IN THE COURT OF APPEAL OF TANZANIA

AT ZANZIBAR

(CORAM: MAKAME, J.A.)

CIVIL APPLICATION NO. 2 OF 1986

In the Matter of an intended Appeal

Between

SALUM SURURU NABHANI. . . . . APPLICANT

And

ZAHOR ABDULLA ZAHOR. . . . . RESPONDENT

(Application for Appeal out of time from the decree of the High Court of Zanzibar) (Ramadhani, C.J.) dated 16th October, 1986

in

Civil Case No. 11 of 1986

R U L I N G

MAKAME, J.A.:

This application arises from a transaction in a financial culture I found interesting: The applicant, resident in Pemba, borrowed from the respondent, in Zanzibar, various sums of money for each of which he issued what was described as a warka, pledging some of his date trees in Muscat. Thereafter the applicant kept on issuing warkas to other people pledging more trees so as to raise more and more sums of money. That complicated matters for the respondent, who eventually had to file a suit in the High Court of Zanzibar to recover shs. 300,000/-. The sum prayed for was duly awarded to the respondent in a judgement delivered by the learned Chief Justice on 16/10/86. On that day the applicant was not in court, but, according to the record, one ABBAS NADA HIJA, who said he and the applicant were married in the same family, received the judgement, "k.n.y. Mdaiwa" - on behalf of the defendant.

On 17th December, 1986, that is over two months later, the applicant swore an affidavit to say that he was away in Oman when

...../2

the judgement was delivered and did not return to Zanzibar until 6th November, 1986. He came to know of the existence of the judgement only when he was called to the High Court on 15th November, 1986. Two days later he filed a Notice of Appeal but was advised that he was already out of time.

At the hearing of this application Mr. Lipiki, learned advocate, represented the applicant, while the respondent appeared in person. Mr. Lipiki submitted, in effect, that the Notice itself was in fact in time because the applicant did **not** know, and could not have known, of the judgement until on 15th November, 1986. Mr. Lipiki said that the man ABBAS NADA HIJA was not the applicant's representative, as he had no power of attorney, and had no business to receive judgement on behalf of the applicant. In reply the respondent, unrepresented as he was, had nothing of moment to say, only that he was wondering what this application was all about, when the applicant had admitted liability and had in fact paid the money.

I would not go as far as saying that to receive a judgement on behalf of another one would necessarily need a power of attorney, as Mr. Lipiki submitted. He was not able to refer me to any authority. In my view it would all depend on the circumstances and, ordinarily, it would be enough if the representative can produce any convincing proof that he was sent and authorized by the party concerned to receive judgement on the latter's behalf. In the present case, however, Hija is shown in the coram as being "k.n.y. Mdaiwa", without any indication as to where that information came from. "Mdaiwa ni mume mwenzangu" seems to be the answer to the only question Hija was asked; and that information, per se, even if true, does not make Hija authorized and entitled to receive judgement on behalf of the applicant. I am satisfied that Mr. Lipiki's submission on this

...../3

is quite sound, and I would have allowed the application if there was no other factor to be considered. There is however another factor I have to take into account, and it is this: Going by the record, the parties were both present in court, on 25/7/86, when the hearing was concluded and the case was adjourned for judgement on 16/10/86. The judgement was delivered on the appointed day, 16/10/86, and if the applicant chose to be away in Oman Arabia, or any other place, and absent from the court, it was his duty to make provisions for him to learn of the outcome of the case soon. It cannot do just to go away and wait until one is called by the court. The Notice the applicant received from the High Court, dated 8/11/86, said "Madhumuni ya wito utaelezwa baada ya kufika" and one is entitled to surmise, especially as, as far as record went, Hija had already received the judgement k.n.y. the applicant, that the purpose was to make the applicant pay up the decretal amount. If 15th November, 1986 was the day he came to know of the judgement it was the result of his own lack of diligence and he had only himself to blame. The purported Notice on 17/11/86, if there was one, was clearly out of time and I am not persuaded to hold that the applicant has advanced any credible reason why I should exercise my discretion under Rule 8 to extend time as prayed.

This application is accordingly dismissed and the applicant is ordered to pay the respondent's costs.

DATED at ZANZIBAR this 6th day of May, 1988.

L. M. MAKAME
JUSTICE OF APPEAL

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

(J. H. MSOFFE)
SENIOR DEPUTY REGISTRAR.