IN THE HIGH COURT FOR ZANZIBAR

HOLDEN AT VUGA

CIVIL APPEAL NO. 62 OF 2016

FROM ORIGINAL DECREE CIVIL CASE NO.11 OF 2010

OF THE LAND TRIBUNAL – ZANZIBAR

1. MOHAMED HAJI FAKI ... ...)
2. DAUD MACHANO FAKI ... ...) APPELLANTS
3. KHAMIS HAJI FAKI ... ...)

VERSUS

1. TWAHIR SILIMA ... ...)
2. MOHAMED SILIMA ... ...)RESPONDENTS
3. DAUD SILIMA ... ...)

JUDGEMENT

BEFORE: HON. ABDUL-HAKIM A. ISSA, J

This appeal arises from the decision of the Chairman of the Land Tribunal, Faraji Sh. Juma (RM) in Civil Case No. 11/2010 at Vuga, Zanzibar. The background to the case is that the Appellants, Mohamed Haji Faki, Daud Machano Faki, and Khamis Haji Faki filed Civil Suit No. 11 of 2010 at the Land Tribunal against the Respondents, Twahir Silima, Mohamed Silima, and Daud Silima. They are claiming that the Respondents have trespassed in their family land situated at Donge Vijibweni, in the Northern "B" District of Zanzibar. The disputed land has the following boundaries:

North: shamba of Abdalla Mohammed

South: shamba of Bi Toto Baya

East: shamba of Faki Muhsini
West: shamba of Khamis Hamza

On the other hand the Respondents disputed having trespassed in the said land and they averred that the second Respondent is the one who owns a piece of land situated at Donge Kisimawivu. He purchased the land in 1959 from Khalfan Hamza Mpembe, Haji Khamis Mpembe, Mshindani Hamza Mpembe and Athman Hamza Mpembe. He produced a sale deed registered with the Registrar of Documents with registration no. 1571 of 1959. It was registered in Vol. VII of Book A-2 on 30.12.1959. The said land has the following boundaries:

North: shamba of Kazija Hassan
South: shamba of Shaaban Uled
East: shamba of Ayub Machano
West: shamba of Juma Ali

The learned Chairman of the land tribunal heard the matter and delivered his judgment against the Appellants on 28.4.2016. The Appellants being aggrieved with the said decision preferred this appeal. They filed a memorandum of appeal which contained eleven grounds of appeal, which are as follows:

1. That the honourable Land Tribunal erred in law and fact in holding that the Appellants have failed to prove their case.
2. That the honourable Land Tribunal Magistrate erred in law and fact for failure to consider Appellants' right to be heard.
3. That the honourable Land Tribunal Magistrate erred in law and fact by holding that the boundaries of the Appellants' shamba are not known when they have no title deed which clearly show they boundary.

4. That the honourable Land Tribunal Magistrate erred in law and fact by not considering, evaluating and inspecting the evidence properly between the disputed land and the shamba of Mohamed Suleiman Ali.

5. That the honourable Land Tribunal Magistrate erred in law and fact in failure to consider and identify the proper Respondents whom claimants complained against them.

6. That the honourable Land Tribunal Magistrate erred in law and fact in holding that the 1st Respondent and 2nd Applicant obtaining the leave of the Court of having representative agents without asking the leave of the Court.

7. That the honourable Land Tribunal Magistrate erred in law and fact in holding the agents who have been given the power of attorney to represent the 2nd respondent was irregular and wrong.

8. That the honourable Land Tribunal Magistrate erred in law and fact by failure to consider the procedure and power of administration of Islamic estates properly.

9. That the honourable Land Tribunal Magistrate erred in law and fact by not properly considering and evaluating the Appellants' evidence.

10. That the honourable Land Tribunal Magistrate erred in law in not giving reasons of not accepting a gentleman assessor opinion.

11. Generally the judgment and decree is against the weight of the evidence adduced.

In the hearing of this appeal the Appellants were represented by learned advocate, Mr. Ali Rashid and the Respondents were represented by learned advocate, Mr. Isaac Msengi. Mr. Rashid during the hearing withdrew grounds of appeal number 6, 7, and 9.

With respect to the first ground of appeal, Mr. Rashid submitted that the judgment on pg 72 said the Plaintiffs failed to prove their case, but in reality the Plaintiffs were able to prove their case. PW1 on pg 17 of the proceedings explained how he went to the shamba and showed the boundaries before the Sheha committee. The Appellants proved what they are claiming on balance of probabilities. During the site visit the Appellants were able to show what they are claiming. He submitted that pg 57 shows the report of the site visit, and it is clear that the Appellants have proved their case.

Mr. Msengi on the other hand submitted that the whole appeal is baseless. Regarding first ground of appeal he submitted that the Appellants failed to prove that they own the shamba. The Appellants failed to show the shamba which the Respondents trespassed. The Appellants brought four witnesses but failed to show boundaries or how they got the land. They had no document to show their ownership.

With respect to the second ground of appeal, Mr. Rashid submitted that the 2nd and 3rd Appellants were not given the right to be heard. It was only the 1st Appellant who was given the right to be heard, and he spoke on his own account and brought his witness. The other Appellants were not heard by the Court, and the records do not show that the 1st Appellant was representing other Appellants. He cited the case of **in the Matter of Independent Power *Tanzania Ltd and 2 others***, Civil Revision No. 1 of 2009 (Unrep.) which talked about the right to be heard. He submitted that in this case the principles of natural justice particularly the right to be heard has been violated.

Mr. Msengi on the other hand submitted that there was no violation of the right to be heard. Appellants brought four witnesses, and there is nowhere on record where it can be said that the Appellants No. 2 and 3 were denied the right to be heard. The Appellants were the first to adduce their evidence and they closed their case after finishing their witnesses.

With respect to the third and fourth grounds of appeal, Mr. Rashid submitted that the boundaries were known by Appellants and were explained during the

site visit. Further, Mr. Rashid submitted that there is confusion on the location of disputed land: DW1 on pg 43 submitted that the shamba is situated at Donge vijibweni, while PW1 was claiming the shamba of Donge kichanga. Further, the boundaries of those two shamba are different. In addition the plaint and WSD showed two different claims; the 2nd Defendant is Mohamed Silima, but the claimed shamba is of Mohamed Suleiman Ali. The documents tendered are also different. DA1 shows the land of Kisimawivu not vijibweni. Mohamed Suleiman, the 2nd Respondent died and his son Yahusu asked to represent him, but the Sheha confirmed Mohamed Silima Pandu who died in 2011 (Annex. D3). The WSD was signed by Mohamed Silima. He submitted that failure to consider these anomalies was fatal.

Mr. Msengi on the other hand, submitted that these grounds of appeal have been covered with ground one, and he added that the Appellants failed to show boundaries of their shamba. Regarding, the names of shamba, he said they are just names. Although the sale deed has different names but it shows that it was not Appellants' land.

With respect to the fifth and eleventh ground of appeal, Mr. Rashid submitted that the claim was against Twahir Silima, Mohamed Silima and Daudi Silima. Judgment referred to these people, but the Decree referred to other people, namely: Twahir Suleiman, Mohamed Suleiman and Daud Suleiman. Mr. Rashid submitted that Order 23 Rule 6 (1) talked about the content of the Decree, but in this case the parties are different, therefore, this decree cannot be executed. Mr. Rashid added that after inspection he discovered that there was amendment of plaint which was filed by unknown person as the Appellants never filed the amended plaint and even the signatures are different.

Mr. Msengi on the other hand submitted that the difference of names in the judgment and decree is just a slip of a pen and it can be corrected. Regarding, the 11th ground of appeal he submitted that the essential matters have been included in the Decree. He added that on pg 11 and 12 of the

proceedings the Appellants were given an opportunity to amend their plaint, hence, it is wrong to deny their signature. They amend their plaint themselves.

With respect to the eighth ground of appeal, Mr. Rashid submitted that the procedure was not followed according to the Wakf and Trust Commission Act. In this case a letter of administration was issued which was against the law. He cited the case of ***Soud Breik Salum*** V. ***PBZ*** Civil Appeal no. 13 of 2011 (HC) (Unrep.) and ***Alawi Abdalla Ahmed and another*** V. ***Farahan Khamis Farahan*** Civil Case No. 1 of 2014 (HC) (Unrep.) which lay down the procedure to be followed. The Wakf Commission was supposed to administer the estate, but they were not involved. The letter of Administration showed Mohamed Suleiman Ali, but the letter of Sheha confirm the death of Mohamed Silima who is a different person. Section 34 of the Commission Act was not considered and there was no agent or administrator of the estate.

Mr. Msengi on the other hand submitted that this is a civil case and we are not talking about the administration of estate. The Respondents were given a letter of administration and they followed the procedures according to the law. Therefore, the provisions of Wakf and Trust Commission Act were not violated

With respect to the tenth ground of appeal, Mr. Rashid submitted that there are errors in the judgment. The Chairman agreed with the assessors, but the opinion of assessors were different. One assessor decided differently. Therefore what was said in the judgment was not clear. Mr. Rashid added that the chairman was supposed to show the grounds for agreeing or disagreeing. If opinion of assessors was not considered the judgment becomes null and void. He cited the case of ***Agnes Severini*** V. ***Mussa Mdoe*** [1989] TLR 164. He reiterates the prayers as are found in the memorandum of appeal and prayed that the appeal should be allowed.

Mr. Msengi submitted that pg 60 and 71 of the proceedings are very clear that the case has been decided by majority of votes and the chairman agreed with one assessor. He added that the case cited by Appellants were irrelevant. He prayed that the appeal is baseless and should be dismissed with cost.

Mr. Rashid on his reply submitted that parties is one of the ingredients of the Decree. Hence, since the decree and the judgment does not tally the judgment should therefore be set aside. He added that the error in the judgment and the decree is not a slip of the pen; the chairman is bounded with what he has written. He prayed that the appeal should be allowed with all their prayers granted.

This Court will start with the determination of grounds four, five and eleven of appeal which centre on the issue of discrepancies and confusion found on the judgment, decree and proceedings. This Court agrees with Mr. Rashid that these discrepancies and confusion do exist in the proceedings, judgment and decree.

We will start with the pleadings; the Appellants on 8.2.2010 filed a plaint and the case was instituted against Twahir Silima, Mohamed Silima and Daud Silima. Mohamed Silima passed away in 2011 before the case was heard and his legal representatives, Yahusu Moh'd Suleiman and Saleh Mohamed Suleiman approached the Wakf and Trust Commission to be appointed as agent of the Commission for the purpose of administration of the estate of Mohamed Silima. In that regard they produced a letter of Sheha of Chumbuni of 25.03.2012 confirming that Mohamed Silima has passed away in 2011. The Wakf Commission appointed them as their agents for the administration of the estate of Mohamed Suleiman by letter of 4.5.2012.

On 3.7.2012 the legal representatives applied to Court to be allowed to continue with the case on behalf of the deceased, and the Court allowed them. But in their application they used the name of Mohamed Suleiman, Twahiri Suleiman and Daudi Suleiman. The Appellants on 16.7.2012 amended their plaint, and changed the names of the Defendants in the amended plaint, which read Twahir Suleiman, Mohamed Suleiman and Daud Suleiman.

The Advocates for Respondents on 16.4.2014 submitted documents in Court under Order XV. The Defendants/Respondents were Twahir Silima, Mohamed Silima, and Daudi Silima. The changes made in the amended plaint was not taken into affect. Among the documents submitted were sale deed which has the name of Mohamed Suleiman, letter of Wakf Commission with the name of Mohamed Suleiman and a letter of Sheha of Chumbuni confirming the death of Mohamed Silima.

The learned Chairman heard the case and delivered his judgement, but the names of Defendants appearing in the proceedings are Twahir Suleiman, Mohamed Suleiman and Daud Suleiman. But the names appearing in the judgment are Twahir Silima, Mohamed Silima, and Daudi Silima. At the same time the name appearing in the decree are Twahir Suleiman, Mohamed Suleiman and Daud Suleiman.

It is obvious that these discrepancies on the names of the parties ought to have been addressed by the learned Chairman and if the father of the Respondents was using two different names, namely Silima and Suleiman the Court should have note it in the proceedings and remove the confusion by writing for instance, Mohamed Suleiman alias Mohamed Silima. Now, the question what is the effect of this confusion. This Court is of the view that it is fatal to the case since the defendants in the amended plaint which instituted the case were Twahir Suleiman, Mohamed Suleiman and Daud Suleiman. These names ought to have appeared in the judgement as well as decree. But since the judgment has used the name "***Silima***" and the decree has used the word ***"Suleiman***". This is fatal as the decree is extracted from the judgment. Order XXIII Rule 6 (1) provides:

> ***" The decree shall agree with the judgment or minute of judgment: it shall contain the number of the suit, the names and descriptions of the parties, and particulars of the claim, and shall specify clearly the relief granted or other determination of the suit".***

This provision has been couched in a mandatory language, and it means it should be complied to the letter. The defects in the decree has been discussed by Court of Appeal in various cases. In ***Dr. Gabriel Michael Muhagama*** V. ***Salum Abass Salum***, Civil Appeal No. 86 of 2006 (Unrep.) where the Resident's Magistrate Court decree was signed by another magistrate the Court of Appeal held that the decree is invalid. Similarly, in ***Abdalla Rashid Abdalla*** V. ***Sulubu Kidogo Amour***, Civil Appeal No. 94 of 2006 (Unrep.) where the decree was wrongly dated the Court of Appeal held that the decree is invalid. In the same vain the decree accompanied the memorandum of appeal in this appeal has wrong names of the Defendants/Respondents, and this Court is of the view that it is invalid.

A decree is an important document which must accompany the memorandum of appeal. Order XLVI Rule 2 clearly laid down this rule as follows:

> ***"... The memorandum shall be accompanied (unless the appellate court otherwise directs) by a copy of the decree and written judgment (if any) from which it is desired to appeal;...".***

From the wording of this rule a decree and judgment are compulsory components of appeal. In this case they both differ in terms of the names of the Defendants. Therefore, they are invalid and they render this appeal incompetent. This Court has no choice, but to strike out this appeal. These grounds are sufficient to dispose of the matter and the Court won't labour with the remaining grounds of appeal. The Appeal is hereby struck out with cost, and the learned Chairman of the Land Tribunal is directed to rectify the errors in the Judgment and Decree.

It is so ordered.

(Sgd) ABDUL-HAKIM A. ISSA
JUDGE
27/4/2017

COURT

This Judgment was delivered inChambers on this 27.4.2017 in the presence of Appellants and their advocate, Mr. Ali Rashid and in the presence of Respondents and their advocate, Mr. Isaac Msengi .

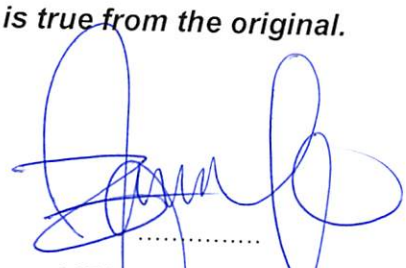
(Sgd) ABDUL-HAKIM A. ISSA
JUDGE
27/4/2017

COURT

The right of appeal is explained.

(Sgd) ABDUL-HAKIM A. ISSA
JUDGE
27/4/2017

I certify that this copy is true from the original.



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YESAYA KAYANGE
DEPURTY REGISTRAR
HIGH COURT-ZANZIBAR.

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