

CORAM: MUSTAFA, J.A.; KISANGA, J.A. And OMAR, J.A.

CIVIL APPEAL NO. 15 OF 1985

RAJABU IGSA. . . . . APPELLANT

VERSUS

JUMA FAKI MBWEWE. . . . . RESPONDENT

(Appeal from the Ruling of the High Court  
of Tanzania at Dar es Salaam) (Mapigano, J.)  
dated the 19th July, 1982

in

Civil Case No. 76 of 1982

JUDGMENT OF THE COURT

MUSTAFA, J.A.:

The appellant Rajabu was a defendant in a case filed by the respondent Juma in which Juma had claimed a sum of money for goods deposited with Rajabu and which were not returned to Juma despite demand.

There apparently were difficulties in serving Rajabu and the court made an order for substituted service. The process server, Frank, deponed that he had duly affixed a notice in terms of the Court Order on the door of the dwelling house of Rajabu. On proof of such substituted service an exparte judgment was entered against Rajabu. Later execution proceedings were taken <sup>out</sup> and an attachment on the dwelling house of Rajabu was ordered. At that stage Rajabu reacted. That was about 1st October, 1983.

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Rajabu applied to set aside the exparte judgment on the ground that he knew nothing about the Summons and that no such notice of service was affixed to his house as far as he knew and that it was only when the attachment order on his house was made that he came to know of the suit filed by Juma.

Affidavits and counter-affidavits were duly filed and as usual in such matters, the affidavits were contradictory. Frank the process server filed his affidavit of service and in it he mentioned that he had affixed the notice of Summons on Rajabu's house in the presence of one Rashidi, a local 10 cell leader. The trial judge ordered Frank and Rashidi to attend his Chambers to testify, and they did. Rashidi directly contradicted Frank concerning the affixing of such notice.

The trial judge clearly preferred the evidence of Frank. However in his ruling dismissing Rajabu's application to set aside the exparte judgment the judge said inter alia

"I have seen and heard the applicant Rashidi Mohamed and the process server. I cannot but help saying that I was impressed by the process server and think that he was a truthful person".

It is obvious that the judge had mistaken Rashidi Mohamed, the 10 cell leader for the applicant, Rajabu. Rajabu did not testify at all before the judge. The trial judge, in error, in fact had found Rajabu not worthy of belief in contrast to Frank, the process server, and rejected Rajabu's contention that he had not known of the notice of Summons without giving Rajabu an opportunity to testify.

In our view this is a material error of fact, and vitiates the ruling. In an application in which affidavits containing

contradictory averments are made, it is extremely difficult to decide on facts unless the principal parties and witnesses are examined and cross examined, if that was thought advisable. Here a principal witness, Rajabu, was by mistake, thought to have been examined and subsequently disbelieved, when in fact nothing of the sort was done.

We think that the ruling of the judge and the exparte judgment entered against Rajabu should be and are hereby set aside. We grant leave to Rajabu to defend. Rajabu must file his statement of defence on or before 30th October, 1986.

The costs thrown away to date be in the cause. The costs of this appeal will also be in the cause.

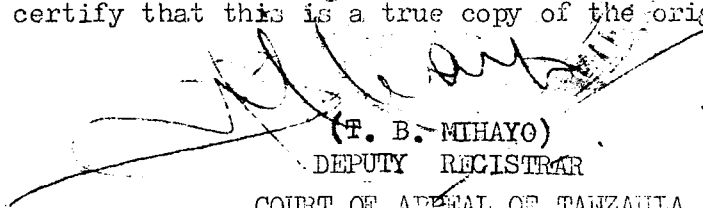
DATED at DAR ES SALAAM this 9th day of October, 1986.

A. MUSTAFA  
JUSTICE OF APPEAL

R. H. KISANGA  
JUSTICE OF APPEAL

A. M. A. OMAR  
JUSTICE OF APPEAL

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

  
(T. B. MIHAYO)  
DEPUTY REGISTRAR  
COURT OF APPEAL OF TANZANIA.