IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

CORAM: MJASIRI, J.A., MWARIJA, J.A., AND MWAMBEGELE, J.A.)

CIVIL APPLICATION NO. 169/17 OF 2017

1. **SAID NASSOR ZAHOR**
2. **MUNTASIR NASSOR ZAHOR**
3. **SABRA NASSOR ZAHOR** .....**APPLICANTS**
4. **INTISAR NASSOR ZAHOR**

VERSUS

1. **NASSOR ZAHOR ABDULLA EL NABAHANY**
2. **MRAJIS WA NYARAKA ZANZIBAR** ..... **RESPONDENTS**

(Application for Revision of the Proceedings, Judgment and Decree of the High Court of Zanzibar at Vuga)

(Rabia Hussein Mohamed, J.)

Dated the 21st day of June, 2012
in
Civil Case No. 13 of 2012

RULING OF THE COURT

11th & 24th July, 2017

MWAMBEGELE, J.A.:

This is an application for revision. It seeks to revise the proceedings, judgment and decree of the High Court of Zanzibar sitting at Vuga in Civil Case No. 13 of 2012 (O.S). The application has been

lodged by a Notice of Motion taken under, essentially, the provisions of section 4 (3) of the Appellate Jurisdiction Act, Cap. 141 of 2002 (henceforth "the AJA"). And rule 65 (1), (2) and (3) of the Tanzania Court of Appeal Rules, 2009 – GN No. 368 of 2009 (henceforth "the Rules"). It is supported by two affidavits. The first one has been duly sworn to by Said Nassor Zahor; the first applicant and the second has been sworn to by Sabra Nassor Zahor; the third respondent. The application is resisted by an affidavit in reply duly sworn to by Nassor Zahor Abdallah El Nabahany; the first respondent. The second respondent did lodge any affidavit in reply.

When the application was called on for hearing before us on 10.07.2017, Mr. Salim Hassan Bakari Mnkonje, learned advocate appeared for the applicants and Mr. Rajab Abdallah Rajab, also learned advocate appeared for the first respondent. The second respondent, though duly served with the Notice of Hearing, did not enter appearance. In the premises, by virtue of rule 63 (2) of the Rules, we ordered the matter to proceed to hearing in the absence of the second respondent.

However, before we could allow Mr. Mnkonje for the applicants to start addressing us on the application, Mr. Rajab for the first respondent rose to tell us that he was conceding to the application. He had reasons for taking that course of action. He contended that the bone of contention in the present application was the glaring fact that the applicants were not a party to the suit in the High Court. Parties to the impugned suit were the respondents; the first respondent was the plaintiff and the second respondent was the defendant. Mr. Rajab, who we salute as a true officer of the Court for taking that course of action, went on to state that the respondents in the suit went on to determine the matter in which the applicants had interest as if the land the subject of that suit was in the hands of the second respondent. That, he submitted, offended the ends of justice as it denied the applicants, who had interest in the lands, the right of a hearing. He thus submitted that the proceedings, judgment and decree of the High Court be quashed and the matter be remitted to the High Court for a rehearing *de novo*. Following the concession, he prayed that there should be made no as to costs.

Mr. Mnkonje for the applicants, naturally, had no objection to the concession. However, he contended that as the applicants were not a party to the suit in the High Court, a rehearing *de novo* will not be apposite in the circumstances. He suggested that the impugned proceedings, judgment and decree of the High Court be quashed and the first respondent be at liberty to refile a fresh suit in which he will implead the applicants if he so wishes. Regarding costs, Mr. Mnkonje submitted that the applicants have incurred costs including travelling to and from Dar es Salaam to attend to the case. That notwithstanding, he submitted, as Mr. Rajab for the first respondent has readily conceded, he would not mind if the applicants are awarded half the costs.

We accorded audience to Mr. Rajab to rejoin on the question of costs as proposed by Mr. Mnkonje. Mr. Rajab stuck to his guns to be exempted from costs as by his concession, he stated, he saved the applicants' and Court's precious time.

We have considered the submissions by the learned counsel for the parties appearing. We should now be in a position to determine the issues of controversy that have popped out after the concession.

However, before we delve into that, in order to appreciate the orders we will eventually make at the end of this ruling, we find it apposite to narrate, albeit briefly, the material background facts of these revisional proceedings.

The first respondent is the father of the applicants. By a Deed of Gift dated 30.01.2002, he (the first respondent), passed ownership of a parcel of land at Kiembesamaki area within the Municipality of Zanzibar in Zanzibar Island to the first and second applicants. Likewise, on the same date; that is, 30.01.2002, by another Deed of Gift, he passed ownership of House No. 19/7 situate at Kikwajuni area within the Municipality of Zanzibar in Zanzibar Island to the third and fourth applicants and a certain Intisari Nassor Zahor who is not party to these proceedings but is the first respondent's child as well. Subsequently, the second respondent registered the Deeds of Gift accordingly.

Vide Civil Case No. 13 of 2012 (O.S), the first respondent successfully sued the second respondent seeking to revoke the two Deeds of Gift. That suit proceeded *ex parte*. The reason why the first respondent sought to revoke the Deeds can be deciphered in his

testimony on 13.06.2012. at pp 147 – 148 of the record, he is recorded as saying:

> *"Your Ladyship I gave my two houses as a gift to some of my children. I did this before I was blessed with other three children. I gave my first house as a gift to my children namely Said Nassor, Muntasir Nassor. I also gave my second house as a gift to my other children namely Sabra Nassor, Inty Salim and Salum Nassor who is now the deceased. Now that I have been blessed with other three children namely Nasrin Nassor, Nasruu Nassor and Mudrik Nassor. These two gifts are registered here in Zanzibar. The first gift concerns house 19/7 of Kikwajuni which is registered in 2002 in Vol. I Book A-3. The second gift involves my house of Kiembesamaki which is registered on 29th 2002 (sic) in Vol. I Book A-3.*

Your Ladyship I pray for revocation of these two gifts for the reasons that I am not in a position to build another house for my other three children. I also don't want to deny these three children their inheritance if I will be the first one to leave this world. Denying inheritance to [these] three children is against my Islamic Religion. I pray for the revocation of gifts of house No. 19/7 of Kikwajuni and that of Kiembesamaki. I also pray for those two houses to be registered by the Defendant in my name, and any other order in my favour."

The High Court (Rabia Hussein Mohamed, J.) revoked the Deeds on 02.07.2012. At a later stage, the revocation came to the knowledge of the applicants who, as already alluded to above, were not a party to the suit revoking the Deeds. The applicants came to learn of the decision in Civil Case No. 13 of 2012 (O.S) through a Written Statement of Defence filed by the first respondent in Civil Case No. 52 of 2014; a

suit which was filed by the first and second applicants in High Court of Zanzibar against the first respondent over the property conveyed through the first Deed of Gift. There was another suit (Civil Case No. 56 of 2014) filed in the same High Court of Zanzibar by the third and fourth applicants in respect of the second Deed of Gift. That suit; that is, Civil Case No. 56 of 2014, was struck out by the High Court of Zanzibar (Mwampashi, J.) on the ground that the High Court could not assail its own decision in Civil Case No. 13 of 2012 (O.S).

That was the point in time when the applicants resorted to this Court through these revisional proceedings. These proceedings were instituted after the applicants sought and obtained leave of the Court (Ndika, J.A) on 06.03.2017 to file them out of time.

Having stated the material background facts to the application, we now revert to the determination of the two issues stated above. We wish to state at this stage that the applicants, whose rights were affected by Civil Case No. 13 of 2012 (O.S) in the High Court to which they were not a party, could only challenge that decision by way of revision; a course they have appositely taken – see: **Halais Pro-Chemie v. Wella A.G** [1996] TLR 269 and ***Selcom Gaming Limited***

v. Gaming Management (T) Ltd & Gaming Board of Tanzania [2006] TLR 200 and **Chief Abdallah Said Fundikira v. Hillal A. Hillal**, Civil Application No. 72 of 2002 and **Attorney General v. Oysterbay Villas Limited & anor**, Civil Application No. 299/16 of 2016 (both unreported). In those cases, we emphasized and held that revision is the only recourse available to a person who was not a party to the suit that has affected his interest to challenge that decision. In the case at hand, the applicants were not a party to the impugned suit in the High Court and therefore could not legally be in a position to challenge it by way of appeal.

The interests of the applicants in the present instance were undoubtedly affected by Civil Case No. 13 of 2012 (O.S). The Deeds of Gift were revoked by the court in a suit they were not a party and therefore could not be heard. This course robbed the applicants of their fundamental right to be heard. The right to be heard is enshrined in our Constitution; the Constitution of the United Republic of Tanzaniz, 1977. The relevant article is 13 (6) (a). It reads:

"wakati haki na wajibu wa mtu yeyote

vinahitaji kufanyiwa uamuzi wa mahakama

au chombo kinginecho kinachohusika, basi mtu huyo atakuwa na haki ya kupewa fursa ya kusikilizwa kwa ukamilifu, na pia haki ya kukata rufaa au kupata nafuu nyingine ya kisheria kutokana na maamuzi ya mahakama au chombo hicho kinginecho kinachohusika ..."

The English version of the official Kiswahili version reads:

"when the rights and duties of any person are being determined by the court or any other agency, that person shall be entitled to a fair hearing and to the right of appeal or other legal remedy against the decision of the court or of the other agency concerned ..."

We have, times without number, held that this right is fundamental and whenever abrogated by court proceedings, such proceedings will be null and void. – see: **Independent Power Tanzania Limited Vs. Standard Chartered Bank (Hong Kong)**

Limited, Civil Revision No 1 of 2009 (unreported) and **Abbas Sherally & another v. Abdul Sultan Haji Mohamed Fazalboy,** Civil Application No. 133 of 2002 (also unreported). In **Independent Power Tanzania Limited**, for instance, this Court held:

> *"No decision must be made by any court of justice, body or authority entrusted with the power to determine rights and duties so as to adversely affect the interests of any person without first giving him a hearing according to the principles of natural justice".*

Likewise, in emphasizing the above position enshrined in the *Grund Norm*, the Court held in **Abbas Sherally and another** (supra) as follows.

> *"The right of a party to be heard before adverse action or decision is taken against such a party has been stated and emphasized by the courts in numerous*

decisions. ***That right is so basic that a decision which is arrived at in violation of it will be nullified even if the same decision would have been reached had the part been heard****, because the violation is considered to be a breach of principles of natural justice."*

[Emphasis supplied].

In the light of the above authorities, we were not surprised at Mr. Rajab's concession. Consequently, we would grant the application.

Having so done, what then should be the way forward? This is the question to which we now turn.

Mr. Rajab thought that it would be appropriate to order that the matter should he ordered to be heard de novo. This prayer, as already stated above, was strenuously objected to by Mr. Mnkonje on the ground that the applicants were not a party to the suit thus if a rehearing *de novo* is ordered, they still will not be a party. He proposed that the proceedings, judgment and decree of the High Court be

quashed with liberty to the first respondent to file a fresh suit and implead the applicants if he so wishes. We have given due consideration to the submissions by the learned counsel for the parties. Having so done, we find so convincing the proposition brought to the fore by Mr. Mnkonje; it has a lot of sense. If we order a hearing *de novo*, undoubtedly, the parties will be the same. That cannot guarantee the applicants' right to be heard on the strength of which the present application is allowed. We are of a considered view that a hearing *de novo* will not be the best way forward to solve the present dispute between the applicants and respondents.

As for costs, we think Mr. Mnkonje has been very considerate. He has asked for half the costs of the suit. The prayer by Mr. Mnkonje for half the costs of the present applicant has, in our view betters the respondents' fate. We are of such a considered view because, in civil cases, the general rule is that costs must follow the event. Costs are the panacea that soothes the souls of litigants that, in the absence of sound reasons, the Court is not prepared to deprive the winning litigant of. These are the usual consequences of litigation to which the respondents are not exempt. At this juncture, I find it irresistible to

quote the statement of Bowen, L.J. in **Cropper v. Smith** (1884), 26 Ch. D. 700, at p. 711:

> *"I have found in my experience that there is one panacea which heals every sore in litigation and that is costs. I have very seldom, if ever, been unfortunate enough to come across an instance where a party had made a mistake in his pleadings which has put the other side to such a disadvantage or that it cannot be cured by the application of that healing medicine".*

And I also find very convincing the statement of Othman, J. (as he then was – later became Chief Justice of Tanzania) in ***Kenedy Kamwela v. Sophia Mwangulangu & another,*** Miscellaneous Civil Application No. 31 of 2004 (unreported) which decision, being one of the High Court, I find it highly persuasive and depicting the correct position regarding costs, in which His Lordship stated:

"Costs are one panacea that no doubt heal such sore in litigations".

We share the sentiments of His Lordship Othman, J. (as he then was) in the foregoing quote as well as the statement of Bowen, L.J. in **Cropper v. Smith** (supra). The mere fact that counsel for the first respondent has readily conceded to the application, cannot exempt the respondents from paying costs of the application. These are the usual consequences of litigation to which the respondents are not exempt.

Be that as it may, counsel for the respondents has forbore the panacea of costs in full. He is contented with half the dose. That course of action should not be belittled by counsel for the first respondent, for, it ameliorates the extent to which the respondents should normally have suffered in terms of costs.

The foregoing said, and as counsel for the first respondent has readily conceded to the application, we are constrained to, as we hereby do, grant this application. The proceedings and judgment of the High Court of Zanzibar in Civil Case No. 13 of 2012 (O.S) are quashed and its flanking order set aside. The respondents are

condemned to pay the applicants half the costs of the application as prayed for by Mr. Mnkonje. The first respondent is at liberty to institute a fresh suit in a proper court and implead the applicants if he so wishes subject, of course, to the prevailing laws on limitation.

Order accordingly.

DATED at **DAR ES SALAAM** this 17th day of July, 2017.

S. MJASIRI
JUSTICE OF APPEAL

A.G. MWARIJA
JUSTICE OF APPEAL

J.C.M. MWAMBEGELE
JUSTICE OF APPEAL

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

A.H. Msumi
DEPUTY REGISTRAR
COURT OF APPEAL