

IN THE HIGH COURT OF TANZANIA
AT DAR ES SALAAM

CIVIL APPEAL NO. 23 OF 1993

BETWEEN

MOHAMED HAMISI }
RAMADHANI SAID } APPELLANTS
CITY COUNCIL OF DSM... }

AND

ISRAEL DUMA RESPONDENT

J U D G E M E N T

LUANDA, PRM - EXT-JUR:

In the Resident Magistrate Court of Dar es Salaam at Kisutu the present Respondent one ISRAEL A. DUMA filed a suit against MOHAMED HAMISI, RAMADHANI SAID and DAR ES SALAAM CITY COUNCIL (hereinafter referred to as the Appellants) for a declaratory judgement that he be declared lawful owner of a plot of Land Number 12D Block A Kipawa area within Dar es Salaam, specific performance among others. At the trial the Respondent was represented by Mr. Maira, Learned Counsel while the Appellants were represented by several advocates at a time. But finally Mr. Kalolo, Learned Counsel represented them and he did so in this appeal.

In their written Statement of defence the Appellants raised a number of preliminary issues one being that at the time of filing the Suit in Court, that is 8/2/1991, the Court had no pecuniary jurisdiction to entertain and try the Suit. The Case was adjourned on several occasions for various reasons. But on 1/7/92 the Suit came for hearing before Mr. J. Mtetela, SRM who adjourned to 16/7/92.

On 16/7/1992 the suit came before Mr. F.A.R. Chillonji, Learned Senior Resident Magistrate who ordered the suit to come for exparte proof by way of an affidavit on 12/8/92. On that date neither the Appellants nor their Advocate entered appearance. But before 12/8/92 the date the suit was fixed for exparte proof Mr. Kalolo, Learned Counsel filed a Chamber Summons for setting aside an exparte order. The application was heard on 7/9/92 whereby Mr. Kalolo, Learned Counsel advanced several reasons as to why he did not turnup. Mr. Maira, Learned Counsel for the Respondent opposed the application. At the end of the day the opposition won. The application was dismissed with costs by F.A.R. Chillonji, Learned Senior Resident Magistrate. Immediately thereafter, on the strength of an affidavit sworn by Mr. Maira, Learned Advocate for the Respondent, exparte judgment was entered with Costs. Again efforts were made to set aside the exparte judgment. The application was made by Mr. Kalolo, Learned Counsel and Mr. Senyoni from Dar es Salaam City Council. The matter was then brought before Mr. J. Mtetela, Learned Senior Resident Magistrate who dismissed the application with Costs. He saw no reason to interfere with the decision of his ^{colleague} Magistrate Mr. Chillonji.

The matter did not end there. An application for stay of execution was made. The application was dismissed for being time barred. However, the record is dead silent whether execution was carried out. Whatever the position the Appellants have filed this appeal in the High Court.

Mr. Kalolo, Learned Counsel for the Appellants raised five grounds in his memorandum of appeal. He however, abandoned grounds 4 and 5. He argued ground 1 and 2 together and ground 3 separately. Mr. Maira, who advocated for the Respondent during the trial, was duly served and appeared. But he informed the Court that the Respondent had withdrawn his instructions on them. So the Respondent was served personally and he appeared on 4/10/95 a date preceding to the hearing of this appeal i.e. 17/11/95. The Respondent never entered appearance on the hearing date. We thus proceeded hearing this appeal as provided by Order XXXIX r.17 (2) of the Civil Procedure Code.

In arguing the appeal in respect of ground 1 and 2 Mr. Kalolo said judgement was erroneous in that it was not based on proper principle of law. On elaborating he said the affidavit upon which exparte judgment was entered was defective both in form and substance. He went on to say that so long as the affidavit was not for interlocutory orders, it was an affidavit to prove a case exparte, Mr. Maira, who is not a party to a suit could not do so. As such whatever he has stated therein is hearsay and therefore inadmissible. This is in accordance with Order XIX r.3(1) of the Civil Procedure Code. Furthermore, he submitted that even the verification leave much to be desired as it is not indicated which are of his own knowledge and which are from the Respondent. He concluded by saying that the affidavit was dective and the Court should not rely on it. He cited a number of cases, namely; Standard Goods v Nathu 1950 17 EACA 99; Mtale v January Kabembwa [1976] LRT No.7, and Khesack and Saybook Ltd. vs Hashan

Kassam & Sons Ltd (1972) Ltd, No. 228.

I have gone through the affidavit of Mr. Maira. The observations made by Mr. Kalolo are quite correct in that the purpose of Mr. Maira's affidavit was to prove a suit and not for an interlocutory order. Also noted is that the verification is defective.

It does not state which paragraphs are of his own knowledge and likewise which are from other sources. In the light of Standard Goods v Nathu 1950 17 EACA 99 it ought not to be relied upon as it contains hearsay Statements. It was wrong on the part of the trial Court to rely on such affidavit.

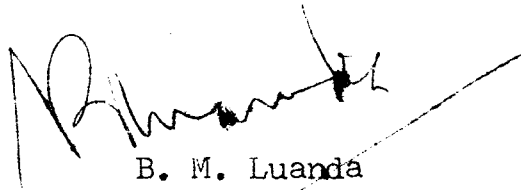
As to the 3rd ground Mr. Kalolo argued that it was not proper for a trial Court to proceed with hearing the case without first disposing preliminary issues raised in the pleadings. In the pleadings a number of preliminary issues were raised, among them is the question of jurisdiction. No finding was made whether the court has jurisdiction.

It is my considered opinion that in Civil matters where preliminary issue is raised touching trial court jurisdiction, it is prudent to deal with such issue first before embarking on hearing the suit either exparte or on merits otherwise the court may end up trying a nullify.

Since there is no finding on this issue, the matter is hanging in the air. This is a misdirection on the party of the trial Court.

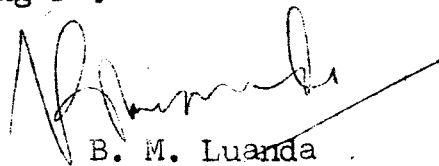
From the foregoing therefore, the decision of the trial court cannot be allowed to stand. I accordingly allow the appeal with costs and set aside the trial court finding. The case is remitted to the Kisumu Resident Magistrate Court for the hearing on merits. Obviously it should be before another Magistrate of competent jurisdiction.

Order accordingly.



B. M. Luanda
PRM-EXT. J.
9/8/1996.

Judgment delivered in the presence of Mr. Kalolo,
Advocate assisted by Mr. Mangara.



B. M. Luanda
PRM-EXT. J.
9/8/1996.