IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MUSSA, J.A., MKUYE, J.A. And WAMBALI, J.A.)

CIVIL APPLICATION NO. 109 OF 2015

MIC TANZANIA LIMITED..... APPLICANT

VERSUS

KIJITONYAMA LUTHERAN CHURCH CHOIR.....RESPONDENT

(Application from the decision of the High Court of Tanzania
(Commercial Division) at Dar es Salaam)

(Mansoor, J.)

dated the 17th day of April, 2015
in
Misc. Commercial Application No. 90 of 2013

RULING OF THE COURT

28th September 2018 & 18th February, 2019

WAMBALI, J.A.:

The applicant was the defendant in Civil Case No. 30 of 2010 which was lodged by the respondent (plaintiff) at the District Court of Ilala in Dar es Salaam Region. The respondent had instituted the suit and sought declaration that the applicant had infringed a copyright of a song called "Hakuna Mungu kama wewe". The applicant thus prayed for the orders of perpetual injunction against the applicant and its servants or agents or any of them or otherwise from infringing upon the respondent

copyright; damages to the tune of One Hundred Million Shillings (100,000,000/=) and costs of the suit.

The applicant lodged the written statement of defence and denied the allegation and claims. The applicant also lodged the notice of preliminary objection protesting the hearing of the suit on merit.

The applicant however, did not appear at the trial court to prosecute the preliminary objections and defend the suit. The District Court of Ilala therefore dismissed the preliminary objections and proceeded to hear the suit ex-parte.

In the end, an ex-parte judgment was entered in favour of the respondent. The applicant who was earlier at the trial represented by a firm of advocates, M/S Kings Law Chambers Advocates instructed M/S Law Associates Advocates to take over the matter. Subsequently thereafter Miscellaneous Commercial Application No. 90 of 2013 was lodged at the Commercial Division of the High Court of Tanzania that sought extension of time within which to lodge a notice of appeal and the appeal to contest the ex-parte judgment and decree of the trial court.

The High Court, Commercial Division heard the parties and delivered its ruling on 17th April, 2015 in which the application was dismissed with costs.

It is from that background that the applicant approached this Court under section 4(3) of the Appellate Jurisdiction Act, Cap 141 R.E. 2002 (the AJA) and Rule 65 of the Tanzania Court of Appeal Rules, 2009 (the Rules) seeking to move the Court to call for and examine the records of Proceedings, Ruling and Order of the High Court of Tanzania, Commercial Division (Mansoor, J.) in Miscellaneous

Commercial Application No. 90 of 2015 dated 17th April, 2015. The applicant urges the Court to satisfy itself as to the correctness, legality, propriety or otherwise of the findings, decisions or orders made therein and where appropriate quash and set aside the ruling and order dated 17th April, 2015.

The grounds upon which the applicant hinges her dissatisfaction with the decision of the High Court, Commercial Division in this application are that:

"(a) *Contrary to what was stated in the application and affidavit in support thereof the High Court failed to appreciate the reasons for delay advanced before it which was based on the fact that the applicant's newly instructed Advocates could not advise the Applicant on appropriate remedies available against the ex-parte judgment and decree and or do anything including filing the Notice of Appeal before being supplied with at least the copy of the judgment and decree and or perusing the court file;*

(b) *The High Court also failed to find that the reasons advanced before it for not filing the Notice of Appeal and appealing within time were sufficient to warrant condonation of delay; and*

(c) *The High Court also failed to appreciate the established principle of law that illegalities and or*

irregularities in the proceedings and or judgment and decree sought to be appealed against as demonstrated before it are in themselves sufficient reasons for extension of time".

The application is supported by the affidavit of Tumaini Shija the Principal Officer of the applicant and the written submissions lodged by M/S Law Associates Advocates.

Upon being served with the application, the respondent through the services of Godwin Muganyizi, learned advocate lodged affidavit in reply opposing the application together with written submissions. The learned advocate also lodged a notice of preliminary objection on the competence of the revision application.

When the application was called on for hearing on 28/9/2018, Mr. Rosam Mbwambo, learned advocate from M/S Law Associates Advocates appeared for the applicant. No appearance was entered by the respondent or his advocate. However, it was brought to the attention of the Court that the respondent was served through the counsel on 28th August, 2018.

In the circumstance, we proceeded to hear the application in the absence of the respondent under Rule 63(2) of the Rules.

We wish also to remark at the outset that although the hearing was ex-parte, the court required the counsel for the applicant to respond to the objection which was raised earlier on by the respondent on 17th June, 2015 on whether the applicant

could have filed revision instead of appeal against the decision of the High Court, Commercial Division. The counsel for the applicant explained briefly the bases on which the application had been brought. He supported his submission on the position of the law set in several decisions of this Court. In this regard, upon consideration of his arguments, we were convinced that the application is properly before the Court and we proceeded to hear the arguments on the grounds of revision.

It is important to note that the High Court, Commercial Division in its ruling observed that there were no sufficient reasons which were advanced by the applicant for condonation of delay. The applicant however, complains in the first ground that the learned judge failed to consider what was stated in the application and the affidavit when she reached that decision. The applicant bittery complains that the judge did not appreciate the fact that the newly instructed advocates could not have advised her properly on the way forward without having been supplied with the copies of the proceedings, ex-parte judgment and the decree.

This complaint is vivid in the notice of motion, the affidavit in support of the notice of motion sworn by the principal officer of the applicant, Tumaini Shija, the written submission and the oral submission of Mr. Mbwambo, learned advocate when he addressed us in Court at the hearing of the application.

Firstly, on this point we think that the story of Tumaini Shija, the Principal Officer of the applicant on when the applicant got the information of the date of delivery of judgment by the trial court and when the new advocates, M/S Law Associates Advocates were instructed to handle the matter is contradictory. In

paragraphs 4 and 5 of the affidavit which was before the High Court judge, Tumaini Shija states that sometimes in September, 2012 the applicant received notice that the judgment was to be delivered on 6/9/2012 and that it was not delivered on that day but was delivered on 24/9/2012. Yet the notice of motion which was lodged together with the affidavit indicated that the prayer for extension of time was for the purpose of appealing against the decision which was delivered by the trial District Court of Ilala on 29th August, 2012. Thus, if we go by paragraph 5 of Tumaini Shija's affidavit that M/S Law Associate Advocates were instructed to take up the matter on appeal after the decision was delivered on 24/9/2012, the argument that the new lawyers who took over from M/S Kings Law Chambers Advocates could not have advised the applicant on appropriate remedies against the ex-parte judgment early is questionable. The issue of the delivery of judgment and when the new advocates were instructed to take over the matter also appears in paragraphs 7 and 8 of the applicant's skeleton arguments before the High Court which were lodged by the advocate.

It is also important to note that the issue of the delivery date, (24/9/2012) of the judgment is also reflected in both letters writen by M/S Law Associates Advocates to the Principal Resident Magistrate Ilala District Court on 26/9/2012 and 30/7/2013.

On the other hand, the affidavit of Tumaini Shija lodged in this Court in support of the application for revision indicates that the ex-parte judgment of the District Court was delivered on 24/08/2012. Yet the words in brackets which precedes the notice of motion and the affidavit show that the decision of the District Court of Ilala

was delivered on 29th August, 2012. This matter was also countered by paragraph 5 of the affidavit in reply which was lodged by the respondent's advocate on 16/6/2015.

Unfortunately, although the written submission was lodged in this Court by the applicant's counsel on 27/7/2015 which was after the respondent's advocate lodge an affidavit in reply, paragraph 4 of the same still maintains that the ex-parte judgment was delivered on 24/8/2012 and that M/S Law Associates Advocates were immediately instructed and wrote a letter requesting for copies of judgment and decree as well as the proceedings.

Indeed, what is apparent, in our view, is that paragraphs 4 and 5 of the affidavits of Tumaini Shija differs from each other in respect of the affidavit which was before the High Court, Commercial Division and before this Court though they are in respect of the same matter. For purpose of clarity we better reproduce them herein below:

AFFIDAVIT BEFORE THE HIGH COURT

"4. *That the Applicant was initially being represented by M/S King's Law Chambers, Advocates and thus all services were being made through the said lawyers. Sometimes in September, 2012 the applicant received a notice of the date of judgment to be delivered on 6/9/2012. When it inquired with the lawyers I was informed by Mr. Makene Advocate of Kings Law Chambers that they are not aware that*

hearing had proceeded and the matter is due for judgment.

5. *That on 6/9/2012 the judgment was not delivered. It was delivered on 24/9/2012 it transpired that the same was ex-parte. The applicant was aggrieved and thus instructed M/S Law Associates Advocates to take up the matter on appeal. Law Associates Advocates immediately wrote a letter requesting for copies of Proceedings, Judgment and Decree for appeal purposes. A copy of the said letter is attached as Annexture TIGO 1."*

AFFIDAVIT BEFORE THE COURT OF APPEAL

"4. *That the Applicant was initially being represented by M/S Kings Law Chambers, Advocates. Sometimes in September, 2012 the Applicant received a notice of the date of ex-parte judgment.*

5. *That on 24/08/2012 the ex-parte judgment was delivered. The unbeknownst (sic) of what is in the record of proceedings and the ex-parte judgment the Applicant instructed M/S Law Associates Advocates to take up the matter. Law Associates Advocates immediately wrote a letter to the trial Court requesting for copies of Judgment and Decree as well as the record of proceedings."*

A thorough reading of the extracted paragraphs from the two affidavits of Tumaini Shija reveals the following matters.

First, there is a deference of what was said in respect of the date of delivery of the ex-parte judgment; where the information was obtained on the date of delivery of the same and who received the said information. There is also uncertainty on when M/S Law Associates Advocates were instructed to take up the matter (whether after 24/08/2012 or after 24/9/2012).

Indeed, it is not known why the deponent's story on the date of delivery of the judgment differed at the High Court and the Court of Appeal. However, according to paragraph 11 of his affidavit lodged at the High Court, the applicant had been granted opportunity to peruse the record of proceedings and had in possession the copies of the judgment and decree which were attached then and even in the record of revision before this Court. Indeed, a copy of the judgment shows that the decision of the trial District Court was delivered on 29th August, 2012. Moreover, the applicant sought extension of time at the High Court to file the notice of appeal and appeal against the decision of the trial District Court that was delivered on 29th August, 2012 and not otherwise. Furthermore, there is nowhere in the affidavits of Tumaini Shija both in the High Court and in this Court where he has denounced the vivid fact that the judgment in consideration was not delivered on 29th August, 2012, although he reproduced the record of what transpired in the trial District Court between 6/12/2010 to 14/8/2013.

Two, although Tumaini Shija inquired from Mr. Makene advocate from M/S Kings Law Chambers, Advocates on the date of delivery of the judgment and was informed by him that he was neither aware of the hearing date nor the date of judgment, there is no affidavit from the said advocate to substantiate the claim. This would have helped to gauge the truth of the matter and the period of transition between when M/S Kings Law Chambers, Advocates stopped to be engaged in the matter and when M/S Law Associates Advocates took over the conduct of the case. Unfortunately, it is also not known whether the direction by the applicant to withdraw the instruction from M/S Kings Law Chambers Advocates to M/S Law Associates Advocates was oral or in writing. This fact was not placed before the High Court or in this Court despite the fact that in both the counter affidavit and reply to the affidavit of Mr. Tumaini Shija by Mr. Godwin Muganyizi, the learned advocate for the respondent the issue of lack of affidavit of Mr. Makene was raised in paragraphs 1 and 2 of the respondent's written arguments at the High Court and paragraph 7 of the affidavit in reply. In those paragraphs the advocate for the respondent emphasized that no reasons had been stated for the failure of former lawyers of the applicant to appear at the District Court during the proceedings.

Interestingly, the learned advocate for the applicant states in paragraph 3 of the written submission lodged in this Court that. "*...the applicant tried to contact her lawyer but in vain. Having at the time retained M/S Law Associates Advocates the Applicant instructed the newly retained lawyers to follow up the matter only to find out that the matter had proceeded ex-parte against her and it is due for judgment.*"

With due respect, this statement, we venture to state, is contrary to what Tumaini Shija said in the affidavit at the High Court that he managed to contract Mr. Makene advocate from M/S Kings Law Chambers Advocates who was not aware of what had transpired in the trial court concerning the hearing and date of judgment. This is different from stating that her lawyer was unsuccessfully contacted. What is more interesting is that in the affidavit before this Court, Tumaini Shija said nothing about contacting Mr. Makene advocate.

Three, going through the letters dated 26th September, 2012 and 30th August, 2013, no one can entertain doubt that in both letters, M/S Law Associates Advocates informed the trial District Court that the applicant intended to apply to set aside the ex-parte judgment. We better reproduce the relevant parts of both letters on this matter.

(26th September, 2012 letter)

"...Being dissatisfied with the judgment, our client intends to apply to set aside the ex-parte decision.
We therefore request a copy of the Judgment, Decree and Court proceedings to be availed to us, in order to assist the preparation of the Application.
Yours sincerely,
Sgd. .....
LAW ASSOCIATES, ADVOCATES"

(30th July, 2013 letter)

"4. That on the 26th day of September, 2012 we wrote to this Honourable Court requesting for a copy of the Judgment, Decree and Proceedings.

5. That we have not been availed with the same to date.

6. We humbly request this Honourable Court to avail us with a copy of the Judgment, decree and Proceedings to assist us in the preparation for our application to set aside the Ex-parte Judgment.

Respectfully,

FOR AND ON BEHALF OF LAW ASSOCIATES ADVOCATES.

Sgd. .....

ADVOCATE

CC: Opposite party

CC: Client."

It is important to note that unlike the second letter, the first letter was not copied to the applicant and the respondent. However, in view of the clear statement from both letters, it seems the instruction of the applicant to the advocates (M/S Law Associates Advocates) was not to appeal but to apply for setting aside the ex-parte judgment.

In this regard, we think that the statement of Tumaini Shija in paragraph 5 of his affidavit which was before the High Court that M/S Law Associates Advocates was directed "***to take up the matter on appeal***" cannot be justified.

Surprisingly, in his affidavit before this Court there is no instruction to take the matter on appeal but simply "**to take up the matter**" as reflected in paragraph 5. It follows that the contention in ground (a) in the notice of motion that the newly instructed advocates (M/S Law Associates Advocates) could not have advised the applicant on appropriate remedies available against the ex-parte judgment and decree before being supplied with at least a copy of judgment and decree or perusing the trial court file cannot be substantiated. This is so because both letters were very clear on the course which the advocate intended to take and thus the crucial issue was to lodge an application before the trial court and explain why the former advocates were prevented from appearing up to the time judgment was delivered ex-parte. Here, we take cognisance of the fact that, be that as it may, the applicant knew that there was an ex-parte judgment before 6 September 2012 as per affidavit of Tumaini Shija. Indeed, according to paragraph 3 of the written submission by the learned counsel for the applicant quoted above at page 14, it shows that when a follow up was done it transpired that the matter had proceeded ex-parte against the applicant and it was due for judgment. It is in this regard that a letter dated 26th September 2012 was written to the trial court by M/S Law Associates Advocates. Indeed, if we go by paragraph 4 of the affidavit of Tumaini Shija before the High Court, the applicant knew that the ex-parte judgment was to be delivered on 6/9/2012 although it was not delivered on that date.

In the event, taking into consideration of what we have described and discussed above with regard to ground (a) of complaint, we pause and ask ourselves whether by dismissing the application for extension of time the High Court judge failed to appreciate the reasons for delay which were placed before her by the applicant. We think, with due respect, that the answer is emphatically No. In the circumstances, we have no hesitation to conclude that this ground has no basis as no sufficient reasons were demonstrated by the applicant. We dismiss it.

Furthermore, with regard to ground (b) of complaint, we think, in view of what we have said above, this matter need not detain us any longer. We hasten to add that if the applicant was determined to file the notice of appeal in the High Court, Commercial Division, that could have been done within fourteen days (14) as required by Rule 69 (4) of the High Court, Commercial Rules, 2012 as observed by the High Court judge in her ruling. It is plain that apart from the inconsistences and contradictions on the dates of delivery of judgment of the trial court in the affidavit of Tumaini Shija which we have observed above, no one can doubt that the applicant had information concerning the of delivery of judgment before 6/9/2012. That is why his principal officer (Tumaini Shija) contacted the former lawyer Mr. Makene advocate. The applicant was thus required to have sought clarification and more information on the status of the case before the trial court. She could also had immediately followed closely on the matter and lodged the notice of appeal before the expiration of 14 days if she so wished. Indeed, as stated by the respondent and

the High Court judge, lodging of the notice of appeal would not have required to be accompanied with either a copy of the proceedings or judgment or decree of the trial court. The duty of the applicant was to know the date of the delivery of the judgment. The applicant could not therefore have waited to file the notice of appeal until when she was supplied with the relevant documents on 27/8/2012 as alleged in paragraph 15 of Tumaini Shija's affidavit before the High Court. In this regard, we similarly entertain no doubt that this ground has no merit and it is accordingly dismissed.

Lastly, in ground (c) of complaint, the applicant blames the High Court judge to have failed to appreciate the established principle of law that illegalities and irregularities is sufficient reason for extension of time. In the circumstances of this matter, we think this argument cannot apply. We think we have amply demonstrated above that the first option which was available to the applicant was to apply to set aside the ex-parte judgment under Order IX Rule 13 (1) within 21 days since the trial court, proceeded under Order IX Rule 6 (1) of the Civil Procedure Act, Cap. 33 R.E. 2002. Indeed, as we have shown above, through the letters to the trial court the direction and the intention of the applicant was to apply to set aside the ex-parte judgment. The option of appealing to the High Court by the applicant came later, almost after one year as the letter dated 30th August 2013 still carried the desire of the applicant to apply to the District Court to set aside the ex-parte judgment. The applicant was thus supposed to have utilized that option to convince the trial court that there were reasons for non-appearance both before the hearing of the

preliminary objections in which the matters of law were pointed out and during the hearing of the case. If the applicant could have convinced the trial court, she could have pointed the alleged illegalities. If the trial court could have declined to set aside the ex-parte judgments she would have appealed to the High Court. Thus, if the appellant wanted to appeal, this would have been done in time.

We are however aware of the argument of the applicant's advocate that the applicant had the option of either appealing or applying to set aside the ex-parte judgment and that both remedies can be exercised concurrently. This matter was delt at length by the High Court judge in her ruling. Nevertheless, in the circumstance of this case, the applicant should have applied to set aside the ex-parte judgment. However, the remedy of setting aside ex-parte judgment could only have ceased if the applicant could have appealed and the appeal determined conclusively. This option has not been exhausted since the applicant has not appealed to the High Court. Besides, the District Court would have been better placed to hear the arguments on non-appearance than the High Court. In the event, this ground is also dismissed.

In the final analysis, we are settled in our mind that the applicant has not sufficiently demonstrated that special circumstances exist to enable us to apply the powers of revision under section 4 (3) of the AJA to revise and quash the proceedings and ruling and set aside the order of the High Court, Commercial Division dated 17th

April, 2015 that dismissed the application for extension of time within which to file a notice of appeal and an appeal.

We therefore dismiss the application in its entirety. However as the respondent did not enter appearance when the application was heard, we make no order as to costs.

DATED at **DAR ES SALAAM** this 5th day of February, 2019.

K. M. MUSSA
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

S. J. Kainda
DEPUTY REGISTRAR
COURT OF APPEAL