

IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

PC CIVIL APPEAL NO. 87 OF 2007

KASSIM N. MAKWAWAAPPELLANT

VERSUS

ATHUMAN YAHAYA MABELA.....RESPONDENT

J U D G M E N T

MWARIJA, J.

The appellant was sued by the respondent in the Primary Court of Rudewa in Kilosa district. The respondent claimed that the appellant defamed him by uttering, on several occasions as from the end of the month of October 2006, that the respondent was unlawfully allocated a shamba by the Village Council. He claimed further that in his utterances, the appellant wanted the people to believe that the allocated shamba belonged to him. The trial magistrate found the claim proved and

therefore awarded the respondent damages to the tune of Shs. 300,000/= out of Shs. 500,000/= claimed.

The appellant was dissatisfied with the decision of the Primary Court and thus appealed to the District Court. The District Magistrate upheld the decision of the Primary Court. Aggrieved further, the appellant has preferred this appeal. He has raised nine grounds in his memorandum of appeal. Before going into the merits of the appeal, the procedure adopted by the appellate magistrate in deciding the appeal need to be considered. According to the record of appeal, there is a glaring irregularity in the proceedings of the District Court. The appeal was neither heard orally nor by way of written submissions. What transpired was that on 15/6/2007 when the appeal was called on for hearing, only the respondent appeared. The appellant was absent. In actual fact, he had not been present as from 18/5/2007 when the previous appellate magistrate

(A.J.Mapunda, Honorary Magistrate) disqualified himself. The appeal was fixed for hearing on 1/6/2007. It was not heard on that date. The record shows that both parties did not appear. It was again called for hearing on 15/6/2007. On that date, whereas the respondent appeared, the appellant did not. That notwithstanding however the appellate District Magistrate proceeded to fix a date of judgment. There is nothing in the record which shows that the appellant was informed of the date of hearing of the appeal especially after the Honorary Magistrate had disqualified himself. Rule 13(1) of the Civil Procedure (Appeals in Proceedings Originating in Primary Courts) Rules, GN. No. 312 of 1964, (hereinafter referred to as “the Rules”) provides for situations under which an appeal can be decided in the absence of the appellant. The rule provides as follows:

“13- (1) An appellant may embody in his petition of appeal a statement that he does not intend to appear personally or by agent at the hearing, together with a statement in writing of his arguments in support of the appeal and in such event and unless the court or the registrar has expressly required the appearance of the appellant, the court shall not dismiss the appeal for want of appearance and the appellate court shall have regard to such argument .”

Since the appellant did not seek to apply that provision of the Rules and given the fact that he was not notified of the date of hearing hence having been denied the right to be heard, the appellate District Magistrate strayed into an error of condemning the appellant unheard. It is necessary here therefore for this court to invoke its revisional powers

under s.44(1) (b) of the Magistrates' Courts Act, Cap. 11 RE.2002 and revise the proceeding of the District Court. Basing on the reasons stated above, the judgment of the District Court is found to be a nullity and cannot be left to stand. The same is hereby accordingly nullified and the resultant orders are set aside. It is ordered that the appeal be heard afresh by another magistrate of competent jurisdiction.


A.G. Mwarija

JUDGE

22/3/2011

22/03/2011

Coram: Hon. A.G. Mwarija, J.

For the Applicant

For the Respondent

CC: Butahe

} Absent

Judgment delivered

A.G. Mwarija

JUDGE

22/3/2011

Order: Parties to be notified of the judgment

A.G. Mwarija

JUDGE

22/3/2011