IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: KIMARO, J.A., ORIYO, J.A., And JUMA, J.A.)

CIVIL APPEAL NO. 64 OF 2009

FRANK DANIEL t/a
MKALIMOTO GROCERY.....APPELLANT

VERSUS

TANZANIA BREWERIES LIMITED... .....RESPONDENT

(Appeal from the judgment of the High Court of Tanzania, Commercial Division, at Dar es Salaam)

(Werema, J.)

dated 23rd day of March, 2009

in

Commercial Case No. 86 of 2005

.....

JUDGMENT OF THE COURT

29th February & 9th March, 2016

KIMARO, J.A.:

Commercial Case No. 86 of 2005 was filed in the High Court of Tanzania, Commercial Division. The respondent was the one who instituted the proceedings. The record of appeal at page 49 shows that on 12/10/2005, the trial court made an order for service to the defendant who is now the appellant. The case was called again on 7/11/2005. On that day, the trial court was informed that the defendant could not be traced for service. An

order for service by publication was issued. On 28/11/2005 the trial court was informed that the defendant was served by substituted service. As 21 days for service had not elapsed, the case was adjourned and fixed for a mention on 7/12/2005. When the case was called for mention on 7/12/2005, the defendant did not enter appearance in court. An order was made to have the case proved *ex parte* by oral evidence on 13/12/2005 but it could not be heard until 27/2/2006.

After the case was heard in the absence of the defendant /appellant, an *ex parte* judgment was entered for the plaintiff. The plaintiff is the respondent in this appeal. Being aggrieved by the *ex parte* judgment, the appellant made an application to have the *ex parte* judgment set aside. The fundamental issue in that application was whether substituted service was ordered in appropriate circumstances. The trial judge (Werema J.) held that substituted service can only be granted upon proof that the process server used all due and reasonable diligence to serve the respondent and proof that there was no likelihood of the respondent being found at their residential houses where they worked for gain within reasonable times.

He said that the presiding judge was satisfied that the defendant could not be traced for ordinary service. He then held that he had no powers of

doing a revision over decisions of other judges and refused to grant the application.

It is the finding of Werema J. which aggrieved the appellant and he filed this appeal. The grounds of appeal are:-

1. That having found that the fundamental issue before him was whether or not service by substituted service was appropriate under the circumstances, the learned High Court Judge should have proceeded to consider and determine the application on merit.
2. That having advertised to and appreciated the law governing substituted service and precedent (case law) on the subject, the learned Judge erred in law and in fact in not applying the same (the law and precedent cited) in the circumstances of the Appellant's application and determine it on merit.
3. That the learned High Court judge erred in law and in fact in finding and holding that he did not have either revisional or appellate powers over decisions of other judges. The learned trial judge erred because what was before him was neither an application for revision nor an appeal against the ruling and *ex parte* judgment and decree of the High Court.

4. That the learned High Court Judge erred in law and in fact in holding that he cannot set aside the *ex parte* judgment merely on the ground that his brother judge exercised a judicial discretion.

At the hearing of the appeal Mr. Michael Ngalo, learned advocate represented the appellant. The hearing of the appeal proceeded *ex parte* under Rule 112(1) of the Court of Appeal Rules, 2009 after it was proved that the respondent was dully served on 13th January, 2009 and he had acknowledged service but he failed to enter appearance.

In support of the grounds of appeal the learned advocate for the appellant said it was wrong for the learned judge to have allowed substituted service because the physical address of the appellant for service was given. On that day, it was an advocate from the bar who held a brief for Mr. Felix Mbuya learned advocate who had filed the plaint on behalf of the respondent. He informed the trial court that the appellant could not be served by the ordinary mode of service. However, no explanation was given on the efforts made to serve the appellant through the ordinary mode of service.

Mr. Ngalo said the remedy provided by the law for a party aggrieved by an *ex parte* judgment is to file an application for setting aside the *ex parte*

judgment. He said that was done by the appellant. In deciding the application, said the learned advocate, the learned judge erroneously held that his jurisdiction to determine the application was ousted because he could neither sit as an appellate judge nor revise the decisions of other judges. He said that finding is not supported by the law because what was before the learned judge was neither an application for revision nor an appeal. He prayed that the appeal be allowed and the file be remitted back to the trial court for hearing of the application on merit.

After going through the record of appeal and the submissions of the learned advocate for the appellant, we agree with the learned advocate for the appellant that the appeal has merit. The learned judge in refusing the application for setting aside the *ex parte* judgment made the following remarks:

> *"In this case my brother judge (as he then was) exercised judicial discretion of admissibility of having recourse to substituted service under O. V r. 20 (1).* ***I cannot sit over his judgment, and though I may have a different opinion, I cannot set aside such decision.*** *It is only the Court of Appeal*

which may exercise such jurisdiction. ***With a restraint, I decline to grant the orders prayed for.*** *Each party to bear own costs."*

In answering all the grounds of appeal raised by the appellant, the issue involved in the appeal is whether the learned judge was right in refusing to determine the application. With respect to the learned judge, he erred. Order 1X Rule 13 of the Civil Procedure Code [CAP 33 R.E. 2002] is explicit that the court that passed an *ex parte* decree has jurisdiction to set it aside. The provisions of the order reads:-

"Order 13-(1) In any case in which a decree is passed ex parte against a defendant, he may apply to the court by which the decree was passed for an order to set it aside; and if he satisfies the court that the summons was not duly served or that he was prevented by any sufficient cause from appearing when the suit was called on for the hearing, the court shall make an order setting aside the decree as against him upon such terms as to costs payment

into court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit:

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also.

(2) Where the judgment has been entered pursuant to paragraph (ii) of sub rule (1) of Rule 6 of this order or sub rule (2) of Rule 14 of Order VIII it shall be lawful for the court, upon application being made by an aggrieved party within twenty-one days from the date of the judgment, to set aside or vary such judgment upon such terms as may be considered by the court be just:

Provided that where a decree has been issued prior to such application being made, the provisions of the Law of Limitation Act shall apply."

It is apparent from the provisions of Order IX Rule 13 of Cap.33 that a trial court which issues an *ex parte* decree against a defendant is conferred with jurisdiction to set it aside. The conditions which the defendant who applies for setting aside the *ex parte* decree has to satisfy is that the summons were not dully served, or that when the *ex parte* decree was entered against him he was prevented by sufficient cause from appearing in court.

The record of appeal at page 117 shows that what was before (Werema J.) was an application made under Order IX Rule 13(1) of the Civil Procedure Code Act 1966 and the prayer that was made was:

> *"That may the Hon. Court be pleased to set-aside the ex-parte judgment and decree passed in favour of the Respondent and order the same be heard interpartes."*

The learned advocate for the applicant rightly submitted that the learned judge had jurisdiction to hear and determine the application on merit. The application before him was neither a revision, nor for an appeal against a decision of his brother judge. It was erroneous for the learned

judge to consider matters which were irrelevant to the application that was before him.

We find the appeal having merit and we allow it with costs. The chamber application which was filed by Ngalo and Company Advocates on 21st October, 2008 in the High Court of Tanzania, Commercial Division, should be heard and determined on merit.

DATED at **DAR ES SALAAM** this 7th day of March, 2016.

N.P. KIMARO
JUSTICE OF APPEAL

K.K. ORIYO
JUSTICE OF APPEAL

I.H. JUMA
JUSTICE OF APPEAL

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

E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL