IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: MWARIJA, J.A., KITUSI, J.A., And KEREFU, J.A.)

CIVIL APPEAL NO. 260 OF 2018

MOUNT MERU FLOWERS TANZANIA LIMITED ..... APPELLANT

VERSUS

BOX BOARD TANZANIA LIMITED ..... RESPONDENT

(Appeal from the Ruling of the High Court of Tanzania at Arusha)

(Opiyo, J.)

dated the 10th day of May, 2016
in
Civil Case No. 8 of 2016

JUDGMENT OF THE COURT

8th & 12th February, 2021

KITUSI, J.A.:

The respondent, a limited liability company, instituted a civil action against the appellant, also a limited liability company, by presentation of a plaint at the High Court in Arusha on 5th March, 2016. On 3rd May, 2016, the appellant filed a Written Statement of Defence, henceforth, a WSD, after a summons had been issued to it on 11th day of March, 2016. These dates and the type of summons issued to the appellant are significant in the determination of the matter before us.

When the parties appeared before the trial Judge, the respondent raised a preliminary objection alleging that the WSD had been filed out of the statutory time. According to the respondent, the WSD was supposed to have been filed within 21 days of the service of summons on the appellant, but it was filed 44 days later. The appellant's position on the other hand was that when a matter is instituted at the High Court, the defendant is served with a summons to appear, in which case he may file a WSD within 7 days of the date of first hearing if he so wishes. He further argued that since the matter was scheduled for hearing on 10th May, 2016, the WSD field on 3rd May, 2016 was within time.

The learned High Court Judge sustained the preliminary point of objection and held the WSD to be out of time and ordered the matter to proceed for ex parte proof. Aggrieved, the appellant challenges that decision on three grounds.

The first ground of appeal is that: -

> ***"(a) The Honourable trial Judge erred both in law and fact in ruling that the appellants were properly served with summons to file written Statement of Defence within 21 days from the date***

of service but failed to do so within time.

Parties were represented by counsel who had earlier filed respective written submissions and they addressed the Court orally to clarify on those written submissions. In arguing the first ground of appeal, Mr. Michael Lugaiya who represented the appellant, combined it with the second ground of appeal which raises the following complaint: -

> ***"(b) The Honourable trial Judge erred both in law and fact in ruling that the summons to appear for hearing required the appellant to file a written statement of Defence within 21 days from the date of service."***

Counsel for the appellant submitted that the summons issued to the appellant had the word *"mention"* cancelled, so that it remained that the matter was set for *"Hearing."* He further argued that a summons for hearing which was issued to the appellant is governed by the provisions of Order V Rule 1 (a) of the Civil Procedure Code, [Cap. 33, R.E. 2002] hereafter the CPC. He went on to argue that where a summons to appear has been issued the defendant may, and if required by the court he shall, within seven days before the first hearing, present a WSD. It was Mr. Lugaiya's submission further that the appellant acted in compliance with

the above law by filing the WSD seven days before the date of first hearing.

Referring to relevant parts of the ruling under consideration, Mr. Lugaiya submitted that after appreciating that the summons issuable by the High Court is a summons to appear under Order V Rule 1 (a) of the CPC, the learned High Court Judge ought to have dismissed the point of objection and that it was not open for her to invoke what she referred to as the practice of the Court, that went against the law.

The third ground of appeal is more of a conclusion of the first two grounds than a ground of appeal itself. It states: -

> ***"(c) The Honourable trial Judge erred both in law and fact in ruling that the written Statement of Defence was filed out of time."***

On the other hand, Mr. Mgoha learned counsel who acted for the respondent, had two arrows to his bow. First, he submitted that the copy of summons appearing at page 52 of the supplementary record of appeal is not the one that the appellant was served with. He recalled that the appellant had been allowed to file a supplementary record so as to include the correct copy of summons, but he has still filed the same old copy that had been objected to earlier. In rejoining this point, Mr. Lugaiya

submitted that what has been filed in the supplementary record is the only copy of summons which the appellant was supplied with by the court registry. Mindful of Rule 99 (1) of the Tanzania Court of Appeal Rules, 2009, (the Rules), we asked Mr. Mgoha why he did not file a supplementary record to include the correct summons he is referring to. However, the learned counsel was unable to rationalize his inaction.

We are going to determine this point here and now. We have no doubt in concluding that the decision of the High Court was based on the summons that has been presented by the appellant. The other summons which is being referred to by the respondent's learned counsel remains a myth since he did not make use of Rule 99 (1) of the Rules to file it by way of a supplementary record. The said Rule provides: -

> *"99 – (1) Where a respondent is of opinion that the record of appeal is defective or insufficient* ***for the purpose of his case,*** *he may lodge in the appropriate registry eight copies of a supplementary record of appeal containing copies of any further documents or any additional parts of documents which are, in his opinion, required for the proper determination of the appeal."(underlining ours)*

In this case, while counsel for the respondent would have us believe that there is another summons and that it is required for the proper determination of this appeal in his favour, he has played seek and hide about it and denied us access to it. We shall therefore proceed with what we have on record.

The second point that Mr. Mgoha argued forms the crux of the matter. The learned counsel submitted that the summons at page 52 of the record required the appellant to appear and also to file a WSD within 21 days. He appeared to us to be appreciating that the law provides for issuance of *"summons to appear"* as one scenario and *"summons to file WSD"* as another. However, he submitted, the summons in question required the appellant to do both.

The learned counsel went on to submit that if the appellant's counsel considered the summons defective or not to be in accordance with the law, he should have desisted from filing a WSD and instead raise an objection against the summons. When asked to comment on the correctness of the statement by the High Court at page 128 of the supplementary record regarding the summons that may be issued by the High Court that it is a summons to appear, counsel stated that the statement is incorrect.

In a final rejoinder, Mr. Lugaiya submitted that the appellant acted in accordance with the law as it then stood, that is, Order VIII Rule 1 (1) of the CPC because that was the procedure obtaining in the High Court, and that the matter had been scheduled for hearing.

When considered, all these arguments call for our interpretation of the provisions of Order V Rule 1 (a) and (b) read together with Order VIII Rule 1 (1) and (2) of the CPC. The former provision has hitherto been amended, but as it stood then, it provided as follows: -

> "*V - 1. When a suit has been duly instituted, a summons may be issued to the defendant at the time when the suit is assigned to a specific judge or magistrate pursuant to the provisions of rule 3 of Order IV –*
>
> *(a) to appear and answer the claim on a day to be specified therein (hereinafter referred to as a summons to appear); or*
>
> (b) *if the suit is instituted in a court other than the High Court and the court so determines to file, in accordance with subrule (2) of rule 1 of Order VIII, a written statement of defence to the claim (hereinafter referred to as a summons to file a defence).*"

With respect, whatever fine arguments presented by counsel, Order V rule 1 (a) & (b) of the CPC creates two types of summonses that is; **First**, a summons to appear which is only issued when a matter is filed at the High Court. There is a corresponding duty to the defendant under Order VIII rule I (1) of the CPC which provides: -

> *"VIII – (1) where a summons to appear has been issued the defendant may, and if so required by the Court all, withln seven days before the first hearing, present a written statement of his defence."*

Second, a summons to file a defence with a corresponding duty to the defendant under Order VIII rule 1 (2) of the CPC which provides: -

> *"VIII – (1) Where a summons to file a defence has been issued and the defendant wishes to defend the suit, he shall, within twenty-one days of the date of service of the summons upon him, present to the Court a written statement of his defence."*

In view of the foregoing clear provisions of the law, there is no way the High Court could have issued upon the appellant a hybrid summons requiring him to appear and to present a WSD at the same time, as suggested by Mr. Mgoha. The case of **Tanzania Habours Authority v.**

Mohamed R. Mohamed [2003] T.L.R. 77 which Mr. Mgoha cited in his submissions is an authority for the proposition that procedural laws should be followed. If that be the case, and we agree it is, then there was no justification for the learned High Court Judge invoking rules of practice to replace the clear provisions of the law. The learned Judge stated at page 128 of the supplementary record: -

> *"It is true as argued by Mr. Umbula that the summons issuable at the High Court is the summons to appear under Order V rule 2 (a) of the CPC which gives a room to Order VIII 1 (1) to apply. However, the same law VIII rule 1 (1) gives a room for the Court to dictate otherwise by using the words "if so required by the court shall." In the circumstances at hand out of practice the Court so required the defendant to file WSD within 21 days from the date of service .... the defendant was supposed to comply with the direction and in case he had* ***reservation against use of wrong summons*** *he could have formerly objected it instead of trying to act in what he sees or thinks right* ***suo motu*** *in the name of being served with wrong summons." (emphasis ours)*

With respect, we think the foregoing approach placed the appellant between a rock and a hard surface and he should not have been punished

for it. First of all, the provision of Order VIII rule 1 (1) of the CPC does not impose a duty on the defendant to file a defence but only when ordered by the High Court he may do so within seven days of service. The words *"if so required by the court"* do not empower the Court to direct the defendant to act outside the law. The other reason is that, the learned Judge appears to have realized that there was an error in the summons, yet she proceeded to fault the appellant in the manner he acted. Mr. Mgoha submitted in support of the view taken by the trial Judge that the appellant should have objected. We wonder how would that objection have been communicated to the court. We think the principle that parties should not be punished for errors committed by the court is sound in the circumstances of this case. See the case of **The Attorney General v. Ahmad R. Yakuti and 2 Others,** Civil Appeal No. 49 of 2004 (unreported).

We wish to make two observations before we conclude. One, the provisions of Order V rule 1 (a) and (b) and Order VIII rule 1 (1) and (2) of the CPC have since been amended, to provide for only one type of summons, a summons to file a WSD within twenty-one days. Two, it is settled law that courts should encourage matters to be determined on merit, unless under exceptional circumstances, they cannot. We stated so in the case of **Independent Power Tanzania Limited v. Standard**

Charted Bank (Hong Kong) Limited, Civil Revision No.1 of 2009 (unreported). In that case, after discussing the right to be heard as a principle of natural justice enshrined in our Constitution, the Court went on to say: -

> *"**Ex post facto** hearings, therefore, should be avoided unless necessitated by exceptional circumstances, as they are at times riddled with prejudice apart from being a negation of timely and inexpensive justice, which we all strive for".*

We also associate ourselves with the principle that justice is better than speed. This has been stated in a number of the Court's decision such as, **Thomas Peter @ Chacha Marwa v. Republic,** Criminal Appeal No. 322 of 2013; **Zena Adam Abraham & 2 Others v. The Attorney General & 6 Others,** Consolidated Civil Revision No. 1, 3 & 4 of 2016 (both unreported) and; **Independent Power Tanzania Limited v. Standard Charted Bank (Hong Kong) Limited,** (supra).

On the basis of what we have tried to show above, the learned Judge's conclusion that the appellants" WSD had been filed out of time, was erroneous because the law as it stood then allowed the defendant to file it within seven days before the first hearing. Thus, we quash the ruling of the High Court and set aside the order which directed the case to

proceed for ex parte proof. We order the suit to proceed inter *partes* before another Judge from the stage where the appellant had filed the written statement of defence. The appeal is, thus, allowed.

Costs to abide by the outcome of the case.

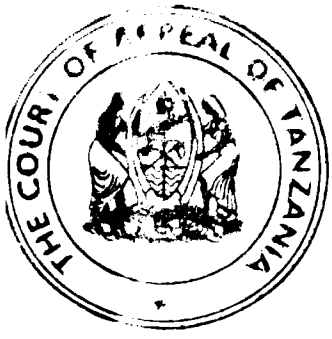
DATED at **ARUSHA** this 11th day of February, 2021.

A. G. MWARIJA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The Judgment delivered this 12th day of February, 2021 in the presence of Mr. Michael Lugaiya, learned counsel for the appellant and Mr. Robert Mgoha, learned counsel for the Respondent, is hereby certified as a true copy of the original.



H. P. NDESAMBURO
DEPUTY REGISTRAR
COURT OF APPEAL