IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF MWANZA)

AT MWANZA

MISC. LAND APPLICATION NO. 82 OF 2020

NZIBIKIRE ROBERT ISACK ..... APPLICANT

VERSUS

ACCESS BANK TANZANIA (T) LTD ..... RESPONDENT

RULING

15th July, & 14th September, 2021

ISMAIL, J.

The Court has been called upon to exercise its discretion and set aside an *ex-parte* judgment on a counter-claim and order that the matter be restored for hearing *inter-partes*. The application has been taken at the instance of the applicant, the judgment debtor in HC-Civil Case No. 17 of 2017, whose judgment was delivered on 9th June, 2020. The application is supported by his own affidavit in which grounds for the prayers sought are set out. The applicant's contention is that no notice of hearing or summons was issued and served on him prior to the ex-parte hearing, meaning that the applicant was condemned unheard.

The application has been valiantly opposed by the respondent. In the counter-affidavit sworn by Noel Muhando, the respondent's principal officer, the applicant's averments have been strongly denied. The averment by the respondent is that the applicant was present when the hearing date of the counter-claim was set, and that it was unreasonable for the Court to issue a notice of hearing while the applicant was present in court.

Hearing of the application took the form of written submissions preferred in conforming with the filing schedule

Submitting in support of the application, the applicant contended that no notice was served on him, to call for his attendance to the proceedings on the counter-claim. He argued that the respondent and its counsel knew that they were suing the applicant on a counter-claim, and that they were under an obligation to issue a notice of hearing and/or a summons and conduct the proceedings in terms of Order VIII Rules 10 (1), (2) and 11 of the Civil Procedure Code, Cap. 33 R.E. 2019 (CPC). The applicant argued that, in the absence of a proper service, proceeding with the hearing of a counter-claim *ex-parte* was erroneous and in violation of the cited provisions of the CPC. The applicant urged the Court to set aside the *ex-parte* judgment.

The respondent's rebuttal submission began by tracing the genesis of the matter. Its counsel recalled that on 9th September, 2019, the date on which the applicant's counsel, Mr. Alfred Daniel, prayed to withdraw the suit, and that the prayer was duly granted. He argued that the withdrawal left the counter-claim which was not controverted, and that the decision to proceed *ex-parte* was done in the presence the applicant's counsel. Turning on to the application, the counsel argued that no good cause has been demonstrated by the applicant to warrant the grant of a restoration order.

With respect to non-service of the notice and condemning the applicant unheard, the argument by the respondent's counsel is that the contention is baseless, adding that the provision cited is misconceived. The respondent argued that in the present suit no person was joined to the matter as to require issuance of a notice of hearing of the counter-claim. The respondent further argued that the existence of the counter-claim was known to the applicant, thereby ruling out the requirement of serving the notice of hearing. He rubbished the applicant's contention that the applicant was condemned unheard. He argued that there is no law which provides that a notice of hearing should be issued. The respondent held the view that sufficient course had not been stated to warrant grant of a restoration order. He prayed that the application be dismissed with costs.

Rejoining to the respondent's submission, the applicant maintained that the provision of the law preferred as an enabling provision is the correct provision. With regards to the notice of hearing, the applicant was adamant that the notice of hearing was necessary, and the applicant has failed to prove that one was served on the applicant. He argued that condemning him unheard in respect of a staggering sum of TZS. 344,562,552/- was a serious flaw. The applicant reiterated his prayer that the *ex-parte* decision be set aside.

The parties' rival submissions raise one critical question. This is whether the applicant raises grounds for its grant.

The law accords a right to a party against whom the matter was determined *ex-parte* to apply to set aside the *ex-parte* decision, and have the matter restored and heard *inter-partes*. The condition precedent, however, is that the applicant must show that his non-appearance was for a good or sufficient cause. This applies in the cases where the order to proceed *ex-parte* arises from or is a result of the party's non-appearance, and the relevant provision in that respect is Order IX Rule 9 of the CPC. It provides as herunder:

> *"In any case in which a decree is passed ex parte against a defendant, he may apply to the court by which the decree was passed for an order to set it aside; and if he satisfies*

the court that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the court shall make an order setting aside the decree as against him upon such terms as to costs, payment into court or otherwise as it thinks fir, and shall appoint a day for proceeding with the suit:

Provided that, where the decree is of such a nature that it cannot be set aside as against the defendant only it may be set aside as against all or any of the other defendants also."

The cited provision has been emphasized in numerous decisions in this Court and the Court of Appeal. Some of these are: ***Benedict Mumello v. Bank of Tanzania*** [2006] E.A. 227; and ***Pimak Profesyonel Mutfak Limited Sikreti v. Pimak Tanzania Limited & Another***, HC-Comm. Application No. 55 of 2018 (unreported).

The applicant's challenge through this application is premised on the feeling that the respondent did not serve the notice of hearing of the counter-claim, which would present an opportunity for the applicant to be present and resist the counter-claim. Before I delve into the plausibility or otherwise of the applicant's contention, I feel obliged to set the record straight on the question of appearance, especially on the date on which hearing of the counter-claim was ordered to proceed *ex-parte*. This was on

12th September, 2019, the date on which the parties were represented by Mr. Alfred Daniel, learned counsel, for the plaintiff in the main suit (the defendant in the counter-claim), and Mr. Gondwe Amos, learned advocate whose services were enlisted by the defendant (the plaintiff in the counter-claim). The counsel was called to receive a ruling on the prayer for costs that came as a result of the decision Mr. Daniel, then representing the applicant, prayed to withdraw the suit. While the defendant's counsel (now the respondent) acceded to the withdrawal, he prayed for costs. He also raised a pertinent question on the fate of the counter-claim filed by his client. Besides deciding on the costs and the fate of the counter-claim, the ruling dwelt on the consequence of the applicant's failure to file a written statement to the counter-claim.

It is clear that on this day, the applicant was ably represented by counsel of his own choice, and that need did not arise for a notice of hearing or a summons the absence of which the applicant is hanging onto as a reason for his quest for setting aside the *ex-parte* judgment.

More importantly, in this matter, is the fact that the decision to proceed *ex-parte* did not arise as a result of the applicant's absence, a contention which is associated with the applicant's non-appearance when the matter came for orders. The factual position is that when the counsel appeared in

Court on 10th September, 2019, Mr. Gondwe Amos for the respondent informed the Court that the counter-claim against the applicant had not been contested as no written statement of defence had been filed and 21-day statutory period set therefor had elapsed. The counsel prayed for necessary orders. The Court took note of the applicant's failure to take the essential step with respect to the counter-claim. As a result, it held as follows:

> *"Consequently and, since it is quite undisputed that the said counter-claim has not been contested, I invoke the powers under Rule 14 (2) (b) of Order VIII of the CPC and order that the matter be proved ex-parte on the day to be appointed in that respect. It is so ordered."*

For ease of reference, Order VIII rule 14 (2) (b) of the CPC that the Court invoked, which is now rule 14 (1) under the Revised Edition of 2019, provides as hereunder:

> *"Where any party required to file a written statement of defence fails to do so within the specified period or where such period has been extended in accordance with sub rule 3 of rule 1, within the period of such extension, the court shall, upon proof of service and on oral application by the plaintiff to proceed ex-parte, fix the date for hearing the plaintiff's evidence on the claim."*

Noteworthy, the exercise of such powers by the Court is consequential to the applicant's failure to exercise the right accorded to him under rule 11 (1) of Order VIII, which provides for the filing of a reply to the counter-claim by a person who has been impleaded as the defendant in the counter-claim. The said rule provides as follows:

> *"Where a defendant sets up a counter-claim, the plaintiff and the person (if any) who is joined as a party against whom the counterclaim is made, shall each, if he wishes to dispute the counterclaim, present to the court a written reply containing a statement in answer to the counterclaim within twenty-one days from the date of the service upon him of the counterclaim."*

Gathering from the submission by Mr. Daniel when the matter came up for orders on 10th September, 2019, there can be no doubt that the applicant was duly served with the written statement of defence filed on 21st July, 2017, and in which a counter-claim whose hearing was done *ex-parte* was raised. Clear, as well, is the fact that the applicant did not file any reply to it or secure an extension of time within which to file a reply subsequent to the expiry of the twenty-one period. The record is also clear, that the respondent made an oral application, on 10th September, 2021, to have the matter proceed *ex-parte*, and that the submission was granted by the Court

on 12th September, 2021. This culminated into an *ex-parte* judgment that the applicant is fighting to set aside.

I am not convinced that circumstances of this case, as stated herein, have anything to do with the alleged failure by the respondent to serve any notice of hearing or summons for appearance by the applicant. This was a default or failure to contest the counter-claim. Such failure can neither be blamed on the respondent nor was it attributed to the applicant's non-appearance in court. It is an outcome of handing the respondent a 'walkover' on allegations levelled by the respondent.

In view of the foregoing, I hold that the application is not only based on sheer misconception but also lacking in merit. Consequently, I dismiss it with costs.

Order accordingly.

DATED at **MWANZA** this 14th day of September, 2021.

M.K. ISMAIL

JUDGE