

TANZANIA / JUDGMENT

masasimtwara coop union vs linus k nkapa 2008 tzhc 124 14 march 2008

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IN THE HIGH COURT OF TANZANIA AT MTWARA MISC. CIVIL APPEAL NO. 3 OF 2007 ARISING FROM THE RULING OF MTWARA DISTRICT COURT IN CIVIL APPLICATION NO. 5 OF 2005 MASASI/MTWARA COOP. UNIONAPPELLANT VERSUS

1. LINUS K. NKAPA
2. ASMA MOHAMED SAIDI RESPONDENTS
3. STRAIGHTLINE AUCTION MART DATE OF LAST ORDER - 12/3/2008 DATE OF JUDGMENT - 14/3/2008

JUDGMENT

MJEMMAS, J. The appellant Masasi/Mtwara Cooperative Union is appealing against the Ruling given by Mtwara District Court in Miscellaneous Civil Application No.5 of 2005. in that duplication the appellant had applied for the following orders.

1. Interim ex-parte order for temporary injunction restraining the respondents and or their agents or servants from evicting the applicant (appellant) and its servants in the house situated on Plot No. 14 Block “GG” in Majengo, Mtwara Township pending the interparte hearing of the application.
2. Interparte orders -
 - (i) For temporary injunction restraining the respondents and, or their agents or servants from evicting the applicant and its servants in the house situated on Plot 14 Block “GG” Majengo, Mtwara pending the determination of the application for extension of time to set aside the sale of the said house. (ii) Extension of time upon which the applicant may apply for setting aside the sale of house/property situated on Plot No.14 Block “GG”, Majengo, Mtwara. (iii) Costs be provided for. (iv) Any other relief(s) as the honourable court may deem fit and just to grant. The Chamber summons was made under section 95 and Order xxxviii r.1 and/or 2 of the CPC, 1966 and Section 14 of the Law of Limitation Act, 1971 plus any other enabling provisions of the Laws. It (Chamber summons) was supported by affidavit of one Mwema Mohamed, Principal Officer of the applicant, that is Masasi/Mtwara Cooperative Union Upon

hearing the application which was argued by way of written submissions the Honourable A.H. Kalli (RM; dismissed it with costs. The applicant was dissatisfied hence the present appeal. The appellant, that is Masasi/Mtwara Cooperative Union has raised four grounds in its memorandum of appeal. The grounds of appeal are stated as hereunder.

1. That, the learned Resident Magistrate was wrong for not be specific in his ruling as to whether she was deciding the merit of the application or the preliminary objection on the point of law.
2. That, subject to the foregoing, the learned Resident Magistrate was wrong when she mainly decided the 2 matter from her own speculation in the documents filed without full hearing of all parties to the matter.
3. That, had the learned Resident Magistrate decide to hear both parties on the preliminary objection she would have found that the wrong citation of the enabling provision of law (if at all) was merely a typing error which is curable in law.
4. That, all in all the learned Resident Magistrate mishandled that matter before her thus arriving at unjust decision. Before looking at the merits or otherwise of the present appeal it is, perhaps, important to give a brief background of this matter. The 1st respondent, one Linus .G.K. Nkapa sued Kampuni ya Uchukuzi Mtwara [KAUMU LTD] for payment of his terminal benefits The case was opened/fied at Mtwara District Court as Employment cause/ civil case no. 11 of 1997. The Company, that is Kampuni ya Uchukuzi Mtwara failed to file a written statement of defence within the prescribed time so the case proceeded on hearing one side, that is ex-parte hearing. An ex-parte judgment was entered in favour of the 1st respondent [who was the plaintiff] on the 7th January, 1998. According to the judgment and decree of the court which was signed on 14th January, 1998 the 1st respondent (plaintiff) was awarded TSh.9,448,720/60 plus interest at the rate of 35% on the outstanding amount as from due date to the date of judgment together with an interest at court's rate on the decretal amount as from the date of judgment to the date of actual satisfaction of payments and costs of the suit. Attempts by the judgment debtor, that is Kampuni ya Uchukuzi Mtwara (KAUMU LTD) to have the ex-parte judgment and decree stayed or set aside failed. On the other hand attempts by the judgment/decreed holder (1st respondent) to have execution of the decree by attachment and sale of the assets of the judgment debtor were not without difficulties. All in all, through the services of various Auction Mart and Court Brokers he (1st respondent) managed to attach and sell some assets of the judgment debtor (KAUMU LTD). One of the assets which were attached and sold in the process of execution of the decree is a house situated on plot no.14 Block "GG" in Majengo Area Mtwara which is the subject matter of this appeal. The house was attached and sold by the 3rd respondent-Straightline Auction Mart. The 2nd respondent-Asma Mohamed Said bought the said house in a public auction conducted by the 3rd respondent. The appellant in this appeal - Masasi/Mtwara Cooperative Union was aggrieved by the attachment and sale of the said house. It therefore, decided to take legal action to have the sale set aside and also to prevent the respondents from evicting it/its servants from the said house. That was done through filing an application in the

District Court of Mtwara i.e Misc. Civil Application No.5 of 2005 As stated before, the application was dismissed with costs hence the present appeal. When the parties appeared before this court they prayed to be allowed to proceed with the appeal by way of written submissions. I granted the prayer and a schedule for filing the written submissions was prepared and accepted by both parties. Mr. Mlanzi, learned advocate informed the court in the presence of the other parties that he would file a joint written submission for all three respondents. 4 The appellant has filed a three page written submission and Mr. Mlanzi, learned advocate has also filed a three page joint reply to the appellant's written submission. In its written submission, the appellant claims that the matter before the trial court was a prayer by the appellant for an order of temporary injunction to restrain the respondents and/or their agents or servants from evicting the appellant or its servants in the house situated on Plot no. 14 Block "GG" Majengo pending the determination of the application for extension of time to set aside the sale of the house. It made the application through a chamber summons supported by an affidavit of its principal officer. The appellant complains that the second respondent failed to appear in court on several occasions until very late when Mr. Mlanzi, learned advocate appeared in court on her behalf. According to the appellant at or by the time when Mr. Mlanzi appeared "pleadings" were complete. He (Mr. Mlanzi) raised a preliminary objection on a point of law that the appellant's application before the court was incompetent and bad in law due to wrong citation of the enabling provisions of law. According to the written submission of the appellant, the court ordered that the preliminary objection on the point of law be argued by way of written submission. That the counsel for the 2nd respondent made a written submission on the preliminary objection on the point of law as well as the merit of the matter thus misdirecting the court. It is the submission of the appellant that the learned Resident Magistrate erred in law for failure to decide first the issue of preliminary objection on a point of law. The appellant submitted further that it is trite law that where in any suit issues of law and facts are raised by any party the court is bound to decide the issues of law first before deciding issues of facts. As authority for that submission the appellant cited Order 18, r.2 of the Civil Procedure Code 1966 and the case of Singida Regional Trading Company v. Tanzania Posts and Telecommunication Corporation [1979] LRT no.11. That part of the written submission covered grounds 1 and 2 of the appeal. On the third ground of appeal the appellant has submitted that the wrong citation of the enabling provisions of the law did not cause miscarriage of justice to the parties because they knew what the application was about. The appellant cited the case of Abubakar Mohamed Mlenda v. Juma Mfaume [1989] TLR 145 where it was observed that omission to cite a proper provision of law in chamber summons is not fatal to the application. The appellant did not elaborate the fourth ground of appeal instead it made the ground as a conclusion of its submission that from what had been stated above the appellant is of the settled mind that the learned Resident Magistrate mishandled the matter. As stated earlier, Mr. Mlanzi, learned counsel filed a joint written reply to the appellant's written submission. Let me make it clear from the outset that in his submission Mr. Mlanzi, did not address the 1st and 2nd grounds of appeal as raised by the appellant in its memorandum of appeal as well as in its written submission. Mr Mlanzi, learned counsel

for the respondents has started his 6 submission with the issue of wrong citation of enabling provisions of the law. Mr. Mlanzi submitted that he is aware of the High Court decision in the case of *Abubakar Mlenda v. Juma Mfaume* [1989] TLR 145 which held that wrong or non citation of the enabling provision of law in a chamber summons is not fatal. He however submitted further that there are decisions by the Court of Appeal to the effect that such irregularity is incurable. He cited the cases of *Mossy Zakaria Co.Ltd V. The Commissioner for Stamp Duty*, (CA) Civil Application Mo.7 of 2002 (Mwanza Registry) and *Abdulhamid Ramadhani Mjombo V. Alii Salim Ali* (CAT) Civil Application No.4 of 2004 (Qar es Saiaam Registry) - both cases are unreported. Mr. Mlanzi, learned Counsel has invited this court as the court of first appeal or first appellate court to revisit the whole of the case at the lower court and come up with its own findings and decision. In addition to that Mr. Mlanzi submitted also on the issue of delay by the appellant to raise objections on the attachment and sale of the house in dispute at the earliest opportunity. He cited Order 88(1) of the Civil Procedure Code, 1966 as relevant provisions of law for a party whose interests had been adversely affected by a warrant of attachment or proclamation for sale of property he claims ownership of it. According to Mr. Mlanzi, learned advocate the appellant did not raise objection in the earliest opportunity so the application at the trial court was properly dismissed. He therefore requested this court to dismiss the appellant's appeal for want of merit. 7 Let me confess that I had a difficult task in addressing issues raised by the appellant in its memorandum of appeal on the one hand and issues raised in the written submission, on the other hand. The first ground of appeal alleges that the learned Resident Magistrate was wrong for not being specific in his (sic) ruling as to whether she was deciding the merit of the application or the preliminary objection on the point of law. In its written submission, the appellant has raised a number of issues some of which are not related to the first ground of appeal. For instance the appellant complains that the counsel for the second respondent misdirected the court because he made submission on both the preliminary objection on a point of law and merit of the matter. The appellant complains also that there was need to hear the matter afresh after the appearance of the counsel for the second respondent because the "pleadings" were complete in respect of other parties in the matter. The 6th paragraph in page two of the appellant's written submission states that; "It is trite law that where in any suit any party to the same raised issues of law and issues of facts the court is bound to decide on the issues of law first before it jumps to decide on the issues of facts. This is in accordance with the provisions of Order 14 r 2 of the CPC, 1966. The same position was emphasized in the case of *Sungida Regional Trading Company V. Tanzania Post and Telecommunication Corporation* [1979] LRT no .11." 8 I think it is important for me to address first the first ground of appeal as it appears on the memorandum of appeal. When the trial court ordered the matter to proceed by way of written submission on 25/8/2005 the appellant submitted its written submission on the 7th September, 2005. The first respondent filed his reply to the appellant's written submission on 10th October, 2005 while the second respondent filed her reply on 18th April, 2006 and the third respondent on 6th October, 2005. The second respondent filed also a notice of preliminary objection on a point of law on 18th April, 2006 Since it was ordered and agreed by the parties that the

matter be argued or proceeded by way of written submissions the 2nd respondent through her advocate Mr. Mianzi filed a written reply to the appellant's written submission and the reply included also the preliminary objection on a point of law as indicated on the Notice of a preliminary objection on a point of law dated 18th April, 2006. What I want to say it that, Mr. Mianzi, learned counsel for the second respondent made or filed a written submission in reply to the appellant's written submission and he (Mr. Mianzi) also included in his submission his preliminary objection on a point of law. In its written submission to this court, the appellant is complaining about the procedure adopted by the learned counsel for the second respondent in submitting in writing its reply to the appellant's written submission as well as preliminary objection on a point of law. Well, I find no merit on that point and it should not detain us. Let me go on with the first ground of appeal. When the appellant received the reply of the second respondent together with the preliminary objection on a point of law it filed a written reply on 2nd June, 2006. Thereafter the trial court proceeded to make its ruling which was delivered on 14th May, 2007. Now the appellant's complaint is that the learned Resident Magistrate was not specific in her ruling as to whether she was deciding the merit of the application or the preliminary objection on a point of law. To carry that point or complaint further the appellant is arguing in its written submission that the learned Resident Magistrate was required to determine first the issue of preliminary objection on a point of law before going into other issues of fact. What I can gather from that submission is that the appellant acknowledges that the learned Resident Magistrate decided the matter on both point of law and fact I have gone carefully through the ruling of the learned Resident Magistrate and I am convinced that she addressed both the issue of preliminary objection on a point of law as well as other issues as raised by the appellant and respondents in their written submissions. That is very clear in her

ruling.

For instance, at page 4 of the typed script she said I quote: "From the submission of both sides, this court rule as follows. That the application was filed under wrong law since the same related with appointment of receivers and their remuneration. Even if the applicant would have cited right provisions of the law, the application would not have succeeded because this application was filed on 3/6/2005 while the house was sold in auction on 25/3/2005." 10 The learned Magistrate concluded her ruling by saying, I quote: "Since the defunct KAUMU sold a house in question to the applicant while the same no longer owned the same, that sale was void. On that ground this application has no merit and it is hereby dismissed with costs." From the foregoing it is very clear as day follows night that the learned Resident Magistrate addressed both the preliminary objection and the merit of the application. Perhaps the issue which arises is whether such a course of action was wrong or illegal as submitted by the appellant or it occasioned a failure of justice. On that point the appellant has referred this court to the provisions of Order xiv rule 2 of the Civil Procedure Code, 1966 and the case of Singida Regional Trading Company V. Tanzania Post and Telecommunication Corporation [1979] LRT No.11. I had the opportunity of reading the judgment of Chipeta, J. in the case cited by the appellant. In my humble opinion the ratio

decidendi of that case is not applicable in the present matter as submitted by the appellant. It is true that in that case, the defendant raised or pleaded a preliminary objection on a point of law in its written statement of defence. In dealing with that point the court decided that since it [point of preliminary objection] went to the root of the matter or action it should be argued and ruled upon before the suit went to trial, if at all. To the best of my mind, that did not constitute the "ratio decidendi" of the case, ■ it was a mere procedure which the court decided to follow. However the point of preliminary objection raised was capable of deciding the matter once and for all which was not the case in this matter. The appellant has also referred this court to Order XIV rule 2 of the Civil Procedure Code, 1966 to emphasize his point that the trial court was obliged to dispose of first the point of preliminary objection. Order XIV r.2 provides: "Where issues of law and of fact arise in the same suit, and the court is of opinion that the case or any part thereof may be disposed of on the issues of law only, it shall try those issues first, and for the purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined." Commenting on a similar Rule (R.2) which is in pari materia with our Civil Procedure Code S.C Sarkar, The Law of Civil Procedure, 3rd Edition at p 413 notes that. "Rule 2 applies when the court thinks that the case may be disposed of on issues of law only and in such case these issues are to be tried first and settlement of issues of fact may be postponed. He states further that: "Discretion to try preliminary issue of law is to be exercised only when it is so clear cut that the decision will decide the suit finally once and for all It also applies to case where the court has not postponed the settlement of the issues of fact. It is my humble opinion that the question whether or not to postpone the issues of facts is a matter of discretion of the trial magistrate. In the present matter, the trial magistrate addressed the preliminary issue of law and exercised her discretion not to postpone the issues of fact. The appellant has not shown in its submission that there was a miscarriage of justice or failure of justice which was occasioned as a result of the trial Magistrate's exercise of her discretion to deal with both issues of law as well as issues of fact. In the case of Ally Shaban Kilima V. Director of Lands Development Services, Civil Reference No.17 of 2004 (CA) Dar es Salaam Registry (unreported) the learned State Attorney who appeared or represented the respondent in the application raised two points of preliminary objection which were resisted by the counsel for the applicant. At the hearing of the application the Court of Appeal required the advocates to argue the preliminary objection and the merits of the application simultaneously. The Court of Appeal expressed the rationale as follows: "To facilitate a quick disposal of the application, and for purposes of control of the time for litigation as well, the court required the advocates to argue the preliminary objection and the merits of the application simultaneously." After hearing the advocates the Court of Appeal upheld the first ground of preliminary objection on a point of law which was sufficient to dispose of the matter but it went on to consider also the merit of the appeal. The Court of Appeal stated that, I quote: "The first ground of objection suffices to dispose of the appeal because the appeal is incompetent. However, as we heard the application on merit as well for the reasons already stated, we will now deal with the merit of the appeal." Of course the Court of Appeal was not dealing with the matter before it under the provisions of the Civil Procedure Code, 1966, however the logic behind the procedure it adopted in the exercise of its discretion to allow or require the advocates to argue both the preliminary points of law and merits of the application

simultaneously and to decide the matter on both the ground of objection and on merit could also be applied in the case at hand. What the trial Magistrate did although she did not say so directly, was certainly aimed at facilitating a quick disposal of the appellant's application and also to control time for litigation as well. In that case, her exercise of discretion not to postpone the issues of facts was fairly done. Another point which is important also to consider is whether the decision on the point of preliminary objection as raised by the 2nd respondent was capable of deciding the suit or application finally once and for all. In Civil Reference No. 2U05 between Joseph Ntongwisangu and Another AND The Principal Secretary Ministry of Finance and Another, (Dsm Registry, Unreported) the Court of Appeal through Kimaro, J.A. said "Where the issue is determined in a preliminary objection then the right course is to strike out the application. In a situation where the application proceeds to a hearing on merit and in such hearing the application is found to be not only incompetent but also lacking in merit, it must be dismissed. The rationale is simple. The effect of striking out an application leaves room for filing the application again even where it has no merit." It is my humble opinion that the point of preliminary objection as raised by the 2nd respondent that the appellant failed to cite the correct provision of law, in correct, has the effect of making the application by the appellant incompetent and should be struck out. According to the Court of Appeal in the case cited above the appellant (Applicant) would have opportunity of filing the application again. That means the issue or point of law raised by the 2nd respondent would not have led the application to be finally determined once and for all. In view of that and in addition to what I have already stated before, it was proper for the learned Resident Magistrate to deal with both issues of law and facts simultaneously. I therefore hold that the first ground of appeal has no merit because the learned Resident Magistrate was very clear and specific that she dealt with both the issue of law [preliminary objection on a point of law] and the merit of the application and that's why she finally dismissed the application instead of striking it out. With regard to the second ground of appeal, the appellant decided to argue it together with the first ground of appeal. I however, wish to say by way of passing that it (second ground of appeal) has no merit. As discussed in this judgment, the parties agreed to argue the matter by way of written submissions and the appellant filed his written submission which was responded accordingly by the respondents. The appellant also responded in writing to the preliminary objection on a point of law as raised by the 2nd respondent. Under those circumstances I fail to understand the appellant when it/she says the parties were not given a "full hearing". On ground three of appeal, the appellant does not deny the fact that wrong provisions of law were cited in the chamber application. What the appellant is arguing is that [the omission is not fatal and the case of Abubakar Mohamed Mlenda v Juma Mfaume [1989] TLR 195 was cited as authority to that proposition. Mr. Mlanzi, learned counsel for the 2nd respondent and on behalf of other respondents has, submitted the contrary, that is, the omission to cite correct provisions of law is fatal. To support his proposition he cited the following cases. Mossy Zari Co. Ltd Vs. The Commissioner for Stamp Duty (CA) Civil Application no. 7 of 2002 (Mwanza Registry) and Abdulhamid Ramadhani Mjombo Vs. Ali Salim AM (CAT) Civil Application No. 4 of 2004 (Dsm Registry). Although copies of the said cases were said to have been attached to the written submission I could not find any in the file. I am, however, aware of other decisions of the Court of Appeal on the issue at hand, i.e. fail to cite

correct provision of law. In Civil Application No.21 of 2006 between Adalla Ndope and Others AND National Housing Corporation [Dsm registry, unreported] the applicant failed to cite Rule 8 of the Court of Appeal Rules, 1979 for the extension of time and Honorable Justice Mroso, J.A said: "Failure to cite that provision renders the application incompetent because the court had not been moved under the proper provision of the rule to give it jurisdiction....." In the same spirit, Honorable Justice Nsekela, J.A in the case of Sheikh Issa Seif Gull and Three Others V. Rajabu Mangara Mtoro and Ten others, Civil Application No.178 of 2006 (Dsm, unreported) remarked that ".....the need to move the court by a proper provision of the law was only a matter of court practice since the days of the Court of Appeal for Eastern Africa (see Abtutu Azh Suleman V. Nyaki Farmers 16 Cooperative Ltd and Another [1966] EA 409). This court has however emphasized in a number of decisions that it was necessary to cite the relevant provision from which the court derived the power to hear and determine the matter brought before it." The message from those authorities or cases decided by the Court of Appeal of Tanzania is very clear; and simple, that non citation of proper provisions of law which give the court its jurisdiction is fatal and renders the application incompetent. I therefore find that ground number three of the memorandum of appeal by the appellant has no merit at all. As stated earlier in this judgment the appellant did not comment in detail or elaborate ground number four of the memorandum of appeal. The appellant simply concluded or rather submitted that it was of the opinion that the learned Resident Magistrate mishandled the matter. Since this ground of appeal is a conclusion made or based on the first, second and third grounds of appeal, which I have already discussed I find no reason to comment on it and especially that the said grounds of appeal have been found to have no merit. In his written submission or rather reply to the appellant's written submission, Mr. Mianzi, learned counsel invited this court as court of first appeal to revisit the whole of the case at the lower court and come up with its own findings and decision. The learned counsel urged this court to uphold the decision of the lower court because the applicant failed to raise objection against the attachment and sale of the house in issue at the earliest opportunity. I am in agreement with the view expressed by the learned counsel that this court being the first appellate court has powers to revisit the whole of the case at the lower court and come out with its own findings and decision. However, such jurisdiction has to be exercised with caution. It is my humble opinion that there is nothing in the present appeal which could make me exercise that jurisdiction. So, the appeal therefore fails and it is hereby dismissed with costs. "rt C" U.K. iv Date: 14/3/2008 Coram: Hon. G.J.K. Mjemmas, J, Appellant - Present Respondents - Mr. M.A. Mianzi (Advocate) for B/C: G. Luoga, RMA Court: This matter is coming for judgment. Order: Judgment delivered in chambers this 14th day of March, 2008 in the presence of the appellant and Mr. Mianzi learned counsel for the respondents // ^ / X < . r " ■ !/? W/ "t \ ./.f!^ I ■ " •*, \ I* G ;I - G.J.K: Mjemmas, J. / Judgment V. v - I 14/3/2006

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