IN THE HIGH COURT OF TANZANIA
AT DAR ES SALAAM

(PC) CIVIL APPEAL NO. 81 OF 1995

(Originating from Kinondoni D\C Civil Appeal No. 46\94 and original Kinondoni Primary Court Civil Case No. 43\94)

ZIDI MGAYA.....APPLICANT

VERSUS

RASHID BAKARI KANDI.....RESPONDENT

JUDGEMENT

KALEGEYA, J.

This is an interesting and also an unfortunate matter. It is unfortunate because it has taken unnecessarily a long time to reach where it is and there is still a long way to go. If we tread by what the records tell us in their duplicate form, it started in 1994 before the Kinondoni Primary Court, and it has yet to terminate. Not only that, while it dilly dallied at the District Court for no apparent and justifiable reason, when it finally came to the High Court, the records disappeared! As if this was not enough, while the originating records (to the High Court Registry) suggest that it came by way of revision it was entered and registered as a Civil Appeal (it is entitled, 'PC Civil Appeal No. 81 of 1995'). And, finally, a look at the records available (both in substance and form), leaves no one in doubt that the proceedings and ensuing judgements\orders cannot be sustained. It is interesting because both parties, represented by learned Counsel, front formidable arguments, which, if true, rather than cleansing any, do paint, darkly and suspiciously, cutting across, the High Court Registry, the parties themselves, the District Court personnel let alone the counsel themselves!

I have already indicated that we are acting on a record in its "duplicate form". This is so because the original Primary Court and District Court records including the original chamber summons and affidavit which brought the matter to the High Court disappeared! What is on record are what are said to be copies of the Primary Court proceedings and judgement; a copy of an amended memorandum of appeal to the District Court; uncertified and undated chamber summons to which is attached an undated though signed affidavit both of which are said to have originated the present case before the High Court; a copy of the judge-in-charge's minute in the general file re-assigning the matter to me (originally it was assigned to Kyando, J, who moved on transfer); a copy of the District Court exparte judgement dated 10\5\95 which allowed Rashid Kandi's (Respondent) appeal against the Primary Court judgement, and a copy of a revisional order in Cr. Revision No. 12\94 between the present Respondent (as a convict) and one Mohamed Said Hatibu which set aside the conviction and sentence of 6 months imprisonment for the offence of threatening violence, which factor I consider irrelevant in the present matter. The chamber summons by Applicant, Zidi Mgaya, pray for orders, among others, that,

> "1. The exparte decision of the Senior Resident Magistrate, Ms. Kalombola, in Civil Appeal No. 46 of 1994 on the 10th May, 1995 be revised.
>
> 2. In the alternative, the appeal No. 46\94 be heard inter-parties by another Magistrate".

Reasons in support of these prayers are contained in an affidavit which allege that the appeal should have been summarily rejected for being frivolous; that the exparte judgement was passed when the Applicant's Counsel was stuck in mud just 100 yrds away from the court room, and that it is against principles of natural justice to condemn a person unheard. Mr. Mkondya, Advocate, for the Applicant, in his further submissions insisted that there was dubious dealings between the District Court and the Respondent

for, the latter, in company of his advocate, was seen entering the Magistrate's chambers while Applicant was standing just outside, and without the case having been called out, only to come out with an order as to when an exparte judgement would be delivered. This attracted preliminary objections from Semgalawe, Jundu & Co. Advocates, to the effect that the affidavit is defective as it was not verified and attested (it will be recalled that it was said to be a re-construction from the lost documents); that there is no indication that necessary fees were paid; that it is not clear as to whether the matter was an appeal or revision (comparing the chamber summons and the way the record is entitled); that the applicant should not have applied for revision under s. 30(1)(c), for, that relates to where courts act suo moto but should have acted under s. 44(1)(b) of the Magistrate's Court Act, No. 2\84; that as no fees were indicated to have been paid by 29\6\95 "going by the date shown in the chamber summons...." (although the copy of the chamber summons on record does not indicate the date and one wonders where the learned counsel got 29.6.95!) the application is time barred by item 21, Part III, of the Law of Limitation, Act, 1971, which fixes the period to only 60 days. On the main submission the respondent argue that it is inconceivable that the counsel could simply remain stranded just 100 yrds away without informing the court when the scheduled time for the case struck; that there were triable issues in the appeal and that there was no bias on the court's side but that the Applicants failed to enter appearance accordingly.

In reply the Applicant's Counsel insists that the fees were paid and receipts were in the lost files; that time should not be computed from 1998 but 1995, and, wonders, asking himself, why the other party is capitalising on the lost files if they have no knowledge of their whereabouts.

All this started with Rashidi Kandi (Respondent) suing unsuccesfully, Zidi Mgaya (Applicant), at Kinondoni Primary Court, for possession of unsurveyed piece of land on which a "Kibanda" is erected.

The Respondent appealed succesfully before the Kinondoni District Court, which, in an exparte judgement set aside the primary court judgement. The Applicant (Zidi Mgaya) could not stomach this hence the present application to revise the District Court exparte judgement as per prayers already quoted above.

I have summarised the history of the matter and the submissions by both parties just for clarity, for, regard being had to two factors which I will shortly discuss, there is no need of going into the merits thereof, for, the proceedings and ensuing judgments\orders have no feet on which to stand.

"First I should state, that the well established principle in criminal Appeals "of loss of record leads to retrial" (Rv Abdi May and Others (1948) 15 EACA 86; Haiderali Lakhoo Zaver (1952) E.A. 244; Shaban Matondo v R (1969) HCD 57) applies as well to Civil Appeals suffering from the same malaise, as is the present appeal whose facts establish beyond doubt that the records got lost or misplaced. This is so because there is no record on which the appeal court can base its analysis and decision regarding the issues raised between the parties. I should go further and state that this principle ... applies as well as in situations where there are no records at all where those available are copies whose authenticity have not been proved. In the case at hand we only have copies of the primary court proceedings. Apart from these unauthenticated primary court proceedings, (and it should be noted that none of the Counsel took stock of the proceedings there, for, Advocates don't appear in primary courts) there are no District Court proceedings, and, which are alleged by the

Applicant to have been pregnant with bias. As what is being challenged is an exparte judgement of the District Court it is pertinent that this court be availed with what actually transpired, record wise, before the same was entered. There is no original nor a copy of the said proceedings. This in itself is deplorably fatal to the present appeal.

There is yet another serious defect on record. And this is the 2nd factor which necessitate a retrial. And this would have attracted same consequences even if the original records were present. Under Rule 3 of the Magistrate's courts (Primary Courts) (Judgment of court) Rules, made under S.71(1) of the Magistrate's Court Act, No. 2 of 1984, the old system whereby at the close of the trial, a primary court Magistrate had to summarise the evidence to assessors and then seek their views was scraped off with no reserved element of discretion. The said Rule provides,

> "3 (1) where in any proceedings the court has heard all the evidence or matters pertaining to the issue to be determined by the court, the magistrate shall proceed to consult with the assessor present, with the view of reaching a decision of the court.
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> (2) If all lthe members of the court agree on one decision, the magistrate shall proceed to record the decision or judgement of the court which shall be signed by all the members.
>
> (3) For the avoidance of doubt a magistrate shall not in lieu of or in addition to, the consultations referred to in sub-rule (1) of this rule, be entitled to sum up to the other members of the court".

The copy of judgement of the primary court on record shows that the Magistrate summarised the evidence, invited the assessors who gave their individual opinions which were recorded. He then

recorded immediately thereafter, Hakimu: and proceeded to express his views supporting those given by assessors. This is followed by:

> Amri: Mdai anashindwa kuthibitisha dai chini ya kifungu No. 06 ya Kanuni za ushahidi. Mdaiwa anayo haki katika dai hili aendelee kuishi katika nyumba hiyo...".

Without even posing to answer whether this is how a judgement should look like, a question prompted by its curious format, I should out-rightly state that it has violated Rule 3 quoted above. Under the Rule a magistrate only consults the assessors and then writes the judgement without putting on record the individual opinions unless there is a dissenting member, and there was none here.

The consequences of violating Rule 3 is to turn the whole proceedings, judgement and orders into a nullity [(PC) Civil Appeal No. 156\97 Omary Nassoro Mbotto vs Abdallah Said Likupila; (PC) Civil Appeal No. 55 of 1990 Selemani Bakari vs Felista Helmani; PC Civl Appeal No. 81\98 Hamisi Ngurangwa vs Zainabu Kondo - all of Dsm Registry, unreported].

Thus, both lower courts' proceedings, judgements and orders are declared a nullity. It is further ordered that the case should start de novo, on same fees as orignally paid, for, the court is to blame for what transpired.

That settled, I have asked myself as to whether I should order to have trial de novo held before the primary court or District Court. Under s. 18 and 63 of the Magistrates' Court Act, the disputed piece of land falls under subject matters whose jurisdiction lie with primary courts unless, among others, "the High court gives leave for such proceedings to be commenced in

some other court". It will be noted that both parties were represented by defence counsel right from the District Court. We are not told (and indeed there would be no justified cause even to inquire, for, we know that Advocates don't appear in primary courts) whether they would not have managed to engage services of counsel from the start. However, having maintained counsel in both courts (District and High Court) it is most likely than not, that given chance, they would still maintain counsels' representation. Considering this, and also the time lag

so far taken, and, further, that the counsel (assuming parties retain the same) must obviously by now have the facts and law at their finger tips, it is my considered view that I should order, as I hereby do, that trial de novo be conducted before the Kinondoni District Court. I have given leave to have this matter commenced in the District court not without due regard to legality. I have carefully considered s. 63 of the Magistrate's Court, Act, where it states,

> "Unless the High Court gives leave for such proceedings to be commenced in some other court",

and I have concluded that the said words mean that the court can be moved by a party to grant the required leave or can act suo moto, depending on the circumstances of a particular case. The present case necessitates the latter course which I have adopted.

Lastly, for the same reasons that compelled me not to order for payment of fresh fees before commencement of retrial I make no order as to costs. Each party to bear its own costs.

(L. R. Kalegeya)
JUDGE

Delivered on 30/12/98