IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: LILA, J.A., KEREFU, J.A., And KAIRO, J.A.)

CIVIL APPEAL NO. 147 OF 2019

1. **METRO PETROLEUM TANZANIA LIMITED..... 1ST APPELLANT**
2. **BILL KIPSANG ROTICH ..... 2ND APELLANT**
3. **FLORENCE CHEPKOECH ..... 3RD APPELLANT**
4. **PREMIUM PETROLEUM COMPANY LIMITED ..... 4TH APPELLANT**

VERSUS

UNITED BANK OF AFRICA.....RESPONDENT

(Appeal from the Ruling of the High Court of Tanzania, Commercial Division at Dar es Salaam)

(Songoro, J.)

dated the 24th day of July, 2015
in
Misc. Commercial Application No. 96 of 2015

JUDGMENT OF THE COURT

22nd September & 14th December, 2021

KAIRO, J.A.:

This appeal arises from the ruling of the High Court of Tanzania, Commercial Division at Dar es Salaam following its refusal to grant the appellants an extension of time within which to make an application to set aside a default judgment and decree in Commercial Case No. 98 of 2014.

Further to that, the appellants also pray to set aside the said default judgment.

Briefly, the factual background that culminated to this appeal as discerned from the record of appeal is that; sometimes in June, 2013, the respondent advanced a loan facility worth USD 5,000,000.00 to the 1st appellant. The loan was secured by the guarantee duly executed by the 2nd, 3rd and 4th appellants among other securities. In between, the 1st appellant defaulted to pay the loan. Following the said situation, the respondent instituted Civil Suit No. 98 of 2014 against the appellants jointly and severally at the Commercial Court praying to be paid the outstanding debt, interest accrued and costs.

The appellants were served through an alternative service after what was alleged by the process server, one Saki Maganga to be fruitless effort to trace them in their indicated fixed abode. The 1st, 2nd and 3rd appellants were served by publication in the East African and Citizen newspapers, being Kenyan Citizens while the 4th appellant was served by DHL. All the same, the appellants neither filed their written statements of defence nor appeared in court. Thus, the court entered a judgment in default against

all of them for failure to file their written statements of defence on 15th October, 2014.

It was alleged by the appellants that they became aware of the default judgment and decree on 18th October, 2014 and started to co-ordinate and look for the counsel to assist them who eventually filed Miscellaneous Commercial Case No. 292 of 2014 on 13th November, 2014 for an extension of time to set aside the ex-parte judgment and decree. However, the application was struck out on 23rd March, 2015 for being incompetent. The appellants later filed an application No. 96 of 2015 on 23rd April, 2015 seeking for an extension of time within which to make an application to set aside the default judgment and decree entered against them as the statutory period of 21 days prescribed under Rule 22 (2) (b) of GN. No. 250 of 2012 had long lapsed. They further prayed for an order to set aside the default judgment if the extension of time to set aside the default judgment would be granted. The Commercial Court declined to grant the appellants the prayers sought after making a finding that they failed to account for 27 days of delay, hence this appeal before us comprising of six grounds of appeal which are interrelated. After a thorough scrutiny of the said grounds of appeal together with the

submissions by the parties for and against, we are of the view that they all boil down to the following main complaint:-

> *(1) That, the High Court erred in law in disregarding illegalities committed by the respondent during service of summons to the appellants in the main suit which made the latter fail to file their defenses and enter appearance in Commercial Court, as a result a default judgment and decree were entered against them.*

At the hearing, the appellants were represented by Mr. Dilip Kesaria assisted by Mr. James Bwana, both learned counsel. On the other hand, the respondent was represented by Mr. Tumaini Shija assisted by Ms. Hafsa Sasya, both learned counsel as well.

Arguing on the stated ground, Mr. Kesaria faulted the correctness of the High Court decision which denied the appellants the extension of time sought basing on a single finding that, the appellants have failed to account for the delay of 27 days despite the pointed-out irregularities which is also a ground for an extension of time. Elaborating, Mr. Kesaria contended that the said irregularities hinged on an omission to serve summons to the appellants so as to inform them on the instituted Commercial Case No. 98 of 2014 against them, as a result the default

judgment was entered against them. He further elaborated that, the service of summons at the Commercial Court is governed by Rule 17 (1), (2) and (3) of the High Court (Commercial Division) Procedure Rules, 2017 and Order V Rules 9 to 33 of the Civil Procedure Code Act Cap 33 R.E. 2019 (the CPC). He went on to list down the relevant provisions pertaining to the said issue as follows: -

(i) That Order V Rule 12 of the CPC provides for the service of the summons to defendant in person or his empowered agent.

(ii) That Order V Rule 13 of the CPC provides for the service of summons upon a manager or an agent within the local limits of the jurisdiction of the court.

(iii) That Order V Rule 17 of the CPC provides for affixing summons on an outer door of defendant's residence or place of business after using all due and reasonable diligence to find the defendant.

(iv) That Order V Rule 20 (1) of the CPC provides for substituted service where there is a reason to believe that the defendant is keeping out of the way for the purpose of avoiding service or that for any reason the summons cannot be served in the ordinary way.

(v)That Order V Rule 28 of the CPC provides for service upon defendants residing in Kenya, Uganda, Malawi and Zambia with known agent in Tanzania.

Mr. Kessaria also submitted that despite the above stated provisions of the CPC, a substituted service may be effected electronically by way of e-mail or facsimile. He went on to argue that, the learned Judge in the case at hand did not comply with any of the above provisions with regards to serving summons to the appellants. As such, the purported service of summons by publication was illegal. Mr. Kessaria added that the order for substituted service was made without considering the requirement of Order V Rule 20 (1) of the CPC.

He went on to state that, the same learned Judge conceded on the existence of illegalities in the application with regards to the mode of serving summons to parties who resides outside Tanzania. That upon the said finding, the learned Judge granted leave to appeal to the Court in Misc. Commercial Application No. 205 of 2015, though he dismissed the application for the extension of time, the denial which is subject to challenge in this appeal.

He went on to argue that the appellants (applicants then) further brought to the Judge's attention the illegalities in their skeleton written arguments as well as the affidavits of the 2nd applicant (2nd appellant therein) in support of the application for extension of time at paragraph

18 which were neither denied nor controverted by the respondent. He argued that the Hon. Judge erred for failing to consider the aforesaid uncontroverted statement of the 2nd appellant which demonstrated the illegality of the purported service of the summons upon the appellants in the Commercial Case No. 98 of 2014. He concluded that the default judgment in the said suit therefore was illegal, a fact which was not taken into account in the decision subject to challenge. He thus, invited the Court to allow the appeal with costs, quash and set aside the decision under discussion, further vacate and set aside the default judgment and decree in Commercial Case No. 98 of 2014 and allow the appellants to file their written statements of defence together with other orders this Court would deem just to make.

In response, Ms. Sasya brought to the attention of the Court that the 2nd and 3rd appellants were the directors of the 1st and 4th appellants, thus serving them summons through the 1st appellant was proper. She submitted that it is not within the mandate of the respondent to choose the process server but the court concerned. She added that, likewise in the case at hand, it was the Commercial Court which chose Saki Maganga to serve the summons.

Ms. Sasya went on to submit that, courts would normally take into account various factors when exercising the discretion to grant a prayer for an extension of time and not only the illegality of the decision subject to challenge. She refuted the appellants' argument that the learned Judge did not take into account the illegalities in the proceedings leading to the default judgment and further argued that the complaint that the appellants were not properly served was not true. She elaborated that the order to serve the appellants through substituted service was issued after exhausting all the efforts to serve the appellants. He referred to us pages 95 – 97 of the record of appeal to back up her contention. That after the process server failed to locate the appellants and swore an affidavit to that effect, the order for substituted service was issued as per Order V Rule 17 of the CPC. Thus, the appellants' argument that the trial Judge did not take into consideration the strict adherence to summons serving provisions does not arise as a point of law. She submitted that the allegation requires evidence to substantiate it. She cited the case of the **Principal Secretary Ministry of Defence and National Service v. Devram Valambia** [1991] T.L.R. 387 which stipulated that the illegality of the impugned decision must be clearly visible on the face of the record. She also referred us to the case of **Lyamuya Construction Co. Ltd v. Board of**

Registered Trustee of Young Women's Christian Association of Tanzania, Civil Application No. 20 of 2010 (unreported) which stated that the point of law at issue must also be that of sufficient importance. But further to that, it should be apparent on the face of the record.

Ms. Sasya went on to argue that, the question of illegalities was not brought to the attention of the learned Judge for his determination, as such he was right not to mention it in his ruling. She finally beseeched the Court to agree with the High Court that the appellants have failed to account for all the period of delay in the application for extension of time denied by the High Court. She further prayed the Court to find out that there was neither apparent nor clear illegality on the face of the impugned decision as required by law. She cited the case of **Ngao Godwin Losero v. Julius Mwarabu**, Civil Application No. 10 of 2015 (unreported) to back up her argument. Ms. Sasya added that in the matter at hand, the question to be asked is whether the appellants were served and the answer is in the affirmative. She concluded by praying the Court to find that this appeal is without merit and dismiss it with costs.

Having heard the rival arguments of the learned counsel representing the parties and going through the parties written submissions, the issues for our determination are:-

i) *Whether the appellant raised illegalities in the application under scrutiny and if yes.*
ii) *Whether the alleged illegalities were determined by the learned judge in his decision.*

However, before our analysis, we wish to put it clear that, we have noted with appreciation the lengthy research conducted by the counsel for the parties, particularly the appellant counsel in this appeal. But for the reason to be apparent later, we will only refer to the arguments which are relevant in determining the issues before the Court.

It is not in dispute that courts have a wide discretionary power of granting or denying an extension of time when sought. However, for the said decision to stand, the discretionary powers must be exercised judiciously, reasonably, and based on sound legal principles and not arbitrarily. It is also a settled principle that an appellate court would not interfere with the discretionary powers of the lower court in that aspect unless the discretion exercised is in contravention of the above stated principles and that the contravention resulted into miscarriage of justice.

The Court has stated that stance in various cases including the cases of **Swabaha Mohamed Shosi v. Saburina Mohamed Shosi**, Civil Appeal No. 98 of 2018 and **Tusekile Dancan v. Republic,** Criminal Appeal No. 202 of 2009 (both unreported). In **Swabaha Mohamed Shosi** (supra) the Court held that, an appellate court can interfere with the discretion of the lower court if, among others, it has acted on a matter that should have not acted upon, or it has failed to take into consideration that which it should have taken, and as a result, it has arrived at a wrong conclusion. We shall be guided by the above principles in determining this appeal.

In the decision subject to challenge, the High Court declined to grant the extension of time sought by the appellants after making a finding that the application to set aside a default judgment was inordinately filed out of time and the applicants (appellants herein) failed to account for the period of delay, as such, no sufficient reason was advanced by the applicants (appellants herein) to warrant the grant of extension of time. However, the appellants in this appeal faulted the said learned Judge's decision for failing to consider the illegalities raised in the application for the extension of time despite being brought to his

attention, instead went on and determine the application basing only on the failure to account for the days of delay.

On the other hand, Ms. Sasya argued that the alleged illegalities have never been brought to the Court's attention that is why the same were never considered. The law is settled that where illegality is raised as a ground for seeking an extension of time, such ground amounts to sufficient cause. The Court in **Ngao Godwin Losero** (supra) quoted the case of **Devram Valambia** (supra) observed as follows when the issue of illegality was raised:-

> *"In our view, when the point at issue is one alleging illegality of the decision being challenged, the Court has a duty, even if it means extending the time for the purpose, to ascertain the point and if the alleged illegality be established, to take appropriate measures to put the matter and the record straight."*

The Court has further reaffirmed the stated stance in **VIP Engineering and Marketing Limited and Three Others v. Citibank Tanzania Limited**, Consolidated Civil Reference No. 6, 7 and 8 of 2006 (unreported) wherein it was clearly stated;

> *"It is, therefore, settled law that a claim of illegality of the challenged decision constitutes sufficient*

reason for extension of time under rule 8 ***regardless of whether or not a reasonable explanation has been given by the applicant under the rule to account for the delay"***
[emphasis added]

As earlier stated, the first issue for determination is whether the appellants raised illegalities in application No. 96 of 2015 which decision is challenged in this appeal.

Going through the affidavit of the applicants (appellants herein) and the skeleton written arguments, the grounds for the delay to file the application to set aside the default judgment were twofold; **one,** the need to coordinate so as to institute the application to set aside the ex-parte judgment took longer time than the time permitted legally to institute the same, considering that the appellants (the applicants therein) are residents of Kenya; and **two;** that there were illegalities committed by the respondent with regards to summons serving to the appellants in Commercial Civil Suit No. 98 of 2014. Further to that the affidavits of the 2nd applicant's paragraph 18, 3rd applicant's paragraphs 15 and 16, as well as the 4th applicant's paragraphs 4 up to 6 explained on the alleged illegalities. On top of that, the joint skeleton written arguments of the appellants further elaborated on the complained legal contravention. For

ease of reference, we wish to quote paragraphs 4 up to 7 sworn by Mr. Mugo Ruthiru, the General Manager of the 4th applicant, and an excerpt from the skeleton written arguments appearing at pages 268 and 320-321 respectively of the record of appeal as follows: -

> 4. *"That I am aware that the 1st Applicant and the Respondent are in constant communication in respect of a loan taken by the former to which I am aware that the 4th Respondent provided corporate guarantee therein. It came as a surprise to me to lean that there has been instituted the Commercial Case against the 4th Applicant, as a guarantor and decree has been obtained while 4th Applicant not being served with the summons on the case.*
>
> 5. *That I am informed by Counsel for 4th Applicant that the Respondent informed the Honourable Court that it has sent the summons to the 4th Respondent through DHL Courier services. I aver that the said DHL Containing the Summons for the Commercial Case has never reached the 4th Respondent.*

6. *I am advised further by Counsel for the 4th Applicant that the law on serving a party located in Kenya was not complied with.*

7. *I aver furthermore that the Respondent was aware of the physical, postal, telephone and electronic addresses of the 4th Applicant and has not used the same to serve the 4th Applicant with the Summons of the Court Case".*

The part of the excerpt from the skeleton written arguments by the applicants (appellants herein) stated as hereunder:-

> *"Provision of Order V Rule 28 of the Civil Procedure Code Cap. 33 R.E. 2002 on service to Defendant resident in Kenya were not complied with. Furthermore, the provisions of Rule 17 (1) of the Commercial Court Rules on the electronic substituted service though available on respondent were not opted for." (Paragraph 5 at pg 320 - 321)*

Interpreting the above averments, the complaint generally was that the appellants were not served as legally required. Though Ms. Sasya has argued that the alleged illegalities were not brought to the High Court's attention but the above pointed out averments in the appellants' affidavits together with the excerpt negates that argument. Besides,

the record further reveals that the respondent had also responded to the said allegation in the skeleton written arguments at pages 433 – 434 of the record of appeal. In the circumstances, we find the argument by Ms. Sasya in this aspect not supported by the record. Basing on the record of appeal, we are convinced that the issues on illegalities were raised by the appellants and consequently refuted by the respondent. Thus, it was a contentious matter which called for determination by the High Court.

Having answered the first issue in affirmative we now revert to the second issue as to whether the alleged illegalities were considered by the High Court. We need not be detained by this issue. Our reading of the ruling and particularly pages 454 – 456 of the record of appeal reveals that the High Court declined to grant the application only after finding that the applicants (appellants herein) failed to account for the days of delay and completely disregarded the issue of illegalities despite being raised and submitted upon before the court by both parties.

One of the basic principles in the administration of justice is the duty of the court to determine points of controversies or issues brought before it. This is the principle which finds expression in Order XX Rule 4

of the Civil Procedure Code Cap 33 R.E.2019. We wish to reproduce the contents of the said rule which guides on the contents of a judgment.

> *"A judgment shall contain a concise statement of the case, the points for determination, the decision. thereon and the reasons for such decision".*

Though the cited provision refers to the judgment, but in our view the principle therein is applicable in any type of decision in court following the hearing of a matter. In **Alnoor Shariff Jamal v. Bahadir Ebrahim Shamji**, Civil Appeal No. 25 of 2006 quoted with approval a Kenyan case of **Kukal Properties Development Ltd v. Maloo and Others** (1990 – 1994) E.A. 281 when faced with a similar situation, it states "A *judge is obliged to decide on each and every issue framed, failure to do so constitute a serious breach of procedure".*

We are alive that the cited case discussed the determination of the framed issues by the court concerned, but the issues are framed out of the points in controversy. We think therefore, the principle is also applicable in the matter at hand as far as determining point in controversy is concerned.

Flowing from the above, the omission to determine the issues of illegality which were pleaded by the applicants and addressed by the

counsel from both sides of the application was a serious breach of procedure which could result into miscarriage of justice. In this regard, we are of the view that the Court is justified to interfere with the exercised discretionary powers by the High Court in this matter as we hereby do for its failure to take into consideration what it should have, namely, considering illegalities addressed by the parties. It is our considered view that had the learned Judge considered them, he would probably had come up with a different finding.

The remaining part to decide is the way forward. We wish to point out that, Mr. Kesaria had a fleet of prayers as above narrated. One of them is to allow the appellants file their written statements of defence after vacating and setting aside the default judgment and decree in Commercial Case No. 98 of 2014, but upon reflection, he decided to leave it to the wisdom of the Court. On our part, we wish to state that, since we find the issue of illegality was placed before the High Court for consideration but was not addressed, it follows that we have no basis to address other issues on the record, most of which are concerned with the merits of the matter that had not been determined yet by the High Court. We therefore decline Mr. Kesaria's invitation, with much respect.

In the end result, we allow the appeal with no order to costs having found that the omission was done by the court. We further quash the ruling of the High Court in Civil Application No. 96 of 2015. We also order that the case file be remitted to the High Court for it to determine the issue of illegality which was omitted in its ruling with regards to the extension of time sought.

It is so ordered.

DATED at **DAR ES SALAAM** this 10th day of December, 2021.

S. A. LILA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

This Judgment delivered this 14th day of December, 2021 in the presence of Mr. Laurent Leonard and Emmanuel Ally, both learned counsel for the Appellants, and Ms. Hafsa Sasya, learned counsel for the respondent, is hereby certified as a true copy of the original.

F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL