IN THE COURT OF APPEAL OF TANZANIA
AT TANGA

(CORAM: MSOFFE, J.A., KILEO, J.A. And KALEGEYA, J.A.)

CIVIL APPEAL NO. 49 OF 2005

ABASI SALIM KICHENJE ..... APPELLANT
VERSUS
1. SHEHE MOHAMED ZAYUMBA]
2. ABDI SALIM KICHENJE] ..... RESPONDENTS

(Appeal from the Decision of the High Court of Tanzania at Tanga)

(Longway, J.)

dated the 10th day of June, 2004
in
Civil Case No. 10 of 2001

JUDGMENT OF THE COURT

2 & 10 July 2007

MSOFFE, J.A.:

It is common ground that the appellant and the second respondent are brothers. Their father, Salim Kichenje, died *intestate*. Following his death, the appellant was appointed administrator of his estate. It is apparent from the record before the High Court that the estate, the subject of the case, is a 35 acre farm. The estate has orange trees planted on it.

In the High Court the appellant sued the respondents in a claim of (i) shs. 3,160,000/= being value of oranges harvested without his authority between the years 1995, 1996 and 1997, (ii) shs. 4,200,000/= being loss of business for the entire period he had come from Mwanza and stayed in Tanga to follow up the matter, and (iii) shs. 500,000/= being general damages. After hearing the parties the High Court decreed sums of shs. 463,335/=, shs. 1,050,000/=, and shs. 250,000/= for items (i), (ii) and (iii) above; and interest of 2½% charged on the decretal amount from the date of judgment to the date of full payment. Dissatisfied, the appellant has preferred this appeal which is, essentially, an appeal against the above quantum. The appellant's view is that the decreed sums are on the low side.

As happened in the High Court, the parties appeared before us in person(s). We heard them quite extensively on the merits or otherwise of the appeal. However, in the end, for reasons which will emerge hereunder, we regret that we have decided to take the rather unusual step of not determining the appeal on merit.

We start with the proceedings of 8/5/2002 and 17/7/2002 which read as follows:-

8.5.2002

Coram - M.H.C.S. Longway, J.

Plaintiff - present in person

Defendants - 2 present in person

c.c. Salimu H.K.

Plaintiff:- My witnesses could not be available today due to various reasons. One had to be at work and another attending a sick child. I am ready to give my evidence.

Defendants:- We have no objection for the hearing to start.

Court:- Considering that the parties are not legally aversed, I have discussed the matter before the court by way of tying to guage issues of the case and I record the following:

1. *That there is a farm which the plaintiff and 2nd defendant own with other members of the family, which farm had various items of produce haversted annually.*
2. *That the harvesting had to be done with knowledge and consent of the plaintiff.*

3. *That the 1st defendant denies making any harvest in the farm.*
4. *That the 2nd defendant admits having harvested from the farm some produce with the knowledge and consent of some members of the family in absence of the plaintiff, and that he did so for three years.*
5. *That the plaintiff is suing in his capacity as Administrator of Estate of his late father, who died in 1992.*
6. *That the 1st defendant was on the 4.6.97 found in the farm with 2nd defendant and other hands in the process of harvesting oranges.*
7. *That the plaintiff generally lives in Mwanza where he works for gain and comes to attend to the farm harvest every June, sell and report to the family, of 12 persons.*
8. *That the farm has 35 Acres and has a title presently held by the bank, which is saved Tshs. 800,000/= as of 1994.*
9. *That in view of the fact that the plaintiff and 2nd defendant are related, the issue was discussed at family level but failed to reach any settlement.*

(M.H.C.S. Longway)

JUDGE

8/5/2002

ORDER:

Having consulted with the parties it is ordered that the matter adjourn to facilitate a family meeting by the 28/6/2002. Hearing 17/7/2002.

(M.H.C.S. Longway)

JUDGE

8/5/2002

17.7.2002

Coram - M.H.C.S. Longway, J.

Plaintiff - present person

Defendant - present in person

c.c. Mr. Salimu H.K.

Plaintiff:- The meeting of the family failed to take off. I have come with my witness as advised.

Court:- Issues shall be framed at a later stage as the parties are laymen.

It occurs to us that the above record of proceedings was irregular in three main aspects. **One,** we do not think it was necessary for the judge to "gauge issues of the case". What the

judge did here was a procedure unknown to the Civil Procedure Code, 1966 (Cap 33 R.E. 2002). **Two,** the assertion by the judge that issues were to be drawn at a later stage because the parties were laymen was unfortunate. It is nowhere provided in the law that where parties are laymen issues can be framed at a later stage. **Three,** and this was a very serious anomaly, the issues were not framed at the first hearing in clear violation of the provisions of Order XIV Rule 1 (5) of the **Civil Procedure Code, 1966** (Cap 33 R.E. 2002) requiring that issues be framed at the first hearing. Sub-rule (5) reads:-

> (5) **At the first hearing of the suit** the court **shall,** after reading the plaint and the written statements of defence, if any, and after such examination of the parties as may appear necessary, ascertain upon what material proposition of fact or of law the parties are at variance, and **shall** thereupon proceed to frame and record the issues on which the right decision of the case appears to depend. (Our emphasis)

Needless to say, sub-rule (5) is couched in mandatory terms. And in terms of **section 53 (2)** of the **Interpretation of Laws Act** (Cap 1 R.E. 2002) in a written law where the word "shall" is used in conferring a function, the word shall be interpreted to mean that the function so conferred must be performed. In this case it was, therefore, mandatory for the judge to ensure that the issues were framed at the first hearing of the suit.

In saying so we are, no doubt, aware that under the provisions of sub-rule 1 of Rule 5 of Order XIV the court may at any time before passing a decree amend the issues or frame additional issues on such terms as it may deem fit. However, the sub-rule is at the discretion of the court depending, of course, on the nature of the evidence before it. In the instant case, it was not a question of amending the issues or framing additional issues. Issues were simply not framed at all at the first hearing!

This brings us to another shortcoming in the matter. In the written statement of defence filed by the respondents on 22/8/2001, under sub-paragraphs (a), (b), (c) and (d) of paragraph 1 thereof, they canvassed a number of preliminary objections basically touching

pertinent issues of the jurisdiction of the court. In her judgment, the judge stated as follows in respect of the preliminary objections:-

> "The defendants filed a joint written statement of defence which was preambled by four preliminary objections averring time bar, lack of cause of action, lack of court jurisdiction and locus. These were later withdrawn after holding consultations with the court".

With respect, the above passage invites the following comments. F**irst,** the record is silent as to when the consultations, if any, were held. **Second,** the record is also silent on the nature and form of the consultations. We wonder whether the consultations, if held, were necessary in the justice of the matter. The court was faced with a matter before it, it had to deal with it head on, guided by the law, instead of holding the so called consultations. **Fourth,** closely related to the second point, is the fact that the matters raised were ones of jurisdiction, as stated above. The judge was duty bound to resolve whether or not she had the requisite jurisdiction before proceeding with the suit.

There is yet a final point. In her judgment, the judge said in part as follows:-

> "At the start of the trial on 8/5/2002 I had intensive consultations with the parties considering that they were not legally aversed. As well as facilitating a drawing of issues, **the idea was also to attempt some mediation ....."**
> (Our emphasis).

In our respectful opinion, what we discern from the above passage is that the judge attempted, albeit unsuccessfully, to mediate the parties in the matter. We are aware that in our civil justice system mediation is a remedy available to litigants and it is mandatory in a case of this nature. It is an alternative procedure directed by the court for resolving the matters in dispute between the parties. Indeed, Orders VIIIA, VIIIB and VIIIC of the Civil Procedure Code, 1966 (Cap 33 R.E. 2002) were specifically introduced for purposes of this alternative procedure for settling disputes. However, we are of the view that mediation has to be conducted within the confines of the law available on the procedure in question. In this case, the mediation mentioned by the judge ought to have complied with the

procedures obtaining under Orders VIIIA, VIIIB, and VIIIC above. For example, it is not the practice for a mediator judge to sit in judgment over the trial of a case in which he/she mediated unsuccessfully. It is no wonder, therefore, that under Rule 3 (1) of Order VIIIB where after full compliance with the directions made under sub-rule (2) of rule 3 of Order VIIIA the case remains unresolved, or "unmediated" so to speak, a final pre-trial settlement and scheduling conference is held and "presided over by the judge or magistrate assigned to try the case". The judge or magistrate assigned to try the case cannot, in our view, be the mediator judge or magistrate. So, it was wrong in this case for the judge to assume the role of a mediator judge and a trial judge in the same case.

In conclusion, we are of the considered view that the cumulative effect of the above shortcomings is that the parties were not given a fair hearing. Accordingly, in exercise of our revisional powers under Section 4 (2) of the Appellate Jurisdiction Act, 1979 as amended by Section 2 of the Appellate Jurisdiction (Amendment) Act No. 17 of 1993, we hereby declare a nullity and set aside the proceedings before Longway, J. There will be a trial *de novo* before

a different judge without payment of fees. We make no order as to costs.

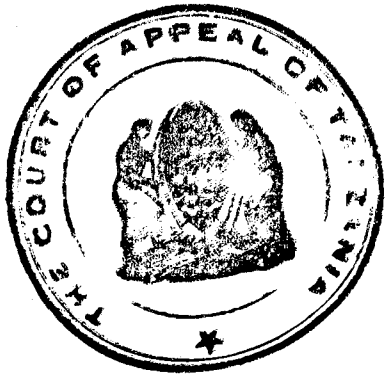
DATED at TANGA this 4th day of July, 2007.

J. H. MSOFFE
JUSTICE OF APPEAL

E. A. KILEO
JUSTICE OF APPEAL

L. B. KALEGEYA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.



(I. P. KITUSI)
DEPUTY REGISTRAR