

TANZANIA / JUDGMENT

koretha do makoye another vs amos so maganga 2007 tzhc 405 3 july 2007

COURT
TZHCDECIDED
3 July 2007

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IN THE HIGH COURT OF TANZANIA AT TABORA. MISC. CIVIL APPEAL NO. 2 OF 2004 (Arising out of Kahama District Court Civil Case No. 51 of 2001)

1. KORETHA d/o MAKOYE) APPELLANTS
2. MAKOYE s/o KINTOKI) Versus AMOS s/o MAGANGA RESPONDENT

JUDGMENT

3rd May, 07 & 3rd July, 07 MUJULIZI.J. The Respondent herein Amos Maganga filed Civil Case No. 51 of 2001 in the District Court of Kahama, against the Appellant's husband one Makoye Kintoki for; "a) Order of declaration of the mortgaged foundation on Plot No. 137 "U" Nyasubi and two cattle to be the property of the plaintiff,

b) in the alternative the defendant be ordered to refund Tshs. 200,000/= with bank interest.

c) Tshs. 100,000/= as compensation,

d) Order for cost be made in favour of plaintiff. l

e) Any other relief as the Court deem fit and just to grant." Consequently the District Court issued a summons for orders, presumably under Orders V. Rule 1 and VIII, Rule 1 (1). The latter provides; "Order VIII -1(1) where a summons to appear has been issued, the defendant may, and if so required by the Court shall, within seven days before the first hearing, present a written statement of his defence." Order V. Rule 4, provides; "Order V. Rule 4-A summons to appear issued by a Court other than the High Court shall direct that the defendant shall produce on the day fixed for his appearance- a) all documents in his possession or power upon which he intends to rely in supporting his case; and b) all witnesses upon whose evidence he intends to rely in support of his case." However, for inexplicable reasons, the District Court of Kahama was at the material time issuing summons for orders under Rule 8, subordinate Courts (Civil Procedure - summons and Pleadings) Rule 1955. These are clearly remnants of a dead law. This is the summons which shows to have been served and signed as received by a person who signed as Makoye on 04/01/2002. The court, labouring under the mistaken belief that it was empowered to issue summons for orders, did so. But, as per the

current position of the law, the Court could only issue either a summons to appear (Order V. Rule, 1 (a) or, a summons to file a defence (Order V. Rule 1 (b). CPC- (cap. 33 R.E. 2002). Be as it may, the Defendant did not appear before the Court as summoned, ordered or at all, leading to a prayer by the Plaintiff on 11/04/2002 in the following words; (page 2 typed record); "Plaintiff: I pray for exparte Hearing as the defendant is reluctant to attend." This lead to the following orders; "Order: 1. Exparte hearing on 29/5/2002

2. Parties to attend

3. PWS to be brought." However, no hearing took place, as scheduled then, for on 12/08/2002 the Plaintiff once again (page 3 typed record) prayed as follows; "Plaintiff: I pray this case be heard exparte as the defendant does not want to file his WSD nor does he want to attend to court." Once again the court made orders; "Order. 1. Hearing exparte on 9/9/2002

2. Parties to attend

3. PWS be brought." But even then hearing did not proceed as scheduled, for, up to 30/10/2002, the Plaintiff was still making the following prayer; (page 3 typed record) "Plaintiff: I pray for exparte proof of this case. I have no P. W. but I will give my own evidence and I have documents to tender." Finally, the plaintiff testified before the Court (page 4 •typed record) and summed up with the following prayer; " I pray that the defendant is ordered to pay back the loan of shs.200,000/= with interest of shs. 100,000/= with costs. That is all." On 18/1/2002, the Court delivered the following short judgment; "EXPARTE JUDGMENT: C ou rt: An exparte judgment is hereby entered in favour of the plaintiff Amos Maganga against the defendant Makoye Kintoki who is hereby ordered to pay to the former cash Tshs. 200,000/= which is the principle (sic) sum with Tshs. 100,000/= as compensation with interest at the bank rate, together with costs, because the evidence adduced by the plaintiff on oath supported by a copy of the loan agreement letter (sic) has proved to the balance of probability that the defendant is indeed liable to pay the claimed debt it is ordered." Consequent to this judgment a decree in the following terms was drawn out as a Simple Money Decree (0.20 rr. 6, 7); "It is ordered that the Defendant do pay to the plaintiff the sum of Shs. 200,000/= + 100,000/= with interest at the rate of BANK per cent per annum from JUNE 2002 up TO DECEMBER,2002 to the date of payment of the said sum and also pay Shs. 100,000/= the costs of this suit with interest thereon at rate of six per cent from this date to the date of payment. SHS. CTS. Principal 300,000 00 Interest 622,260 00 Costs 100,000 00 Costs of decree 1,000 00 Total 1,023,266 00 Given under my hand and the Seal of the Court, thisday JULY,2003. SEALED NOT SIGNED) REGISTRAR" It is against an order of attachment in execution of the above decree that the present Appellant, filed a Chamber Summons praying for inter alia;
- i) Execution of Attachment of her Matrimonial House on plot No. 236 Block "U" Nyasubi, Kahama Township be stayed. ii) Costs iii) Any other relief's as the court will deem fit and just; In its ruling dated 5/3/2004 the District Court, dismissed the above application terming it as an "objection" in its totality on the basis that the present Appellant was not competent to

have brought the objections. This Appeal is against that ruling. For reasons that will come out clearly in the course of this judgment, I have decided to take two seemingly conflicting courses. First, I will dismiss the appeal, however, I will suo motto move this court to revise the proceedings, judgment, decree and orders made by the district court. I start with the Appeal; The Appellant did not specify under what law the chamber summons was made. But she prayed for stay of execution of attachment of her matrimonial house on plot No. 236 Block "U" Nyasubi, Kahama Township. As to pending what steps the stay was to be granted was not made clear. The district court chose to treat the application before it as an objection to attachment. The Application was either an application for stay or an objection to attachment. On the basis that it was an application for stay. It is my considered judgment that an order dismissing it would not be appealable, as such order would only be interlocutory in nature. In case we agree with the District Court that it was an objection, then an order dismissing such an application would also not be open to appeal. Objection proceedings are governed by Order XXI, Rules 57-62. Order XXI Rule 62 provides the remedy to a party against whom an order in objection is made in the following terms: "62-where a claim or an objection is preferred, the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute, but, subject to the result of such suit, if any, the order shall be conclusive." It is clear that the order sought to be appealed from in this Court is not appealable. From that reason I will not dwell into the merits of the appeal as to whether or not the decision of the lower Court was correct or not. It was always open to the Appellant to file suit in relation to the property. I therefore hereby dismiss the Appeal. Each party to bear its costs. I now turn to the legality, propriety and correctness of the proceedings, judgment, decree and orders before and made by the District Court: It is contrary to natural justice to make an adverse order against a person without first giving him an opportunity to speak in his defence. This principle of natural justice has in our country forms one of the fundamental rights guaranteed by our constitution 1977 (Cap.2, R.E. 2002) in Article 13(6)(a) in the following words; "13(6) Kwa madhumuni ya kuhakikisha usawa mbele ya sheria, Mamlaka ya Nchi itaweka taratibu zinazofaa au zinazozingatia misingi kwamba;

- a) Wakati hakina wajibu kwa mtu yeyote inapohitajika kufanyiwa Mahakama au chombo kingine chochote kinachohusika, basi mtu huyo atakuwa na haki ya kupewa fursa ya kusikilizwa kwa ukamilifu, na pia haki ya kukata rufani au kupata nafuu nyingine ya Kisheria kutokana na maamuzi ya Mahakama au chombo hicho kinginecho kinachohusika. The rules of procedure laid out by statute, and in this case the civil Procedure Code, (Cap.33. R.E. 2002) are not merely hand maidens of Justice, but are the very basis on which the jurisdiction of a Court can be exercised upon any person in relation to giving of orders binding on such person in any dispute brought before such Court. For this reason the Rules of procedure demarcate the -clear path to justice and a fair trial, they must by necessity therefore be followed by the Courts and the litigants in equal measure. However, contrary to this clear rule of law, fairness and uniformity of practice, the Rules of Civil Procedure are more often than not respected in non compliance. In this case, it is clear to me that the trial

court did not care to follow nor think about the consequences of the various orders passed in the course of these proceedings. As already reiterated in the summary of facts and background to this case, the trial Court gave an order for "summons for orders to issue." The appropriate order ought to have been an order for summons to appear if at all. Granted, that was not of great consequence, however, the summons issued must contain all the essential information necessary to the summoned party to understand its contents and be able to make appropriate response. But, contrary to that, the summons actually said to have been served in this case was a poor photocopy of a standard form cast in a minute font which rendered it to be illegible, because of being so faint. Secondly prior to the Court issuing the summons taking any adverse action against the summoned person it is not enough to state or show a mere signature on the original summons to evidence effective service. The summons must also clearly notify the summoned party as to the date when he is required to appear in Court. In this case the court ordered that the case be mentioned on 02/01/2002, but the summons shows that it was served on 04/01/2002, long after the Court had varied the mention date to 07/2/2007. That notwithstanding, no evidence was adduced before the Court in accordance with the Rules of procedure under which the summons had been issued to show that the Defendant had been duly served. (The summons provides for an affidavit of service but in this event it is in blank). The consequences to a party who was duly served failing to comply with the directives in the summons are set out in Order VIII Rule 14. However, since in this case the summons issued was from a dead law, we can not apply those provisions to this case. But in this case there was no affidavit sworn by the process server to prove that service had actually been effected on the Defendant. All that there is, is the repeated statements by the Plaintiff that "the defendant is reluctant to attend" which lead to an order for ex parte hearing. Was this order properly founded? The clear answer in my judgment is, No. There was no evidence of proof of service. For all we know the Defendant was never served. Supposing that he was duly served, was the order for ex parte proof the appropriate order? The answer to this, must be directly within the summons themselves, which must ordinarily spell out the consequences of failure to comply, with the orders expressed there in. In this case it was not clear as to what the Court wanted the defendant to do. In the premises therefore there was no basis for the order for ex parte proof. In otherwise the court did not give basis for the foundation of its jurisdiction so to proceed. Under Order VIII Rule 14 (2)(b) in any case which a defendant who is required to file a written statement of defence as required under sub rule (1) of Rule 1, the court may fix a day for ex-parte proof and may pronounce judgment in favour of the plaintiff upon such proof of his claim. But as already observed these powers can only be exercised by the Court upon proof of service and not otherwise. Order V. Rule 18 provides: "The serving officer shall, within fourteen days of service in all cases in which summons has been served under rule 16, endorse or annex, or cause to be endorsed or annexed, on or to the original summons, a return stating the time when and in the manner in which the summons was served, and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of the summons." Rule 19 of the same order provides for examination of the serving officer in the absence of an affidavit of service under Rule 18. That being said

however, S.44 (1) (b) of the Magistrates Courts Act, (Cap.11.R.E. 2002) provides as follows; "44 (1) In addition to any other powers in that behalf conferred upon the High Court, the High Court;

- a) N/A
- b) May, in any proceedings of a civil nature determined in a district court or a court of a resident on application being made in that behalf by any party or of its own motion, if it appears that there has been an error material to the merits of the case involving injustice, revise the proceedings and make such decision or order therein as it sees fit; Provided that no decision nor order shall be made by the High court in the exercise of the jurisdiction conferred by paragraph (b) of this sub section, increasing any sum awarded or altering the rights of any party to his detriment, unless the party adversely affected has been given an opportunity to be heard-" Under these circumstances, although the judgment and decree of the District Court was appealable, it is clear that this fact did not come to the attention of the Judgment Debtor, Mr. Makoye Kintoki within good time so as to take the necessary steps to appeal against the judgment and decree. In view of the circumstances that I have gone at great length to elaborate upon, I will give orders as will afford both parties to be heard on appeal. In the premises I order that the execution of the decree be stayed pending determination of the appeal if any is to be filed by the judgment debtor or as shall be ordered by the District Court as hereinafter directed. The Judgment debtor is granted extension of time by 30 days from the date hereof to file appeal against the Judgment and decree of the District Court in the High Court. Should the Judgment debtor fail to file Appeal within the prescribed time, then the District Court of Kahama should rectify the errors apparent in the contents of the decree of the District Court so as to conform with the judgment, the Plaintiff's claim and the law, within 60 days from the date of this judgment. Further in case the judgment debtor fails to settle the decretal sum as shall have been rectified by the District Court, as ordered above the decree be executed against the judgment debtor personally and or by attachment of his personal property, subject to compliance with section 48 of the Civil Procedure Code, (Cap.33 R.E. 2002). It is so ordered. A.K. MUJULIZI JUDGE 03/0 7 /2 0 0 7 Delivered in the presence of Koretha Makoye the Appellant and the Respondent, Amos Maganga. A.K. MUJULZI JUDGE 3 /7 /2 0 0 7

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Prepared on 14 October 2026 · Esheria