IN THE COURT OF APPEAL OF TANZANIA

AT ZANZIBAR

(CORAM: MWARIJA, J.A., NDIKA, J.A., And KEREFU, J.A.)

CIVIL APPEAL NO. 59 OF 2017

GEDDA FRANCO ..... 1ST APPELLANT
ANTONIETTO MAURA ..... 2ND APPELLANT

VERSUS

MOHAMMED RASHID JUMA ..... RESPONDENT

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

(Sepetu, J.)

Dated the 12th day of November, 2015
in
Civil Case No. 49 of 2001

JUDGMENT OF THE COURT

3rd & 12th December, 2019

MWARIJA, J.A.:

This appeal arises from the judgment and decree of the high Court of Zanzibar sitting at Vuga (Sepetu,J.) in Civil Case No. 49 of 2001 dated 12/11/2015. In that suit, the respondent, Mohammed Rashid Juma who was the plaintiff, had three main types of claims against the appellants, Gedda Franco and Antonietto Maura who were the defendants at the trial.

First, he claimed for a total amount of Tzs 500,000,000.00 as a dividend which allegedly accrued from two shares he held in the company known as Bridge Limited formed by the appellants as shareholders and from which, the 2nd respondent allotted to him the two shares out of her fifty (50) shares in that company. **Secondly,** the respondent sought to be declared the lawful owner of four buildings built on two plots of land situated at Kiwengwa North 'A' District within the Zanzibar Municipality, the premises in which hotel business was being operated. **Thirdly,** he claimed to be paid mesne profits derived from the use of land used for hotel business and a Horse Club business which according to him, was being operated by the appellants on another plot of land owned by him. He also sought an order of eviction against the appellants from the three plots of land.

The appellants denied the respondent's claims. On the claim for dividends, they averred that, although he was initially allotted 2 shares in a company known as Bridge Limited, he later transferred the same to the 2nd appellant on 15/7/1997. With regard to the claim of trespass on the four buildings used for hotel business, the appellants contended that the plots of land on which the buildings were situated, were leased by the Government of Zanzibar to the companies which used them to operate the hotel business.

Having heard the evidence of five witnesses who testified in support of the respondent's claims and three witnesses for the appellants in their defence, the

learned trial Judge was satisfied that the respondent had proved his claims. Consequently, the leaned Judge granted all the reliefs prayed for by the respondent.

Aggrieved, the appellants have preferred this appeal raising the following nine grounds of appeal:

"1. *The Honourable Judge erred in law and in fact in holding that the Appellant is the rightful owner of the land and the four houses situated on the same.*

2. *The Honourable Judge erred in holding that the Appellant's signatures were forged by the 2nd Appellant.*

3. *The Honourable Judge erred in law and in fact in holding that the transfer of shares done by the Respondent was illegal.*

4. *The Honourable Judge erred in law and in fact in holding that Vera Club is owned by the company known as Bridge Limited.*

5. *The Honourable Judge erred in holding that, Deputy Registrar of Documents conspired with the Appellants and drew a fake mortgage deed and land lease agreement with forged signature.*

6. *The Honourable Judge erred in expecting the Appellants to produce before him the land lease documents which are the properties of the Sun Sea Company Ltd, Treasure Company Limited and Bridge Limited.*

7. *The Honourable Judge erred in law and in fact in holding that the Respondent deserves the sum of shillings five hundred million*

(500,000,000/-) as dividends as his 2% share income from Bridge Company Limited and the Appellants are liable to pay the same.

8. *The Honourable Judge erred in condemning the Appellants to pay the Respondent the sum of US Dollars two thousand and nine hundred per month ($2900=) from 1998 to date for the houses which are not in their control.*

9. *The Honourable Judge erred in fact by ordering the Appellants to pay the Respondent the sum of US Dollars one thousand and five hundred ($1500=) per month as mesne profit for alleged running of a Horse Club in the alleged Respondent's shamba."*

After service upon him, of the record and memorandum of appeal, the respondent lodged two notices of preliminary objection. The first notice was filed on 27/11/2017. However, at the hearing on 25/11/2019, that notice was abandoned after the counsel for the respondent had noted that written submission in support of the appeal, the subject matter of the objection, was lodged by the appellants as required under Rule 106 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules). The second preliminary objection which was filed on 15/11/2019 consisted of the following grounds:

"1. *That the appeal is time barred for the appellant has failed to institute her (sic) appeal within sixty (60) days of the date when the notice of appeal was lodged, contrary to Rule 90 (1)*

2. *That appeal is incompetent for the certificates of delay attached in the Record of Appeal are invalid.*

3. *The appeal is incompetent for being cited improperly."*

When the appeal was called on for hearing on 25/11/2019, the appellants were represented by Mr. Nassor Khamis Mohamed assisted by Mr. Suleiman Salim Abdallah, learned advocates. The respondent was represented by Mr. Isaack Msengi, also learned advocate. As is the rule of practice, before we could proceed to hear the appeal, we heard first, the learned counsel for the parties on the preliminary objection. At the end of hearing, we reserved our ruling which we promised to give at a later date. Having deliberated on the submissions made by the parties' advocates, we were of the settled view that the preliminary objection was devoid of merit. In the spirit of expediting this matter which has had a protracted history; the same having been in Court for over 18 years, on 26/11/2019 we made an order overruling the objection and promised to incorporate our reasons in this judgment, which we now hereby do.

During the hearing of the preliminary objection, Mr. Msengi abandoned the 3rd ground of the preliminary objection and went on to argue the 1st and 2nd grounds together as the same centred on the issue whether or not the appeal was filed within the prescribed time of sixty (60) days from the date of the institution of the notice of appeal. He argued that, whereas the notice of appeal was filed on 19/11/2015,

the record and the memorandum of appeal were filed on 24/1/2017. Relying on the provisions of Rule 90(1) of the Rules, Mr. Msengi submitted that, the appeal which was filed after a period of 372 days from the date of institution of the notice of appeal, is time-barred and thus deserves to be struck out.

He argued further that, the appellants cannot rely on the *proviso* to Rule 90(1) of the Rules because the certificate of delay issued by the Registrar of the High Court on 20/1/2017, is invalid for having been issued subsequent to the one issued on 19/11/2019. It was Mr. Msengi's argument that, since the first certificate of delay was not withdrawn by the Registrar, it rendered the second certificate invalid. To bolster his argument, the learned counsel cited the cases of **Omary Shaban S. Nyambu v. Capital Development Authority & 2 others,** Civil Appeal No 258 of 2017 and **Meneja Mkuu, Zanzibar Resort Limited v. Ali Said Paramana,** Civil Appeal No. 263 of 2017 (both unreported).

The learned counsel contended also that, even if existence of two certificates of delay will not be found to be fatal, the appeal would still be time-barred because the appellants did not serve the respondent with a copy of their letter of application for certified copies of proceedings. This argument which is based on Rule 90 (3) of the Rules is not, however, based on any of the grounds of the preliminary objection filed by the respondent. It thus raised a new issue which could not be entertained by the Court

In response, Mr. Mohamed did not dispute that, whereas the notice of appeal was lodged on 19/11/2015, the appeal was filed on 24/1/2017 outside the period of sixty (60) days stipulated under Rule 90(1) of the Rules. He argued however, that the appeal is in time because the appellants had applied for certified copy of proceedings and according to the second certificate of delay issued by the Registrar on 20/1/2017, the certified copy of proceedings was supplied to them on 16/1/2017. The learned counsel argued therefore that, in terms of the *proviso* to Rule 90(1) of the Rules, the appeal was filed within time.

In his further submission, Mr. Mohamed distinguished the two cases cited by the respondent's counsel. With regard to the case of **Omary S. Nyambu** (supra), the appellants' counsel contended that, unlike in the present case, the Registrar issued three certificates of delay without any explanation as to the fate of the two previous certificates. On the case of **Meneja Mkuu, Zanzibar Resort Ltd** (supra), Mr. Mohamed submitted that, unlike in the present case where the second certificate was issued after the appellants' had disputed the first one on account that they were not supplied with a certified copy of the proceedings as requested, in the cited case, the certificate was issued after a lapse of time from the date of supply of the requested documents. Whereas, the documents were supplied on 14/3/2017, the certificate was issued on 3/10/2017.

The submissions made by the learned counsel for the parties give rise to only one issue; whether or not the appeal is time-barred. As intimated by the respondent's counsel, the two grounds of the preliminary objection centre on the existence of two certificates of delay. His argument is that, since the Registrar did not withdraw the first certificate, the omission renders the second certificate invalid.

In the case of **Omary S. Nyambu** (supra) cited by Mr. Msengi which, like in the present case, more than one certificate of delay was issued by the Registrar. In considering the effect of the irregularity, the Court was guided by what was stated in the case of **Maneno Mengi Limited and 3 Others v. Farida Said Nyamachube and the Registrar of Companies** [2004] TLR 391. In that case, the Court had this to say:

> *"There cannot be two certificates of delay concurrently applicable in respect of the same matter; in this case the certificate of 8th June, 2003 was the valid one and the second certificate of 8th July, 2003 was of no legal consequence as it amounted to extending the time within which to file appeal, something the Registrar had no power to do .... It was wrong for the Registrar to issue a second certificate while the first one had not been withdrawn; if the intention was to withdraw the first certificate, then the Registrar should have indicated so when issuing the second certificate."*

Mr. Mohamed argued that both cases cited by Mr. Msengi are distinguishable. We respectfully agree with him. On the case of **Meneja Mkuu Zanzibar Resort Limited** (supra), the issue of existence of two certificates did not arise. After he had issue the requested copies on 14/3/2017, the Registrar did not issue a certificate of delay. He issued it later on 10/10/2017. The appellant filed the appeal on 13/10/2017, seven months after the date on which it was supplied with copies of proceedings. The appellant's counsel argued that the certificate of delay was not issued because, although a copy of the proceedings, judgment and decree were issued on 14/3/2017, the appellant was awaiting for other documents listed under Rule 90(1) of the Rules. That argument was not accepted by the Court.

In the case of **Omary Shaban S. Nyamgu** (supra), the appellant who applied for certified copies of proceedings and judgment on 6/6/2016 was supplied with the same on 23/11/2016 and a certificate of delay was issued. Later however, he applied twice for other documents and two certificates of delay were subsequently issued. The appeal which was filed on the basis of the third certificate of delay was found to be time-barred because the first two certificates were not withdrawn.

In the case at hand however, the appellants were not issued with a copy of the proceedings as requested on 19/11/2015. They were supplied with certified

copies of judgment and decree. This is clear from their letter to the Registrar dated 21/12/2016 which reads as follows, in part:

> *"On 21 December, 2015 were (sic) supplied with the copies of the judgments and decree alone. No copies of proceedings were furnished to us. It is indeed, and we made it very clear that we need the said documents for the purpose of filing appeal before [the] Court of Appeal. By this letter therefore we are reminding your office to supply us with the* ***missing*** *copies of* ***Proceedings*** *to enable the smooth filing of our clients' appeal within time."*

It was upon that letter that the Registrar supplied a copy of the proceedings to the appellants on 16/1/2017 and proceeded to issue the second certificate of delay on 20/1/2017. So, while in the cases cited by the respondent's counsel the appellants were supplied with a copy of the proceedings, in the present case, that was not done. Rule 90 (1) of the Rules provides as follows:

> *"90 (1) Subject to the provisions of rule 128, an appeal shall be instituted by lodging in the appropriate registry within sixty days of the date when the notice of appeal was lodged with:*
>
> *(a) a memorandum of appeal in quintuplicate;*
> *(b) the record of appeal in quintuplicate;*
> *(c) security for the costs of the appeal.*

Save that where an application for a copy of the ***Proceedings in the High Court*** *has been made within thirty days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted be excluded such time as may be certified by the Registrar of the High Court as having been required for the preparation and delivery of that copy of the appellant."* [Emphasis added]

By virtue of the above quoted provision of the Rules therefore, once it is applied for by the appellant, a certified copy of the proceedings is a key document which, if not supplied, the prescribed period of filing an appeal does not start to run. A certificate of delay cannot thus be issued unless a certified copy of the proceedings is ready for supply and the appellant has been so informed. Where the Registrar issues a certificate of delay without providing the appellant with a copy of the proceedings, then as argued by Mr. Mohamed, such a certificate is pre-mature, hence ineffective. In our considered view therefore, even though at the time of issuing the second certificate, the Registrar did not withdraw the first one, the omission did not render the second certificate invalid. In our view, the defect was curable under Rule 2 of the Rules which was in force at the time of when the certificates of delay were issued. That provision provided as follows:

"In administering these Rules, the Court shall have due regard to the need to achieve justice in the particular case."

It is on the basis of the above stated reasons that we overruled the preliminary objection.

That said and done, we now turn to consider the appeal. At the hearing, the same learned advocates appeared for the respective parties, Mr. Mohamed learned counsel began by adopting the appellants' written submission filed on 22/2/2017. On his part, Mr. Msengi, who did not file any reply submission, made oral arguments in opposition of the appeal.

For reasons which will be apparent herein, we do not intend to consider the submissions made by the learned advocates for the parties on all the grounds of appeal. We only need to consider the submissions made on grounds 7 and 8 of the appeal. As stated above, the respondent's claims were based on three different causes of action; **first** is the claim for payment of Tzs 500,000,000.00 as dividends for 2 shares which he claimed to have held in a company known as Bridge Limited. **Secondly,** is a claim of mesne profits for the buildings used for hotel business and a plot of land on which a Horse Club was being operated and **thirdly,** the respondent claimed ownership of the plots of lands on which the hotel buildings and the Horse Club are situated and thus, apart from the above stated claims, he sought an order of eviction against the appellants from the three plots of land.

The respondent states as follows in paragraphs 4 and 7 of the plaint:

"4. *That the plaintiff in this suit is claiming from the Defendants(a) payment of his 2% shares in the business Company Bridge Limited for the period from 1997 in the sum of Tshs. 500,000,000/- (b) payment of US Dollars 220,000 being mesne profit from his shamba and houses which are in possession of the defendants for the period from 1998 up to February, 2002 (50 months). (c) The vacant possession of the plaintiff's four houses and shamba which are being unlawfully occupied by the Defendants.*

7. That in 1994 the plaintiff and the Defendants agreed to establish a hotel business company known as Bridge Limited at Kiwengwa on another farm plot very close to the plaintiffs shambas in which the plaintiff would be allotted 2% shares out of 100 shares and on 28th March, 1994 going by that agreement the second Defendant transferred to the plaintiff 2 shares out of her 50 shares as shown in the allotment of shares form dated 28th March 1994 and registered with the Registrar of Companies on 28th March, 1994 which is annexed hereto as P5 to form part of evidenced."

Furthermore, in paragraphs 9, 10 and 12 of the plaint, the respondent states as follows:

"9. *Further the plaintiff and the Defendants agreed to establish a horse club in another shamba belonging to the plaintiff the income from which according to the agreement would be*

divided equally between the plaintiff on one part and the defendants of the other part.

10. *That the Bridge Limited hotel business started its operation in 1997 operating as Vera Club and the horse club was in operation in 1998.*

12. *(1) Further as soon as the plaintiffs four houses were competed in 1998 the defendants without any claim of right and permission from the plaintiff entered up on the houses and kept them entirely under their possession and control hence unlawfully dispossessing the plaintiff of his houses.*

(2) That the Defendants in furthering their unlawful dispossession of the plaintiffs houses have leased three houses to different persons collecting therefrom US Dollars 1500 per month from one of the houses and 1400 US Dollar from two houses per month and using the fourth house to accommodate Vera Club hotel staff.

(3) That in utter disregard of the plaintiff's rights in his four houses unlawfully dispossessed by the Defendants, the Defendants refuse (sic) the plaintiff to attend to any matter concerning the houses as a result of which he does not get or enjoy any benefit out of his houses."

On the basis of the above extracts from the plaint and the tendered evidence, it is a clear that, at the time of the institution of the suit, the land on which the

hotel buildings are situated had been leased to the companies stated by the respondent in his evidence at the trial. According to his evidence, the companies are Sun Sea Company Limited, Bridge Co. Ltd, Treasure Company Limited and Kangaroo Ltd. In his evidence at page 274 of the record of appeal, the respondent states as follows:

> *"[In] 1995 the defendants already written the agreement with the Government relating to any properties (houses). And same companies which they wanted me to write in those documents already in those agreement with the Government. And they (defs) forged any signature as if I accepted the deal."*

The issue now is whether in the particular circumstances of this case, it was proper for the respondent to sue the appellants in their personal capacities. When arguing the 7th ground of appeal, Mr. Mohamed submitted that the claim on dividends ought to have been preferred against the company in which the respondent claimed to have held the 2 shares. In his reply, Mr. Msengi conceded to the position stated by the appellant's counsel. Indeed, it is trite principle that a claim on any right accruing from shares in a limited liability company cannot be made against the shareholders because in law, a company is independent from its shareholders.

With regard to the claim of mesne profits from the hotel and the horse club, although at first, the learned counsel for the respondent was firm that the same

were properly claimed against the appellants because they are the ones who were operating the two businesses, after being probed by the Court on whether from the contents of the pleadings and the tendered evidence, the appellants could be sued in their personal capacities, Mr. Msengi conceded that the appellants were wrongly sued.

The principle as stated more than two centuries ago, in the famous case of **Salomon v. Salomon & Co. Ltd,** [1897] A.C 22 is that in law, a company is not the agent of its subscribers or trustees. It is independent from them and thus the subscribers or shareholders cannot be personally liable for the debts or liabilities of the company. In the case of **Yusuf Manji v. Edward Masanja & Another,** Civil Appeal No. 78 of 2002 (unreported), the Court reiterated that position by citing the following passage from **Salomon v. Salomon case** (supra).

> *"The company is at law a different person altogether from subscribers..., and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee of them. Nor are subscribers, as members liable, in any shape or form, except and in the manner provided by the Act."*

On the basis of the above stated reasons therefore, there is no gainsaying that the appellants were wrongly sued. The High Court ought therefore to have

found that the appellants could not be held liable. In the event we allow the appeal and hereby quash and set aside the decision and the decree of the High Court. The appellants shall have their costs.

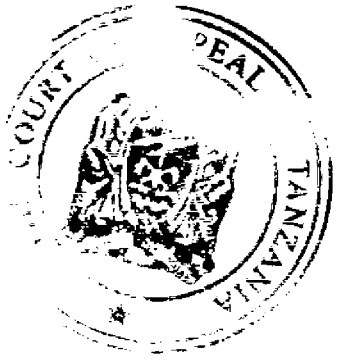
DATED at **ZANZIBAR** this 11th day of December, 2019.

A. G. MWARIJA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The Judgment delivered this 11th day of December, 2019 in the presence of Suleiman S. Abdulla, counsel for the Appellants and in the absence of the Respondent who was dully served is hereby certified as a true copy of the original.



A. H. Msumi
DEPUTY REGISTRAR
COURT OF APPEAL