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SMILE STORE v. CHIEF OF J.K.U

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**HIGH COURT OF ZANZIBAR
AT VUGA**

(Farouk Lawan, J.)

C

CIVIL APPEAL No. 38 OF 1999

(Appeal from the Judgment of the Regional Magistrate's Court in Civil Case No. 10 of 1999, dated 1 September 1999)

D

*Civil Practice and Procedure – Notice to Sue Government – Requirement of Notice – Whether may be waived.**Civil Practice and Procedure - Notice to Sue Government – Requirement of Notice – Whether there was non-compliance with section 60 of Civil Procedure Decree Chapter 8.*

E

Evidence – Estoppel – Application of Estoppels rule–Suit for declaration of proper landlord – Whether estoppel may be invoked under section 110 of Evidence Decree Chapter 5.

F

The appellant appealed against a judgment of the Regional Magistrate's Court which had upheld preliminary point of law raised by the respondent, when the case was filed therein by the appellant. The preliminary point was that the appellant filed Civil Suit Number 10 of 1999 to sue the Government without complying with the provision of section 60 Civil Procedure Decree Chapter 8 and that the appellant was estopped by section 110 of Evidence Decree Chapter 5, from denying the respondent as the proper landlord. The appellant, on appeal, contended that, (i) the trial magistrate erred in law and fact in holding that requirement of section 60 of Civil Procedure Decree had not been complied with, (ii) the trial magistrate erred in law in turning the requirement of 60 days notice to sue Government into a sword, (iii) the trial magistrate erred in law in invoking estoppel when the suit was for declaring who was the proper landlord.

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Held: (i) The issue of compliance with the notice requirement is a matter of practice.

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(ii) There was substantial compliance with section 60(5) of the Civil Procedure Decree Chapter 8 by the appellant and the fact of receipt of notice had not been contradicted by the respondent.

(iii) The appellant cannot deny the landlord is title unless he has handed over possession in terms of section 116 of the Evidence Decree Chapter 5.

Appeal allowed

Cases referred to:

(1) *Kanhayalal v. Government of India* (1974) A G UC 37(2) *Patel Kilabaiv v. Hargaban* - 19 B 133(3) *Ekoba v. Dayaran* (1919) 22 BOM.LR(4) *Basheshaer North v. I.T. Commissioner* A.I.R. 1956 SC 149

Statutory provisions referred to:

(1) Civil Procedure Decree Chapter 8, sections 60 and 60(5)

(2) Evidence Decree Chapter 5, sections 110 and 116

JUDGMENT

(Delivered 17 April 2000)

Farouk Lawan, J.: This is an appeal by the appellant against the Judgment or the RM delivered on the 1 September 1999 in RM Civil Case Number 10 of 1999 on the following grounds among others:

- (a) that the learned trial magistrate erred in law and fact in holding that requirements of section 60 of the Civil Procedure Decree Chapter 8 have not been complied with, when there was a fulfilled promise and waiver.
- (b) that the learned trial magistrate erred in law in turning the requirement of 60 days notice to the Government into a sword, contrary to the of enacting the same.
- (c) that the learned Regional Magistrate erred in law invoking estoppels when the suit was for declaring the proper landlord.

WHERE OF the appellant prays that:

- A A - the appeal be allowed
 B - dismiss suit or be heard on merit
 C - costs to follow the event
 B D - any other order deemed fit be issued.

The summary of the facts of the case is follows:

C The appellant filed suit Number 10 of 1999 against the respondents as defendants in the same suit before commencement of hearing, the respondent/defendant advocate raised a preliminary point of law that:

- D (a) there was no compliance with the provisions of section 60 of Chapter 8, as the parties involve Government defendants.
 (b) the plaintiff (appellant) is estopped by section 110 of the Evidence Decree Chapter 5 from denying that the first defendant is the landlord.

E After arguing these points, the learned Magistrate ended in upholding the two (2) objections and dismissed that the suit, hence this appeal.

F Under ground I of the appeal, the advocate to the appellant contended that the promise under section 60 which was amended by Act 5 of 1995 gives the plaintiffs the right to file an application before the expiration of 60 days on condition that they have issued a notice or a promise within 3 days of filling the suit.

G He contended that the promise was fulfilled and notice prepared on the first of February, 1999 and served on the secretary to the Rev, Council, the AG, Ministry of Land, Water and Chief of JKU.

H He further contended that on the suit, he showed the court their office dispatch book that the notice was served to those offices and the Chief of JKU confirmed this.

I He submitted that at that time interlocutory applications always go with the main suit, while the argument of the respondent was the there must be notice for the both the interlocutory and the main suit.

A On the same ground of appeal, the advocate contended that there was a waiver of the said notice by the respondents. He pointed out that, after issuance of the interim order, the main suit was first mentioned on the 23 February 1999, hearing of the suit commenced in May 1999.

B Therefore, the act of the state attorney, their request to the court before filling WSD to put their house in order is taken as waiver of the notice. If the respondents have any objections, they could have raised before asking for the time to put their house in order.

C The advocate referred to **Mulla on Code of Civil Procedure** 1925 Edition pg 502 and section 80 of Indian Code which is paragraph *Mattria* with section 60 of Chapter 8.

D Therefore the conduct of the state attorney is sufficient to amount to a waiver of the notice.

E On the second ground of appeal, the advocate contended that the rationale behind enacting section 60 of Chapter 8 is to give the Government enough time to see the possibility of settling matters out of court and not to bar person from suing the Government when there is a cause of action.

F It was therefore wrong for the RM to turn the requirement into a sword to strike down the plaintiff's case in matters involving Governments.

G On the third ground of appeal, the advocate contended that the suit against the defendants was for declaration of the proper landlord. The appellant did not deny any of the respondents to be the landlord. The section (section 116 of the Evidence Decree) applies where two (2) people, one claiming being landlord, therefore the section was improperly invoked.

H He finally prayed that the matter be allowed to be heard by the RM *inter-partes* on his reply, advocate to the respondent submitted that, with regard to the first ground of appeal, the RM is correct in holding that the appellant did not comply with section 60 of Chapter 8.

A The section concerned suits other than interlocutory applications and the appellants admitted that the suit was not an interlocutory one.

B He submitted further that sub-section 5 of Chapter 8 section 60 should be read together with sub-section 1 of the same provision which allow a party to obtain an urgent or immediate relief.

C And on the issue of waiver that because a party asks for enough time to put his house in order cannot amount to waiver of notice and this ground can only be raised at the first trial and not on appeal (the counsel cited **Sakar on the Law of Civil Procedure**, (5 ed) addition page 171.

D The advocate further contended on the second ground that the word used in section 60 of Chapter 8 "shall"- connotes mandatory action, therefore according to **Mulla on the Code of Civil Procedure** (11 ed) page 200 and 201 explains section 50 of the Indian Code which is in paragraph *mattria* with Chapter 8 (section 60) is not a procedural provision but a substantive one.

F He cited the case of *Kanhayalal v. Government of India* (1) at page 37 where it was held that if not complied with, the suit must be rejected. Therefore, it is mandatory to comply with the provision.

G On the third ground, the advocate contended that the trial magistrate was correct in determining the issue of estoppels. He submitted that the appellant has been the tenant of the first defendant/respondent for several years, but after being requested to vacate the premises, the plaintiff/appellant contracted and entered into another Tenancy Agreement with Ministry of Land, Water Construction in respect of the same premises. This means he is denying his first landlord right to the title which the plaintiff/appellant is estopped by section 116 of the Evidence Act.

I He relied on the case of *Patel Kilabai v. Hargaban* (2) and **Sarkar Law of Evidence** (10 ed) page 1029 and page 1024.

A Therefore, if the plaintiff/appellant wishes to question the title of the first/defendant/ respondent who is his landlord he must first surrender the premises back to first defendant/respondent. section 116 bars the plaintiff/appellant from questioning the title of the landlord.

B He submitted that the second defendant who deems to be the lawful owner of the premises seems to have no interest in the proceedings; although served with notice to appear, they never appeared before the trial court and before this court. He lamented that even the A.G. failed to appear before the court. The advocate finally submitted C that the appeal lacks any merit and should be dismissed with costs and the court should order the appellant to vacate the premises forthwith.

D The appellant's advocate further in his reply contended that the second defendant has interest because up to this moment there is a subsisting lease between him and the plaintiff/ appellant; this shows the second defendant has an interest in the premises.

E He further submitted that, this court cannot order vacant possession since there was no counterclaim before the RM's Court. And also, the case of "*Dayalal*" does not apply because the facts are not similar therefore the appeal is not vexatious or frivolous and the issue as to who is the landlord cannot be determined without properly hearing F the suit inter parties.

G On the second ground, he contended that the section (section 60) is mandatory and they complied with it by way of promise which was actually fulfilled. The section simply provides that case of non-compliance the court should reject the plaint and not dismiss it. He submitted that it is trite law that all objections are to be raised at the trial court unless the objection is to do with the appeal. The fact that the plaintiff did not bring notice for the main suit cannot hold H water; application and main suit go together therefore one notice suffices. The notice was properly given. He prayed for their earlier prayers be granted and the appeal be allowed.

A In my opinion grounds numbers 1 and 2 of the appeal could be considered together.

B The counsel for the appellant contended that by virtue of section 60(5) as amended by Act no 5 of 1995, they have fulfilled the requirement of the section as notice was served on the respondents and on the hearing date, a copy of the notice was shown to the court and quoted the reference number of the letters to respondent is enough, and receipt of the said letter was even acknowledged by the respondents.

C Even if that has not been fulfilled, the appearance of the counsel to the respondent waived the issue of the notice, and the conduct of the Attorney is sufficient to amount to a waiver.

D In the same vein, the counsel contended, that the learned Magistrate turned the requirement of 60 days notice into a sword contrary to the rationale of enacting the same; which is to give the Government time to settle a matter if possible out of court and not to bar person from suing the Government when these is a cause of action.

E What is the effect of the section 60(5) of Chapter 8 as amended? The section provides that.

F ... Nothing in the section SHALL be deemed to bar application in interlocutory order against the Government without expiry of 60 days from the date of notice under section 60, Chapter 8 save that no such application shall be entertained without proof of or a promise that notice require under section 60 Chapter 8 have been issued or will be so issued within not less than three days from the date of that application...

G From the record annexed to the ground of appeal page 7, Mr Mkonje submitted that:

H ... in appeal Number 17 of 1999, we had clearly given a promise that will give a notice to the government within 3 days and we did so by our letter ref. Number MISC/Volume. DOT 1/99/03 of 1 February 1999 addressed to the Secretary Rev. Government and copied to AG, J.K.U and Ministry of Construction

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A Must the notice be given for each application in a suit? It is quite clear that the suit which gave rise to this appeal, suit Number 10 of 1999 is quite distinct from the Misc. Application Number 17 of 1999; does the notice in the letter application suffice?

B In my opinion, the issue of complying with the notice requirement is a matter of practice.

C The section is explicit and mandatory and admits no implications or exception as the notice is intended to alert the state as I stated earlier and to negotiate a first settlement or a least to have the courtesy to tell the potential outsider why the claim is being instituted, therefore in my view notice is sufficient if it substantially fulfills its objective in informing the parties concerned of the notice of the suit to be filed.

D The fact that letters or notice issued was not annexed to the plaint is not enough reason to refuse accepting on the ground that notice was not issued; these facts have not been contradicted by the respondents that they have not received any notice front the appellant.

E Accordingly, I am of the view that there is substantial compliance with the requirement of section 60(5) of Chapter 8 by the appellants and find grounds 1 and 2 succeed.

F On the issue of waiver of the said notice by the conduct of the attorney, I must point out there that the requirement of section 60(5) is mandatory, and the generally accepted connotation of waiver is that "to constitute waiver there must be an intentional relinquishment or abandonment of a known existing legal right or conduct such as warrants an inference of a known right or privilege" see the case of *Basheshaer North v. I.T. Commissioner* (4).

H Therefore the fact that the Attorney appeared in court, requested for an adjournment cannot be said to amount to a waiver of the requirement of section 60(5) of Chapter 8. Waiver of right cannot be lightly inferred.

I

A On the appellant's counsel while arguing ground 3 contended that the Magistrate erred in invoking estoppel when the suit was before declaring the proper landlord. He contended that the appellant did not deny any of the respondents to be the landlord; their prayer
B is only to declare the proper landlord. Therefore, the Magistrate should not have applied section 116 of the Evidence Decree.

While the respondent's counsel concluded that the Hon Magistrate cited the section 116 of the Evidence Decree correctly.

C He cited **Sarkar on Evidence** (10 ed) page 1029 and the case of *Patel Kilabai v. Hangaram* (2).

D The appellant cannot deny the landlord title unless after handing over possession.

In my opinion, even if the issue of who is the landlord is to be determined there is no two way about the provision of section 116 of the Evidence Decree, that the tenant (appellant) must hand over
E possession first to the landlord no matter how defective the landlord title is. So the issue of the court determining who the landlord is does not arise until after the handing over. The equitable maxim that where there are equal equities the first in time prevails even though
F one may say that this is not a court of equity. It is a well known fact that the appellant was a tenant of the first defendant, the second defendant came into the picture after the expiration of the tenancy. How did the second landlord come into the scene? This could only
G be determined after hearing evidence.

As rightly stated by counsel to the respondent in his submission on the conduct of the second defendant who never appeared in the trial court below and on appeal after being summoned, shows lack
H of the interest on his part and if he is really the actual landlord he would have definitely appeared.

Tenant who holds over. Therefore as a general principle of law as decided in the case of *Ekoba v. Dayaran* (3), a tenant who wishes
I to dispute his landlord's title must not only see that the tenancy has

come to an end, but also possession which was in him as a tenant has been surrendered. Therefore, a tenant who holds over and remains in possession cannot be allowed to use that possession as a lever to support a case in which he denies the landlord has title.

In the final analysis, I allow this appeal in part. I hereby order for the dismissed suit (Civil case Number 10 of 1999) to be heard and determined on merit.

MTUMWA SAID HAJI AND 49 OTHERS v. ATTORNEY GENERAL

HIGH COURT OF TANZANIA
AT DAR ES SALAAM
(Mapigano, Mackanja and Bubeshi, JJ)

CIVIL CASE No. 2 OF 1995

Constitutional Law – Constitution of the United Republic of Tanzania 1977 – Article 126 – Petition for a declaratory order to summon a Special Constitutional Court – Whether members of a registered political party have legal personality to seek the order.

Constitutional Law – Articles of the Union – Whether validity expired upon promulgation of the Union Constitution.

Constitutional Law – Articles of the Union – Whether unalterable.

Constitutional Law – Constitutional amendment – Enactment of the 11 Amendment to the Constitution of the United Republic of Tanzania 1977 – Whether made unilaterally.

Constitutional Law – Interpretation of Constitution – Ordinary prescriptions not appropriate.