

**IN THE HIGH COURT OF ZANZIBAR
HELD AT VUGA**

CIVIL APPEAL NO 5 OF 2012

FROM ORIGINAL ORDER IN CIVIL CASE NO 126 OF 2010
OF THE LAND TRIBUNAL - ZANZIBAR

ABUBAKAR ALI SALIM.....APPELLANT

VERSUS

ABBAS GULAMHUSSEIN MANJI.....RESPONDENT

JUDGMENT.

MWAMPASHI, J.

The appellant Abubakar Ali Salim filed Civil Suit No. 126/2010 in the Land Tribunal at Vuga/Majestic against the respondent Abbas Gulamhusein Manji over a plot of land situated at Kibweni within the Municipality of Zanzibar. Alongside the suit the appellant filed an ex-parte application for temporary injunction praying for an order that the respondent is stopped from, among other things, using the plot in dispute in any way. On 05/11/2010 the Chairman of the Tribunal Mr. H. Sh. Pandu (RM) in a very simple way granted the ex-parte application as prayed by the appellant. Thereafter on 26/05/2011 the

suit came for mention and Mr. Mula mula learned advocate for the respondent informed the Tribunal that he had filed a counter affidavit in regard to the appellant's ex- parte application for temporary injunction and prayed for the application to be heard inter- partes. The Tribunal agreed with him and fixed the date for the appellant's ex parte application to be heard inter- partes. On 05/08/2011 the appellant did not turn up but the Tribunal proceeded by hearing Mr. Mulamula who asked the Tribunal to set aside the ex- parte injunction order dated 05/11/2010. Then on 15/12/2011 the Tribunal delivered its ruling agreeing with Mr. Mulamula and setting aside the ex- parte injunction order dated 05/11/2010 the decision that has prompted the appellant file this appeal.

The appellant has raised a number of ground in support of his appeal and at the hearing of the appeal Mr. Uhuru H. Khalfan learned advocate for the appellant has asked this court to allow the appeal by quashing the Tribunal's orders dated 15/12/2011 and that the Tribunal's ex- parte order dated 05/11/2010 be upheld. He has argued that the Tribunal erred in entertaining Mr. Mulamula's prayer

to set aside the ex- parte order dated 05/11/2010 because there was no application to set aside the order. He has insisted that the respondent was supposed to make an application under Order XLIV rule 4 of the Civil Procedure Rules, Cap 8 if he was not satisfied with the ex- parte order dated 05/11/2010.

It has also been submitted by Mr. Uhuru that the Tribunal's ruling and orders dated 15/12/2011 are in contravention of S. 37 of the Land Tribunal Act, 1994 because the decision was not made by majority vote but the Chairman alone. Mr. Uhuru has also made extensive arguments on other grounds in support of the appeal but because the arguments go to the merits of whether under the circumstances the Tribunal was justified to issue the injunction or not and for reasons to be disclosed later the arguments are not to be discussed in this appeal.

Mr. Mulamula learned advocate for the respondent has vehemently opposed this application arguing that the appeal is baseless. He has submitted that the Tribunal did not err in setting aside the ex- parte

order dated 05/11/2010 because the respondent was not involved when it was being made and that he actually made an oral application for the order to be set aside. As for non adherence to S. 37 of the Land Tribunal Act, 1994 it has been argued by Mr. Mulamula that even when the Tribunal was making the ex- parted order in the appellant's favour on 05/11/2010 the assessors were not involved. He has insisted that whoever comes to equity must come with clean hands. He has therefore asked for the appeal to be dismissed with costs.

This court agrees with Mr. Uhuru that the Tribunal's ruling and orders dated 15/12/2011 cannot stand. First of all as it has been corretly argued by Mr. Uhuru since the ex- parte application for temporary injunction order filed by the appellant was finally determined by the Tribunal on 05/11/2010 and also since the appellant had not in his application applied for the application to be heard inte-r partes then the right course for the respondent to challenge the order was not to file the counter affidavit and ask for the application to be heard inter-partes but to file an application for the ex parted order to be set

aside under Order XL1V rule 4 of the Civil Procedure Rules, Cap 8 of the Laws of Zanzibar under which it is provided that:-

'Any order for injunction may be discharged, or Varied, or set aside by the court, on application Made thereto by any party dissatisfied with such order'.

It is observed from the Tribunal's record that when Mr. Mulamula learned advocate for the respondent appeared before the Tribunal on 26/05/2011 he informed the Tribunal that he had already filed their counter affidavit in respect of the appellant's ex- parte application. This is surprising because said ex-parte application had already been finally determined since 05/11/2010 and there was no order for him to file the said counter affidavit. Records on the same date also show that Mr. Mulamula did also pray for the inter- partes hearing of the application while in fact there was no such application to be inter- parters. It was therefore a misconception for the Tribunal to agree with Mr. Mulamula and set for the inter- partes hearing of the

application which was not there. It is also observed by this court that even on 05/08/2011 when the said misconceived inter- partes hearing came Mr. Mulamula's argument and prayer was for the ex parted order dated 05/11/2010 to be set aside as if the hearing was for an application for the ex- parte order to be set aside under Order XL1V rule 4 of the Civil Procedure Rules, Cap 8.

Mr. Uhuru is also correct when he argues that S. 37 of the Land Tribunal Act, 1994 was not adhered to by the Tribunal in making its ruling and orders dated 15/12/2011. S. 37 of the Land Tribunal Act, 1994 makes it mandatory for all decisions by the Tribunal to be made by majority vote of the three members of the panel. It is provided under S. 37 that;-

*'All decisions of the tribunal, whether the final
Judgment or interim matter, shall be made by
Majority vote of the three members of the panel,
the Chairman and two assessors.*

However, the Chairman shall have a deciding

Vote in all questions of law'.

As it can be clearly observed from the above quoted provisions the three members of the panel must vote on any decision made by the Tribunal. It is also mandatory that any decision by the Tribunal must be made by majority vote. The provision does not empower the Chairman to make any decision alone. Even where the decision to be made is on a question of law still the Chairman cannot avoid involving the assessors. On decision based on questions of law the Chairman is only given a deciding vote meaning that it is only when the three members have voted and where the chairman does not agree with the majority decision i.e the decision by the two assessors, that the Chairman has been given the extra deciding vote. It is therefore the duty of the Chairman where a decision to be made is on a question of law, to explain to the assessors what is the law in question, and then leave each of the assessors air his opinion on what should be the decision.

Records of the Tribunal's proceedings show that it is not only in the Tribunal's ruling and orders dated 15/12/2011 from which this appeal at hand arises that the assessors were not involved but also in the ex- parte order made in the appellant's favour on 05/11/2010 where the assessors were not even present. The Chairman was supposed to involve the two assessors in making the decision which was made by him alone on 15/12/2011. As for the proceedings leading to the ex- parte order dated 05/11/2010 the Tribunal was not even properly constituted. The quorum/panel was not formed. The Chairman sat alone without the aid of the two assessors as it is required by the law. S. 37 (2) of the Land Tribunal Act, 1994 as amended by Act No 1/2008 provides that the Chairman of the Tribunal or Deputy Chairman as the case may be will sit in all hearings as the presiding person together with two assessors.

It is for the above two given reasons that the Tribunal's ruling and order dated 15/12/2011 came from a misconceived application or that the Tribunal was not properly moved and the reason that S. 37 of the Land Tribunal Act, 1994 was not adhered to by the Tribunal

that the appeal is allowed. The proceedings, ruling and the orders dated 15/12/2011 and 05/11/2010 are hereby quashed and set aside. It is also hereby ordered that there should be a fresh and inter- partes hearing of the appellant's application for temporary injunction against the respondent. The application as well as the main suit be heard by another presiding magistrate of competent jurisdiction.

Appeal allowed and no order as for costs.

Sdg: Abraham Mwampashi J.

25/04/2012.

Delivered in court this 25/04/2012 in the presence of the appellant and in the presence of the respondent with his advocate Mr. Mulamula.

Sdg: Abraham Mwampashi J

25/04/2012.

I CERTIFY THAT THIS IS A TRUE COPY OF ORIGINAL

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REGISTRAR

HIGH COURT

ZANZIBAR

Mbs/.