

IN THE HIGH COURT OF ZANZIBAR

HOLDEN AT VUGA
CIVIL APPEAL NO. 19 OF 2013

ALI SIMAI ALI

.....

APPELLANT

VERSUS

RAMADHAN SILIMA MOHAMED.....

RESPONDENT

JUDGMENT

Rabia H. Mohamed, J

Being aggrieved by the judgement and decree of the Regional court the appellant, Ali Simai Ali filed this second appeal containing five grounds of appeal. The respondent is Ramadhan Silima Moh'd.

Both the appellant and the respondent appeared in person.

Historical background of the matter may briefly be stated as: Respondent filed suit No. 23 of 2011 at the District court Mwanakwerekwe claiming Tshs. 3,503,000/- for the loss of business caused by appellant and Tshs. 1,500,000/- for the inconvenience caused. The case was heard and decided in favour of the respondent. Appellant was not satisfied by that decision, he filed his first appeal at the Regional court, which upheld the District court decision.

Before going onto the merit of this appeal, there are certain things I would like to discuss first. As shown in the proceedings of the Regional Court of 11th March 2013, the appeal before that court was

withdrawn under **Order XI rule 9 (1) and (2) of the Civil Procedure Rules Cap 8**. The record reads: -

“DATE 11/03/2013

Coram: Makame Khamis- RM

Applicant: Absent

Defendant: Present

C/Clerk: Mboja

DEFENDANT:

I am here for this case, but I pray to be withdrawn this case due to the plaintiff have no interest on this appeal.

Sgd: M.Kh. Ali (RM)

11/3/2013

COURT /ORDER

“This case has been withdrawn by the non-appearance of the plaintiff since it was filed before this court as order XI rule 9 (1) (2) of the Civil Procedure Decree, the law of Zanzibar.”

After the elapse of about three months from the date of the withdrawal, the suit proceeded on 3rd June 2013 as if nothing happened previously, with the presence of only the respondent. Then on 5th July 2013 the said court reinstated the suit suo motu by giving the following order: -

COURT:

“This court by suo moto shall continue to hear this course of appeal, because in the previous session this appeal was being withdrawn due to the wrong records of non-appearance of applicant, while this truth is that, the appellant has appear or both session and the respondent in the case who was absence. So that it was verse versal (sic) due to the wrong record or mistake. So hereby hearing of an appeal shall proceed accordingly.”

To my understanding **Order XI rule 9(1)** provides for dismissal of suit when only defendant appears when the suit is called for hearing. This Order reads: -

“9. (1) Where the defendant appears and the plaintiffs does not appear when the suit is called for hearing, the court shall make an order that the suit shall be dismissed, unless the defendant admits the claim, or part thereof, in which case the court shall, unless it sees sufficient cause to the contrary, pass a decree against the defendant upon sufficient cause to the contrary, pass a decree against the defendant upon such admission, and, where part only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder.”

What was before the Regional court was not an application or a suit but an appeal. The proper provision, which provides for dismissal of appeal for non-appearance of the appellant, is Order XLVI rule 17 (1) of the Civil Procedure Rules. This Order reads: -

“ 17 – (1) Where on the day fixed, or on any other day to which the hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing, the court may make an order that the appeal be dismissed.”

Apart from what I have discussed above, it is the position of the law that once a court has decided a case it becomes functus officio. So in this case the Regional Magistrate did not have the powers to reinstate the appeal suo motu. This position was discussed in the case of **Laemthong Rice Company Ltd v. Principal Secretary, Ministry of Finance [2002] T.L.R 389** where it was held: -

“ A judge becomes functus officio once he has given his original order and cannot depart from it in the absence of an application...”

In a situation, where an appeal was dismissed for non- appearance of the appellant under the order I cited above, it is only the appellant who is allowed to apply to the court for re-admission of his appeal. When it is proved to the satisfaction of the court that the appellant was prevented by any sufficient cause from appearing when the appeal was called on for hearing, the court shall re-admit

the appeal. This is provided under **Order XLVI Rule 19 of the Civil Procedure Rules Cap 8**, which reads: -

“19 - Where an appeal is dismissed under paragraph (2) of rule 11, or rule 17, or rule 18, the appellant may apply to the appellant court for the re-admission of the appeal, and where it is proved to the satisfaction of the court that he was prevented by any sufficient cause from appearing when the appeal was called on for hearing..., the court shall re-admit the appeal on such terms as to costs or otherwise as it thinks just.”

Having said the above it is the decision of this court that the Regional Magistrate ought to have applied **Order XLVI rule 17** to dismiss the appeal. It was also for the appellant to make application to the court for readmission of his appeal under **Order XLVI rule 19**.

Another thing, which I have discovered in the proceedings of the Regional court, it contained a lot of errors, the records sometimes referred the appellant as the applicant and the respondent as the defendant. We all aware, that the parties in any appeal are known as the appellant and the respondent.

Having discussed the above I hereby nullify, quash and set aside the entire proceedings before the Regional court as well the judgement which give rise to this appeal. This court further orders the appeal to be remitted to the Regional Court to be heard de novo by another Magistrate of similar jurisdiction.

COURT:

Read this 20th May, 2014 in the presence of the Appellant and
the Respondent.

Sgd: Rabia H. Mohamed

Judge

20/05/2014.

I hereby certify that this is a true copy of the Original.

GEORGE J. KAZI
REGISTRAR
HIGH COURT
Z A N Z I B A R.

/Maulid: