

**IN THE HIGH COURT OF TANZANIA  
AT DAR ES SALAAM**

**CIVIL APPEAL NO.100 OF 2003**

***( From the ruling of the Court of the Resident  
Magistrate at Kisutu in Civil Case No.155/2002  
Hon. Mingi - SRM )***

**SALAMA O. KITENGE .....APPELLANT**

***VERSUS***

**SOPHIA MSHORO.....RESPONDENT**

**J U D G M E N T**

**A.Shangwa,J.**

This appeal is against the decision of the Court of the Resident Magistrate at Kisutu in Civil Case No. 155 of 2002 in which the Appellant's application to set aside the ex-parte judgment which was passed on 6/2/2003 by E.H. Mingi, SRM was refused by her on 10/4/2003. The dispute between the

parties involves a claim of shs 500,000/= which the Respondent Sophia Mshoro gave to the Appellant Salama O.Kitenge as a loan on 15/3/2001.

In her memorandum of appeal, the Appellant has raised two grounds of appeal against the learned senior Resident Magistrate's refusal to set aside her exparte judgment. First, that the exparte judgment was made during mediation and in the absence of the Appellant. Second, that mediation took place in the absence of the Appellant which denied her the right to be heard.

On examining the trial Court's record, I have found that although judgment was entered in favour of the Respondent in the absence of the Appellant, it was not so entered during mediation. The correct position is that judgment was

entered in favour of the Respondent on a date which had been fixed for mediation and in the absence of the Appellant. This position can clearly be seen from the trial Court's record which reads as follows and I quote:

**" 6/2/2003**

***Mediator – E.H.Mingi, SRM***

***Plaintiff : Present in person***

***Defendant : Absent .***

***Order : Judgment is entered in favour of the  
plaintiff as prayed. E.H. Mingi – SRM  
6/2/2003".***

First of all, I think that it was wrong for the learned senior Resident Magistrate to enter judgment in favour of the plaintiff / Respondent on a date fixed for mediation. It

was also wrong for her to record that judgment is entered in favour of the plaintiff as prayed whereas the record does not show that the plaintiff made such a prayer.

In my considered opinion, a mediator has no mandate to enter judgment in favour of the plaintiff for non-appearance of the defendant or to dismiss the suit for non-appearance of the plaintiff. The role of a mediator is nothing else but to assist the parties in a dispute to arrive at an amicable settlement. A mediator's role is not to decide the case either way as if he or she were a trial Magistrate. If one of the parties to the suit does not appear on a date fixed for mediation or if both of them do not appear, the appropriate thing to do for a mediator is to adjourn the mediation until another date, and accordingly notify him or them.

In so far as this case is concerned, I do not think that the learned senior Resident Magistrate conducted any mediation on that day because it was not practicable for her to do so in the absence of one of the parties i.e. Appellant.

In her ruling, the learned senior Resident Magistrate observed that the defendant / Appellant was using delaying tactics to avoid the case and that she did not see any good reason to set aside her ex parte judgment passed on 6/2/2003. Unfortunately, the trial Court's record does not support her observation. In fact, the defendant / Appellant used to attend the Court on many occasions fixed by the Court and that on the date when judgment was entered in favour of the plaintiff/Respondent, the defendant /Appellant went to Court early in the morning but she was misled by the Court clerk who instructed her to wait for **G.W.**

**Mrumbe, RM** who had not yet reported on duty, and who had not been assigned to deal with the parties' case.

For these reasons, I firmly hold that the learned senior Resident Magistrate was wrong in refusing to set aside her *ex parte* judgment. I do quash her decision. Consequently, I allow this appeal and order that the original case file should be sent back to the Court of the Resident Magistrate at Kisumu for mediation process before another mediator and if mediation fails, the case should proceed to trial before another Magistrate with competent jurisdiction. Each party to bear her own costs.

  
**A. Shangwa**

**JUDGE**

**8/12/2005**

Delivered in open Court this 8<sup>th</sup> day of December, 2005.

  
**A. Shangwa**

**JUDGE**

**8/12/2005**