

IN THE HIGH COURT FOR ZANZIBAR

HELD AT CHAKE CHAKE – PEMBA

CIVIL APP NO.26 OF 2013

SULEIMAN OMAR SULEIMAN

MSIMAMIZI WA MIRATHI

YA MAREHEMU

MWAKAME HASSAN DADI

APPELLANT

V/S

1. KATIBU MTENDAJI KAMISHENI

YA WAKFU NA MALI

YA AMANA PEMBA

RESPONDENT

JUDGMENT

Mwampashi, J

The appellant Suleiman Omar Suleiman in his capacity as an administrator of the estate of Mwakame Hassan Dadi filed a suit in the Land tribunal at MachomanneChakeChake Pemba (Civil suit No. 08/2010) against Ali AbdallaJuma and MkurugenziM.I.C Tanzania Limited (TIGO) who are hereinafter to be referred to as the 1stnd 2nd defendant respectively. On 23/11/2011 the appellant obtain an ex parte judgment against the defendant. In that judgment the Land Tribunal declared the appellant the rightful owner of a shamba located at MadenjaniWete Pemba and ordered the defendants to remove their hands from the shamba . The Land Tribunal did also declare an agreement which had been entered between the defendants in respect of the shamba null and void and it also directed that the 2nd defendant should enter into a new agreement with the appellant.

Sometimes on 06/03/2013 the respondent to this appeal Katibu Mtendaji Kamisheni ya Wakfuna Mali ya Amana Pemba who was not a party to Civil Suit No. 08/2010 but who claimed to be an administrator of the estate of the 1st defendant filed an application before the Land Tribunal (Chamber Application No. 08/2013) under Order L rule 2 of the Civil Procedure Rules, Cap 8 of the Laws of Zanzibar praying for the ex parte judgment entered in the appellant's favour on 23/11/2011 to be set aside. The Land Tribunal on its ruling dated 29/4/2013 granted the application and set aside the ex parte judgment as prayed by the respondent. This appeal by the appellant is against that ruling.

The appellant has raised two grounds in support of his appeal which can be paraphrased as follows:

1. That the Deputy Chairman of the Land Tribunal did err in law in granting the application which was filed out of time.
2. That the Deputy Chairman of the Land Tribunal did err in law and did mis-direct himself in entertaining the application filed by the respondent who was not a party to the main suit.

At the hearing of this appeal the appellant appeared in person unrepresented while the respondent had the service of Mr, Suleiman Khalfan Said learned counsel.

It was submitted by the appellant in support of the first ground that the Land Tribunal passed the ex parte decree in his favour on 23/11/2011 following the failure by the defendants to enter

appearance. Thereafter the present respondent who was not a party to the suit but who purported to represent the estate of the 1st defendant who had passed away did on 06/3/2013 file an application before the Tribunal to set aside the ex parte decree. It was his argument that since the ex parte decree was passed on 23/11/2011 the application for setting aside the ex parte decree filed on 06/3/2012 was time barred. He insisted that the application was time barred even before the demise of the 1st defendant who passed away on 29/3/2012. The appellant referred the court to the Schedule to the Limitation Decree Cap 12 alleging that the time of limitation for setting aside an ex parte decree is 30 days. He therefore argued that under S. 92 of the Civil Procedure Decree, Cap 8 the Tribunal had no jurisdiction to entertain the application filed out of time.

As for the second ground of appeal it was argued by the appellant that it was wrong for the Tribunal to entertain the application filed by the respondent not only because the respondent was not a party to the main suit but also because the respondent has not applied and obtained the leave of the court to represent the deceased as it is required under Order XXVI rule 4 (1) of the Civil Procedure Rules, Cap 8.

The appellant did therefore pray for the court to consider the two grounds raised in support of the appeal and allow the appeal with costs. Mr. Suleiman Khalfan Said the learned counsel for the respondent readily conceded the fact that the application for setting aside the ex parte decree was filed out of time. He however argued that the Tribunal did not err in entertaining the application filed out

of time because the proviso to S. 92 of the Civil Procedure Decree, Cap 8 empowers the Tribunal to enlarge the time of limitation.

Responding to the second ground it was Mr. Khalfan submissions that the ground is baseless because the Executive Secretary of the Wakf and Trust Commission under S. 32 (1) of the Wakf and Trust Commission Act No.2/2007 ~~the Commission~~ was the lawful legal representative of deceased 1st defendant. He added that in the first place the appellant was not supposed to sue the 1st defendant but the respondent and therefore that the appellant's suit was incompetent for suing a wrong party. He therefore prayed for the appeal to be dismissed with costs.

In his short rejoinder the appellant insisted that the appeal has to be allowed because though it is true as argued by Mr. Khalfan that under the Proviso to S.92 of the Civil Procedure Decree the Tribunal is allowed to enlarge the time of limitation the Tribunal need to be moved in order to do so. He pointed out that the respondent was supposed to first apply for leave to file the application out of time but he did not do so. **L**Without beating around the bush it suffices to be clearly pointed out at this very point that this appeal is very sound and has to be allowed as prayed by the appellant. Apart from the two grounds raised in support of the appeal, the Land Tribunal ought not to have entertained the application filed by the respondent for setting aside the ex parte decree because the Tribunal was not properly moved. As earlier pointed out, the application before the Tribunal was filed under Order L rule 2 of the Civil Procedure Rules, Cap 8 which basically provides for review of decrees or orders and not for setting aside ex parte decrees. The

application was therefore incompetent for being filed under a wrong provision of law. The proper provision for setting aside ex parte decrees is Order XI rule 14 of the Civil Procedure Rules, Cap 8 under which it is provided that:-

“ 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 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 a day for proceeding with the suit.”

Turning to the first ground of appeal that the application for setting aside the ex parte decree was filed out of the period of limitation, as argued by the appellant and conceded by Mr. Khalfan the learned counsel for the respondent, the application was surely filed out of time. The law on application or appeals filed after the period of limitation is very clearly spelled out under S. 92 of the Civil Procedure Decree, Cap 8. Such application or appeals must be dismissed even where limitation has not been set up as a defence. It is provided under S. 92 that:-

“ Subject to the other provisions of this Decree every appeal preferred, and application made, after the period of limitation

prescribed therefore by the First Schedule shall be dismissed although limitation has not been set up as a defence”.

Furthermore under item 6 of the First Schedule to the Civil procedure Decree, Cap 8 of the Laws of Zanzibar, the period of limitation for setting aside a decree passed ex parte is 30 days from the date of the decree or where the summons was not duly served, when the applicant has knowledge of the decree. Since the ex parte decree was passed on 23/11/2011 then the application to set aside the decree filed by the respondent on 06/3/2013 was hopelessly time barred.

The attempt by Mr. Khalfan the learned counsel for the respondent to avoid the application of S. 92 by arguing that under the Proviso to S. 92 the court is allowed to enlarge the period of limitation and therefore that the Tribunal invoked the Proviso and properly entertained the application filed by the respondent ~~is~~ a futile attempt. The Proviso to S. 92 reads as follows:-

“ Provided that where any period is fixed for the doing of any act allowed or prescribed by this Decree, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed may have expired”.

Though it is not disputed that under the Proviso to S. 92 the court is vested with powers to enlarge the time of limitation it is however a considered view of this court that the powers vested into the court under the Proviso are not automatic. A party who desires for the court to exercise its discretion under the Proviso to S. 92 i.e enlarge

the period of limitation, must not only properly move the court by filing an application for that purpose but he must also demonstrate that there are sufficient and sound grounds to support his application. It is a party who fails to act within the period fixed by the court or the time prescribed by the law, who knows the reasons for the delay and who has the duty to properly move the court and satisfy it that he was prevented by any sufficient cause to act within the fixed or prescribed period of time if he wants the court to exercise its discretion in his favour. The court cannot exercise such powers *suomotu*.

The Tribunal did therefore err in law in entertaining the respondent's application which was filed out of time without first being properly moved and satisfied by the respondent that the respondent was prevented from filing the application within the prescribed period of time by sufficient cause.

As for the second ground of appeal this court agrees with Mr. Khalfan that under S. 32 (1) (a) of the Wakf and Trust Commission Act No. 2/2007 after the death of the 1st defendant the Executive Secretary of the Commission became the administrator of the estate of the 1st defendant and therefore he had powers to step into the shoes of the deceased and act for the interests of the deceased estate. The only problem is whether the Executive Secretary after becoming the legal representative of that 1st defendant was allowed by the law to so act for the deceased and file the application on behalf of the deceased without first ^{applying for} ~~ask~~ the leave of the Tribunal to so act. This question brings us to Order XXVI rule 4 (1) and (2) of the Civil Procedure Rules, Cap 8 where it is clearly provided that:-

“ (1) Where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the right to sue survives, ***the court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party*** and shall proceed with the suit.

(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant”.

From the above provision it is clear that the respondent was required first to apply to the Tribunal so that he is allowed to be made a party to the matter as a legal representative of the deceased before he filed the application for setting aside the ex parte decree. The Tribunal did therefore offend the law in entertaining the application filed by the respondent on behalf of the deceased while the respondent had not applied and allowed by the court to be made a party to the matter and to act for the deceased.

It is on the above observations and reasons that the appeal is hereby allowed. The Tribunal did err in entertaining the application filed by the respondent for setting aside the ex parte decree because the application was time barred and the respondent had not applied and had not been allowed to be made a party to the matter and act for the deceased (1st defendant). The appeal is therefore hereby allowed with costs.

Abraham M. Mwampashi, J


20/08/2015

Delivered in Court this 13th day of August 2015 in the present of the appellant and Mr. Massoud Ali (Legal Officer) from the respondent's office and Mr. ZahranYussuf (Adv) holding brief for Mr. Suleiman Khalfan Said (Adv) for the respondent.

Abraham M. Mwampashi, J

20/08/2015

I CERTIFY THAT THIS IS A TRUE COPY OF THE ORIGINAL.


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HON. KHAMIS A. SIMAI
/DISTRICT REGISTRAR

HIGH COURT

PEMBA