IN THE HIGH COURT OF TANZANIA

AT TANGA

MISC. CIV. APPL.NO. 3/2002

(Orginating from D/C Tanga Civil Case No.52/1998)

E.J. MMASI ..... APPLICANT

versus

K.S. MKUNDI ..... RESPONDENT

RULING

LONGWAY, J

This application by E.J. Mmasi the applicant, is for an order for the extension of time to file an appeal in this court against the exparte judgement x given against the applicant in the Civil Case No.52/1998 of the District Court of Tanga. The prayer is sought with costs and any other reliefs as the court may deem fit.

The applicant according to the facts deposed in her supporting affidavit states that she was represented by Mr. Akaro learned counsel. The trial magistrate in the Civil Case No.52/1998 had on the 26.10.2000 made an order for that matter to be heard exparte due to the applicant's non-appearance. This order was set aside and an order for an interparte hearing made in lieu thereof on the 30.11.2000 in the Misc. Civil Application No.38 of 2000 of the District Court of Tanga -'Annexture A1'. By the 23.1.2001, the same trial magistrate in the Civil Case No.52/1998 in an interlocutory process held her ruling in the 'Annexture A1' to be in force subject only to a review. 'Annexture A2', was with an expression of an intention to appeal against the ruling by counsel for the respondent, Mr. Lyamunga.

The applicant further deponed that while following up the 'Annexture A1 & A2' through Mr. Akaro's letter of 20.10.2001, the 'Annexture A3 and 4', the learned advocate learnt of the Ruling in the CIVIL REVISION No.6 of 2001 originating from Civil Case No.50/97 - 'Annexture A6 and the Exparte judgement in the Civil Case No.52/98 both dated the 16.5.2001. The process of the Civil

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Revision the applicant deponed was never served on her or her advocate and that by the time certified orders were received well after 22.6.2001, on the 19.11.01 when time for appeal had elapsed. Lastly, it is the applicant's deposition in paragraph 13 of her affidavit that her intended appeal has over whelming chances of succeeding. Mr. Akaro's affidavit in substance supports the applicant's affidavit.

The respondent's counter-affidavit admits paragraphs 1 - 5, 8, 10 and 11 and sought strict proof of paragraphs 6,7,9, and 12. The affidavit by Mr. Akaro is not countered.

It was the applicant's submission through her learned counsel Mr. Akaro that for purposes of the application the applicant has to show that there was reasonable or sufficient cause for the delay. On this the learned counsel submits on two subheads. On reasons for delaying to file the appeal refers to Annextures A1 and A2, the abandoned intention to appeal by the respondent followed by Annextures A3 to A6 which reveals Civil Revision No.6 of 2001 which was not served on the applicant and her counsel. It was Mr. Akaro's submission that the burden to establish that the applicant had notice of process and judgement was on the respondent. On the issue of good chances of the intended appeal to succeed the case of [illegible] vs [illegible] (1990) TLR 133 was referred to and submitted that on the face of the record there were several grounds of law and fact which give the intended appeal the strong likelihood of success. These all partly listed as follows:

(1) That the applicant was not given the opportunity to be heard in Civil Revision No.6 of 2001.

(2) That in accordance with section 79 of the Civil Procedure Code 1966 and section 44 of the Magistrates Court Act No.2 of 1984, the trial court lacked jurisdiction to exercise revisional proceedings.

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That the exparte judgement was based on the applicants failure to file a written statement of defence, but which was filed and replied to.

The reply submission by the respondent by Mr. Tahir Ali was to the effect that the application was incompetent and miscouceived and prayed that it be dismissed with costs. Learned counsel listed some 9 points viz:

(1) That the affidavit in support of the application not showing payment of prescribed fees, were not properly before the court, so they should be struck out. That an court has jurisdiction to decide a question rightly wrongly in law and fact so long as it has jurisdicti So it is submitted that the trial magistrate revisional order remains in forde. To this that the applicant should have resorted to section 79 of the Civil Procedure Code 1966 in line with the provisions of section 74 of the Code.

(2) That the applicant should have first set aside the exparte judgement before seeking appeal as per the case of [illegible] vs [illegible], [illegible] Court Digest 326 - Biron, J.

(3) That the applicant had ample time to have the exparte judgement set aside and did not do so - R.M. M.Z. Administrator of M.M. Agakhan Hospital, Dsm vs T. SINGH (1968) H.C.D. 353, so the applicant is time barred.

(4) That no reason for the inordinate delay has been given by the applicant when the exparte judgement was read in her presence and was duly notified.

(5) In further submission, learned counsel submitted that the judgement of the trial magistrate revisiong her own order was sound since the applicant deponed nothing against its merits.

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(6) It is submitted that Mr. Akaro knew there was no appeal against the order of the 23.1.2001, so he could not have waited for the appeal.

(7) That the appeal court would not have disturbed the quantum of damages.

(8) It is submitted by counsel that a magistrate's wrong decision cannot amount to bias unless facts as set out to demonstrate the same. In any case that the same was not addressed to the trial magistrate to allow her to disqualify herself.

(9) Lastly, it was submitted that the applicant was not diligent to pursue her remedies to set aside the exparte judgment and intended appeal, because she had sufficient time. But in any case that the intended appeal has no chance of succeeding.

In rejoinder, Mr. Akaro submitted the applicant's objection to having the respondents preliminary objections entertained because the established rule of procedure for dealing with preliminary objections was not followed. He submitted for the same to be struck out or disregarded.

In the alternative the learned counsel submitted that there was no law that demanding an indication of payment of fees on the face of the affidavit while filing fees can be checked with the court record. In any case he submitted that the supporting affidavits were properly before the court.

On the respondents reply in Item 1(b) and (c) Mr. Akaro submitted that the revision was heard exparte as shown in the Annexture A6 that the ruling was entered in the applicants (respondent's) presence on 16.5.2001. He went on that this applicant intended to appeal against the appellable revisional order. On the reply submissions of the respondent in Items 2 and 3, it was submitted that the MUONDOO vs JAMNADAS (1970) E.A. 326 case was misconstrued. That the High Court had ordered the appellant to deal with reasons for his failure to

appear first before dealing with the merits of his appeal. He submitted that in the present case the applicant was seeking to deal with the merits of his intended appeal, therefore distinguishable.

The learned counsel went on to submit on the provisions of section 70 of the Civil Procedure Code 1966 as compared with those of section 96 of the Indian Code of Civil Procedure as commented upon by [illegible] that in this case the exparte decree was wrong in law because it was based on the premise that the applicant (as defendant) had not filed written statement of defence when it was not so: ALI vs [illegible] (1950) 17 E.A.C. 68. Regarding the respondent's reply in Item 4, learned counsel submitted the record was clear that neither the applicant nor her advocate were present at the delivery of the exparte judgement or notified of the same as shown by Annextures A6, A5 and the trial magistrates contradictory record. The applicant's rejoinder submission reiterated her absence and that of the advocate on the delivery of the exparte judgement or their awareness of it before the 19.11.2001.

Latter on the 4.5.2002 Mr. Okaro wrote to the District Registrar appending a copy of authority additionally made in support of the applicants submissions on section 70 of the Civil Procedure Code 1966 on exparte judgement. The authority being the [illegible] LTD vs VITALIS AMALLO & 44 OTHERS Misc. Civil Appeal No.17 of 1999 HIGH COURT ELDT., unreported. The letter was copies to the respondent who objected to the process being pleadings had closed. In order to simplify the issue and as no indicator was made of intention to supply the authority, I disregard the same.

The respondent rightly commented that the authority is not binding on this court and in any case the issue was covered.

I have made an indepth and dispassionate study of the submissions on the processes complained of in the application and responses thereto. I was also able to peruse the ~~xxx~~ relevant records.

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In the record of the Civil Case No.52/98 on the 23.1.01 in the presence of both counsels, the counsel for the respondent intimated an intention to appeal against the trial magistrate's order and the matter was set for mention on the 12.2.01. Without any other process of information, the next record is the Ruling/Judgement dated the 16.5.01. The ground being failure by the defence to file Written Statement of Defence. The same file indicates that the latter Plead was filed on the 19.2.99 vide the Exchequer Receipt No.06874946/3 dated 19.2.99. This defence was replied to on 8.3.99. In fact there was no failure to file the Written Statement of Defence.

Then in the record of the Civil Review No.6 of 2001 originating from Civil Case No.50/97 of the District Court Tanga - this latter original record is not available. This review process as opposed to the appeal intimated by the respondent's counsel, has no record of service. The applicant's advocate is recorded to be present, but strongely is not recorded to have submitted anything even that he intended to file a reply. Then on a date convinient to the Respondent's counsel the applicant's counsel is absent and without any submission, counsel for the respondent requests for a ruling date. This record in my view did not in any way involve/nor was it intended to involve the present applicant. In fact there is not even record to indicate that effort of service had been attempted by the court before the 20.10.02.

In my consideration of the arguements by learned counsels for the parties, I have been persuaded to agree with that of the applicant that the complaints listed as according to the records were sound. Procedural rules in my considered view were flouted and in view of the Misc. Civil Application No.6 of 2001 which the trial magistrate had no jurisdiction to try gives the applicant's intended appeal a very good chance of success.

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In all the application for extension of time I find is justified, and is therefore allowed as prayed. Costs to follow the events.

Pronounced in the present of Mr. Amaro for the applicant and Mr. Mahawari for the respondent this 4th day of December, 2002.

M.A.G.S. MOSHOESHOE, J