

IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CIVIL REVISION NO. 79 OF 1999

JOHN K. MADAHA APPLICANT
Versus
NATIONAL HOUSING CORPORATION RESPONDENT

R U L I N G

THEMA, J:

In RM Civil Case No. 161/1998 the Resident Magistrate Court of Dar-es Salaam at Kisutu entered an *ex parte* judgment on 18th August 1998 in favour of the National Housing Corporation, the plaintiff. The defendant John Madaha, having been served with summons for leave to appear and defend, failed to appear and defend the suit filed under summary procedure pursuant to Order 35 Rules 1 and 2 of the Civil Procedure Code 1966.

Following this *ex parte* judgment, Mr Madaha the judgment debtor on 25th August 1998 filed a Chamber Summons under Orders IX Rule 13 (1), XXXVI Rule 2 (1), Sections 68 (e) and 95 of the Civil Procedure Code as well as Section 14 of the Law of Limitation Act 1971 and prayed for the following orders, namely:-

- (i) setting aside the *ex parte* orders entered on 18th August 1998
- (ii) restraining the decree holder from allocating Flat No. 402 on Plot No. 21/5 Sea View, herein after referred to as the suit premises, to any other tenant pending the determination of the main suit;
- (iii) ordering the restoration of the judgment debtor to the suit premises
- (iv) granting extension of time within which the applicant can apply for leave to appear and defend the suit.

On 11th December 1998 leave to appear and defend the suit was granted by the Resident Magistrate Court of Dar es Salaam at Kivukoni, however the said Court refused to grant the other prayers including the prayer to set aside the *ex parte* order invariably because it did not find sufficient reason advanced by the judgment debtor in that regard. It is on record that on the strength of this order, the judgment debtor cum defendant filed a written statement of defence on 30th December 1998. Nothing took place after the filing of the written statement of defence until on 21st December

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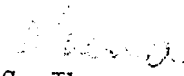
1999 when revisional proceedings were filed in this court by the defendant/ judgment debtor under Section 44 (1) (b) of the Magistrates Courts Act 1984 and Section 14 (1) of the Law of Limitation Act, 1971. The revisional proceedings are intended, once enlargement of time is granted, to seek the revision of the orders which were not granted by the Resident Magistrate Court in its order dated 23rd March 1999. These revisional proceedings are the subject matter of this Ruling.

Rule 4 of Order 35 of the Civil Procedure Code gives power to a Court of Law "to set aside a decree, and if necessary stay or set aside execution, and thereafter give leave to the defendant to appear to the summons and to defend the suit, if it seems reasonable to the court so to do, and on such terms as the court thinks fit." As earlier on stated in his ruling dated 11th December 1998 the learned Resident Magistrate (Hon Mirumbe RM) declined to set aside the ex parte judgment entered on 11th August 1998, instead he granted leave to the defendant / judgment debtor to appear to the summons and defend the suit. The refusal to set aside the ex parte judgment was grounded on the fact that the defendant was himself to blame for his failure to appear and seek leave to defend after having been served.

It is clear to me that the order granted to the defendant to defend the suit without setting aside the ex parte judgment is ineffectual and invalid as the defendant had become a judgment debtor at that time, as such he could not in law file a defence against a claim which had already been determined to finality although the defendant/judgment debtor is of the view, erroneous in my humble opinion, that the grant of leave to appear and defend automatically has the effect of setting aside the other orders entered on 18th August 1998.

After further careful consideration of the issues before me I have reached the conclusion that an order quashing the proceedings culminating in these conflicting orders, some of which I have found to be ineffectual and invalid, would serve the best interest of justice to the parties in this litigation. Accordingly I quash the whole proceedings culminating in the orders entered on 11th December 1998 and order that the Chamber Summons filed on 25th day August 1998 be heard de novo before another Magistrate as speedily as possible. Costs in the cause.

With this order the revisional proceedings before this Court automatically abate.


S. Ihema

JUDGE

COURT:

Ruling delivered on 30/01/2002 before Mr. Fungantoma
learned Advocate for the applicant and in the
absence of the respondent the National Housing
Corporation to be notified immediately. Right of
Appeal open to the parties.

S. Ihema
S. Ihema

JUDGE

30/01/2002