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IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM

CIVIL APPEAL NO. 52 OF 1999
(Originating from the decision of
Kisutu RM Civ. Case No. 375/96)

MATEO NGODA APPELLANT
Versus
UBWA MSIYU UBWA RESPONDENT

J U D G M E N T

THEMA, J.

This petition of appeal has been filed by Mateo Ngoga after being aggrieved by the ruling of the Resident Magistrate's Court at Kisutu in RM Civil Case No. 375/96. The Resident Magistrate Court on 27th day of March, 1997 entered an ex parte judgment with costs in favour of the respondent and attempts to apply for extension of time to set aside the ex parte judgment failed hence this petition of appeal.

The petition of appeal filed contains following grounds:

- (i) error of law and fact on the part of the learned Resident Magistrate for failing to take into account that appellant had not been served notwithstanding the substituted service by way of publication in the Uhuru Newspaper;
- (ii) error in law in failing to consider appellant's right to be heard;
- (iii) error in law and fact on the part of the Resident Magistrate refusing extension of time to apply to set aside the ex parte judgment.

Professor Mgongo Fimbo advocated for the appellant while respondent Ubwa Msiyu Ubwa appeared in person on 4/7/2000 for the first time after this court had barred the representation of Hassan Juma ~~Ubwa~~ who had all along been passing off as Ubwa Msiyu Ubwa.

In his usual lucid submissions Professor Mgongo Fimbo learned Advocate argues that the appellant did not know the contents of the judgment until 20/7/97 and upon such information, appellant filed his application on 30/7/97. It is Professor Fimbo's view that such is both reasonable and sufficient cause to warrant the grant of extension of time. In addition Prof. Fimbo submits that even the substituted service in the Uhuru Newspaper was known to the

appellant after judgment had been delivered. The summons was published on 28/3/97 but appellant saw the copy of the publication on 2/4/97 almost five days after judgment ^{was} entered on 27/3/2000. To this end Professor Fimbo argues that the appellant was entitled to the protection of Order IX Rule 13 of the Civil Procedure Code.

On the question of barring Hassan Juma Luwa from appearing as he was passing off as Ubwa Msiyu Ubwa and that he was the same person who appeared in the lower court passing off as such, Professor Mgongo Fimbo submits that the exparte judgment was therefore obtained by fraud and in law such judgment ought to be vacated and nullified. The case of SAID SALIM BAKRESSA VS VIP ENGINEERING 1996 TLR 309 was cited in support and the court was invited to invoke Order XXXIX Rule 2 in sustaining the submission on fraud though outside the memorandum of appeal.

It is common ground that the appellant upon discovery of the exparte judgment had diligently and immediately taken steps though unsuccessfully to set aside the same. Although the trial court had observed that appellant was not interested in prosecuting the case as he failed to appear on the day of hearing, my close examination of the record of the Lower Court has revealed that the appellant did not know the date of hearing for lack of service. At any rate the appellant took immediate and necessary steps to apply to set aside the exparte judgment as there was sufficient cause to do so.

As regards the question that the exparte judgment was obtained through fraud following the appearance of one Hassan Juma Luwa passing off as Ubwa Msiyu Ubwa I adopt the decision of the Court of Appeal in the case of SAID SALIM BAKRESSA 1996 TLR 309 and set aside the exparte judgment dated 27/3/97 obtained through fraud.

In the final analysis, I allow the petition of appeal with costs and set aside the exparte judgment dated 27/3/1997. I however decline to make any further order in terms of Order IX Rule 13 of the Civil Procedure Code 1966.

S. Ihema

JUDGE

19/9/2000

COURT: Delivered before the appellant and respondent in Chambers on 20/9/2000. Right of appeal is open to the parties.

S. Ihema

JUDGE

20/9/2000