IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

Coram: Mwakasendo, J.A., Makame, J.A. and Kisanga, J.A.

CIVIL APPEAL NO. 1 OF 1983

BETWEEN

MAULID H. MWANJA ..... APPELLANT

VERSUS

H. N. KAVIRA ..... RESPONDENT

(Appeal from the ruling of the High Court of Tanzania at Dar es Salaam Mr. Justice C. G. Mtenga) dated 29th day of June, 1982

in

Civil Case Number 260 of 1981

J U D G M E N T

MAKAME, J.A.

In the High Court the present respondent, H. N. KAVIRA, sued the appellant, MAULID MWANJA, his brother in-law, for a sum of Shs. 108,000/= being the final balance of monies he had entrusted to the appellant. The appellant admits that he was duly served, but on the return date, 7th November, 1981, he did not turn-up and he had not entered any appearance. An ex-parte judgment was eventually entered, more than five months later, and the appellant made no move known to the trial court until after he had been served with an order attaching his property, Starehe Guest House, situated at Mabibo in the City of Dar es Salaam. He made a Chamber application seeking to have the ex-parte judgment set aside and to be allowed time to file his Defence. The Chamber summons were drawn by the applicant himself, apparently a lay-man, and that probably explains why the need to obtain leave of the court to have the time within which to make the application extended was not brought out with sufficient clarity in the summons as well as orally in court.

The application was indeed out of time as pointed out by Mr. Ismail, learned advocate for the present respondent at the hearing of the application. The learned HighCourt judge who heard the applications, for they were evidently two applications, dismissed them. He did so in these terms:

"Order: Upon reading the affidavit in support of the application of the Judgment debtor, and hearing the applicant in chambers, coupled with the fact that the application is time barred and no reasons are advanced by the applicant as to why he has been so late in filing his application I order that this application to have ex-parte judgment to be set aside be dismissed with costs".

Mr. Raithatha, learned counsel for the appellant before us, submitted that the learned judge did not at all consider whether or not the appellant was "prevented by any sufficient cause from appearing", as the learned judge was required to do under Order 9 rule 13 of the Civil Procedure Code 1966. Only the application to set aside the ex-parte judgment was considered.

According to the Order the judge made, he took into account both the appellant's affidavit and what was said orally in court and, having done so, he was satisfied that the appellant had no reason for coming in so late. The reason the appellant gave was that the High Court did not inform him of the fact that an ex-parte judgment had been entered against him immediately after the High Court had made the order. The High Court was certainly under no such obligation and the appellant did not advance any other reason. We are respectfully of the view that the learned High Court judge was right in finding that there was no reason for the appellant being late by which, in the context of the order, the learned judge must have meant that there was no reasonable or sufficient cause to extend the time.

Mr. Raithatha concedes that the learned judge did consider the application to have the ex-parte judgment set aside. We are satisfied that the reasons the appellant gave for not entering an appearance are necessarily incredible. The appellant pleaded circumstances beyond his control, in that some brother of his, one JACOB JAMES, had assured him that he had secured the respondent's consent to have the matter settled out of court and that that was why he, the appellant, did not bother to show up. The court below was obviously not impressed by this assertion and we are not so gullible either. The brother allegedly went off to Dodoma thereafter "and has never come back". Mr. Ismail, who appeared again for the respondent before us, correctly pointed out that if the appellant was not telling a fib he would surely have pursued the matter and sought to find out from the present respondent the terms of the

alleged proposed settlement. The appellant never did any such thing, which makes one reasonably to infer that the appellant merely chose to sit back without entering an appearance. Mr. Raithatha sought to promote his argument by assisting us with the case of MBUI v THAIRU, 1969 EARLR, 133. In that case the party bringing an application to have an ex-parte judgment set aside had twice been to the adverse party's advocate to discuss the case with him. The learned judge in that case was satisfied, on the facts, that while the learned advocate did not intend to mislead the applicant, the latter was left under a bona fide misapprehension that it was unnecessary for him to enter an appearance. The facts in that case are clearly distinguishable from the present matter.

We are of the view that, in circumstances, the learned High Court judge was entitled to dismiss the appellant's application to set aside the ex-parte judgment. This appeal is accordingly dismissed with costs.

DATED at DAR ES SALAAM this ...5th... day of ...July, 1983.....

(Y.M.M. Mwakasendo)
JUSTICE OF APPEAL

(L. M. Makame)
JUSTICE OF APPEAL

(R. H. Kisanga)
JUSTICE OF APPEAL

certify that this is a true copy of the original.

(L. A. A. Kyando)
SENIOR DEPUTY REGISTRAR