

**IN THE HIGH COURT OF TANZANIA  
AT MTWARA  
CIVIL APPEAL NO. 4 OF 2007  
ORIGINAL MTWARA DISTRICT COURT  
CIVIL CASE NO.13/2005  
HAMISI MOHAMEDI HAMISI ..... APPELLANT**

**VERSUS**

**HUSSEIN MOHAMEDI HAMISI ..... RESPONDENT  
( A MINOR SUED THROUGH HIS NEXT  
FRIEND IBRAHIM ISMAIL KALUMA)**

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**DATE OF LAST ORDER – 13/3/2008**

**DATE OF JUDGMENT – 04/4/2008**

**JUDGMENT**

**MJEMMAS, J.**

The appellant Hamisi Mohamedi Hamisi was appointed as administrator of the estate of the late Mohamedi Hamisi. The late Mohamed Hamisi was the father of the appellant as well as the respondent Hussein Mohamedi Hamisi who is a minor and hence appearing by his next friend, Ibrahim Ismail Kaluma. The appellant was appointed as administrator of the estate of his late father by Mtwara Urban Primary Court in 2004 [Administration Cause No.35 of 2004]. From the records, it appears that the appellant as administrator of the estate of the late Mohamed Hamisi failed to administer properly the estate of his late father. One of the beneficiaries who is the respondent in this appeal filed a civil case No.13 of 2005 before the District Court of Mtwara. He sought for the following reliefs:

- (i) A declaration that the defendant [present appellant] has failed to administer the estate as required by law.
- (ii) The defendant be ordered to give accounts and inventory of the estate.
- (iii) The defendant be ordered to give the plaintiff his share from his father's estate.
- (iv) Costs of the suit.
- (v) Any other relief that the Honourable court may deem fit to grant.

The appellant failed to file a written statement of defence within the prescribed time by the court so the court gave judgment infavour of the respondent. The appellant was aggrieved by that judgment hence he preferred the present appeal.

The appellant has raised the following grounds in his memorandum of appeal.

1. That the learned Magistrate misdirected himself for adjudicating upon a suit which was res-judicata.
2. That the learned magistrate erred in law for granting costs in the suit which was prosecuted forma pauperis by National Organization for Legal Aid (NOLA)
3. That the learned Magistrate erred in law and fact for giving victory to the respondent before proving his case in the required standard.

4. That the learned Magistrate misdirected himself for adjudicating upon a matter which was instituted contrary to the law governing probate and administration of deceased's estate.
5. That the learned magistrate misdirected himself by applying the principle laid down by the Court of Appeal of Tanzania in the case of **John Lessa Vs. Zamcargo Ltd & Johnas Mmali, Civil Appeal No.61/1996.**
6. That the learned Magistrate erred in law and fact for ordering the execution of decree by way of sale of the house in dispute before the expiry of time to appeal.

The appellant asked this court to issue the following order:

1. Setting aside the ex-parte judgment and issuing necessary and just orders.
2. Any other relief as this honourable court may deem fit and just to grant.

The respondent has filed his reply to the memorandum of appeal which reads:

1. The contents of paragraph 1 are disputed.
2. That the contents of paragraph 2 are disputed and the respondent avers that even though he sued as a pauper, there are other costs he incurred during the proceedings of the suit.
3. In replying the content of paragraph 3 the respondent states that he proved his case ex-parte and the appellant was given a right/opportunity to be heard which he denied. The respondent further states that the appellant was supposed to make an

application to set aside the ex-parte judgment rather than appealing.

4. The contents of paragraph 4 are strongly disputed.
5. The contents of paragraph 5 are disputed.
6. The content of paragraph 6 is disputed.

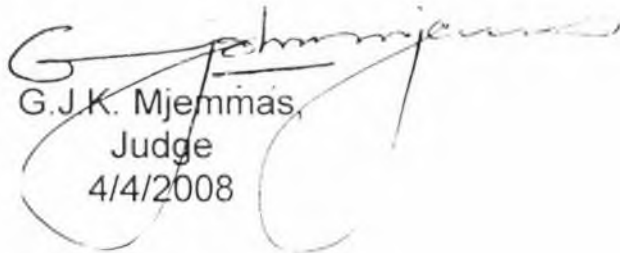
At the hearing of the appeal both parties appeared in person, unrepresented. Neither the appellant nor the respondent had anything to contribute or elaborate in respect of the memorandum of appeal and reply to memorandum of appeal respectively.

The appellant is appealing against the ex-parte judgment of Mtwara District Court delivered on 7/3/2006 by the Hon. M.C. Mteite, (RM). That judgment was entered in accordance with Order VIII r.14(2)(b) of the Civil Procedure Code. The order provides:

O.8 r.14(2)(b) "In any case in which a defendant who is required under subrule (2) of rule 1 to present his written statement of defence fails to do so within the period specified in the summons or, where such period has been extended in accordance with the proviso to that subrule, within the period of such extension, the court may –

- (a) [Not relevant]
- (b) in any other cases, fix a day for ex-parte proof and may pronounce judgment in favour of the plaintiff upon such proof of his claim.

The appellant has raised serious grounds of appeal but there is one thing which is very important in this matter and it has been raised also by the respondent. The appellant was aggrieved by the ex-parte judgment entered against him after he had failed to present his written statement of defence as ordered by the trial court so the proper course for him to take was to make an application to the same court to have the ex-parte judgment set aside. The appellant did not do that instead he preferred this appeal. That is not proper. The appellant's appeal is accordingly dismissed.

  
G.J.K. Mjemmas,  
Judge  
4/4/2008

**Date:** 4/4/2008

**Coram:** Hon. G.J.K.Mjemmas, J.

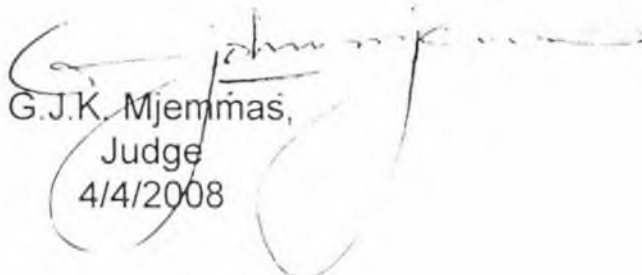
**Appellant:** Present in person

**Respondent:** Present

**Court:** This appeal is coming for judgment today.

**Order:** Judgment delivered this 4<sup>th</sup> day of April, 2008 in the presence of the parties.



  
G.J.K. Mjemmas,  
Judge  
4/4/2008