

IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY
AT MWANZA

HC. CIVIL APPEAL NO. 09 OF 2017

(Originating from Misungwi District Civil Case No. 5 of 2015)

JAMES LUGWIGWI APPELLANT

VERSUS

LUGWISHA NG'WINAMILA RESPONDENT

JUDGMENT

19/09/2018 & 21/01/2019

RUMANYIKA, J.:

It is against the 22/12/2016 exparte Judgement and decree of Misungwi District Court. The latter having refused audience of Mr. Sebukato solicitor/advocate for the appellant (defendant then) and proceeded exparte.

The three (3) grounds of appeal revolve around points as hereunder:-

1. That the trial magistrate erred in law not allowing appearance of the appellants solicitor advocate.
2. That the trial magistrate denied him right to be heard. Having disqualified his advocate and proceeded exparte.

3. That the trial magistrate erred in law and fact not holding that the respondent had not proved his case on the balance of probabilities.

The appellant appeared in person. Ms. Gladness Lema learned counsel appeared for respondent.

When the appeal was called on for hearing on 19.09.2018, Ms. G. Lema said a preliminary point of objection namely the appeal against exparte Judgment was incompetent and property before the court. That pursuant to order IX Rule 13 (1) of the Civil Procedure Cap 33 RE 2002, one should have applied for setting aside the exparte order/judgement (case of **Maruma Tumbotumbo & Another V. Medard Gilion** Civil Revision No. 89 of 2002 (CA) unreported. The respondent actually did not prove his case. We pray that the appeal be dismissed with costs.

The appellant just pleaded ignorance of the respective procedural laws. That is it.

The issue is not whether exparte order and a judgement is appealable but the appeal is alternative of application for setting aside exparte order/Judgement. The answer is no! Provisions of Order IX rule 13 (1) of the CPC clearly and lite terry require that appeal be last resort to all unless the law prohibited it or was otherwise blocked.

When the case was called on 8/12/2016 and appearance of Mr. Sebukato learned solicitor of Misungwi district council was questioned as he appeared for the individual defendant, and was, for reasons successfully

dejected to (as the public servant should not have served two masters at a time), the learned trial resident magistrate ordered *ex parte* proof but gave one 12 good days (until 20/12/2016) to prepare I suppose. With all this time given the appellant neither filed application to set aside *ex parte* order or engage any other alternative legal representation. The issue of denial of right to be heard is neither here nor there under the circumstances. Ground 2 of appeal is dismissed. The short the preliminary objection is sustained. Suffices the point to dispose of the incompetent and out of place appeal.

Without prejudice to the foregoing, and, in exercise of revision powers conferred upon me, I will now see into whether Mr. Sebuloti was properly disqualified, respondent was denied of right to be heard, and whether his case was, on the balance of probabilities proved.

No doubts Mr. Alphonse P. Sebukoto learned Solicitor of Misungwi district counsel in other wards a public servant at the same time advocate on the roll, was engaged and appeared for the individual James Lugwigwi then the defendant). Such a solicitor may have had a leeway to represent individuals in court of law provided that in so doing, no employers' rights and interests were compromised. But the remained that not only a public servant who also for personal gains worked for individual may be serving two masters at a time. That one happening, and him being a human kind, possibilities in terms of time and resources spent being biased could not be ruled out. The public would end up being the loser. It is very unfortunate that the Misungwi district council permitted the employee (according to

address from Kigoma) leave alone when, how and to whom he paid tax for the gains. Ground 1 of appeal dismissed.

With regard to the issue whether the respondent proved his case on balance of probabilities, I will answer it in the negative. Looking at its primary cause of action, the appellant accused him of blocking easement and or encroachment of the disputed land. Whether or not the allegations were aired out in public, before local or church leaders and probably at a later stage in court, they all had, and enjoyed immunity. Exparte order and proof notwithstanding. This reminds me of a long settled principle that it is always the case that an order of exparte proof guarantees one Judgement and decree. Ground 3 of appeal is granted.


Appeal is, in the upshot allowed with costs. Decision and orders of the trial court are for avoidance of doubts quashed and set aside respectively. Ordered accordingly.

Right of appeal explained.


S.M. RUMANYIKA
JUDGE
09/01/2019

Delivered under my hand and seal of the court in chambers this 15th day of January, 2019 in the presence of respondent and his representative Ms. Gladness Lema in the absence of the appellant.




M.A. Moyo
DEPUTY REGISTRAR
21/01/2019