IN THE HIGH COURT OF ZANZIBAR
HELD AT VUGA
CIVIL APPEAL N0. 53 OF 2012
FROM ORIGINAL ORDER CIVIL N0 10 OF 2012
RM'S COURT AT VUGA ZANZIBAR

OMAR SHAMUUN KHAMIS .....APPELLANT

VERSUS

REGISTRAR HIGH COURT
ZANZIBAR
ATTORNEY GENERAL ..... RESPONDENT

Date of Last order17/07/2013
Date of Ruling 04/10/2013

RULING

MWAMPASHI, J.

In order to appreciate what exactly this ruling is for, it is prudent to give the history of the whole matter. Pending in the Regional Magistrate's Court (Vuga) is a Civil Suit No 10/2012 wherein the applicant herein Mr. Omar Shamuun Khamis is the plaintiff and the respondents namely the Registrar High Court Zanzibar and the Attorney General Zanzibar are 1st and 2nd defendant respectively. The applicant's suit against the respondents is based on defamation arising from allegations that the 1st respondent did unlawfully order the police to hold him in confinement for three hours.

In their joint written statement of defence the respondents raised a preliminary objection against the suit on grounds that the suit was

bad for contravening SS. 6(2)(3) and 10(2) of the Government Proceedings Act, 2010 (Act No 3/2010), that the plaintiff has no cause of action against the defendants and that the claim is frivolous, vexatious and an abuse of court process. On 18/10/2012 the Regional Court delivered its ruling dismissing all the grounds raised on the preliminary objection with the exception of the 1st ground which was to the effect that under S. 6(3) of the Government Act, 2010, the 1st defendant i.e the Registrar of the High Court has been wrongly joined to the suit and therefore that he be struck out from the suit. The trial court therefore made an order that the plaint be amended to that effect.

The order made by the trial court that the 1st respondent be struck off from the suit angered the Plaintiff who on 27/12/2012 through his counsel Mr. Ajar Patel, filed in this court something very novel and confusing. He filed a mixture of an appeal and an application for review. He cited Order XLV1 rule 1 of the Civil Procedure Rules, Cap 8 and SS.7(1)(a)(c) and 8 of the High Court Act, 1985 as the enabling provisions under which the appeal/application is based. In a more confusing manner Mr. Patel raised two alternative grounds one of them raising not only a new issue which was not featured in the trial court but also which very seriously accuses the 1st respondent of having prepared and composed the ruling in his favour and that what the trial court magistrate did was just to sign and pronounce it. The two grounds are in the following form;

'The Appellant above named appeal to and/or seeks Review of the Ruling given in R M C C 10 of 2012 and sets forth the following grounds namely;

1. That the Ruling dated 18.10.2012 made in R M C C 10 of 2012 be set aside as it was forged and supplied by the 1st Respondent to the trial Magistrate who adopted, uttered and

signed it as his own which ruling made the 1st Respondent a beneficiary absolving him from his co-liability due in the underlying suit. In which case, the four Pos raised by the Respondents in their Defence be struck off as being abuse of court process and/or unmeritorious and therefore judgment be entered for the Appellant as prayed in his underlying suit as the parties are not at issue on matters of Law and facts.

2. In the alternative, if the Honourable Court were to hold the said Ruling is genuine then the Respondent 1st PO be truck off as being an abuse of court process and/or unmeritorious and therefore judgment be entered for the Appellant as prayed by him in his underlying suit as the parties are not at issue on matters of law and facts.

On the same date i.e 27/12/2012 Mr. Patel filed a Chamber Summons under S. 129 of the Civil Procedure Decree, Cap 8 and Order XLV1 rule 27 of the Civil Procedure Rules, Cap 8 praying for the following orders;

{a} the facts and beliefs given in his attached affidavit Be admitted as evidence to prove the 1st Ground of High Court Civil Appeal No...../2012 which is that 'the Ruling dated 18.102012 made in R M C C 10 of 2012 be set aside as it was forged and supplied by the 1st Respondent to the trial Magistrate who adopted, uttered and signed as his own which ruling made the 1st Respondent a beneficiary absolving him from his co-liability due in the underlying suit' OR

{b} to summon Hon Khamis Ali Simai, Suleiman Said, Saada Mikidad, Abbas Bakari, Maulidi Ali Mrisho, Bi Hamisa and the 1st Respondent all employees of the High Court, so that he can cross examine

them to prove the 1st ground of appeal and

{c} consequential order(s) be made.

This application was supported by a 13 pages affidavit of Mr. Patel and on the other hand Mr. George Kazi the Registrar High Court of Zanzibar who is the 1st respondent in this application did file his counter affidavit opposing the application. The 2nd respondent the Attorney General of Zanzibar did not file any counter affidavit though at the hearing Ms. Fatma Mtumweni learned State Attorney did appear for the 2nd respondent but had nothing substantial understandably because of her failure to counter the affidavit filed by Mr. Patel.

At the hearing of this matter Mr. Patel learned counsel represented the applicant while Mr. George Kazi the Registrar of the High Court appeared for the 1st respondent.

In his submission in support of the application Mr. Patel began by pointing out that the central issue in this matter is fraud constituting forgery. He argued that the trial court ruling dated 18/10/2012 was composed by the 1st respondent and that the trial magistrate just read and signed it. He invited the court to pass through his supporting affidavit in which it is abundantly shown that the ruling was not prepared or composed by the trial magistrate but by the 1st respondent.

Mr. Patel then attacked the counter affidavit filed by the 1st respondent arguing that the same is fatally defective for contravening Order XX11 rule 3(1) of the Civil Procedure Rules, Cap 8 and for being argumentative. He also argued that the counter affidavit is full of speculations, allegations, pleadings, hearsay and conclusions of law. Mr. Patel did therefore pray for the counter affidavit to be truck out.

It was further submitted by Mr. Patel that if the 1st respondent is denying the fact that he is the one who composed the ruling in question then he was supposed to file an affidavit of the trial magistrate confirming that the ruling was prepared by him and not by the 1st respondent.

Mr. Patel did lastly pray for his application to be granted either by accepting his affidavit as enough evidence proving the alleged forgery of the ruling or by calling the court officers named in the application including the trial magistrate as witnesses to prove that the ruling was not composed by the trial magistrate but by the 1st respondent.

As it can be expected Mr. George Kazi the High Court Registrar who appeared for the 1st respondent vehemently opposed not only this application but also the appeal/review application on which this application at hand is based. He also expressed his concern on the confusion as to whether what is before the court and on which this application is based is an appeal, review or revision. Mr. George did also contend that the alleged issue of forgery or fraud which is crime cannot be dealt with in an appeal or chamber application but by reporting it to the Police.

It was further submitted by Mr. George that the application is not properly before the court because it is brought under Order XLV1 rule 27 of the Civil Procedure Rules which is not applicable to the applicant and that the application is based on the appeal which is not competent because it is not from a decree but ruling. He submitted that the order made by the trial magistrate in his ruling is not one of the appealable orders as provided for under Order XLV11 of Cap 8. He therefore asked the court to dismiss the application and that even the appeal/review on which the application is based has to be summarily dismissed for being incompetent and purely an abuse of court process.

Mr. George did also ask the court to strike out the affidavit filed in support of the application and therefore find the application incompetent for not being supported by any affidavit. The reason given by him is that the filed affidavit is incurably defective for having a defective jurat. He explained that in the jurat there is no name of attesting officer. He insisted that the name appearing in the rubber stamp is not sufficient and on this point the court was referred to the Court of Appeal of Tanzania decision in the case of ***Felix Francis Mkosamali vs Jamal A Tamim,*** Civil Application No 4/2012 (unreported) where it was held that a rubber stamp is not part of jurat and that lack of the name of attesting officer in jurat makes the jurat defective.

It was lastly insisted by Mr. George that for all the above given reasons the application is incompetent and that because the same is also based on an incompetent appeal/review then even the appeal has to be dismissed summarily and that Mr. Patel has to be condemned for costs personally.

This court agrees with Mr. George that this application and in fact even the appeal/application for review on which this allocation is based are both incompetent and misconceived. With due respect and without prejudice the way and manner the complaint against the trial court ruling dated 18/10/2012 is being pursued leaves a lot to be desired. While this court is not saying that the allegations that the ruling was not composed by the trial magistrate but by the 1st respondent are true or not, it goes without saying that the allegations are very serious as they touch a very sensitive issue in the administration of justice in regards to the competence and ethics of judicial officers. If the judiciary has judicial officers who are incompetent to the extent of not being capable of preparing judgments or ruling on their own and if their judgments and rulings have to be prepared by other people including their superior judicial officers and people who are parties to proceedings the subject of such judgment and rulings then the shame is not only

upon such judicial officers but mostly upon the judiciary and the whole judicial system.

The point this court wants to make here is that such serious allegations need to be seriously addressed to and cannot be dealt with in an appeal or applications as Mr. Patel is vigorously attempting to do. Such allegations need to be taken either before a proper forum/authority dealing with ethics and competence of judicial officers or need to be dealt with in separate proceedings. Principles of natural justice require that no person is to be judged unheard. It is also a matter of great importance that where a person is being accused of such serious allegations as fraud and forgery then he must be afforded a fair hearing including the right and opportunity to defend himself and call witnesses if any. These cannot be attained if this court is to agree with Mr. Patel and therefore deal with his allegations against the 1st respondent and the trial magistrate in the appeal or applications filed by him in this court. It should be borne in mind that the trial magistrate who in fact is the one who shoulders a great deal of the accusations is not part to these proceedings. How is the court going to judge him in his absence? Mr. Patel has suggested that the trial magistrate and other employees named by him in his application be called as witnesses. Will this afford him sufficient opportunity to defend himself while in the witness box? The answer is definitely NO. The appeal and applications filed by Mr. Patel in this court are not the proper forums through which the accusations that the 1st respondent and the trial magistrate did commit the alleged forgery and fraud in that the trial court ruling dated 18/10/2012 was not prepare by the trial magistrate but the 1st respondent who is his boss and one of the parties to the trial. Mr. Patel's case might be of merits but with due respect to him he has chosen a wrong way to pursue it.

The accusations by Mr. Patel can also not be dealt with in the appeal/application filed by him in this court because they are about

new issues or new case. The case before the trial court is for damages from unlawful confinement and the ruling from which the purported appeal or application arises in regard to what has not satisfied the applicant is on who are proper or necessary parties to the pending suit. The issue Mr. Patel is raising against the 1st respondent and the trial magistrate cannot be raised in the appeal/application because if is not part of the trial court proceedings and the ruling. Issues that can be raised in appeal are those which were issues raised in the trial court and not otherwise.

Let me now turn to the application at hand. As correctly argued by Mr. George Kazi the application is incompetent not only for being supported by a defective affidavit but also for being brought under wrong provisions of law. The affidavit is incurably defective because the name of attesting officer is not shown in jurat. The law relating to affidavits and jurat in particular is settled. Where the name of attesting officer appears only on the rubber stamp and not in the jurat itself then the affidavit is defective because the rubber stamp is not part of the jurat. The Court Appeal of Tanzania has stressed this in a number of cases like ***Zubeir Mussa vs Shinyanga Town Council***, Civil Application No 100/2004 (unreported), ***M/S Bulk Distributors Ltd vs Happyness William Mollel***, Civil Appl. No. 4/2008 (unreported) and also in ***D.P Shapriya and Co. Ltd vs Bish International BV*** [2002] EA 47 which was quoted with approval by the Court of Appeal of Tanzania in ***Wilfred Muganyizi Kagasheki vs Hon. The Attorney General***, Civil Appeal No 107/2008 (unreported) and again reiterated by the same Court in ***Felix Francis Mkosamali vs Jamal A Tamim.*** Civil Application No 4/2012 (unreported) that:-

'We are therefore of the opinion that the affidavit of METHOD RAYMOND GABRIEL KABUGUZI has a signature of a attesting officer, but lacks the name of the

attesting officer. This makes the jurat defective, a defective which renders the application incompetent'.

That being the law the affidavit of Mr. Patel which has the signature and name of attesting officer in the advocate's rubber stamp but no name of the attesting officer in the jurat is incurably defective and renders the application incompetent because as held by the Court of Appeal in ***Zubeir Mussa*** (supra) advocate's rubber stamp is never part of the jurat. It is also worth mentioning here that even the counter affidavit of Mr. George Kazi suffers the same disease and it is therefore also hereby held defective and expunged as well.

The application is also incompetent because to my understanding and taking into consideration the circumstances of this matter Order XLV1 rule 27 of the Civil Procedure Rules, Cap 8 under which the application is brought is not applicable and it is irrelevant. First of all the evidence sought to be introduced by Mr. Patel is not additional evidence as required by Order XLV1 rule 27. The evidence sought to be introduced is new and is intended to prove new issues which were not even featured in the trial court. This cannot be accommodated under Order XLV1 rule 27 which is strictly for additional evidence and not new evidence.

Furthermore Order XLV1 rule 27 strictly prohibits parties from producing additional evidence in appellate stage except where a trial court improperly refused to accept such evidence which is not the case in this matter and where an appellate court on its own move is of an opinion that such additional evidence is required which is also not the case here. It is provided under Order XLV1 rule 27(1) that:-

'The parties to an appeal shall not be entitled to

produce additional evidence whether oral or documentary, in the appellate court. But if-

(a) the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted; or

(b) the appellate court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause,

the appellate court may allow such evidence or document to be produced, or witness to be examined'

It has to be emphasized that the requirement under sub-rule 1(b) must be of the court itself and not of any party to the suit. Additional evidence can be admitted only where the appellate court requires it.

Mr. Patel did also cite S. 129 of the Civil Procedure Decree, Cap 8 as another enabling provision of law under which his application for production of new evidence in this appellate court to prove a new issue which was not an issue in the trial court is brought. This should not detain me because S. 129 of the Civil Procedure Decree, Cap 8 of the Laws of Zanzibar is a provision that gives the High Court inherent power that can be invoked only in proper

situations. S. 129 is a serving provision which is applied not only where justice is in danger of being defeated but where there are no any provision of law covering the situation or under which justice in danger of being defeated can be rescued. There must be no any other way from which the required justice can be attained for the court to invoke its inherent power under S. 129. Inherent powers of the court under S. 129 are powers that have to be rarely invoked by courts only where it is necessary to do so. In our case at hand as earlier pointed out the accusation against the 1st respondent and trial magistrate can be dealt with through other forums and by other means and not through the appeal/application as filed by Mr. Patel.

For the reasons amply demonstrated above this court do also find the appeal/application for review on which the application is based incompetent and misconceived. The order by the trial court for the 1st respondent to be struck out from the suit because he being a public officer is duly represented by the 2nd respondent as required by S. 6(3) of the Government Proceedings Act, 2010 is not one of the orders which are appealable under Order XLV11 rule 1 of the Civil Procedure Rules, Cap 8. Furthermore this court cannot be moved to review the trial court ruling simply because the court with powers to review the order is the trial court which is the court that passed the order in question.

In the final analysis and for the above given reasons the application as well as the appeal/application for review are hereby struck out with costs. Mr. Patel cannot be personally condemned on costs as suggested by Mr. George Kazi because there is no evidence that he did file these proceedings not under the applicant's instructions.

Sdg: Abraham Mwampashi, J.
Judge,
04/10/2013.

Delivered in court this 04/10/2013 in the presence of applicant with his advocate Mr. Patel (adv) and Ms. Fatma Mtumweni (SA) holding brief for the 1st respondent and appearing for the 2nd `respondent.

Sdg: Abraham Mwampashi, J.
Judge,
04/10/2013.

I CERTIFY THAT THIS A TRUE COPY OF ORIGINAL

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DEPUTY REGISTRAR
HIGH COURT
ZANZIBAR

/mbs.