

LIBRARY - H/c.  
O.Sun.

IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CIVIL APPEAL NO.. 2/1997

PONSIANO OKULLO..... APPELLANT

Versus

NATIONAL MILLING CORPORATION.. RESPONDENT

---

JUDGMENT

NSEKELA, J:

On 21.6.95 Nchimbi, Senior Resident Magistrate, dismissed RM. Civil Case No. 162 of 1992 under Order 9 Rule 8 of the Civil Procedure Code for non-appearance of the plaintiff. After that on 26.6.95 the plaintiff filed a chamber application under Order 9 Rules 9 (1) 13 (1) and section 95 of the CPC seeking the following order.

- " 1. That the order dismissing the suit dated 21st June, 1995 be set aside and a day be appointed to determine the main suit on its own merits".

The application was supported by an affidavit of William C. Mwakasungula learned advocate for the plaintiff. This application was dismissed on 11.4.96 hence this appeal to this court against that Ruling. Mr. Mwakasungula, learned advocate appeared for the appellant and Mrs. Mukalle appeared for the respondent. The memorandum of appeal raises the following grounds of appeal, namely- -

- " 1. The learned trial magistrate erred in law and in fact in not holding that the clerks in the chambers of the appellants advocate could <sup>have</sup> not immediately know what predicament be fell the advocate for the appellant as to be able to attend the court in good time.
2. The learned trial magistrate erred in law and in fact in holding that communication between the home of the advocate for the appellant and his office in the city centre was not possible in the

circumstances because of the distance".

In order to appreciate these grounds of appeal, it is in my view necessary to examine Mr. Mwakasungula's supporting affidavit in the plaintiff's application in the trial court. A few paragraphs will suffice for own purposes:--

- " 4. That this matter was however dismissed for want of appearance of plaintiff/applicant herein.
5. That on that material date, was bereaved by my next door neighbour one Mr. Joboka at Ukonga where I had to participate in the funeral.
6. That my clerk could not attend the case as he was not aware of my predicament.
7. That I am informed by the applicant that he was at Kivukoni Court on time but never heard his case being called out."

Before me, Mr. Mwakasungula has repeated these averments in his affidavit. He did not attend the court since his neighbour at Ukonga was bereaved and had to attend the funeral, that he had no telephone contact with his office to notify his clerk though he did not say whether or not he thought of boarding a "daladala" or any other available transport to rush to his chambers in town. He added that his client, the applicant was present in court on the material date but did not hear his case being called out. The learned advocate said he believed the appellant who had no reason to tell lies or fabricate a story. On her part Mr. Makalle, learned advocate submitted that the appellant has not advanced sufficient cause to enable the court to invoke Order 9 rule 9 (1) of the CPC and that Order 9 rule 13 (1) was inapplicable to the circumstances of this suit.

Order 9 rule (1) of the CPC is in the following terms- -

- " 9 (1) where a suit is wholly or partly dismissed under rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same case

of action. But he may apply for an order to set the dismissal aside, and if he satisfies the court that there was sufficient cause for his non-appearance when the suit was called on for hearing, the court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit".

The trial magistrate was well-aware of this provision of the law and was of the view that the reasons advanced by the learned advocate did not amount to sufficient cause to enable him to set aside the dismissal order he had previously made. I am in entire agreement with him. The unnamed clerks in the chambers of the appellants advocate did not file any affidavit to explain generally or in detail what exactly happened on the material date. The court would indeed like to know what steps the unnamed clerks did take in the absence of Mr. Mwakasungula himself. As clerks in the said chambers, I guess they would know the court calendar of Mr. Mwakasungula. There is no affidavit evidence to this effect. It is in Mr. Mwakasungula's affidavit that the appellant was physically present at the court premises but did not hear his case being called out. Again there is no affidavit evidence from the appellant himself except hearsay evidence from Mr. Mwakasungula. This cannot support such an allegation. In the circumstances I agree with the trial magistrate that no sufficient cause had been shown to invoke order 9 rule 9 (1) of the CPC. The appeal is dismissed in its entirety with costs.

NSEKELA

JUDGE

24.10.97.

CERTIFIED TRUE COPY OF THE ORIGINAL.

  
F.S.K. MUNGU  
DEPUTY REGISTRAR

IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

AIDA KYENKUNGU .. .. . PLAINTIFF

Versus

1. JOHN KYENKUNGU }  
2. EQUATOR INTERNATIONAL } .. DEFENDANTS  
3. N.B.C. LIMITED }

J U D G M E N T

( E X - P A R T E )

MASSATI, J.:

In a suit filed by Aida Kyenkungu against John Kyenkungu, Equator International Agency Ltd. and NBC Limited, the plaintiff sought for a permanent injunction to restrain the defendants from foreclosing and selling all that property situated on Plots No. 273/A Mikocheni and No.479 Kawe Low Density on the ground that they are matrimonial properties. The Plaintiff also sought to vitiate the transaction on the ground of fraud. She filed the suit on 22nd February, 2001. Only the 3rd Defendant NBC LTD., filed a written statement of defence.

In the written statement of defence the 3rd Defendant not only denied liability for the Plaintiff's claims, but, also raised a counterclaim praying for judgment and decree against EQUATOR INTERNATIONAL AGENCY LTD., JOHN KYENKUNGU, and ASHURA WASHOKERA for

- comprised
- (a) An order of foreclosing and sale of properties in Certificates No. 39085 and 186314/53 both situated in Dar es Salaam City.
  - (b) Payment of Tshs. 178,253,734.00 less the sum to be reduced from selling the properties.
  - (c) Interest at 25% up to the date of judgment.
  - (d) Interest at court rate of 12% from the date of judgment to that of final settlement and
  - (e) Costs.

The Defendants failed to file their Written Statement of Defence and their application for extension of time within which to file the same was dismissed by Kimaro J. on 20.8.2002.

After dismissal of the application for extension of time the case was fixed for trial on 11.11.2002. Ever since the Plaintiff failed to appear and so on 29.7.2003 I struck out the suit for want of prosecution. And on 10.7.2003 I ordered the 3rd Defendant to prove its case exparte by filing an affidavit. That affidavit was filed on 25.7.2003.

Upon perusal of the affidavit of Mr. Godson Tito Killiza the 3rd Defendant's Company Secretary, and as there is no defence, I find and hold that the 2nd Defendant, John Kyenkungu had mortgaged properties comprised in Certificate of Title No. 30085 and ASHURA WASHOKERA had mortgaged CT 186314/53 with the 3rd Defendant NBC Ltd to secure an unspecified sum to be advanced to the 1st Defendant, EQUATOR INTERNATIONAL LTD. I am also satisfied that the properties legally belong to the mortgagors and that the mortgages were duly registered. I am also satisfied that as at December 2000 the amount outstanding against EQUATOR INTERNATIONAL AGENCY LTD., stood at shs. 137,619,005.84 as principal sum and 50,010,927.95 as accrued interest, thereby making a total of shs. 187,629,932.79 as alleged in the counterclaim.

On the above premises, I enter judgment and decree in favour of the 3rd Defendant as prayed with interest at 25% from the date of filing the counterclaim to the date of the judgment but I will award only 7% interest on the decretal sum. The 3rd Defendant shall also have his costs.

S. A. MASSATI

JUDGE

27.8.2003

Judgment delivered in Chambers this 27th day of August, 2003 in the presence of Mr. Mujuluzi for the Counterclaimant/ Defendant and in the absence of the other parties.

S. A. MASSATI

JUDGE

27.8.2003