

IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

PC.CIV.APPEAL.NO. 103 OF 2000

ZAINABU KONDOAPPELLANT

VERSUS

HAMISI ALLY NGULANGWARESPONDENT

JUDGMENT

LUANDA, J.

The appellant in this appeal one ZAINABU KONDO is appealing against the judgment of the Temeke District Court (Mrs Nzota-DM) which ~~REVERSED~~ the finding of Kigamboni Primary Court. The Kigamboni Primary Court declared the Appellant the winner of a civil suit involving the Appellant and HAMISI ALLY NGULANGWA (here inafter referred as the Respondent) The dispute touches on a piece of land.

The historical background of the matter giving rise to this dispute is as follows:-

The Appellant filed a suit number 52/97 at Kigamboni Primary Court against the Respondent. She was successful.

The Respondent was dissatisfied, he appealed to Temeke District Court. The Temeke District Court upheld the lower court judgment. Dissatisfied, the Respondent appealed to this court. This court (Justice Kalegeya) discovered an error on the record namely judgment of the Kigamboni Primary Court was not written in accordance with the provisions of Government Notice (GN) number 2 of 1988 in that the trial primary court magistrate (Mr. Hamad Hassani) who is referred to as a member by the above named GN 2/1988 summed up the case to his colleague members. Justice Kalegeya declared the proceedings a nullity and ordered retrial. The case was assigned to Ms J.M. Junbo a primary Court Magistrate of course with a new set of assessors.

When the case came before Ms. J.M. Junbo - Primary Court Magistrate, the Appellant informed the court that she had served the Respondent through Majira News Paper and asked the court she be allowed to proceed exparte.

Her prayer was granted. The case proceeded ex parte and judgment was entered in her favour. When the Respondent came to know this development, through the service of Mr. Rwabutaza, learned counsel, filed an appeal in the Temeke District Court challenging the manner of substituted service effected inter alia in that it was not stated whether all efforts to serve the Respondent was unsuccessful, hence publication in the news paper. This contravenes S.19 of the Primary Court Civil Procedure Rules 1964 vide GN. 310/64.

The Temeke District Court allowed the appeal pointing out that there is no order issued for substituted service. That, the District Court concluded, contravenes Rule 19 of the Primary Courts Civil Procedure Rules 1964. It declared the proceedings nullity and ordered retrial. Disastified with that finding, hence the appeal.

In her memorandum of appeal the Appellant raised four ground. I reproduce them verbatim for ease reference:-

1. Ni kwamba Mahakama ya Wilaya imekosea kusikiliza rufaa ya Hamisi Alli Ngulangwa wakati kesi ilishasikilizwa tayari Mahakama ya Mwanzo Kigamboni mpaka Mahakama Kuu na Hamisi Ally hakuweza kufuatilia madai hayo kwa makusudi Mheshimiwa uwamuzi wa Jaji Kalegeya (Sic) na uwamuzi wa Hakimu Mahakama ya Mwanzo.
2. Kwani baada ya kesi hiyo kufikishwa Mahakama ya Mwanzo Kigamboni Hamisi Ally Ngulangwa hakuweza kuhudhuria Mahakama kwa makusudi tu hali yeye anajua kesi hiyo na Hakimu wa Mahakama ya Mwanzo alitosa (Sic) amri ya kutoa tangazo na nilifanya hivyo Mheshimiwa Tangazo langu.
3. Kwani kesi hiyo ya Mahakama ya Mwanzo baada ya kutolewa uwamuzi mpaka siku 30 zimetolewa na kwisha hakutokea huyo Hamisi Ally Ngulangwa kuomba rufaa mpaka ukafanyika utokelezaji kubomolewa kwa nyumba ya Hamisi Alli Ngulangwa kwa amri ya Mahakama ili eneo langu hilo la shamba nikabidhiwa na nilikabidhiwa Mheshimiwa barua za utokelezaji.

4. Hivyo Mheshimiwa Mahakama yako itapitia kumbukumbu zote zangu kama mahakama ya mwanzo ilivyotekeleza uwamuzi uliyonifanya nimiliki sehemu yangu na Mkuu wa Wilaya Temeke ametekeleza kwa amri ya Mahakama.

Let me start with the first ground. The Appellant is saying the matter was heard and finally determined starting from Kigamboni Primary Court to High Court vide Justice Kalegeya's judgment. In other words she says the matter is res judicata. With due respect to the Appellant the matter was not finally adjudicated. Justice Kalegeya ordered retrial because of a fundamental ^{error} of non compliance with GN 2/1988. Retrial means to start afresh. So this ground has no leg to stand.

As to the second ground the Appellant is saying publication of summons in the Majira News paper was correct as the Respondent was aware of the case. It is true that the Respondent was aware of the case, but I am afraid whether he was aware of the hearing date. And in fact this is a bone of contention in this appeal.

It is Mr. Rwabutaza's contention in the District Court, Mr Rwabutaza did not appear in this court thought he was aware of the hearing date, that the course taking by the Appellant in publishing the summons in Majira News Paper was not proper. It offends Rule 19 of the Primary Courts Procedure Rules, 1964. The Rule provides.

19(1) subject to the provisions of sub-rule(2) a summons or any other document required to be served under these rules shall be served on the defendant personally or if he has an agent authorized to accept service on such agent.

- (2) Where the court is satisfied that personall service cannot be effected or cannot be effected without UNDOE DELAY AND EXPENSE, it may direct that the summons or document be served either by post or by leaving it with an adult male member of the defendant or with some adult male servant residing with him, or his employer by affixing a copy of the summons or document on some conspicuous part of the last known residence of the defendant and as other copy thereof on the court notice board.

My understanding of sub-rule 1 of Rule 19 is this. As a general rule personal service should always be effected upon the defendant either to himself or through his agent. Sub-rule (2) of Rule 19 is an exception to sub - rule 1 in that other modes of service which are not personal may be effected but subject to court satisfaction that personal service cannot be effected or cannot be effected without undue delay or expenses.

In the instant case service was effected by way of publication in Majira News Paper. Though this is not among the modes enumerated above but this mode has been adapted used for a quite a considerable time and now it has flourish as one of the ways of effecting service. As it does no harm to the administration of justice, I am of the view that the practice should continue to be used.

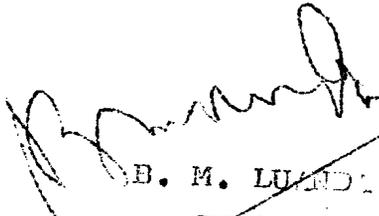
Having said so let us proceed. The record shows very clearly that there is no application to effect service by way of publication in Majira News Papers. Indeed no evidence or explanation was offered as to whether personal service was not possible to be effected, hence the application. More so there is nothing on record to indicate whether the court was satisfied with the reasons. So in absence of any explanation the substituted service effected was not properly made.

As regard to the third ground the Appellant is saying this appeal is time barred in that thirty days had elapsed long time ago when he appealed to the District Court. I quite agree on this. But the Respondent sought and obtained leave to appeal out of time vide Misc.Civ.Case. (sic) No, 8/99 filed in Teneke District Court.

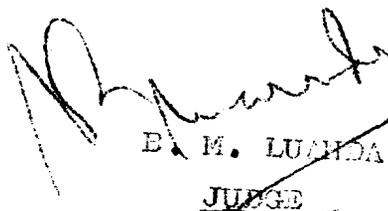
Finally is the fourth ground. I have gone through the record, I am satisfied that the Appellant's grounds of appeal /
As the execution is based on an illegal premises, the execution are without merits. cannot stand.

In the final analysis the appeal is dismissed with costs. For avoidance of doubt the decision of the District Court is hereby upheld.

Order accordingly.


E. M. LUANDA
JUDGE
26/7/2001

Judgment read over in the absence of the Respondent, in the presence of the Appellant.


E. M. LUANDA
JUDGE
26/7/2001