IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: LUBUVA, J.A., MROSO, J.A. AND RUTAKANGWA, J.A.)

CIVIL APPEAL NO. 47 OF 2004

CARITAS KIGOMA.....APPELLANT

VERSUS

K. G. DEWSI LTD.....RESPONDENT

(Appeal from the Order of the High Court of Tanzania at Tabora)

(Mwita, J.)

dated the 23rd October, 2002
in
Misc. Civil Application No. 24 of 1998

JUDGMENT OF THE COURT

19 February & 16 March 2007

LUBUVA, J. A.:

This appeal arises from the decision of the High Court (Mwita, J.) of 23rd October, 2002 in Tabora High Court Miscellaneous Application No. 24 of 1998. The respondent, K. G. Dewsi Ltd., had filed the suit

against the appellant, Caritas Kigoma, for the sum of 15 million shillings and interest at the court rate.

On 14.4.1998 the court (Masanche, J.) entered an ex-parte judgement infavour of the respondent. Being aggrieved, the appellant applied in the High Court under Order IX Rule 13 of the Civil Procedure Code, 1966 for setting aside the exparte judgment. On 17.9.1998, Masanche, J. dismissed the application. The appellant successfully appealed to this Court against the High Court Order of 17.9.1998. Allowing the appeal, this Court inter alia stated:-

> We allow the appeal and set aside the order of the High Court dated 17/9/1998. In consequence thereof, the appellant's application for extension of time in which to apply to set aside the exparte judgment is granted. The matter is remitted to the High Court with direction to hear the application for setting aside the exparte judgment by another judge.

Consequently, Miscellaneous Civil Application No. 24 of 1998 was opened at the High Court Tabora seeking to set aside the exparte judgment of 14.4.1998. On 23.10.2002 Mwita, J. dismissed the application and hence this appeal has been lodged.

At the commencement of hearing this appeal, the Court ***suo motu*** raised the issue whether the appeal is properly before the Court as the drawn order was signed by the District Registrar and not the trial judge. Mr. Mtaki, learned counsel for the appellant, who has all along been representing the appellant in previous proceedings maintained that the appeal was properly before the Court. He said Order XX Rule 7 of the Civil Procedure Code, 1966 specifically provides for decrees and not orders. In his view, as the law stands, it is only decrees which have to be signed by the presiding judge, there are no provisions relating to orders. That this is the legal position, Mr. Mtaki referred the Court to its decision in the case of **Cleophace M. Motiba And Others v. 1. The Permanent Secretary Ministry of Finance. 2. The Attorney**

General 3. Tanzania Revenue Authority, Civil Appeal No. 17 of 2003, *(unreported).*

It is hardly necessary to belabour the legal position in this regard. This Court has taken the view that for purposes of Order XX Rule 7 of the Civil Procedure Code, 1966 it is not provided that an order has to be treated as a decree which has to be signed by the Judge. There is no such requirement under the law. In the case of **Cleophace M. Motiba (supra)** the Court had occasion to deal with this aspect of the law. We are therefore in agreement with Mr. Mtaki that the District Registrar had authority to sign the extracted order and that the appeal is properly before the Court.

On 15.2.2007, when this matter was called on for hearing, Mr. Mtaki applied under rule 105(2) of the Court Rules, 1979 for the hearing of the appeal to proceed in the absence of the respondent. It is to be observed that from 22.2.2005 when the matter was first called on for hearing the respondent could not be served. The matter was next called on for hearing on 15.3.2006 but because the respondent could

not be served, Mr. Mtaki applied for substituted service by publication in the Daily News and Majira. The application was granted. For this reason, as the Court was satisfied that substituted service had been effected by publication in the Daily News of 18.1.2007 and Majira of 21.1.2007, hearing of the appeal proceeded in the absence of the respondent.

For the appellant, Mr. Mtaki, learned counsel, filed the following grounds of appeal:-

1. That the learned Judge erred both in law and in fact in holding that the Appellant had been served with a summons for hearing of the suit before the court proceeded ex-parte against the Appellant.
2. That the Learned trial judge erred in Law in holding that the Appellant had a duty to call a Court Process server who had allegedly served the disputed summons for cross-examination.
3. That the Learned Judge erred in law in refusing to set aside the ex-parte judgement and decree.

In his submission, Mr. Mtaki firmly maintained that the learned judge erred in refusing to set aside the ex-parte judgment. He went on in his submission that under the provisions of Order 9 Rule 13(1) of the Civil Procedure Code, 1966, on the application by the defendant the court may set aside an exparte judgment if it is satisfied that the respondent was either not served or was prevented by any sufficient cause from appearing when the suit was called on for hearing. In this case, Mr. Mtaki urged, the appellant had not been served in which case he could not appear in court on 14.4.1998 when the suit was called on for hearing and the ex-parte judgment was passed. Counsel further faulted the learned judge in holding that the record shows that the appellant was served twice on 21.8.1997 and 8.12.1997 for the hearing of the suit on 14.4.1998. This is not borne out from the record, Mr. Mtaki stressed.

Furthermore, Mr. Mtaki also said that it was wrong for the learned judge to hold that the appellant ought to have applied for the process servers who served the summons on the appellant to testify at the trial.

The reason he said is that this was contrary to the cardinal principle that he who alleges should prove it. In the instant case, Mr. Mtaki said the respondent, the original plaintiff, who alleged that the appellant had been served should have applied for the process server to testify that in fact they had served the appellant for the hearing of the suit on 14.4.1998.

The determination of this appeal turns around the issue whether service had been effected on the appellant. That is whether the appellant had been served with the notice of hearing of the suit on 14.4.1998. As Mr. Mtaki, learned counsel, has strongly maintained that the finding of the learned judge that the appellant had been served was not supported by evidence on the record, we find it desirable to examine the record closely in this regard. As indicated before, the learned judge was categorical that the appellant had been served twice on 21.8.1997 and on 8.12.1997 by process servers Hamis Kizamba and P. I. Ruhaga respectively.

From our own examination of the record, the summons which purports to have been signed on 8.12.1997 by an undisclosed person with the rubber stamp "Treasurer Caritas Kigoma" shows that the suit was set down for mention on 11.12.1997. This is also clearly borne out from the record. On 18.11.1997, the matter came before P. M. Kente, Acting District Registrar when the plaintiff, the respondent in this appeal, was present but the appellant was absent. The case was fixed for **mention** on 11.12.1997 and that the appellant was to be served. On 11.12.1997, the suit again came on for mention before P. M. Kente, Acting District Registrar when the respondent was present in court but the appellant was absent. It was ordered that the suit was to come next for mention on 10.2.1998. In the circumstances and as urged by Mr. Mtaki, it is clear that the summons dated 8.12.1997 had nothing to do with the hearing date of the suit, namely 14.4.1998 when the ex-parte judgment was passed.

We shall next examine the summons of 21.8.1997. This is the summons which, according to the learned judge was served on the appellant by one Hamis Kizamba. In the summons, it is crystal clear

that the appellant was required to appear in court on Thursday, 4th September, 1997. The record of the proceedings shows that on 4.8.1997, the case came on before Mutongore, District Registrar, when both parties were absent. The case was fixed for mention on 4.9.1997. It was also ordered that summons for settlement of issues to be issued upon the defendant. In this light we are with respect, in agreement with Mr. Mtaki that the record does not support the finding of the learned judge that the appellant had been served by the summons of 21.8.1997 to appear in court on 14.4.1998 for the hearing of the case. As a matter of fact, the summons of 21.8.1997, relates to 4.8.1997 when the case was fixed for mention.

In recapitulation, it is clear to us that the summonses for 8.12.1997 and 21.8.1997, do not support the learned judge in his finding that the appellant was duly served to appear in court on 14.4.1998. In the absence of proof that the appellant had been served, it was, as urged by Mr. Mtaki, learned counsel, wrong for the learned judge to refuse to set aside the ex-parte judgment passed against the

appellant. The decision refusing to set aside the ex-parte judgment against the appellant flies in the face of the evidence on record.

Before concluding this judgment, we wish to briefly comment on one other aspect in which the learned judge erred. First, the learned judge rejected the application to set aside the ex-parte judgment on the ground that "it was unusual for an office to be closed on a working day simply because some of the workers are engaged somewhere else". This, we think is rather more of conjecture than a finding of fact whether the appellant had infact been duly served.

Second, it is also our firm view that it was a misdirection on the part of the learned judge in his holding that the appellant should have applied for the process server to be summoned to testify at the trial for cross-examination. It was a misdirection because, as submitted by Mr. Mtaki it is common principle that "he who alleges must prove it". Here, the respondent who alleged that the appellant had been served should have summoned the process servers to testify.

All in all therefore, for the foregoing reasons, we allow the appeal and set aside the e-xparte judgment of 14.4.1998 of the High Court (Masanche, J.) with costs.

DATED at MWANZA this 16th day of March, 2007.

D. Z. LUBUVA
JUSTICE OF APPEAL

J. A. MROSO
JUSTICE OF APPEAL

E. M. K. RUTAKANGWA
JUSTICE OF APPEAL

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

S. M. RUMANYIKA
DEPUTY REGISTRAR