RASHID HUSSEIN *v.* BONIFACE NYAMUHANGA AND ANOTHER

COURT OF APPEAL OF TANZANIA AT DAR ES SALAAM

(Ramadhani, Lubuva and Lugakingira, JJ.A.)

CIVIL APPEAL No. 21 OF 1996

(From the Judgment of the High Court of Tanzania at Dar es Salaam, Rubama, J., dated 3 August 1990, in Civil Case No. 159 of 1986)

Civil Practice and Procedure – Ex-parte proof – Application to set aside order for ex-parte proof – Suit dismissed for non-appearance and defendant granted leave to prove counter claim ex parte – Locus standi in subsequent application to restore the suit – Order IX, rule 9 of the Civil Procedure Code.

The appellant is appealed against a decision of a judge refusing to entertain his application to set aside an *ex-parte* proof order by which the judge dismissed the appellant's suit for non-appearance and granted leave to the respondents to prove their counter claim *ex-parte.*

Held: The appellant was in law entitled to make the application and to be heard on the reasons for his non appearance when the suit came up for hearing.

Appeal allowed

Statutory provision referred to:

1. Civil Procedure Code, 1966, Order IX, rule 9, Order 9, rule 8

Mr Lugua, for the Respondents

JUDGMENT

(Dated 11 September 2000)

Lugakingira, J.A.: This appeal is against an *ex parte* judgment of the High Court (Rubama, J.) entered on 3 August 1990, in a suit in which the appellant was the plaintiff and the respondents defendants. Both respondents are now dead and were substituted by the administrators of their estates, Laurencia Chande for the first respondent and Musa Mohamed for the second. Learned counsel, Mr Lugua, appeared for the respondents while the appellant appeared in person. The only material ground of appeal is that the learned judge erred in refusing to entertain an application by the appellant to set aside the order made on 14 December 1989 by which the judge dismissed the appellant's suit for non-appearance and granted leave to the respondents to prove their counter-claim *ex parte*.

The appellant's plaint alleged trespass by the respondents to a piece of land, Plot Number 348 (Certificate of Title Number 26521), at Regent Estate in Kinondoni, Dar es Salaam, and prayed for damages, eviction of the respondent, a perpetual injunction against them and costs. In their written statement of defence, the respondents counter-claimed for specific performance of alleged contracts binding the appellant to transfer the suit land to them or one of them.

When the suit came on for hearing on 14 December 1989, the then counsel for the respondents, Mr Mwajasho, appeared but neither the appellant nor his counsel, Dr Lamwai, appeared. Mr Mwajasho prayed for the plaint to be dismissed and asked for a date to be fixed for the respondents to prove their counter-claim *ex parte* by oral evidence. In other words, the respondents themselves were not in a position to proceed with the hearing on that day. The judge granted the prayers under Order 9, rule 8 of the Civil Procedure Code 1966, and fixed 23 December 1989 for mention of the case. Neither the respondents nor their counsel appeared for the mention or for the further mention on 27 January 1990 when the hearing was fixed for

10 May 1990, save that at the second mention Mr Kinguji held Mr Mwajasho's brief. On 10 May 1990 the following transpired:

Coram: Rubama, J.

For the plaintiff: Mr Mwakasungula

For the defendants: Mr Mwajasho

Mr Mwakasungula: I filed chamber application on behalf of plaintiff. At the moment I have no copies. The plaintiff came to me by way of legal aid.

Mr Mwajasho: I regret that I have to object. I do not believe that Mr Mwakasungula has a *locus standi.* The plaintiff was represented by Dr Lamwai who is yet to withdraw. The plaintiff cannot just jump from one advocate to another. The court should not entertain the presence of Mr Mwakasungula.

Mr Mwakasungula: It is true the plaintiff was represented by Dr Lamwai. I do not know the circumstances that led him to come to me.

Court: I accept the submission by Mr Mwajasho that I should not entertain the application by Mr Mwakasungula. *I base my decision on the fact that an order has already been made for the hearing of this case ex parte by oral evidence today.* It is this that is before me today. [emphasis supplied]

Sgd. Yahya Rubama

Judge

10 May 1990

Court: The Order that *ex parte* proof be made by oral evidence made on 23(*sic*) December 1989 is hereby changed to read *ex parte* proof by affidavit. Affidavit to be filed by 18 May 1990 and mention 19 May 1990.

Sgd. Yahya Rubama

Judge

10 May 1990

The application referred to by Mr Mwakasungula was lodged on 5 April 1990. It contained two prayers: an extension of time to apply to set aside the order dismissing the appellant's suit and granting the respondents leave to proceed *ex parte*, and the application to that effect. It will be noted that while refusing to entertain that application, the learned judge went out of his way to make matters easier for the respondents by gratuitously altering his order from *ex parte* proof by oral evidence to *ex parte* proof by affidavit, and gave the respondents eight days to file the affidavit or affidavits. The affidavits were duly filed on 17 May 1990 and the suit was mentioned on 19 May 1990 when 3 August 1990 was fixed for judgment. On that date the proceedings ran as follows:

Coram: Rubama, J.

Mr Mwajasho, for the defendants

Plaintiff present in person

Mr Mwajasho: This case had last come for *ex parte* proof by oral evidence and the court ordered that it be affidavit. We have filed the affidavit. We pray for judgment.

Plaintiff: I have come to ask about my application filed on 10 May 1990 [correct date 5 April 1990].

Court: The order for *ex parte* proof was made since 14 December 1989. *The plaintiff has no locus standi* today when this case has been called for *ex parte* proof by affidavit. On the strength of affidavit, judgment is entered as prayed [emphasis supplied].

Sgd. Yahya Rubama, J.

3 August 1990

A The appellant contends that those decisions by the learned judge were contrary to law. In reply, Mr Lugua argued, first, that there was no application to set aside the dismissal order because Mr Mwakasungula had no standing to file one, and, second, that the application was, in
B any case, defective for being duplex. In his submission there should have been a separate application for extension of time and a separate application for setting aside the dismissal order upon the former being granted.

C We state at once that Mr Lugua's arguments are beside the point because Rubama, J. did not reject the application because Mr Mwakasungula was incompetent to file it or because the application was defective, but because the judge simply did not want to vacate
D his order or because he believed that once the order was made, it could not be set aside, judging by his statement that the appellant had no *locus standi*. Which ever way one looks at the matter, the learned judge was clearly wrong. The appellant was in law entitled
E to make the application and to be heard on the reasons for his non-appearance when the suit came on for hearing. This is expressly provided for in Order 9, rule 9 which reads:

> 9(1) Where a suit is wholly or partly dismissed under rule 8, the plaintiff
> F shall be precluded from bringing a fresh suit in respect of the same cause of action. But he may apply for an order to set the dismissal aside, and if he satisfies the court that there was sufficient cause for his non-appearance when the suit was called on for hearing, the
> G court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.
>
> (2) No order shall be made under this rule unless notice of the application
> H has been served on the opposite party.

It is thus clear that an order dismissing a suit for non-appearance of the plaintiff can be set aside and there was no question of the appellant in this case lacking *locus standi*. We have experienced great difficulties
I in trying to comprehend the learned judge's contrary view, while he

was at the same time so accommodating to the respondent's side, but we will say no more about it. As to whether Mr Mwakasungula had no standing or whether the appellant's application was vitiated by its composite nature, it was for the High Court to decide, and we would not wish to prejudice the issues by any comment.

Accordingly, the appeal is allowed with costs, the *ex parte* judgment is set aside, and the suit is remitted to the High Court to hear and determine the appellant's application filed on 5 April 1990.

SCANDINAVIAN ENTERPRISES *v.* HASSAN M JEMADARI AND OTHERS

HIGH COURT OF TANZANIA
AT ARUSHA
(Msoffe, J.)

MISCELLEANOUES CIVIL APPEAL No. 13 OF 1993

Civil Practice and Procedure – Appeals – Appeals to the High Court – Memorandum of Appeal filed without attaching to it a certified copy of the decree appealed against – Whether fatal to the appeal – Order xx, rule 20 and Order XXXIX, rule 1(1) of the Civil Procedure Code 1966.

An objection was raised against this appeal to the High Court on the grounds that the memorandum of appeal filed was not accompanied by a certified copy of the decree sought to be appealed against.

Held: (i) No certified copy of the decree was attached to the memorandum of appeal and this was fatal for offending the law; although Order XXXIX, rule 1(1) of the Civil Procedure Code makes no provision for a "certified" copy of the decree, it must be read together with Order xx, rule 20 which provides for a certified copy;