IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: KISANGA, J.A., RAMADHANI, J.A., And MNZAVAS, J.A.)

CIVIL APPEAL NO. 28 OF 1994

BETWEEN

FRANCIS M. NJAU. . . . . APPELLANT

AND

DAR ES SALAAM CITY COUNCIL . . . . RESPONDENT

(Appeal from the Order of the High Court of Tanzania at Dar es Salaam)

(RUBAMA, J.)

dated the 2nd day of April, 1991

in

Civil Case No. 122 of 1980

JUDGEMENT OF THE COURT

RAMADHANI, J.A.:

The late RUBAMA, J., presiding the High Court of Tanzania at Dar es Salaam, rejected the application of the present appellant, Francis Njau, seeking to set aside the ex-parte order granting the present respondent, The Dar es Salaam City Council, leave to prove its case ex-parte by affidavit. The learned judge had two grounds for doing so. First, he did not see a sufficient reason explaining the absence of the appellant when the case was set for hearing. Second, the affidavit of the learned advocate for the appellant, Mr. Marandu, was defective and should not have been acted upon.

The appellant is aggrieved by that refusal and hence this appeal before us argued by Mr. Marandu. He advanced three grounds for the appeal. First, he maintains that there is good reason to explain his failure to be present in Court on the day set for the hearing. The learned advocate recapitulated that because of unavoidable circumstances he asked Mr. Maira, learned advocate, to hold his brief for the mention and that he did not inquire from

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Mr. Maira the date the case was set for hearing and that his secretary forgot to make an entry in his Court diary. Mr. Marandu strenuously sought to persuade us that that was not negligence but normal human error due to forgetfulness.

As his second ground, Mr. Marandu argued that his affidavit was not faulty and that he deposed to matters entirely within his knowledge; that no entry was made in his Court diary. Alternatively, the learned advocate contended, the affidavit was not necessary. He reminded us that O IX R.7 does not require a written application to set aside an ex-parte order and that the application could be verbal and hence no need for an affidavit. So, Mr. Marandu argued, even if the affidavit was faulty it was not necessary. Lastly, the learned Counsel pleaded with us to allow the appeal to meet the ends of justice so that the matter could be fully heard and that the appellant should be made to bear the costs.

For the respondent appeared Mrs. Latifa Mansoor and Mr. Thomas Eustace, learned Counsel. Mrs. Mansoor tackled the first ground of appeal. She argued that Mr. Marandu has exhibited gross negligence by omitting to inquire from Mr. Maira. She also pointed out that the secretary of Mr. Marandu was not forgetfull but that she was negligent. She submitted that the learned judge properly exercised his discretion. The learned Counsel referred us to B.P. Patel v. The Star Mineral Water and Ice Factory (Uganda) Ltd. [1961] EA 454.

Mr. Eustace dealt with the affidavit. He conceded that under O IX R.7 the appellant could have made a verbal application to set aside the ex-parte order and in such a case there would not have been a need for an affidavit. However, he argued, the moment Mr. Marandu

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decided to have a written application supported by an affidavit then he had to file a proper affidavit and not a faulty one or else he must face the consequences.

Mr. Eustace pointed out that apart from Mr. Marandu's affidavit being faulty under Kighoma Malima appeal, as found by the learned judge, that affidavit has not been attested to contrary to O XIX R. 3(1).

After hearing both sides and after going through the record of the High Court we are satisfied, as was the learned trial judge, that there is no sufficient reason given to account for the absence of the appellant on the day the case was set for hearing. Mr. Marandu as a diligent advocate should have enquired from Mr. Maira, whom he had asked to hold his brief, what had been ordered by the Court when the case came up for mention. That omission is not and cannot be sufficient reason.

Of course Mr. Marandu has also said that his secretary forgot to make an entry in his court diary of the date of hearing of the case. Here we have only the word of Mr. Marandu. The secretary did not file an affidavit and this is what RUBAMA, J. said offended our decision in Kighoma Malima. Mr. Marandu's stand is that he testified to matters entirely within his knowledge. That is definitely true with respect to the fact his court diary was blank. But when Mr. Marandu offered an explanation why the diary was blank, that is because his secretary forgot to make an entry, then that was not a matter within Mr. Marandu's knowledge. The secretary had to testify as to how she came to know of the date of the hearing, whether or not it is her duty to make entries in the court diary and whether or not she had forgotten to do so in

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the present case. That is certainly an omission which nullifies the affidavit.

Mr. Eustace pointed out another anomaly that the affidavit has not been verified. That is an essential requirement under O 19 R. 3(1).

For the reasons given above, we find no merit in this appeal and we dismiss it with costs. It is so ordered.

DATED at DAR ES SALAAM this 8th day of December, 1997.

R.H. KISANGA
JUSTICE OF APPEAL

A.S.L. RAMADHANI
JUSTICE OF APPEAL

N.S. MNZAVAS
JUSTICE OF APPEAL

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

(M.S. CHANGALI)
DEPUTY REGISTRAR