

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: LILA, J.A., LEVIRA, J.A., And KIHWELO, J.A.)

CIVIL APPEAL NO. 286 OF 2021

SIMON PIUS MWACHILO.....APPELLANT

VERSUS

GRATIAN THADEO MUTASHOBYA

(As a legal representative of

FRED EDWARD)1ST RESPONDENT

NASMA AUCTION MART & COURT BROKERS.....2ND RESPONDENT

OBADIA LUPHINGO MTEWELE.....3RD RESPONDENT

**(Appeal from the Decision of the High Court of Tanzania, Land Division
at Dar es Salaam)**

(Wambura, J.)

dated the 8th day of June 2018

in

Misc. Land Case Application No. 662 of 2017

.....

JUDGMENT OF THE COURT

9th July, & 11th August, 2023

KIHWELO, J.A.:

Time immemorial, the phrase "*Justice delayed is justice denied*" has often been used to emphasize the importance of timely and efficient delivery of justice. This is in realization that when a legal system fails to provide

justice in a timely manner, it can lead to frustration, loss of faith in the system, and even further injustice. Conversely, "*Justice hurried is justice buried*" in the sense that, a rush in the delivery of justice can also lead to incorrect and unjust outcomes. Hence, the later phrase is used to caution against hasty decisions in the name of expediency, bearing in mind that *speed is good but justice is better* and the spirit of justice does not reside in hasty decision but rather in just decision.

The appeal before us presents similar outlook of the two phrases referred to above, and particularly the second. The appellant, Simon Pius Mwachilo, seeks the reversal of the decision of the High Court of Tanzania, Land Division (Wambura,J.) dated 08.06.2018 which dismissed the application for restoration of Land Case No. 92 of 2013.

The background to this appeal has a bit of protracted history as it emanates from Land Case No. 92 of 2013 (the suit) which was lodged by the appellant against the first and the second respondents on 07.05.2013 in relation to a piece of land located at House No. 320, Mwenge within Kinondoni Municipality known as Maryland Bar (the suit property). The appellant sought the court to order that the suit property should not be attached in satisfaction of the decree of the court in an earlier case, Civil

Case No. 134 of 2005 issued by Kinondoni District Court, and instead declare that the same is the property of the beneficiaries of the late PIO M.S. MWACHILO. The first and second respondents lodged separate written statements of defence, sturdily opposing the claim by the appellant.

It occurred that, the matter was initially handled by Hon. Judge Mansour from 08.05.2013 to 12.12.2014, then, Hon. Judge Nchimbi and finally Hon. Judge Wambura (the learned trial judge) who on 18. 07. 2017 dismissed the suit under Order VIIIA rule 5 of the Civil Procedure Code [Cap. 33 R.E. 2002] (CPC). Unamused, the appellant on 31.07.2017 lodged an application under Order IX rule 9(1) and section 95 of the CPC seeking the court to vacate its order dismissing the suit for failure to comply with a scheduling order or to appear at the first Pre-Trial Conference and restore the suit and fix the date for hearing on merit.

Upon hearing the parties on the merit of the application, the learned trial judge found out that, there was no justifiable reasons advanced by the appellant for the court to exercise its discretionary power to set aside its order of 18.07.2017 and thus, she dismissed the application with costs. Unhappy with that decision, the appellant has approached this Court by way of an appeal.

The appellant's Memorandum of Appeal is comprised of four grounds of complaint namely;

- 1. That the trial Judge erred in law when she refused to vacate the order dismissing the suit while the appellant was personally present in court on the ground that he did not give sufficient reason for his absence;*
- 2. That the trial Judge erred in law when she refused to restore the suit which was dismissed in the presence of the appellant without giving the appellant an opportunity to proceed himself;*
- 3. That the trial Judge erred in law when she refused the application on the ground that Mr. Mugyabuso advocate did not swear an affidavit while there was one attached to the affidavit in reply; and*
- 4. That the trial Judge erred in law in strictly sticking to procedural technicalities without regard to substantive justice.*

On 09.06.2023 when the matter was ripe for hearing, the appellant was represented by Mr. Barnaba Luguwa, learned counsel, while Mr. Armando Swenya, learned counsel appeared for the respondents. The learned counsel for respondents lodged written submissions in opposition to the appeal which he fully adopted during the hearing, while the learned counsel for the appellant elected to make oral submission in terms of rule 106 (10) (b) of the Tanzania Court of Appeal Rules, 2009. In the upshot, Mr.

Luguwa invited us to allow the appeal with costs, whereas Mr. Swenya, urged us to dismiss the appeal.

We are grateful to both learned counsel for their useful assistance to the Court. We propose to discuss the grounds of appeal in a pattern preferred by Mr. Luguwa and bearing in mind that, in essence the appellant faults the learned trial judge for her failure to restore the application while the suit was dismissed in the presence of the appellant who was not given an opportunity to proceed herself.

Mr. Luguwa prefaced his submission by praying to abandon grounds 3 and 4. He also, prayed to combine grounds 1 and 2 in the course of arguing the appeal. In his submission, he argued that, on 18.07.2017 the suit was fixed for First Pre-Trial Conference before the learned trial judge and that the appellant was present in person, the first and second respondents were absent while the third respondent was represented by Mr. Mtiginjola, learned counsel. However, the learned judge dismissed the appeal under Order VIIIA rule 5 of the CPC, Mr. Luguwa argued.

Mr. Luguwa contended further that the appellant lodged an application seeking to vacate the impugned order of dismissal for the reason that the

suit was dismissed while the appellant was present in person. In his view, this was inappropriate, because Order VIIIA rule 3 (1) of the CPC permits the court to proceed with Pre-Trial Conference where a party to a case is present and therefore it was not proper for the learned trial judge to dismiss the suit while the appellant was present in person, and bearing in mind that records are silent as to whether the appellant was consulted if he wanted the matter to proceed or not.

Illustrating further, Mr. Luguwa submitted that, what is expected during Pre-Trial Conference is expressly provided for under Order VIIIA rule 3 (1) of the CPC and the learned trial judge could have resorted to the approach provided by the law as the appellant was present in person, and that dismissal was not one of the options available under the law at that time. He thus, took the view that, the appeal has merit and therefore it should be allowed.

Conversely, Mr. Swenya, elected to adopt the written submissions in rebuttal to the appeal without more. In his written submission the learned counsel argued that, the learned trial judge was right in refusing to vacate its dismissal order in terms of Order VIIIA rule 5 of the CPC since the appellant's counsel was not diligent enough as he did not avail the appellant

with any message to relay to the court knowingly that the matter was coming for First Pre-Trial Conference while at the same time he was engaged in another matter at High Court in Tanga.

In his view, the learned trial judge correctly applied the provisions of the law citing Order VIIIA rule 5 of the CPC. Reliance was also placed in the case of **A.H. Muhumbira & Others v. John K. Mwanguku**, Misc. Civil Appeal No. 9 of 2002 (unreported) for the proposition that negligence on the part of the counsel does not constitute sufficient reason for extension of time. We must confess to our being rather surprised by the learned counsel for the respondents' reliance on the case of **A.H. Muhumbira & Others** (supra) which in our view is not applicable because the impugned decision related to application to vacate the order and restore the suit and not extension of time.

Arguing further in opposition to the appeal, the learned counsel curiously contended that, the appellant had ample time to raise any comment on the whereabouts of his legal counsel. However, the record bears out that, the learned trial judge did not provide any opportunity to the appellant other than dismissing the suit.

The learned counsel contended further that, the affidavit in support of the application was not supported by the affidavit of his colleague Mugyabuso. He paid homage to the case of **Umoja Garage v. National Bank of Commerce** [1997] T.L.R. 109 for the proposition that negligence on the part of the counsel does not constitute sufficient reason for extension of time, which in our view, just like the case of **A.H. Muhumbira & Others** (supra) we earlier on remarked, is not applicable because the impugned decision related to application to vacate the order and restore the suit and not enlargement of time. Thus, he contended that, the appeal has no merit.

Our starting point will be examination of the decision of the learned trial judge who dismissed the suit when the matter came up for First Pre-Trial Conference. As to what exactly transpired before the High Court, and which ultimately led to the impugned decision, we wish to let record of appeal at pages 43 and 44 of the supplementary record speak for itself:

"Date: 18.07.2017

Coram: Hon. S.A.N. Wambura, J.

For Plaintiff/ Applicant: Present in person

For 1st Defendant: Absent

For 2nd Defendant: Absent

For 3^d Defendant: Mr. Mtiginjola, Advocate

B/Clerk: D. Mhagama

Mtiginjola:

The matter was scheduled for 1st PTC but all the other parties are absent. We pray for the court's directives.

Plaintiff: *My counsel has travelled. He has got an emergency.*

Court:

The counsel for the plaintiff was present when the matter was scheduled for 1st PTC on 06.07.2017. This being a long outstanding matter he could have notified the court or sent any other counsel to hold his brief. In the circumstances the matter is dismissed under Order 8A Rule 5 of the Civil Procedure Code with no orders to costs.

Sgd. S.A.N.Wambura

JUDGE

18.7.2017"

Clearly, the excerpt above speaks for itself that, the learned trial judge do not appear to have asked the appellant who was present in person whether he could proceed with first Pre-Trial Conference on that particular day or not.

Our next attempt is reflection of the law by then, which provided for failure of a party or his recognized agent or advocate to appear without good cause to comply with a scheduling order or to appear at a conference. For

the sake of clarity, we wish to reproduce the provisions of Order VIIIA rule 5 of the CPC which provided thus;

"Where a party to a case or the party's recognised agent or advocate fails without good cause to comply with a scheduling order, or to appear at a conference held under sub-rule (1) of rule 3 or is substantially unprepared to participate in such conference, the court shall make such orders against the defaulting or unprepared party, agent or advocate as it deems fit, including an order for costs, unless there are exceptional circumstances for making such orders."[Emphasis added]

Furthermore, Order VIIIA rule 3 (1) of the CPC provided that:

"In every case assigned to a specific judge or magistrate, a first scheduling and settlement conference attended by the parties or their recognised agents or advocates shall be held and presided over by such judge or magistrate within a period of twenty-one days after conclusion of the pleadings for the purpose of ascertaining the speed track of the case, resolving the case through negotiation, mediation, arbitration or such other procedures not involving a trial."[Emphasis added]

Speaking of the above provisions, it is, perhaps, pertinent to observe that, the provisions of Order VIIIA rule 5 of the CPC is clear and loudly speaks for itself in that, it applies in a situation where none of the parties who are expressly stated, namely, a party to the case or the party's recognised agent or an advocate fails to appear or comply with the scheduling order or a scheduling conference held under Order VIIIA rule 3 (1) of the CPC without good cause.

Quite surprising, and for an obscure cause, the learned trial judge did not bother to invite the appellant who was present in person to express his view on whether or not he was ready to proceed in the absence of his advocate in terms of Order VIIIA rule 3 (1) of the CPC. In the contrary, the learned trial judge elected to dismiss the case despite the fact that dismissal was not one of the options under the law in force by then.

We are, of the considered view that, it was erroneous and wrong for the learned trial Judge to dismiss the suit in total disregard of the provisions of the law that did not permit dismissal of the suit, even if we assume for the sake of arguments that the appellant and his advocate were absent which is not the case.

Whilst we are mindful of the need for the courts to control proceedings, we hold the view that such control should be done in a manner that promotes and facilitates orderly and smooth conduct of cases which entails affording parties opportunity to present their cases within the spirit and confines of article 13 (6) of the Constitution of the United Republic of Tanzania, 1977 as amended. We held similar position in the case of **Gurmit Singh v. Meet Singh and Another**, Civil Appeal No. 256 of 2018 (unreported).

We wish to predicate the second part of our deliberation with a little exposition, for the future benefit. Upon dismissal of the suit, the counsel for the appellant lodged an application which was predicated on Order IX rule 9 (1) and section 95 of the CPC seeking to vacate the dismissal order and restore the suit. The question which has exercised our mind quite considerably is whether the counsel for the appellant took the right approach in moving the court under the cited provisions of the law.

In an attempt to answer that question, we wish to digress the provisions of Order IX rule 9 (1) of the CPC which provides that:

"Where a suit is wholly or partially dismissed under rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same

cause of action, but he may apply for an order to set the dismissal aside and, if he satisfies the court that there was sufficient cause for his non-appearance when the suit was called on for hearing, the court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit and shall appoint a day for proceeding with the suit" [Emphasis added]

On the other hand, Order IX rule 8 of the CPC provides that:

"Where the defendant appears and the plaintiff does not appear when the suit is called on for hearing, the court shall make an order that the suit be dismissed unless the defendant admits the claim, or part thereof, in which case the court shall pass a decree against the defendant upon such admission and, where part only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder." [Emphasis added]

The issue that emerges from the above provisions of the law is whether the counsel for the appellant properly moved the court to vacate the order dismissing the suit which is the basis of the impugned order. We must express ourselves more in sorrow rather in fear, our dismay in Mr. Luguwa's

misconception of the law in relation to the proper approach the appellant ought to have taken in challenging the dismissal of the suit.

It is clear from the record that, on the date when the suit was dismissed the appellant was present in person while the first and the second respondents were absent. Furthermore, the suit was fixed for First Pre-Trial Conference in terms of Order VIIIA rule 3 (1) of the CPC and the learned trial judge dismissed it under Order VIIIA rule 5 of the CPC. Under those circumstances, we are unable to grasp why Mr. Luguwa moved the High Court under Order IX rule 9 (1) of the CPC which deals with suits dismissed under Order IX rule 8 of the CPC, where the defendant appears and the plaintiff does not appear, when the suit is called on for hearing and not when the suit is fixed for Pre-Trial Conference. It was therefore, erroneous for the counsel for the appellant to have moved the High Court in the manner he did, and also bearing in mind that, in the instant case the appellant was present in person but the first and the second respondents were absent.

In the upshot, we allow the appeal. We reverse the impugned High Court's order that dismissed Land Case No. 92 of 2013 and direct that the record be remitted to the High Court for expeditious determination of the suit at the stage it had reached immediately before the impugned order.

Since none of the parties was to blame for the outcome of the impugned order, we make no order as to costs.

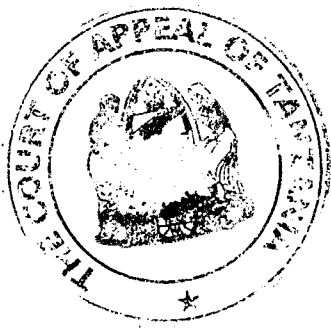
DATED at DAR ES SALAAM this 25th day of July, 2023.

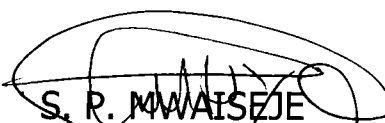
S. A. LILA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The Judgment delivered this 11th day of August, 2023 in the presence of Mr. Armando Swenya holding brief for Mr. Barnaba Luguwa learned counsel for the Appellant, Mr. Mluge Karoli Fabian for the 1st Respondent and Mr. Armando Swenya learned counsel for the 2nd and 3rd Respondents, is hereby certified as a true copy of the original.




S. P. MWAISEJE
DEPUTY REGISTRAR
COURT OF APPEAL