IN THE HIGH COURT OF TANZANIA
AT DAR ES SALAAM

CIVIL APPEAL NO. 296 OF 2004

ABDUL RAHIM SHADHILI as Guardian of
MISS FATUMA A. R. SHADHILI ..... APPELLANT

VERSUS
MANDHAR GOVIND RAYKAR ..... RESPONDENT

Date of Last Order 27/3/2007

Date of Judgment 05/06/2007

JUDGMENT

Mlay, J.

This is an appeal from the judgment and decree of the Kinondoni District Court (L. J. Mbuya SRM) in Civil Case No.110 of 2004. The Respondent / Plaintiff filed a suit against the Appellant / Defendant on an alleged breach of contract relating to the sale of the Plaintiffs house on Plot No.1476 Msasani Peninsula and unlawful occupation of the house. The Respondent / Plaintiff sought judgment and decree against the Appellant/ Defendant as follows:-

I. That the Honorable Court be pleased to declare that the occupation of the defendant in the house Plot No. 1476

Msasani Peninsula is unlawful and should vacate it and give possession to the Plaintiff.

II. That the Honourable Court be pleased to order the defendant to pay to the Plaintiff loss of income of USD 3,000.00 per month from the date he occupied till vacation of same.

III. That the Defendant should be ordered to pay general damages of Tsh.10,000,000/= to the Plaintiff.

IV. That the defendant should pay interest of Commercial rate 30% on (ii) herein above from the date of occupation till judgment.

V. That the defendant be ordered to pay interest at Courts rate from the date of judgment till payment in full.

VI. Costs of this suit be provided for.

VII. Any other relief (s) as this Honourable Court may deem fit and just to grant.

The record of the proceedings shows that the Defendant having been granted an extension of time in which to file a written statement of Defence filed the same late and it was

expunged from the record. The plaintiffs advocate their parayed for a hearing date for exparte proof which prayer was granted. The exparte hearing was adjourned two times and on the third hearing, the Plaintiffs advocate Mr. Kishaluli prayed for ***"the matter to be disposed off by proving it by affidavit"***. The prayer was granted and the following order was made:

i) Judgment on 25/10/2004

ii) Affidavit to be filed by 4/10/2004.

On 25/10/2004, the trial Magistrate L.J. Mbuya SRM delivered the following judgment:

"JUDGMENT

Having scrutinised the grounds contained in the Affidavit sworn by one MAHOHAR GOVIND RAYKAY and the Annextures "A", "B", "C", "E", "F" and "G" the court is satisfied that the Plaintiff is entitled to the relief's prayed in the plaint. Judgment is therefore entered in favour of the Plaintiff as prayed. Order accordingly".

The Appellant / Defendant, being aggrieved by the above judgment, has now appealed to this court, on the following grounds:

1. *That the learned trial magistrate grossly erred in law and fact in entertaining to matter while that court had no jurisdiction in respect of the subject matter as it related to land and also the subject matter was beyond its pecuniary jurisdiction.*
2. *That the learned trial Magistrate grossly erred in law in allowing the claim to be proved by way of affidavit.*
3. *That the learned trial magistrate grossly erred in law in not composing a judgment as required by law.*

At the hearing of this appeal Mr. Kashaluli advocate for the Respondent proposed the matter to be disposed of by way of written submissions and Mr. Msafiri advocate being in agreement, this court allowed both counsels to file written submissions.

On the 1st ground of Appeal Mr. Msafiri submitted that the suit having been instituted in the subordinate court on 20/4/2004, the subordinate court had since 1/10/2003 ceased to have jurisdiction in Civil matters relating to land, following the coming into force of the Land Disputes Courts Act 2002. He quoted section 4 (1) of the Land Disputes Courts Act as providing as follows:

> 4-(1) unless otherwise provided by the Land Act 1999, no magistrate courts established by the Magistrates' Courts Act, 1984 shall have Civil jurisdiction in any matter under the Land Act, 1999 and the Village had Act, 1999".

Mr. Msafiri submitted that inview of the above provisions, the District Court had wrongly and without jurisdiction admitted and proceeded to determine the suit. He therefore submitted that the judgment and decree of the subordinate court there a nullity.

On the second ground, Mr. Msafari contended that it was improper for the trial court to allow the Respondent / Plaintiff to prove the entire suit by affidavit. He submitted that there is the provision in the Civil Procedure Code which allows a party to a suit to prove the merits of the out by affidavit. He contended that the court is bound to adhere to Order VIII Rule 14 (2) (b) by requiring the Plaintiff to prove his case exparte by oral evidence as provides under the said order. He cited the decision of the Court of Appeal of Tanzania in the case of FAIZEN ENTERPRISES LIMITED Versus AFRICARRIERS LIMITED Civil Appeal No.38/97 (unreported).

On the 3rd ground, the learned advocate quoted the provisions of Order XX Rule 4 which states:-

> *"Judgment shall contain a concise statement of the case, the points for determination, the decision the on, and the reasons for such decision".*

He submitted that the judgment of the District Court did not contain any statement of the case leave alone a concise one and there were no points for determination or reasons for the decision. He contended the trial magistrate merely referred to annextures, without stating what they catained and their relevancy to the suit. He referred to the case of COASTMILLERS LTD and 2 OTHERS Versus JOYCE JOSEPH CIVIL APPEAL NO.144/2004 (Unreported) and quoted Shangwa, J stating as follows:

> *" I agree with Mr. Lyimo that non appearance of the Defendant in a suit as it was the case here does not relieve the trial (sic) of writing judgment which is in conforming under r.4 and 5 of O.XX of Civil Procedure Code 1966. I agree with him that the trial District Court's judgment*

is nullity for non- compliance with these provisions".

For this reason he prayed that the 3rd ground of appeal be allowed. Finally and for the above reasons Mr. Msafiri prayed the appeal be allowed and the judgment quashed and decree set aside, with costs.

The Respondents counsel Mr. Kishaluli who also represented the respondent/ Plaintiff during trial, submitted that the 1st ground of appeal has no merit. He contended that ***"the main object of the parties is expressly on contract entered between the parties"*** and that "***the main issue which was before the Honourable Court was on breach of the contract of sale where upon the appellant was required to pay the Respondent the amount agreed so that the house could pass"***. He submitted that there are many laws which govern the subject matter and cause of action apart from the Land Act which the appellants counsel has cited. He argued that in the respondents case, "*the main concept was governed by the law of contract ordinance and the terms of the contract should be followed".* He submitted that "*as far as the appellant was in breach of contract, the proper law was on law of contract and the suit which was filed by the Respondent is based on contract as the terms were breached*". He further stated that the court "*executed its inherit*

jurisdiction under Section 95 of the Civil Procedure Code and vest itself with powers to adjudicate on the matter". He submitted that since the matter was govered by the contract ordinance, "**the Land was just an item to be given once the contract is Honoured**, therefore, ***the court had jurisdiction to adjudicate the matter***".

Mr. Kashaluli also argued the issue of pecuniary jurisdiction which was raised in the first ground of appeal but was not touched on by Mr. Msafiri in his written submissions. He contended that since the contract entered was for ST.£.150,000/= and the loss caused USD 3,000.00, the court had jurisdiction as on immovable property it was up to more that 150,000,000/=.

On the 2nd ground relating to proof by affidavit, he contended that the law allows it as the circumstances require. He argued that the Civil Procedure Code has to be read together with other laws, in this case, with section 34 (c) (1) (a) (i) and (ii) of the Evidence Act 1967. He quoted the said provisions as follows:

> *"(i) In any Civil Proceedings where direct or oral evidence of fact would be admissible any statement made by a person in a document tending to establish*

that facts shall, in production of the original document, be admissible as evidence of that fact, in lieu of the attendance of the witness, if the following is satisfied".

Mr. Kishaluli did not wish to go to the "*conditions*" to be satisfied. Be that as it may, he submitted that "***the proof by Affidavit by the person who had personal knowledge is allowed, and the affidavit of the Respondent who entered into agreement is very much sound to be taken as evidence on proof of evidence in the case".***

On the last ground of appeal, Mr. Kishaluli submitted that. "*Each judgment is written according to facts therefore there is not strict rules (sic) as to how the judgment could be written*". He contended that evidence was given and the Annextures were observed to be of value in reaching the decision. He referred to and quoted Bubeshi, J . in the case of CARITAS VS MKWAWA 1996 TLR 239 as follows:

"Although Rules 4 and 5 of order 20 of the CPC, require Judgment to contain a concise statement of the case, the points for determination the decision, the content of each judgment depends upon the

particular case and there is not specific format as he how a judgment should be presented".

For the above reasons Mr. Kishaluli prayed that the appeal be dismissed, with costs.

In a rejoinder Mr. Msafiri submitted that the provisions of section 4 (1) of the Land Disputes Courts Act, 2002 do not accommodate the distinction made by the Respondents advocate. He contended that the provisions state that all magistrates Courts Act, 1984 shall have "NO CIVIL" Jurisdiction be it based on contact, tort or otherwise. He submitted that the only jurisdiction given to the magistrates court is criminal jurisdiction in respect of offences relating to land as stated in subsection (2) of section 4 of the Act.

On the issue of pecuniary jurisdiction, Mr. Msafiri submitted that the pecuniary jurisdiction of the court was limited to Tshs. 100,000,000/= only while sterling #150,000 was oven Tsh.150,000,000/= at the exchange rate prevailing at the date instituting the suit in the District Court.

On the issue of proof by affidavit, Mr. Msafiri reiterated that there is no provision for it in the Civil Procedure Code, 1966 and that the affidavit sworn by the Respondent in proof

of the suit, did not satisfy the conditions set by the provisions of section 34 C of the Evidence Act, 1967. He referred to and quoted section 34 C(3) which states:

> ***"34C (3) Nothing in this section shall render admissible as evidence any statement made by a person interested at the time when proceedings were pending or anticipated involving a dispute as to any fact which the statement might tend to establish".***

Mr. Msafiri made two submissions. First, that the provisions of section 34 C (1) (a) (i) and (ii) of the Evidence Act 1967 cited by the Respondents counsel, are irrelevant and inapplicable to the case and at any rate the affidavit was inadmissible under subsection (3) above. Secondly, assuming that the Respondents Affidavit was a "statement", that affidavit was wrongly acted upon as the maker had not been called as a witness as required by the provisions of paragraph (b) of subsection (i) of section 34 C and there were no reasons assigned to dispence with the calling of the maker as a witness or to invoke the application of the enumerated exceptions.

He prayed that the holding in the FAIZEN'S case be applied to this appeal.

On the applicability of the decision in CARITAS TANZANIA Vs STUWARD MKWAWA [1996] TLR 239, Mr. Msafiri submitted that the decision supports the appellants argument, rather than the Respondent. He argued that the "format" envisaged does not mean dispensing with the requirements of Rules 4 and 5 of Order XX of the Civil Procedure Code, 1966.

Before coming to grips with the three grounds of appeal, it is placed on record that in terms of section 54 (4) of the Land Disputes Courts Act, 2002, the Honorable Chief Justice by Circular Ref. JY/D.20/3/52 dated 16/6/2006, extended the time to hear and conclude the proceedings and appeals for two years. In the event that this appeal arises from a land matter falling under the Land Disputes Court Act, 2002 this Court does have jurisdiction to entertain the appeal by reason of the said extension.

Now we are fortified to tackle the grounds of appeal. The first ground of appeal questions the jurisdiction of the District Court to entertain the suit which was filed after the coming into operation of the Land Disputes Courts Act, 2002 Cap 216

RE 2002. We have been referred to section 4 (1) of the Act which provides:

> ***"4- (1) unless otherwise provided by the Land Act, 1999, no Magistrate's Court established by the Magistrates Courts Act, 1984 shall have Civil jurisdiction in any matter under the Land Act, 1999 and the Village Act, 1999".***

The Land Disputes Courts Act, Cap 216 RE 2002 came into operation on 1st October 2003, vide GN 223 of 2003. It is not in dispute and the exchequer receipt for filing fees shows, that the suit was filed in the District Court on 20/4/2004, nearly six months after the Act had come into operation. If, therefore the subject matter of the suit is "*any matter under the Land Act, 1999 and the Village Act, 1999*", by operation of the provisions of section 4(1) of Cap 216 RE 2002, the District Court would have had no jurisdiction to entertain the suit. The respondents counsel has argued that the suit is based on breach of contract.

The subject matter of the suit can be established or determined by looking at the contents of the Plaint. The

transaction giving rise to the suit can be ascertained by looking at paragraphs 4, 5 and 6 of the plaint, in which the plaintiff has avered as follows:

> 4. THAT, I am the legal owner of the house situated on Plot No. 1476 Msasani Peninsular, Dar es salaam and I have a title Deed No. 36148. I shall attach a copy of Title Deep as Annexture "A" to form port of the Plaint.
>
> 5. That, the Plaintiff been in the need to sell his house, agreed with the Defendant who was interested to buy it to have an agreement for sale and the Defendant was willing to pay sterling pounds 150,000,000.00 that was 1st January, 1996. We shall attach the copy of the agreement as Annexture "B" to form part of the Plaint.
>
> 6. THAT, when the parties entered into agreement, the Defendant requested to occupy the House while making an advance payment on that understanding of advance payment while the rest of the amount is arranged for payment. Unfortunately, the cheque which was presented as

consideration in that contract was breached".

In paragraph 12 of the Plaint the Plaintiff has further averred:

"12 THAT, the Plaintiff the house before this dubious transaction of the Defendant at the rate of USD 3,000.00 PER Month therefore, for the unlawful occupation of the Defendant had lost income since 1996 todate which argument should be paid by the Defendant".

Form the above paragraphs of the plaint, the suit is based on breach of a sale Agreement by the Defendant, for the purchase of the Plaintiffs house situated on Plot No. 1476 Msasani Peninsula. The sale Agreement which is Annexture B to the Plaint states in part, as follows:

I the undersigned Mr. M. G. RAYKAR of P.O.Box 8707 Dar es salaam (hereinafter called) the seller hereby agree to sell one four Bedroom Bungolow situated on Plot No. 1476 Msasani

Peninsula, Dar es salaam, to Ms Fatuma AbdulRahim Shadhili (here after called the Buyer) of P.O.Box 8985 Dar es salaam.

The amount of consideration for the said property as it is to be the sum of sterling pounds. 150,000.00 (Hundred and fifty thousand only as agreed by the seller and Buyer.

***Mode of Payment**: One Hunderd thousand sterling Pounds to be paid to the seller immediately on signing the sale Agreement and the **balance to be paid on transferring** the properly in the name of the buyer.*

Expences [Not applicable]

In the event of the seller failing to transfer the properly in the name of the buyer, the seller has to refund the buyer the advance payment and if the Buyer fails to pay his balance of the agued amount the Buyer m will perfect the advance payment made to this seller.

The agreement was signed on 1st January 1996.

According to what was avered in the plaint and on the face of the terms of the sale agreement which is Annexture "B" to the Plaint, the suit is based on the alleged breach by the Defendant of the agreement in which the Plaintiff had agreed to sell and the Defendant had agreed to buy the plaintiffs house on Plot No. 1476 Msasani Peninsula. The agreement which has been breached, is an agreement of a transfer of a right of occupancy from the plaintiffs to the Defendant upon payment of a consideration. In the Plaint, it is stated that the consideration is sterling Pounds 150,000,000.00 (one hundred and fifty million), while in the sale agreement the consideration is stated to be 150,000.00 (one hundred and fifty thousand). This difference may have a bearing on the issue of pecuniary jurisdiction of the District Court but for the purpose of the 1st ground of appeal, there is no doubt in my mind that the subject matter of the suit is a matter falling under the land Act, 1999. The agreement being about a transfer of a right of occupancy makes the subject matter of the suit a land matter for which, in terms of section 4 (1), of the Land Disputes Courts Act, Cap 216 RE 2002, the District Court had no jurisdiction to entertain. That being the case all the proceedings in the District Court of Kinondoni Civil Case No.11 of 2004 are a nullity. The first ground of appeal therefore succeeds on the issue of statutory jurisdiction. The question of pecuniary jurisdiction becomes irrelevant in the

light of the finding that the trial court had no statutory jurisdiction to entertain the suit based on land. In addition, considering the different values of the consideration stated in an Plaint and in the sale agreement and the absence of evidence on the exchange rate relating to pound sterling as existing at the time the agreement was signed, it will be a mere academic exercise to engage in the issue of pecuniary jurisdiction of the court.

The second ground of appeal, is whether the trial Magistrate was wrong to allow the Plaintiff / Respondent, to prove his case by affidavit. The appellants counsel has argued that there is no provision in the Civil Procedure Code, 19966 allowing a party to prove a case by affidavit and the decision of the Court of Appeal in the FAIZENS case, which has been cited earlier on in this judgment, is a against such a practice. In the FAIZENS case the at page 6 of the typed judgment, MFALILA JA, posed the question:

> *"Secondly, under what provision did the court allow counsel for the Plaintiff to prove his case by affidavit?".*

In the case under consideration the trial Magistrate did not cite any provision for allowing the Plaintiff to prove that suit by affidavit. In the Faizens case the Court of Appeal examined the provisions of Order 9 Rules 1 and 3 which state:

> *"r. 1 Any court may at any time for sufficient reason order that any particular fact may be proved by affidavit on that the affidavit of any witness may be read at the hearing at the hearing on such conditions as the court thinks reasonable.*
>
> *Provided that where it appears to the court that either party bonafide desires the production of a witness for cross examination, and that such witness can be produced, an order shall not be made authorising the evidence of such witness to be given by affidavit.*
>
> ***Rule 3.*** *Affidavit shall be confined to such facts as the deponent is able of his an knowledge to prove, except on inter locutory applications, on which statements of belief may be admitted".*

Having considered the above provisions of Order 19 the Court of Appeal observed:

> *"Even assuming that the provisions of this order allow the Plaintiff to prove his case by affidavit, what* ***sufficient reason did counsel give to bring his case within the ambit of O.19 r. 1*** *and that he was not disqualified under the proviso to that rule.*

> *But we think more important is the consideration that in this case the Plaintiff would be required* ***to prove the entire case*** *not isolated or individual facts by affidavit. In the circumstance we think this order should not be used to allow absent plaintiffs to proceed exparte".*

In the present case under consideration the Defendant was late to file a written statement of Defence, after being granted an extension of time. The record of the proceedings shows that after the ruling was made on 24/8/2004

expunging the written statement filed late without leave of one court, The Plaintiffs counsel Mr. Kishaluli prayed for a date for exparte hearing. The trial Magistrate made the following order:

"Exparte hearing date on 30/9/2004 at noon".

On 30/9/2004 both parties were absent and the Magistrate made the following order.

"Order: Hearing on 4/10/2004"

On 4/10/2004 both parties were again absent and the Magistrate ordered:

"Order: Hearing on 13/10/2004"

On 13/10/2004 the following proceedings took place.

"Mr. Kishaluli We pray the matter to be disposed off by proving it by affidavit"

Court: *The prayer is granted the matter to be proved by way of affidavit"*

There was no reason given why the matter did not proceed to "*exparte hearing*" as previously ordered or why the "*exparte hearing*" had to be adjourned three times. Could it be like it was in the Faizens case, that Mr. Kishaluli did not have

a witness to put on the stand to prove the case by oral evidence? As it was in the FAIZENS case, the trial Magistrate did not give any reason, other than granting the prayer, as to why the advocate was allowed to prove the case by affidavit or to show that the case came within the scope of Order 19 r.1 and not disqualified under the proviso thereto. Like in the FAIZES case, there is not doubt that the court was not correct in proceeding the way it did.

Since the Defendant had failed to file a written statement of Defence after he had been granted an extended period in which to do so, the provisions of order VIII Rule 14 (2) (b) applied to the suit. Under sub rule (2) (b) it is provided:

> *"(b) in any other case,* ***upon an application*** *in writing by the plaintiff fix a day for exparte proof and may pronounce judgment in favour of the Plaintiff upon such proof of his claim".*

In the present case the was no application made in writing and as stated earlier, it was improper to allow proof of the claim by affidavit. Apart from the finding on the first ground of appeal that the proceedings are a nullity for lack of jurisdiction, the second ground of appeal also has merit. The respondents argument that the affidavit is admissible under

section 34 C of the Evidence Act1967 or Cap 6 RE 2002, is without any merit. An affidavit is not in my view, a *"a statement"* envisaged by the provisions of section 34(c). The affidavit was clearly made after the suit had been instituted and it was for the purpose of proving the claim in the very suit. Assuming that it was a "statement" it would be inadmissible under subsection (3) of section 34 (C) of the Evidence Act, which provides:

> *" (3) Nothing in this section shall render admissible as evidence any statement made by a person interested at the time when proceedings were pending or anticipated involving a dispute as to any facts which the statement might tend to establish.*

The affidavit of exparte proof was made by the plaintiff who is an interested party and it was made when the suit was pending and it involves the very facts which are in dispute in the suit, intending to prove them. Section 34 C of the Evidence Act, 1967 does not therefore help the Respondent.

The last ground of appeal challenges the legality of the judgment for not complying with to provisions of Order XX Rule 4 which states;

> *"4 Judgment shall cantain a consise statement of the case the points for determination, the decision there an and there on and the reasons for such dicision".*

The judgment of the District court which has been quoted in full earlier an in this judgment does not contain any of the ingredients set out in Rule 4 of Order XX above. It has been argued that according to the decision of this court in the case of CARITAS TANZANIA Vs STUWARD MKWAWA (supra) there is no specific format of how a judgment should look.

That decision represents the correct position on the form of judgments. What is at stake here however, is not the form but the contents of the judgment. The trial court ordered the suit to be proved exparte by affidavit and recorded such proof as ordered. The trial court was therefore duty bound to consider the evidence presented, assess the evidence and make a decision and give the reasons for its decision. For

example, if the court had considered paragraph 4 of the "EXPARTE PROOF AFFIDAVIT" that the Defendant was willing to pay sterling pounds 150,000,000.00 (One hundred and fifty million pounds sterling) and the contents of Annexture B to the plaint which was adopted as part of the affidavit, which shows that the agreed consideration was £150,000.00 (One hundred fifty thousand pounds sterling), the judgment would have shown how the court was satisfied that the claim had been prove, not withstanding the contradictory evidence.

As the judgment did not contain the statement of the case or points of determination and the reasons for the , it was not a judgment.

In the final analysis the appeal is allowed. The trial court had no jurisdiction to entertain the suit which is on a land matter and consequently the proceedings are a nullity. The parties are at liberty to institute proceedings in the appropriate tribunal vested with jurisdiction on land matters.

Having given due consideration to the lacunae which existed between the enactment of the Land Disputes Courts Act 2002 and the establishment of the appropriate tribunals to

deal with land disputes, I think it is fair for each party to beare own costs in this appeal. It is ordered accordingly.

J.I Mlay,

JUDGE

Delivered in presence of Mr. Msafiri advocate for the Appellant and Mr. Kanute Chugu holding a power of Attorney for the Respondent, this 5th day of the 2007. Right of appeal is explained.

J.I Mlay,

JUDGE

05/06/2007