

IN THE COURT OF APPEAL OF TANZANIA  
AT ZANZIBAR

(CORAM: KISANGA, J.A., LUBUVA, J.A., And LUGAKINGIRA, J.A.)

CIVIL REFERENCE NO. 19 OF 1997

BETWEEN

1. HARBAN HAJI MOSI  
2. SHAHET HAJI MOSI . . . . . APPLICANTS

AND

1. OMA HILAL SEIF  
2. SEIF OMAR . . . . . RESPONDENTS

(Reference from the Ruling of a  
single Judge of the Court of Appeal  
of Tanzania at Zanzibar)

(Ramadhani, J.A.)

dated the 1st day of July, 1997

in

Civil Application No. 5 of 1996

R U L I N G

LUGAKINGIRA, J.A.:

This reference comes from the decision of a single judge dismissing an application for leave to appeal. Briefly, the applicants sued the respondents in a Zanzibar district court to secure specific performance of a contract for the sale of a hut. The suit was dismissed for want of merit, as were the applicants' first and second appeals to the Resident Magistrate's Court and the High Court respectively. Their application to the High Court for leave to appeal to this Court was refused by Courado, Ag. J. who held that the intended appeal did not disclose a point of law. The applicants then made the application to the single judge (Ramadhani, J.A.) and his refusal to grant leave on the same ground prompted this reference.

Before us the applicants who appeared on their own had nothing useful to say, at the issue, as we see it, has throughout been whether the intended appeal required leave only of the High Court whether,

additionally, it required a certificate on a point of law. This is discernible from para 9 of the applicants' affidavit before the single judge which reads: "That as this appeal originates from the district court case there is no need to certify a point of land law," and this statement is, in turn, a response to the ruling of Dourado, Ag. J. where he actually said:

In order to grant leave I have to be satisfied that a point of law is involved. Only then can I issue a certificate that a point of law is involved as required by rule 89 (2) of the Court of Appeal Rules, 1979.

It is at once apparent from this passage that two distinct requirements are mixed up in relation to appeals that only lie with leave. Since the mix-up or confusion frequently recurs and in view of the added difficulty in the context of Zanzibar, it is proposed to devote some attention on the subject.

The circumstances in which appeals in civil cases may lie from decisions of the High Court to the Court of Appeal are set out in section 5 of the Appellate Jurisdiction Act, 1979. For the problem at hand, subsections (1) (c) and (2) (c) thereof are relevant. Subsection (1) (c) requires leave of the High Court or the Court of Appeal to be obtained in all appeals not covered under subsection (1) (a) and (b), that is, appeals from decisions of the High Court in the exercise of its original jurisdiction. In this context, there is no requirement for certification on a point of law. Leave may be granted or refused without the necessity of a reasoned decision, and when it is granted, it is assumed that the intended appeal has reasonable prospects of success. Where leave is couched in a reasoned ruling, the judge may allude to the merits of the intended appeal or the necessity of

having another decision on the subject-matter, but he does not frame and certify any points of law. Subsection (2), on the other hand, in essence creates provisos to the whole of subsection (1), and according to para (c) thereof an appeal would not lie from a decision of the High Court in proceedings under Head (c) of Part III of the Magistrates' Courts Act, 1984, unless the High Court certifies a point of law. In other words, with that sort of appeal, it is not enough to obtain leave to appeal under subsection (1) (c), but one has to go further and obtain a certificate of the High Court on a point or points of law. The Magistrates' Courts Act, 1984, is a Mainland enactment which creates and establishes a hierarchy of courts subordinate to the High Court and defines their constitution, jurisdiction and powers. The primary court is the lowest court and exercises jurisdiction within the district in which it is established. Head (c) of Part III of the Act deals with the appellate and revisional jurisdiction of the High Court in relation to matters originating in primary courts. Therefore, according to subsection (2) (c), a certificate on a point of law is necessary with appeals relating to matters originating in primary courts. The practice of the High Court is to frame such a point or to approve and adopt one framed by the intending appellant and to certify it to the Court of Appeal. Not infrequently also an intending appellant would simply apply for a certificate under subsection (2) (c), and when granted, it also serves as leave to appeal under subsection (1) (c). There is no provision under the Appellate Jurisdiction Act or elsewhere requiring a certificate on a point of law in addition to leave to appeal as regards appeals relating to matters originating in district or resident magistrates' courts.

The Magistrates' Courts Act, 1984, does not apply in Zanzibar, yet the applicants are correct in their contention that their appeal did not require a certificate on a point of law, it having arisen from

proceedings commenced in a district court. Indeed this Court had occasion to hold so in Mohamed Idrissa Mohamed v. Hashim Ayoub Jaku [1993] T.L.R. 280, a case whose facts are strikingly similar to the facts in the instant case. The vital link between the Mainland and Zanzibar is supplied by the appellate Jurisdiction Act as amended by the Constitution (Consequential, Transitional and Temporary Provisions) Act, 1984, which came into operation on 1st March, 1985. In the first place, the Act was declared applicable throughout the United Republic. The definition of "High Court" was amended to mean "the High Court of the United Republic of Tanzania or the High Court of Zanzibar, as the case may be," which means wherever reference is made to the High Court, it is to be construed to mean the High Court of Zanzibar in the Zanzibar context. Section 3 (2) next provides:

(2) For the purpose of this Act, reference to any provision of any procedural or substantive enactment applicable to Mainland Tanzania shall be construed to include reference to a like or similar provision of a corresponding procedural or substantive enactment of the House of Representatives applicable to Zanzibar in relation to the matters to which the former enactment relates.

In Zanzibar the House of Representatives enacted the Magistrates' Courts Act, 1984, which, like the Mainland Act, created a hierarchy of magistrates' courts subordinate to the High Court. At the bottom is the primary court which is vested with jurisdiction within the district in which it is established. The only significant structural difference between the set up on the Mainland and the set up in Zanzibar is that whereas appeals from the district court on the Mainland lie direct to the High Court, in Zanzibar they lie to the Resident Magistrate's Court. In the light of the provision cited above, therefore, reference to any provision of the Mainland Magistrates'



Courts Act is to be construed to include reference to a like or similar provision of the Zanzibar Magistrates' Courts Act in relation to the matters to which the Mainland Act relates. Moreover, section 3 (3) of the Appellate Jurisdiction Act also provides:

(3) For the purposes of this Act, reference to a court subordinate to the High Court shall be construed to include a court subordinate to the High Court of Zanzibar corresponding to the court referred to in this Act.

As stated earlier, on the Mainland the primary court is the lowest court with jurisdiction in the district within which it is established and, as just seen, the primary court in Zanzibar occupies the same position and enjoys equal territorial jurisdiction. The two courts, therefore, correspond to each other within the meaning of section 3 (3). It therefore follows that reference to the primary court on the Mainland has to be construed to include reference to the primary court in Zanzibar.

Section 5 (2) (c) of the Appellate Jurisdiction Act has reference to appeals relating to matters originating in primary courts on the Mainland and by parity of reasoning it has to be construed to include reference to appeals relating to matters originating in primary courts in Zanzibar. This is notwithstanding rule 89 (2), to which Dourado, Ag. J. referred, which lists among the essential documents to accompany an appeal, a certificate on a point of law when the appeal is a third appeal. On the Mainland a third appeal is with reference to an appeal in matters originating in a primary court, but with Zanzibar a third appeal arises from matters originating in a district court while an appeal from matters originating in a primary court would be a fourth appeal. But in view of section 3 (2), providing for correspondence of provisions, and view also of subsection (3), providing for correspondence of subordinate courts, reference to a

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third appeal in the context of the Mainland is reference to a fourth appeal in the context of Zanzibar. The discrepancy stems from the fact that the amendments to the Appellate Jurisdiction Act were effected a year before the enactment of the Zanzibar Magistrates' Courts Act and could not have foreseen the set up which the latter Act, came to institute. There is therefore need, for modifying rule 89 (2) to accommodate the Zanzibar position. To sum up then, a certificate on a point of law is required in matters originating from a primary court in Zanzibar but, as with the Mainland, no such certificate is required in matters originating in district and resident magistrates' courts, but leave only.

The discussion does not necessarily benefit the applicants. Going back, it will be noted that Justice Dourado's ruling falls into two parts: the first is to the effect that the intended appeal did not involve a point of law; the second, that he could not for that reason certify any such point. In view of what has transpired, the first part was sufficient to dispose of the application before him and the second was superfluous. However, that does not mean that leave to appeal would be automatic where a certificate is not required, for that would defeat the whole purpose of section 5 (1) (c). Leave is grantable where the proposed appeal stands reasonable chances of success or where, but not necessarily, the proceedings as a whole reveal such disturbing features as to require the guidance of the Court of Appeal. The purpose of the provision is therefore to spare the Court the spectre of unmeriting matters and to enable it to give adequate attention to cases of true public importance. For that reason the Court would not, when dealing with these appeals, interfere with concurrent findings except where there are such misdirections or non-directions as could have resulted in a miscarriage of justice. In the instant case Dourado, Ag. J. in effect found no merit in the



intended appeal for the matters at issue were entirely factual on which concurrent findings had been reached throughout, and his further reference to a certificate on a point of law did not detract from that finding. Ramadani, J., on the other hand, was well alert and made no reference to certification but simply said: "... I concur with Dourado, Ag. J. that there is no point of law involved to entitle a third appeal." In fact were the issue of a certificate relevant in this case, he would not have troubled to consider the application before him, but would have struck it out, because such certificates are grantable by the High Court only.

Having carefully considered the nature of this case, we are unable to fault the decisions already reached. The agreed price for the hut was 170,000/= of which the applicants paid 100,000/= in instalments of 20,000/= and 30,000/=. The respondents' case was that the applicants were to pay the remaining 70,000/= within one and half months of the second instalment, but they defaulted in doing so, and still defaulted with a further extension of one month. The applicants claimed that there was no time limit for the final payment and that when they sought to pay, the respondents refused to accept the money. Whether there was a time limit, whether payment was not made within the time, or whether payment was offered but refused, all these questions were considered by the three lower courts and answered in the respondents' favour. Although the applicants submitted before us that the lower courts did not properly address the evidence, we can find no basis for the argument, and they did not suggest any.

The reference thus fails and is dismissed with costs.

DATED at DAR ES SALAAM this 14<sup>TH</sup> day of APRIL 2000



R.H. KISANGA  
JUSTICE OF APPEAL



D.Z. LUEUVA  
JUSTICE OF APPEAL

K.S.K. LUGAKINGIRA  
JUSTICE OF APPEAL

certify that this is a true copy of the original.

*Mwarija*  
( A.G. MWARIJA )  
DEPUTY REGISTRAR