

IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM

CIVIL APPEAL NO 109 OF 2016

(Arising from Misc. Civil Case No 252 of 2014 and Civil Case 212 of 2012 at the
Resident Magistrates Court At Kisutu)

BENEZETH RWEYEMAMU.....APPELLANT

VERSUS

1. CYPRIAN ALEXANDER MLAY.....1ST RESPONDENT
2. SALVATORY SOKA.....2ND RESPONDENT
3. M MAUCTIONEERS.....3RD RESPONDENT

JUDGMENT

MASABO, J.L.:-

The appeal emanates from the Civil Case No 212 of 2012 in which the FIRST Respondent, Cyprian Alexander Mlay obtained an *ex parte* judgment against the Applicant and the 2nd Respondent for payment of a total sum of Tshs 50,000,000/= as damages for the loss caused by the second respondent's negligent driving. Sixteen months after the pronouncement of the *ex parte* judgment, the appellant logged an application in Misc. Civil Application No. 252 of 2014 at the Resident's Magistrates Court for Dar es Salaam at Kisutu seeking for an order of the court lifting the warrant of attachment in respect of his residential house. He also prayed for an order setting aside the *ex parte* judgment out of time. The application was partly successful. The prayer for

lifting of the warrant of attachment was granted whereas the prayer for setting aside the ex parte judgment was denied. Disgruntled, the appellant has lodged this appeal.

His appeal is based on the ground that, that the trial court magistrate erred in law and fact in holding that the appellant was served through a registered mail in Civil Case No. 212 of 2012 as he did not have knowledge of the suit. That, he became aware of the of the existence the said suit when his family house was in process of being attached and he immediately filed an application to have the ex parte judgement set aside. Further, further stated in his memorandum of appeal that the denial to set of the exparte judgement was prejudicial to his rights and contravened the principle of natural justice.

The appeal was heard orally. Only one party was represented. Mr. Julius Mtui Learned Counsel represented the Appellant whereas the respondents appeared in person.

In his address to the court, Mr. Mtui consolidated the 1st, 2nd and the 3rd appeal submitting that the trial magistrate erred to rule out that appellant was served, therefore the case was heard without the proof of service contrary to Order 9 Rule 13(1) of the civil Procedure Code. He reasoned that the respondents claimed that the service of summons was made by way of registered mail but failed to produce evidence thereof. He further contended that dismissal of his application is against the rules of natural justice, depriving the appellant an opportunity to be heard since there was no proof of service.

The first and 2nd Respondent were very brief. The 1st respondent prayed this court to do justice to both parties. He noted that, the 1st Respondent has rights which also needs to be safeguarded. The 2nd respondent supported the appeal. The 3rd respondent objected the appeal and submitted that this matter is old thus it is not easy for the 1st Respondent to provide proof of service. He prayed that the court be pleased to order the execution to continue.

Having carefully considered the submissions from both sides. There is only one issue to be determined by the court, that is, whether or not the magistrate erred in denying the application to set aside the *exparte* judgement.

Before I proceed further, I wish to set the records correct. Upon perusal of the case file, I have noted that the application in Misc Civil Application No. 252 of 2014, was an omnibus application in which the Appellant listed three main prayers namely: an order to lift the attachment warrant for his residential house; (ii) leave to make an application for setting aside the *exparte* judgment out of time; (iii) an order setting aside the *ex parte* judgement and restoration of the suit. In support of the second and third prayer, the Appellant told the court that he was not aware of the pendency of the suit hence he could not lodge his application on time. Having heard the parties, the trial court, found that the reason was insufficient to warrant the grant of an order setting aside the *ex parte* judgement and decree as there was proof that the Appellant herein was served.

Applications for setting aside ex parte judgments fall under Order 9 Rule 13(1) of the Civil Procedure Code (Cap 33 RE 2002) which provides that:

13.-(1) In any case in which a decree is passed ex parte against a defendant, he may apply to the court by which the decree was passed for an order to set it aside; and if he satisfies the court that the summons was not duly served or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the court shall make an order setting aside the decree as against him upon such terms as to costs, payment into court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.

As per the affidavit filed in support of the application, the sole ground for delay was that the applicant was not aware of the pendency of the suit. Having considered this fact the first court found the application to be devoid of merit as there was proof that he was dully served.

Upon consulting the court records, I have found that, the decision by Hon. Mkeha SRM (as he then was) was well grounded. It is on record that upon numerous futile attempts to effect service upon the Applicant, on 8th October 2012 the court granted leave to the 1st Respondent to effect service through substituted service by way of registered mail. On 31st October 2012, the 1st Respondent provided proof that service by registered mail had been effected

(the proof is on record) whereupon the matter was adjourned to 8/1/2013 on which date the Appellant did not enter appearance and an order for ex parte judgment was issued.

Order V Rule 20 (2) provides the following with regards to substituted services:

Service substituted by order of the court shall be as effectual as if it had been made on the defendant personally.

Since there is proof that service was done, a fact which defeats, entirely, the appellant's sole ground for setting aside the ex parte judgement, there is, certainly, no ground upon which to fault the decision appealed against.

Accordingly, I dismiss the appeal with costs.

DATED at DAR ES SALAAM this 11th day of February 2020.



J.L. MASABO
JUDGE

Judgment delivered this this 11th day of February 2020 in the presence of the Appellant, 1st Respondent and 3rd Respondent.



J.L. MASABO
JUDGE