing the respondents' Bank accounts in Tanzania,

a) Diamond Trust Bank limited A/C No. 5026195001

b) FBME Bank Limited A/C No. 033909

c) *FBME Bank Limited A/C No. 037938*

In United states:-

a) *Citibank A/C No. 40038880379*

b) *Citibank A/C No. 5424181027061717*

c) *Citibank A/C No. 542418027061717*

d) *First Century Bank No. 4018046666014*

In Switzerland

a) *Cim Bank, Lugano A/C No. CH28088221080000000*

b) *Cim Bank, Lugano A/C 6108822104617565000*

In Poland

a) *BNP PARIBAS A/C PL 88160010680003011021660406 5*

b) *BNP PARIBAS A/C PL71160010680003010216604080*

c) *BNP PARIBAS A/C PL44160010680003010216604081*

In the Seychelles

a) *Euro Pacific Bank Limited*

In Cyprus

a) *Piraeus Bank"*

The trial Court however on 30th January, 2015 granted an *ex parte* order sought by the respondents ordering the applicants account with FBME Bank be freezed. Looking at the nature of the orders made we are of the respective view that the same affect the rights of the applicants. Given the fact that the applicants were not accorded a hearing – a principle of natural justice, what then are the consequence of breach of this principle? Settled law is to the effect that its breach or violation unless expressly or impliedly authorized by law, renders the proceedings and decisions and /or orders made a nullity, even if the same would have been reached had the party been heard: see **Abas Sherally & Another v. Rabdul Sultan H.M. Fazalboy**, Civil Application No. 33 of 2002 (unreported) and **IPTL vs Standard Chartered (supra).**

In the case of **Onyango Oloo v. Attorney General** [1986] EA 456, though its decision is not binding, the Court of Appeal of Kenya considered in a local context the application of rules of Natural Justice as follows:-

> *"The Principle of natural Justice applies where ordinary people would reasonably expect those making decisions which will affect others, to act*

fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard.....There is a presumption in the interpretation of statute that rules of natural justice will apply and therefore the authority is required to act fairly. The principle of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated it matters not that the same decision would have been arrived at ...."

In the instant case, we are constrained to find that the trial court seriously erred in issuing orders affecting the applicants without according them a hearing. We respectively agree with Mr. Nyika and hold that the trial court committed a material irregularity. This alone is sufficient to determine the matter at hand.

In the exercise of the Court's revisional powers, therefore under section 4(1) and (3) of the Appellate Jurisdiction Act, Cap 141 RE 2002 we accordingly nullify, quash and set aside the proceedings in the High Court of Zanzibar as well as the subsequent orders made on 20th and 30th

January 2015. We also order that the matter be placed before another judge for adjudication.

In fine, we allow this application with costs to the applicants.

DATED at **DAR ES SALAAM** this 24th day of March, 2016.

S.A. MASSATI
JUSTICE OF APPEAL

A.G. MWARIJA
JUSTICE OF APPEAL

R.E.S. MZIRAY
JUSTICE OF APPEAL

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

Z.A. MARUMA
DEPUTY REGISTRAR
COURT OF APPEAL