

IN THE HIGH COURT FOR ZANZIBAR

HOLDEN AT VUGA

CIVIL APPEAL NO. 18 OF 2012

FROM ORIGINAL DECREE IN CIVIL APPEAL NO. 05 OF 2011 OF THE
REGIONAL COURT AT ZANZIBAR

ABDULRAHMAN HAJI SIMAI

APPELLANT
(ORIG. DEFENDANT)

V E R S U S.

1. MAKAME KHAMIS
2. AYOUB YUSSUF IBRAHIM
3. VUAI ISSA ALI

RESPONDENT
(ORIG. PLAINTIFFS).

J U D G M E N T.

RABIA H. MOHAMED, J.

This is the second appeal from Ex-Parte Judgment of the District Court in Civil Case No. 5 of 2011. The first appeal was before the Regional Court.

The Appellant herein in ABDULRAHMAN HAJI SIMAI, originally the Defendant, and the Respondents are MAKAME KHAMIS, AYOUB YUSSUF IBRAHIM and VUAI ISSA ALI whom originally were the Plaintiffs.

The Appellant have filed three grounds of appeals as follows:-

1. Kwamba, Mhe. Hakimu wa Mkoa amekosea kisheria na kushindwa kuchanganua kilichoombwa katika rufaa iliyopelekwa mbele yake, na ameshindwa kisheria kutoa haki ya kuzuia utekelezaji wa maamuzi yaliyokataliwa na Mahkama ya Wilaya.
2. Kwamba, Mhe. Hakimu huyo msomi alikuwa na kila sababu ya kuipitia kesi nzima ya Mahkama ambayo kimsingi ina makoseo mengi ya kisheria ambayo yangepelekea kutengua maamuzi ya Mahkama ya Wilaya.
3. Kwamba, kama ilivyo katika Mahkama ya Wilaya Hakimu wa Mkoa amekosea kisheria kuwasikiliza Mpinga Rufaa Nam. 2 na Mpinga Rufaa Nam. 3 peke yao bila ya kumpata Mpinga Rufaa Nam. 1 ambae

hakuna taarifa zake na wala hakuna taarifa ya
kuwasilishwa kisheria.

Historical background of the matter before me is as follows: the Appellant was sued by the Respondents/the Plaintiffs whom were members of a small group called PRIDE. On 18th March, 2008 the Appellant took a loan of T.Shs. 5,000,000/= from PRIDE through a group that included him and the Respondents whereby the Respondents were his sureties in that loan. Appellant has repaid part of the loan, which now the remaining amount is T.Shs. 1,242,000/=, the amount, which PRIDE deducted from the sureties monies. The Respondents/Plaintiffs have also prayed for T.Shs. 900,000/= for the inconvenience caused by the Appellant/Defendant. The case was heard by the District Magistrate and the Judgment was given in favour of the Respondents/Plaintiffs whereby the Appellant/Defendant was ordered to repay the Respondent T.Shs. 1,242,000/= in one month period and T.Shs. 300,000/= for the inconvenience caused. As well the cost was on the Appellant/Defendant.

The Appellant was aggrieved by this decision he appealed to the Regional Court where his appeal also failed. He then appealed to this court with three grounds of appeal as mentioned above.

In his submission before the court the learned counsel Makame for the Appellant has submitted in relation to all grounds of appeal that the Regional Magistrate erred in law for not considering Order XI Rule 6 (1) (b) (c) of the Civil Procedure Decree Cap. 8 and failing to analyze the evidence and satisfy himself that there is proof.

Learned Counsel Makame continued submitting that the Ex-Parte hearing which was conducted by the District Court, the source of appeal to the Regional Court and then to this court was not properly conducted. His reason for his argument was because before an ex-parte hearing is conducted leave of the court must be obtained by the one applying for it. He told the court that this is in accordance with Order XI Rule 7 (1) of the Civil Procedure Act Cap. 8.

He also argued that the Plaintiff/Second Respondent acted as an agent in trial but did not have a power of attorney to represent the other plaintiffs.

Lastly he prayed for this court to grant the appeal and quash the Regional Court decision, order the case to be heard afresh by the District Court with costs. He also prayed for any other order to be given in favour of the Appellant.

On the other side the second and third Respondents prayed for this court to take their reply to Memorandum of Appeal which was signed by first, second and third Respondents as it is. The reply reads as:-

1. Kwamba, Mhe. Hakimu wa Mkoa hakufanya makosa kisheria na wala hakushindwa kuchanganua kilichoombwa katika rufaa iliyopokelewa mbele yake, kwa sababu Muomba Rufaa alishindwa kuhudhuria Mahkamani na kesi ikasikilizwa upande mmoja wa Wapinga Rufaa Nam. 1, 2 na 3 na hilo linathibitishwa na Wapinga Rufaa Nam. 1, 2 na 3 kutokana na mwenendo wa kesi ya msingi katika Mahkama ya Wilaya inaonesha kuwa Muomba Rufaa aliidharau mahkama na kuwa amri ya Mahkama ya Mkoa ya kukubaliana na Hukumu ya Mahkama ya Wilaya ilikuwa ni sahihi kwa ajili ya utekelezaji.

2. Kwamba, Wapinga Rufaa Nam. 1, 2 na 3 hawakubaliani na maelezo ya Kifungu cha 2 cha sababu za rufaa na kwamba wanajibu kuwa Mahkama ya Mkoa ilizingatia kuwa Muomba Rufaa alihudhuria Mahkamani mnamo tarehe 21/04/2010 na kufuatiwa na tarehe 19/05/2010 na Muomba Rufaa aliomba kuwasilisha majibu yake katika Mahkama ya Wilaya na kukubaliwa lakini hakuwasilisha majibu yake kwa

muda aliopewa na badala yake alipewa amri nyengine ya kuwasilisha majibu yake mnamo tarehe 16/06/2010 katika Mahkama ya Wilaya. Hivyo ni kuthibitisha kwamba Muomba Rufaa alitendewa haki kamilifu katika Mahkama ya Wilaya na kwamba uamuzi wa Mahkama ya Mkoa wa tarehe 14/03/2010 ulizingatia upembuzi yakinifu wa kisheria na kumuona Muomba Rufaa hakua na sababu za msingi za rufaa yake.

3. Kwamba, Wapinga Rufaa Nam. 1, 2 na 3 wanapinga maelezo ya sababu za rufaa ya kifungu cha 3 na wanaendelea kujibu na kusisitiza kuwa Hakimu wa Mahkama ya Mkoa alitoa maamuzi ya kuzingatia mwenendo wa kesi na Hukumu katika Mahkama ya Wilaya baada ya kuridhia kuwa uamuzi uliotolewa ulizingatia ombi la ex-parte chini ya Order X rule 2 na Order XI rule 6 (1) (a) Sura ya 8 ya Mwenendo wa Madai mbele ya Wapinga Rufaa Nam. 1, 2 na 3 (Wadai Asili) siku ya tarehe 12/10/2010. Aidha Mpinga Rufaa Nam. 1 hana pingamizi na uamuzi uliotolewa na Mahkama ya Mkoa ambapo ni wajibu

Muomba Rufaa kujieleza mwenyewe kwa ini aliidharau Mahkama ya Wilaya hadi kufikia uamuzi wa kusikiliza kesi upande mmoja wa Wapinga Rufaa (Wadai Asili).

Before going into the merit of the appeal there are crucial matter I want to discuss first. It is very clear from the records of the case that this appeal emanated from the decision of the District Court, which heard the case ex-parte and gave its decision. Before aggrieved with the decision of the trial court, the defendant appealed to the Regional Court. Order XLVIII of the Civil Procedure Rules Cap. 8 provides for orders, which an appeal shall lie. Under this Order an order from a decree passed ex-parte is not among the orders listed there from.

Order XI rule 14 of the Civil Procedure Rules Cap. 8 requires a Defendant aggrieved by a decree passed ex-parte to apply to the court which passed the said decree to be set aside. This Order reads:-

"14. In any case in which a decree is passed ex-parte against a defendant, he may apply to the court by which the decree was passed for an order to set it aside; and if he satisfies the court that the summons was not duly served, or that he was prevented by any

sufficient cause from appearing when the suit was called on for hearing, the court shall make an order setting aside the decree as against him upon such terms as to costs, payment into court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit”.

This means the Appellant was not supposed to file an appeal to the Regional Court and then to the High Court but to file an application to set aside a decree ex-parte to the same court, which passed the ex-parte decree.

Having discussed the above I don't find the need of discussing the appeal on its merit. I hereby quash the proceeding and the decision of the Regional Court and the appeal is hereby dismissed.

Court:

This judgment was read this 21st February, 2013 in the presence of the KASSIM from Advocate Makame's Office, the Appellant and the Respondents.

I hereby certify that this is a true copy of the Original.

Sgd. GEORGE J. KAZI

REGISTRAR

HIGH COURT

ZANZIBAR.