IN THE HIGH COURT OF TANZANIA

AT DAR ESSALAAM

CIVIL APPEAL NO. 12 OF 2011

(Originating from RM Court of Dar es Salaam at Kisutu in Civil Case No. 260 of 1995)

ISAACK KAGAMBO. . . . . APPELLANT

VERSUS

JOSEPH SIAME. . . . . .RESPONDENT

Date of last order: 18/10/2011

Date of Ruling: 12/12/2011

JUDGMENT

KARUA, J.

Isaack Kagambo, the appellant in this case, was on 4th July, 1995, sued by the respondent, Joseph Siame, at the Court of Resident Magistrate of Dar es Salaam at Kisutu,

over a piece of land known as plot No. 230 Block 42 Kijitonyama Area, Dar es Salaam. The respondent asserted title to the piece of land. The appellant, on his part, while having been dully served, failed to present his written statement of defence and the matter therefore was, on 16th August, 1995, decided one sided, by Magoda RM, in favour of the respondent.

The appellant made several applications to set aside the ex-parte judgment but in vain, mostly because his applications were caught by limitation. Initially, the appellant made an application, on 24th July, 1996, for extension of time for which to file an application to set aside the ex-parte judgment. Indeed, that application was granted on 21st August, 1996. The application itself to set aside the ex-parte judgment was lodged on 10th July 1997. That application however was dismissed on 8th September, 1997 for want of prosecution. On 25th June, 1998, the appellant filed an omnibus application asking for several orders, including the setting aside of the dismissal order or rather restoration of the former application; enlargement of time for which to lodge the application to set aside the ex-parte decree and stay of execution.

This application, which was presented without the leave of the Court, did not pass through the eyes of Mirumbe, RM, on 4th February, 2003, who dismissed it for having been caught by limitation. From that period the appellant never pursued the matter, until on the 29th December, 2008, when the respondent filed an application for execution, which was granted by Lyamuya, PRM, on 15th April, 2009. Two days later, the appellant filed an application seeking for the restoration of the application to set aside the ex-parte judgment; and the enlargement of time for which to set aside the ex-parte judgment. Katemana, RM, found the application without substance and accordingly dismissed it on ground that the Court had already dealt with those matters.

The appellant felt aggrieved with that order, hence, this appeal, which was argued before me by Mr. Ndibalema, learned counsel, on behalf of the appellant and on the other hand Mr. Maftah, learned counsel, resisted the appeal on behalf of the respondent.

I directed that the appeal be disposed of by way of written submissions. Mr. Ndibalema presented six grounds of complaint against the decision of the trial court.

In the first ground Mr. Ndibalema is aggrieved by the decision of trial magistrate, who is said to have fixed a hearing date before all the proceedings were completed. It is said after the appellant lodged his application seeking for stay of execution, pending the hearing of an application for extension of time to restore the application which would set aside the ex-parte judgment, the respondent failed to present his counter affidavit, which according to the appellant, meant that the respondent did not oppose the application. However, at the hearing, the trial magistrate entertained the respondent who opposed the application by word of mouth which the appellant believes to be improper.

On the other hand, Mr. Maftah contends that the respondent did not challenge the application because it had already been dealt with and the court was functus officio. The remedy was for the appellant to appeal against the decisions of the trial court rather than for the appellant lodging similar application which was nothing but abuse of the court process. With respect, I agree. The matter had already been decided. If the appellant was aggrieved by the decision of the trial court, the remedy was to appeal to the

High Court. The current application was nothing but abuse of the court process.

In the second ground of appeal, the appellant assert that the trial magistrate should have determined the application that was presented before him. Indeed, as demonstrated above, the matter was res judicata and the court was fanctus officio.

In the third ground it is said that the court was wrong in carrying out the execution from a two lined judgment. Indeed, that was a decision of the court which could only be upset by a superior court. The appellant should have appealed against the two sentence decision. Otherwise, the decision remained in force. The trial court order to proceed with execution cannot be faulted.

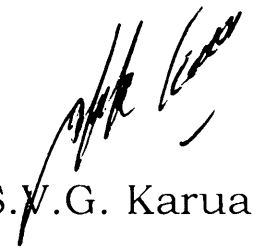
In the fourth ground, the appellant assert that he was denied the right to be heard. According to the appellant, the dismissal order made by the trial court was unjust and the same violated the law and was against the principles of natural justice. Indeed, the principle that no one should be condemned unheard is very revered in the administration of justice in this country. However, the appellant in this case, was afforded all the opportunities available to present

his case. When the matter was decided against him, the available opportunity for the appellant was to appeal against the decision of the trial court. Otherwise, by lodging the same application before the trial court was nothing but an abuse of the court process.

In the fifth ground the appellant is aggrieved by the fact that, the respondent who had no locus in a previous suit no. 174 of 1993 subsequently obtained locus in civil case No. 296 of 1995 and went on to win the case against him. I find this complaint irrelevant. In the first place, those were two different cases and subsequently the respondent acquired the relevant instruments which enable him to have locus. The appellant should not complain over that. In the sixth ground the appellant assert that the trial magistrate was wrong in ordering that the proper remedy available to the appellant was for him to appeal against the decision of the trial court. I am surprised that this statement was ever made by a lawyer. Indeed, as demonstrated, the only remedy was for the appellant to appeal against the decision of the trial court.

In fine, this application, which is devoid of merit, was indeed, nothing but an abuse of the court process.

Consequently, it is dismissed with the usual consequences. The respondent will have his costs in this court and in the court below.



S.M.G. Karua

JUDGE

12/12/2011

DATED AT DAR ES SALAAM

Appearances:

For the appellant: Present in person

For the respondent: present in person