NURBHAI N. RATTANSI *v.* MINISTRY OF WATER CONSTRUCTION ENERY LAND AND ENVIRONMENT AND HUSSEIN RAJABALI HIRJI

COURT OF APPEAL OF TANZANIA AT ZANZIBAR

(Lubuva, J.A.)

ZNZ CIVIL APPLICATION No. 3 OF 2004

(From the judgment of the High Court for Zanzibar at Vuga, Mshibe, J., dated 10 March 2003, in High Court Civil Appeal No. 5 of 2000)

Civil Practice and Procedure – Leave to appeal to Court of Appeal – Whether there was a legal point worth consideration of the Court of Appeal.

The applicant lost in a Civil Case before the Regional Magistrate's Court in 1996. He appealed to the High Court where the appeal was also dismissed in 2003. Still dissatisfied he applied to the High Court of Zanzibar for leave to appeal to the Court of Appeal. The application was dismissed on the ground that there was no point of law involved worth consideration by the Court on Appeal. Hence this application.

Held: The complaint that the High Court judge did not deal with the appeal on its merits but instead dismissed it on other grounds which did not feature in the trial is a contentious legal point worth the consideration of the Court of Appeal.

Leave to appeal granted

Case referred to:

(1) *Said Remadhani Mayange v. Abdalla Salehe* [1996] T.L.R. 74

Statutory provision referred to:

(1) Court Rules 1979, rule 43(b)

Messrs Mbwezeleni and Makanje, for the first Respondent

Mr Nassoro, for the second Respondent

RULING

(Dated 19 November 2004)

Lubuva, J.A.: There is before me an application for leave to appeal to this court. By Notice of Motion, the applicant, Nurbhai N. Rattansi, has filed this application supported by affidavit sworn by Salim Hassan Mnkonje. The matter arises from the decision of the High Court, Zanzibar (Mshibe, J.) in Civil Appeal Number 5 of 2000 of 10 March 2003. From the affidavit deposition and other documents laid before me the brief historical background of the matter may be outlined as follows:

The matter arose from the decision of the Regional Court at Vuga, Zanzibar in Civil Case Number 93 of 1996 in which the applicant lost. Being dissatisfied, he took the matter on appeal to the High Court Zanzibar, where the appeal was dismissed on 10 March 2003. Still dissatisfied, the applicant sought to appeal to this court by first lodging a Notice of Appeal on 21 March 2003 and applying to the High Court Zanzibar for leave to appeal to this court. After hearing the application, the learned judge took the view that there was no merit in the application because there was no point of law involved worth consideration of the court on appeal. Accordingly, the application for leave was dismissed on 23 March 2004. After the refusal, the applicant has filed this application in terms of the provisions of rule 43(b) of the Court Rules1979.

In this application, the applicant is represented by Mr Mbwezeleni and Mr Mnkonje, learned counsel, and the first and second respondents are represented by Mr Saleh Mumbarak and Mr Nassoro, learned advocates, respectively.

For the applicant Mr Mnkonje stated that the learned judge on first appeal, erroneously dismissed the appeal on the ground that the appeal lodged before the High Court, Zanzibar, new issues had been raised which were not before the trial Regional Court. This, Mr Mnkonje maintained, was wrong because in the High Court the

A main ground of complaint was that the trial magistrate erred in basing his decision to dismiss the suit on the issue of *res judicata* and not the issues framed at the trial. Counsel went on in his submission that this was a legal issue that warranted consideration of the Court
B of Appeal but unfortunately the learned judge dealing with the application for leave, did not accept it as a legal point worthy of consideration by the court. He charged that the learned judge instead of directing his mind on the central issue of complaint in the Memorandum of Appeal
C before him, strayed into extraneous matters, namely, the issue of *res judicata* and the fact that the second respondent had a proper letter of administration of the estate of his father. Had the learned judge addressed his mind properly on the framed issues before the trial
D court, which were not considered at the trial and the High Court on first appeal, he would have granted the application for leave to appeal. In support of the application the court was referred to the decision of the High Court in *Said Ramadhani Mayanga v. Abdalla Salehe* (1).

E Mr Saleh Mumbarak, learned State Attorney, for the first respondent, the Ministry of Water, Construction, Energy, Land and Environment, apart from stating that he did not see the grounds for the application, otherwise, he conceded to the application. In effect, therefore, he
F did not make any substantive submission to counter the application.

On the other hand Mr Nassoro, learned counsel for the second respondent, made brief submission in opposition to the application. He urged that the learned judge cannot be faulted in refusing to grant
G leave because there was no point of law for consideration by the Court on Appeal. He also said that the new issues raised before the High Court which were refused are now the subject of complaint in respect of which leave to appeal is being sought. This, Mr Nassoro
H stressed, should not be allowed. Furthermore, he went on in his submission, as was done by the learned judge in the High Court, leave should not be granted because there are no chances of success on appeal.

I have closely considered these submissions. In my considered
I view, the narrow issue for consideration in this application turns on the fact whether there was a legal point worth consideration of the

Court on Appeal. As already indicated, Mr S. Mumbarak, learned State Attorney, for the first respondent readily conceded that in the circumstances of the case, leave should have been granted. With respect, I think there is merit in the position taken by the learned State Attorney in this matter. If as submitted by Mr Mnkonje, learned counsel for the applicant, the trial magistrate decided the case on the basis of extraneous matters, namely the question of *res judicata* and that the second respondent had a letter of administration for his late father's estate and not the issues framed during the trial, I have no hesitation in accepting the contention that this was a legal aspect worth consideration by the court on appeal. From the documents laid before me and the submission by counsel for the applicant, it can be gleaned at once that the complaint before the High Court judge on first appeal was that the trial court did not address the issues raised before it. With respect, in that situation, the learned judge did not deal with the appeal on its merits. Instead, the appeal was dismissed on other grounds which did not feature at the trial.

In the circumstances of the case, I am, with respect, in agreement with the view expressed by Msumi, J. (as he then was) in *Said Ramadhani Mnyanga v. Abdallah Salehe* (1), in which I think he restated the correct position of the law in this regard. He stated *inter alia*:

The matter raises contentious issues of law and is a fit case for further consideration by the Court of Appeal.

In the event I am inclined to the view that the basis upon which the suit was determined by the trial Regional Court and thereafter on first appeal before the High Court, Zanzibar, was such that it raised a contentious legal point. Such an aspect, I am further persuaded to accept, is worth consideration of the court on appeal. I am therefore, with respect, unable to accept Mr Nassoro's attractive argument that there was no point of law raised for the court's consideration.

Accordingly, leave to appeal to the Court of Appeal is granted.