IN THE COURT OF APPEAL OF TANZANIA

AT MTWARA

(CORAM: MWARIJA, J.A., KWARIKO, J.A. And MWANDAMBO, J.A.)

CIVIL APPEAL NO. 5 OF 2019

ARISTIBES PIUS ISHEBABI.....APPELLANT

VERSUS

1. **HASSAN ISSA LIKWEDEMBE**
2. **HASSAN MOHAMEDI MBARUKU (as the administrator of SAID MOHAMED MBARUKU**
3. **HASSAN MOHAMED MBARUKU**
4. **SAUL HENRY AMON**

.....RESPONDENTS

(Appeal from the decision of the High Court of Tanzania at Mtwara)

(Twaib, J.)

dated the 16th day of June, 2016

in

Civil Revision No. 3 of 2014

JUDGMENT OF THE COURT

11th & 20th February, 2020

MWARIJA, J.A.:

This appeal arises from the decision of the High Court of Tanzania at Mtwara (Twaib, J.) in Civil Revision No. 3 of 2014 dated 16/6/2016 (hereinafter "the impugned decision"). In the impugned decision, the High Court upheld the judgment of Mtwara District Court in Civil Case No. 1 of 2008 as well as the decision in Miscellaneous Civil Application No. 16 of 2009 which arose from that judgment.

The background facts giving rise to this appeal can be briefly stated as follows: The respondents, Hassan Issa Likwendebi, the late said Mohamed Mbaruku (appearing in this appeal through his legal representative, Hassan Mohamed Mbaruku) and Hassan Mohamed Mbaruku (the 1st - 3rd respondents respectively) were the plaintiffs in the District Court of Mtwara, Civil Case No. 1 of 2008. They instituted that suit against the appellant, Aristibes Pius Ishebabi claiming for a total of TZS 20,811,500.00 being the value of sea cucumber supplied to him by the respondents on credit.

According to the plaint, the 1st respondent supplied to the appellant the said sea product worth TZS 2,060,500.00 while the 2nd and 3rd respondents supplied the same kind of product worth TZS 13,668,000.00 and TZS 5,083,000.00 respectively. The respondents also claimed for general damages, interest and costs of the suit. The suit was heard *ex-parte* on account that the appellant was duly served by post through EMS and by way of publication in "Uhuru" Newspaper of 6th and 7th July 2008 but defaulted to file his written statement of defence.

At the hearing of the suit, the 1st -3rd respondents testified as PW1, PW2 and PW3 respectively. The substance of their evidence was to the effect that, they sold on credit the sea products to the appellant

whereon, by agreements entered between each of them and the appellant, the latter was to effect payments on 4/11/2008 or 5/11/2008. The contractual documents were admitted in evidence as exhibits.

Having considered the evidence and the tendered exhibits, the trial court was satisfied that the respondents had proved their respective claims and thus awarded them the respective amounts claimed. They were also awarded TZS 3,000,000 as general damages resulting from the appellant's breach of the agreements and costs of the suit.

The appellant was dissatisfied with the *ex-parte* judgment and thus intended to apply to set it aside under O. IX r.13 (1) and (2) of the Civil Procedure Code [Cap. 33 R.E. 2002] (the CPC) but the time to do so was not on his side. He therefore filed Civil Application No. 16 of 2009 moving the trial court under s. 14(1) of the Law of Limitation Act [Cap 89 R.E. 2002] for grant of extension of time to institute an application to set aside the *ex-parte* judgment (hereinafter the intended application).

Initially, the application for extension of time, which was instituted on 27/7/2009, was heard by Kahamba, RM who dismissed it. However, on appeal to the High Court vide Miscellaneous Civil Appeal No. 1 of 2010, the High Court (Lila, J. as he then was) ordered that the application be heard *de novo* before another magistrate on account that

the District Court did not determine the crucial issue whether or not the appellant had established a sufficient or reasonable cause for the delay in filing the intended application. Following that decision of the High Court, the application for extension of time was heard afresh by Fovo, RM (the successor magistrate). At the hearing, the appellant and the respondents were afforded the opportunity of filing their documents afresh. The respondents filed a joint counter affidavit on 29/11/2012 after service upon them of copies of the chamber application and the supporting affidavit which were filed afresh by the appellant. Having heard the parties, the successor magistrate found that the appellant had failed to establish sufficient cause for the delay. He thus dismissed the application.

The trial court's decision triggered the filling of several applications including applications for review as well as a number of appeals. In the end result however, the appellant instituted Civil Revision No. 3 of 2014, the subject matter of this appeal. That application was instituted by the appellant on 8/12/2014 after he was granted extension of time by the High Court (Kibela, J.) in Miscellaneous Civil Application No. 26 of 2013. In the said application for revision, the appellant essentially sought to fault both the *ex-parte* decision of the trial court in Civil Case No. 1 of 2008 and other decisions made in the applications filed subsequent to

the *ex-parte* judgment, including Miscellaneous Civil Application No. 16 of 2009. For the reasons which will be apparent herein, we find it apposite to reproduce the substantial part of the appellant's chamber summons as well as the supporting affidavit in extenso. In the chamber summons, the appellant sought the following orders:

> *"1. That this Honourable Court be pleased to call for records and quash the proceedings in Mtwara District Court Civil Case No. 1 of 2008 and subsequent orders therein including records in Mtwara District Court Misc. Civil Application No. 6 of 2009; Mtwara District Court Misc. Civil Application No. 7 of 2012 and Mtwara District Court Misc. Civil Application No. 2 and 3 of 2013, due to errors materials to the merits of the main case, i.e Mtwara District Court Civil Case No. 1 of 2008, and subsequent proceedings, involving injustice to the Applicant herein.*
>
> *2. Costs.*
>
> *3. For any other orders that may be deemed just and necessary to grant."*

With regard to the supporting affidavit, the appellant states as follows:-

> *"1. ....*
>
> *2. On the 24th April, 2009 I arrived at my home at Sinza in Dar es Salaam from Mtwara where I had gone on business trip and saw a notice issued by*

Unyangala Auction Mart Ltd & Court Brokers for sale of house No. 260, Block E, posted on the gate alleging that, the house will be sold after 14 days pursuant to order of the Kisutu Resident Magistrate Court in RM Civil Case No. 44 of 2008, attached herewith as Annexure AP-1, without according me the right to be heard.

3. *On following up the matter at Kisutu RM's Court I discovered that, there was an exparte judgment and decree issued by Mtwara District Court dated 29th August, 2008 and 29th September, 2008, respectively, attached herewith as Annexture AP-2. Collectively.*

4. *I immediately filed Mtwara District Court, Misc. Application No. 16 of 2009 applying for extension of time to file an application to set aside ex-parte judgment and decree and I also applied for stay of execution by way of attachment of my house in Dar es Salaam Misc. Civil Case No. 44 of 2006.*

5. *On the 26th January, 2010, the Mtwara District Court refused my application as per its ruling attached herewith as Annexure AP-3 which aggrieved me and I appealed against it before this honourable court in Misc. Civil Appeal No. 1 of 2010.*

6. *On the 1st April, 2010 the Dar es Salaam Resident Magistrate Court refused my application for stay of execution as per Annexure AP-4 of this affidavit and*

subsequent to that, it issued orders of attachment and sale of my residential house, and the latter was sold to the 4th Respondent.

7. *I appealed against the decision dated 26th January, 2010 in Misc. Civil Application No. 16 of 2009. On the 30th October, 2012, this Honourable Court entered a judgment in my favour as per Annexure AP-5 where this honourable court ordered trial de-novo of Misc. Civil Application No. 16 of 2009 before another magistrate.*

8. *Pursuant to that Judgment, the case file for Misc. Civil Application No. 16 of 2009 was returned to the Mtwara District Court and was assigned to Hon. Fovo, RM, for retrial.*

9. *On the 21st November, I filed Misc. Civil Application No. 7 of 2012 for restoration into suit premises pending hearing and determination of the application for extension of time in Misc. Civil Application No. 16 of 2009.*

10. *When I entered appearance before Mtwara District Court, I was ordered to file fresh pleadings in respect of Misc. Civil Application No. 16 of 2009. I did so on the 23rd November, 2012.*

11. *On the 23rd January, 2013, the Mtwara District Court, prior to the determination of Misc. Civil Application No. 7 of 2012, entered a ruling refusing my application for extension of time to set aside ex-parte judgment and decree of the trial court in Civil*

Case No. 1 of 2008, as per Annexure AP-6 of this affidavit.

12. *On the 24th January, 2013, the Mtwara District Court entered a ruling not to my favour in Misc. Civil Application No. 7 of 2012 as per Annexure AP-7 of this affidavit.*

13. *The above two rulings aggrieved me. On the 15th February, 2013 I filed two applications for review of the above rulings and orders, i.e Misc. Civil Application No. 2 of 2013 emanating from Misc. Civil Application No. 16 of 2009, originally Civil Case No. 1 of 2008, and Misc. Civil Application No. 3 of 2013 emanating from Misc. Civil Application No. 7 of 2012.*

14. *On the 3rd May, 2013 the Mtwara District Court entered rulings in the above applications and dismissed them as per Annexure AP-8 and AP-9.*

15. *I was aggrieved by those rulings and orders dated 3rd May, 2013 hence I filed application for revision number 2 of 2013, which was struck out on the 25th September, 2013 for being incompetent in the jurat of attestation as per Annexure AP-10 of this affidavit.*

16. *Immediately upon the striking out of the Civil Revision No. 2 of 2013 I filed application for extension of time to file application for revision, i.e Misc. Civil Application No. 26 of 2013 on the 22nd October, 2013.*

17. *On the 24th November, 2014, this Honourable Court, Hon. Kibela, J. granted leave to me to file this application out of time for revision of the ex-parte judgment and decree dated 29th August, 2008 and 29th September, 2008, respectively, in Mtwara District Court Civil Case No. 1 of 2008 and subsequent order in Dar es Salaam Resident Magistrate Court No. 44 of 2006; Mtwara District Court Misc. Civil Application No. 1 of 2009; Mtwara District Court Misc. Civil Application No. 7 of 2012; Mtwara District Court Misc. Misc. Civil Application No. 2 and 3 of 2013."*

In his submission before the High Court, the appellant challenged the ruling of the trial court which refused to grant him extension of time to institute the intended application contending that the trial court erred in failing to find that he had established sufficient cause for the delay. He argued further that he was not notified of the date of the *ex-parte* judgment and that such omission constituted a sufficient cause for the delay. According to his submission, he became aware of the judgment on 24/4/2009 and immediately thereafter filed the application for extension of time which was later dismissed by the trial court. According to the record, while the *ex-parte* judgment was handed down on 29/8/2008, the application for extension of time which was heard and decided for the first time by Kahamba, RM was filed on 26/10/2010.

He also challenged the judgment of the trial court in Civil Case No. 1 of 2008 contending that the same is tainted with illegalities on two aspects; **first**, that the decree arising from that judgment is defective and **secondly**, that the trial court's act of hearing the case *ex-parte* breached the provisions of O.V of the CPC particularly rr.7, 18 and 19. The cited rules provide for the manner in which a defendant who cannot be physically served or who refuses service may be served by affixation of a copy of the summons at his residence or place of business. They provide also for the manner in which such kind of substituted service may be proved as having been effected.

Relying further on O.V r. 22 of the CPC, the appellant argued that, since he was residing in Dar es Salaam, the summons could have been sent to the court having jurisdiction at the place where he resided so that that court could effect service on him. He argued that since that was not done, in essence, he was not duly served, and therefore the trial court erred in proceeding to hear the case *ex-parte*.

In its decision, the High Court found that the application for revision was devoid of merit. On the ground that the trial court failed to properly exercise its discretion to grant the application for extension of time, the learned judge agreed with the trial court that the appellant did not give reasons for the delay in filing the intended application, instead he

narrated the reasons upon which the ex-parte judgment could be set aside, the stage which was not yet reached because the relevant application had not been filed.

With regard to the ground that the *ex-parte* judgment was tainted with illegalities, the learned Judge found, **first**, that the alleged irregularity, that is, the decree was defective because it was neither signed nor dated or for contravening O.XX rr.3 and 7 of the CPC, could not have been of any relevance to the application for extension of time. **Secondly**, he found that even if such irregularities existed, they were not errors on the merit of the case involving injustice. For those reasons, the learned judge dismissed the application with costs.

The appellant was further aggrieved by the decision of the High Court and thus preferred this appeal raising the following two grounds:-

> *"1. The Honourable High Court erred in law and in fact when it refused to entertain the application for revision of the proceedings, judgment, decree, ruling and drawn orders emanating from Mtwara District Court Civil Case No. 1 of 2008.*
>
> *2. The Honourable High Court erred in law when it dismissed the application for revision and thus upheld the previous proceedings emanating from Mtwara District Court Civil Case No. 1 of 2008 which were marred by irregularities and*

illegalities."

At the hearing of the appeal, the appellant appeared in person, unrepresented, so were the 1st -3rd respondents. On his part, the 4th respondent had the services of Mr. Mohamed Mkali assisted by Mr. Kibasi Mwanjisi, both learned advocates.

In compliance with Rule 106(1) of the Tanzania Court of Appeal Rules, 2009 as amended (the Rules), on 31/5/2018, the appellant filed his written submission through Mr. Gregory C. N. Lugaila, learned counsel who, according to the record, represented the appellant in the lower courts. The appellant adopted the submission and urged the Court to allow the appeal.

In his written submission, the appellant reiterated the arguments which he advanced in the High Court in support of his contention that the trial Court erred in failing to grant the application for extension of time to file the intended application. Like in the High Court, he based his submission on the provisions of O.V rr.17, 18, 19 and 22 of the CPC contending that the same were not complied with so as to ascertain that he was duly served before the trial court proceeded to hear the case *ex-parte*. He also reiterated that he was not notified of the date of judgment contrary to O.XX r.1 of the CPC. He said that he became

aware of the judgment on 24/4/2009 when he was so informed by the Court broker who was appointed to carry out the execution of the decree.

On the second ground, he similarly reiterated the submission he made in the High Court, that the decree was defective adding that the same does not comply with O.XX r. 7 of the CPC. He pointed out that the date of the decree differs with the day on which the judgment was delivered. According to the appellant, had the High Court considered these factors, it would neither have upheld the decision of the trial court refusing his application for extension of time nor the *ex-parte* judgment.

In an unexpected situation, the 1st -3rd respondents who instituted the suit in the trial court and who had all along opposed among others, the application for extension of time to institute the intended application, conceded to the appellant's submission. All of them stated that they were supporting the arguments made by the appellant, meaning that they were supporting the appeal.

The appeal was, however, resisted by the 4th respondent, the buyer of the appellant's house. In his reply submission, Mr. Mkali, for the 4th respondent argued that the grounds of appeal lack merit. According to the learned counsel, the arguments made in support of the 1st ground of appeal are meritless because the appellant did not establish existence of

sufficient or reasonable cause for the delay in filing the intended application. Mr. Mkali argued further that, the High Court did not have the mandate of stepping into the shoes of the trial court to decide the matter which was purely in its discretion to determine unless in its decision, that court misdirected itself, a thing which the trial court did not do.

On the 2nd ground of appeal, the learned counsel argued that the learned High Court Judge was correct in deciding that the appellant did not give reasons for the contention that the *ex-parte* judgment was tainted with irregularities and illegalities but instead, he narrated the facts giving rise to the application for revision. The learned counsel added that the appellant's arguments are out of context because the same seek to fault the trial court's decision to proceed *ex-parte,* the arguments which could only be relevant in the intended application.

We have duly considered the submission of the appellant which, as stated above, was not opposed by the 1st – 3rd respondents as well as the reply submission made by the learned counsel for the 4th respondent. In determining the appeal, we wish to begin with the 2nd ground of appeal. We think we need not be detained much in disposing that ground of appeal. We hasten to state that, from the nature of the illegalities relied upon by the appellant, we agree with the learned High

Court Judge that the same had nothing to do with the *ex-parte* judgment. At page 5 of his submission, the appellant states as follows:

> " *On the second ground of appeal, it is our humble submission, apart from the above irregularities in the proceedings [relating to the decision in the application for setting aside ex-parte judgment] apart from the fact that, the Appellant's family house was sold to the 4th Respondent, there has never been a properly drawn decree. The decree found at page 38 of the record is dated 29th September, 2008, contrary to Order XX Rule 7 of the Civil Procedure Code, Cap. 33 R.E. 2002 as it differs with the date of judgment dated 29th August, 2008....*"

It is a trite position that a defect in a decree can always be rectified by issuing a properly drawn one. Its defect cannot invalidate a judgment. Now therefore, since in the High Court the appellant did not raise any ground concerning illegalities pertaining to the *ex-parte* judgment, we are unable to agree with him that the High Court erred in failing to revise the *ex-parte* judgment on the ground that the decree was defective. For these reasons, this ground of appeal is devoid of merit and we thus dismiss it.

That said and done, we turn to consider the first ground of appeal in which the appellant challenges the decision of the trial court arising

from the application for extension of time to file the intended application. Having considered the submissions of the appellant and the learned counsel for the 4th respondent, we are of the opinion that the learned High Court Judge rightly upheld that decision of the trial court. We purposely reproduced above, the contents of the appellant's chamber summons and the supporting affidavit filed in the High Court in respect of Civil Revision No. 3 of 2014. As can be gleaned from those documents, no where did the appellant state the reasons for faulting the decision of the trial court. It was for this reason that the learned High Court Judge observed as follows in his ruling at page 15 of the record of appeal:

> *"Did the learned Magistrate, in refusing extension of time, commit any error material to the merits of the case involving injustice which may justify this court in revising the decision? I have gone through the applicant's affidavit in support of the application for extension of time at the trial court and noted that the applicant instead of stating reasons for delaying to file an application for setting aside the aforesaid ex-parte judgment, narrated reasons for setting aside the ex-parte judgment, a stage that it [was] yet to be reached, as no such application has been filed."*

On the allegation that the decision in question was also tainted with illegalities, the learned High Court Judge had this to say:

> *" I agree that illegality in appropriate case constitutes sufficient cause for extending time: see* ***CRDB Bank (1996) Ltd v. George Kilindu,*** *Civil Application No. 162 of 2006 (unreported) and* ***Transport Equipment Ltd v. D.P. Valambhia*** *[1993] TLR 91. In our case however, I do not see how the defects highlighted by the applicant above could be of any relevance to the application."*

According to the appellant's submission both in this court and the High Court, the illegalities raised in the chamber summons relate to the *ex-parte* decision, not the decision in the application for extension of time. As stated above, the appellant contended that the trial court proceeded to hear and determine the case *ex-parte* without proof that he was duly served. Obviously, those are the matters which could be argued in the intended application. In his ruling at page 14 of the record, the learned High Court Judge stated as follows:

> *"Basically, the applicant is faulting the trial court for entertaining Civil Case No. 1 of 2008 in his absence. But these allegations ought to have been made in an application ... for setting aside the ex-parte judgment. Unfortunately, no such application was filed. His*

application for extension of time within which to file such application (Misc. Civil Application No. 16 of 2009) was refused by the trial court. That refusal should have been the subject matter of this revision. Otherwise, we will be faulting the trial court for matters which were never brought before it."

Indeed, it is a settled principle that where a defendant against whom an *ex-parte* judgment was passed, intends to set aside that judgment on the ground that he had sufficient reasons for his absence, the proper course for him is to file an application to that effect in the court which entered the judgment. - See for example, the decisions of the Court in cases of the **Government of Vietnam v. Mohamed Enterprises (T) Ltd**, Civil Appeal No. 122 of 2005, **MIC Tanzania Limited v. Kijitonyama Lutheran Church Choir**, Civil Application No. 109 of 2015 and **Jaffari Sanga Jussa & Another v. Saleh Sadiq Osman**, Civil Appeal No. 54 of 1997 (all unreported). This is because in most cases, the reasons for the defendant's absence involve matter which require to be established by evidence.

In the present case, the appellant unsuccessfully filed an application for extension of time to institute the intended application. Unless the application to set aside the *ex-parte* judgment had been filed and decided by the trial court, the argument made by the appellant in this

court and the High Court as regards the reasons for his non-appearance were thus misconceived.

On the basis of the foregoing reasons, this appeal must fail. The same is accordingly hereby dismissed with costs.

DATED at **MTWARA** this 18th day of February, 2020.

A. G. MWARIJA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The Judgment delivered this 20th day of February, 2020 in the presence of the appellant in person and 1st, 2nd and 3rd respondents in person and Mr. Kibasi Mwanjisi, learned counsel for the 4th respondent is hereby certified as a true copy of the original.

G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL