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IN THE HIGH COURT OF TANZANIA
AT DAR ES SALAAM

MISC.CIVIL CAUSE NO. 288 OF 2003

DAR ES SALAAM CITY COUNCIL.....APPLICANT

VERSUS

THE REGISTERED TRUSTEES OF
CATHOLIC CHURCH-UKONGA.....RESPONDENT

Date of Last Order 6/12/2006
Date of Ruling 01/03/2007

RULING

Mlay, J

This ruling, is on an application brought under Section 14 of the Law of Limitation act and Order XXIV Rule 24 of the civil Procedure code, 1966, and unspecified "**other enabling provision of the Law".**

The Dar es salaam city council who is the applicant/Judgment Debtor according to the Chamber summons, is seeking the following orders:

> "(ii) *That the Honourable Court be pleased to extend the time of limitation to enable the applicant to appeal out of time.*

(ii) That the Honourable court be pleased to stay execution pending the determination of the intended appeal.

The application is supported by the affidavit of PAUL PRANCIS MUGASHA, Legal Officer of the Applicant/Judgment Debtor.

At the hearing of this application the parties were granted leave to file written submissions. In the applicants written submission; it is contended that the Respondent/Decree Holder instituted Civil case No. 267/1999 against the Applicant/Judgment Debtor on account of compensation for unexhausted improvements on Plot No. 139 Kipawa Industrial area, Ilala Municipality, Dar es Salaam. The Applicant/Judgment Debtor further stated that the plot which was in the possession of the Respondent/Decree Holder, was re-allocated by the Applicant/Judgment Debtor to a new occupier, M/S Coast Breweries, for development as per the City Development Scheme. The Applicant/Judgment Debtor contends that, the re-allocation was upon the condition that the new occupier M/S Coast Breweries would compensate the Respondent/Decree Holder. The Applicant/

Judgment Debtor went on to contend that although the pleadings in Civil Case No. 276/99 were not served on the Applicant/Judgment Debtor, the Respondent/Decree Holder did on the hearing date, mislead the court and successfully obtained an exparte judgment on 24/03/2000. The Applicant/Judgment Debtor contends that the exparte judgment contravenes Order VII R 14(2) (b) of the Civil Procedure Code 1966. In essence, the applicant alleged the contravention, lies in the fact that there was no exparte proof. The Applicant/Judgment Debtor blames the Respondent/Decree Holder for "habitual practice of misleading the court in order to win on technicalities which culminated into the issuance of the warrant of attachment by the same court on 03/12/2001 against the Applicant/Judgment Debtor". The Applicant/Judgment Debtor claims that "the irregularities calculated to poach Government fund without justification suffice to justify the release of this application." The applicant cited CIVIL REVISION NO. 72/98 CITY COMMISSION VS FRED GONDI for which text was not provided and KILWA DAUD VS REBECA STEPHEN (1985) TLR 116 where it was observed that" where the claim is for liquidated sum of money exceeding 1,000/=

proof must be given, short of that no court can eater ex-parte judgment"

The applicant further submitted that a decree is an extraction of the judgment and so long as there is no judgment in the court file and in the eyes of the law, the purported decree lacks legs to stand on. He further contended that what is in the court file is a ruling dated 24/3/2000 and referred to Orders XX Rule 4 and XXXIXR31 of the Civil Procedure code 1966 on the definition of a judgment, to show that there was no judgment entered.

Finally the applicant/Judgment Debtor contended that if the prayers in this application are not granted, the Applicant/Judgment Debtor will suffer irreparable loss. The irreparable loss has been stated to be that the Applicant being an Urban Authority charged with statutory responsibilities such as fire and rescue services, enhancement of health, educational and social life in Dar es Salaam be frustrated etc.

In reply, the Respondent/Decree Holder contended that they obtained a default judgment in the Resident Magistrates Court at Kisutu Civil Case No. 267/99 on 8th 2000 following the failure of the

applicant/Judgment Debtor to file a Written Statement of Defence on 14/10/99 as per court order of 29th September, 1999 and also after an extension of time was granted to 3/12/99. The Respondent/Decree Holder submitted that the Applicants allegations that the Decree Holder has the habitual practice of misleading the court in order to win on technicalities, are unsubstantiated. They contended that the Applicant has itself to blame for failure to file written submissions. Further, the Respondent/Decree contended that the Applicant/Judgment Debtor failed to make an application to the Magistrate Court to set aside the exparte judgment and subsequently also failed to file an appeal within time. They submitted that the applicant has completely failed to advance any sufficient reason why extension of time to file the intended appeal should be granted. The respondent concluded that the intended appeal is hopelessly out of time and that the application is therefore without merit and should be dismissed.

As for the application for stay of execution, the Respondent submitted that it is misconceived and bad in law on grounds that the application is required to specify the details and particulars of loss

it would suffer if stay is not granted and that the vague and generalized ascertations of irreparable loss, will not do. Reference is made to the case of TANZANIA COTTON CO S A [1997] TRL 63 (CA). It is further submitted that the application for stay having been filed before the appeal, it is bad in law. The case of E.R. MUTANGANYWA V AHMED ALLADN AND OTHERS [1996] TLR was cited for the proposition that, no application for stay of execution pending appeal can be entertained where no appeal has been filed. The applicant did not filed any further submission as rejoinder.

As the facts leading to the present application have been summarized in the submissions filed by both parties, to which I have reverted to at the beginning of this ruling, I propose to deal straight with the application and only revert to the facts when necessary.

The chamber summons has combined two applications one for extension of time to enable the applicant to appeal out of time and the other, for stay of execution pending the determination of intended appeal. I will start with the second relating to "Stay of execution pending the determination of the intended appeal". Before considering the submissions relating to this party of the application,

will be noted that the Chamber Summons has stated that the application is "made under Section 14 of the Law of Limitation Act Order XXIV Rule 24 Section of the Civil Procedure Code, 1966 and any other provision of the law". Reference to section 14 of the Law of Limitation Act is intended to move this court in the application for extension of time in which to appeal. It remains therefore the reference to "Order XXIV Rule 24 Section of the Civil Procedure code 1966", is intended to move this court in relation to the application for stay of execution. Having perused the provisions of the Civil Procedure code, Order XXIV which has been cited by the applicant, deals with "payment into court" of money to satisfy the plaintiffs claim in a suit, by the defendant. I does not provide for stay of execution and it does not even contain Rule 24.

The only provision containing Rule 24 which deals with stay of execution, is Order XXI. Assuming that the reference to Order XXIV Rule 24 was slip of the pen and that it was intended to refer to Order XXI Rule 24, the said Order XXI Rule 24 provides in part, as follows:-

O. XXI R 24-(1) ***The court to which a decree has been sent for execution***

shall, upon sufficient cause been shown, stay the execution of such decree, for a reasonable time, to enable the judgment debtor to apply to the court by which the decree was passed or to any court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay execution..."

The provision applies to an application for stay of execution made to a court to which the decree has been sent for execution. The decree of the court of Resident Magistrate whose stay of execution is being sought, has not been sent to this court for execution. This being an appellate court and not an executing court to which the decree has been sent, even the provisions of Order XXI Rule 24 are not applicable as a basis for bringing the application for stay of execution to the court. Although the issue was not raised or argued, it would be sufficient to dispose of the application for stay of execution.

Stay of Execution pending appeal is governed by the provisions of Order XXXIX either under Rule 5 or 6 thereof. Under either rule of Order XXXIX, such an application can be made to the court which passed the decree. Having perused the record of the proceedings in Civil Case No. 267 of 1999 in the Court of Resident Magistrate at Kisutu, it appears that such an application was infact made and the parties filed written submissions on it, but the ruling was not, and to date has not, been delivered. The last record in the proceedings is:-

"Date 23/7/2003

Coram: E.H. Mingi – SRM

Applicant/Plaintiff

Respondent/Defendant

C.c. Shillinde

***Order**: Ruling on 18/8/2003"*

There is no further record in the proceedings which shows that the ruling has been delivered. The application for stay of execution filed in this court should not have been made while there is such an

application pending determination in the court which passed the decree.

Of course I entirely agree with the respondents advocate that since an extension of time in which to file an appeal has not been granted and no appeal has been filed in this court, no application for stay of execution pending appeal can be entertained.

For the reasons given above, the application for stay of execution is misconceived and improperly before this court and it is accordingly struck out with costs. The applicant is at liberty to persue the ruling which is pending before the court which passed the decree.

The second part of the application is for extension of time in which to file and appeal. The application has been made under section 14 of the Law of Limitation Act, CAP 89 RE 2002, which provides as follows:-

> *"14(1) Notwithstanding the provisions of this Act, the court may, for any reasonable or sufficient cause, extend the period of*

limitation for the institution of an appeal or an application, other than an application for the execution of a decree, and an application for such extension may be made either before or after the expiry of the period of limitation prescribed for such appeal or application.

(2) For the purpose of this section "the court " means the court having jurisdiction to entertain the appeal, as the case may be, the application."

The issue for determination in an application for extension of time in which to file an appeal, as it is in this application, is whether the applicant has shown a "reasonable" or sufficient cause" to move this court to exercise its powers under section 14 of the Law of Limitation Act.

The decision intended to be appealed against, is an exparte judgment entered against the applicant under Order VIII rule 14(1) of the civil Procedure code 1966, on 24/03/2000. Under Order IX

rule 13, a defendant "**may apply to the court by which the decree was passed for an order to set it aside ,..... if he satisfies the court that summons was not duly served or that the was prevented by any sufficient cause from appearing when the suit was called on for hearing...**"

In the entire affidavit supporting the application, the applicant has not alleged or stated that any efforts were made to have the exparte judgment set aside or that there were any reasons why an application to have the exparte judgment set aside could not be made. Secondly, although in the affidavit and in the written submissions the applicant has contended that they were not served with the pleadings in the civil case before the trial court, it is not stated in the affidavit or in the written submissions, as to when the applicant became aware of the exparte judgment or when exactly they were served with the warrant of attachment by the court broker. Be that as it may, the record shows that as early as on 9th January2002 the applicant filed in the trial court under a certificate of urgency an application *"to raise its warrant of attachment dated 27th December 2001 pending the determination of the intended appeal in*

the High court" and also for "stay of execution pending determination of the intended application to the High court to stay execution"

Assuming that this was the earliest point in time the applicant became aware of the exparte judgment, decree and warrant of attachment, the applicant did not also apply to the trial court to have the exparte judgment set aside, or if the period of limitation had run out, the applicant did apply to that court for extension of time in which to file an application to set aside the exparte decree.

Instead of applying to the court which passed the decree to set aside the exparte judgment, having applied to that court to raise the warrant of attachment and for stay of execution pending determination of an intended application for stay in the High Court, the applicant almost simultaneously, filed the present application in this court on 10/1/2002. The record shows that the High court Registry wrongly registered the application as Civil Appeal No. 4 of 2002, while infact the memorandum of appeal, was clearly stated to be an appendix to the present application. Somehow the error was subsequently discovered and this application was then registered as Miscellaneous Civil Application No. 288 of 2003.

Notwithstanding the errors of the registry of this court, to fact remains that the applicant has not given any reasons as the why they did not apply to the court which passed the exparte judgment, to set it aside.

As for the delay to appeal within the prescribed period of ninety days from the date of the judgment, the reason which can be discerned from the affidavit and from the written submissions, is that the applicant was not aware of the exparte judgment, as they had not been served even with the pleadings.

The record of the proceedings leading to the exparte judgment, starting from 31/8/99, would appear to support the applicants contention. The record of the said proceedings, is as follows:-

"Date 31st August, 1999

Coram Mr. G.K. Rwakibarila PRM

For the Plaintiff. Mr. Marandu for the Plaintif

For the Defendant: Absent

Mr. Marandu: Defendant has not yet been Served: I pray for another date on 29/09/09

Mr. Marandu XD by Court: I shall undertake to pay necessary fees for court broker to serve Defendants

ORDERS

1. *Mention on 29/9/1995*
2. *Defendant to be served summons for orders/to file defence" (emphasis nine).*

It is not clear from the order of the court as to which summons would issue to the Defendant, whether for orders to appear or for an order to file a defence. Whatever the position, service on the Defendant was also dependent on the undertaking by Mr. Marandu the plaintiffs counsel, to pay the necessary fees for court broker to serve the Defendant and also, upon the court broker actually effecting service on the Defendant. Was service effected on the Defendant? The proceedings on 29/9/95 are as follows:-

"Date 29th September, 1999

Coram: Mr. KIBONA, PDM

For Plaintiff – Present

For the Defendant – Present

Order: By Consent

(1) Defendant to file Written Statement of Defence by 14th/10/99

(2) Mention on 15/10/1999"

The proceedings of 29/9/99 were presided over by KIBONA, a Principal District Magistrate, while the proceedings had been instituted in the Court of the Resident Magistrate. Secondly both the Plaintiff and Defendant who are respectively, THE REGISTERED TRUSTEES CATHOLIC CHURCH UKONGA and DSM CITY COMMISSION, are recorded as being "present" surely the two parties being corporate entities, could not have been present in person. If they were "present", then they must have been represented by natural persons. Who was "Present" for the plaintiff and for the "Defendant". on 29/9/1999? The applicant has claimed that they had not been served with the pleadings until they were surprised by the warrant of attachment. Was the applicant really represented in

court on 29/9/99 and therefore aware of the order to file WSD by 15/10/99? Had the applicant been served to appear on 29/9/99 according to the order of the court made by Rwakibarila PRM on 31/8/99 and the undertaking by the Plaintiffs advocate to pay fees for a court broker to effect service on the Defendant?

The proceedings which look place on 1/1-/99 the mention-date ordered by Kibona PDM, are as follows:-

"*Date 1st October, 1999*

Coram: Mr. M.M.J. Luguru

For the Plaintiff Mr. Marandu

For the Defendant – Absent

C.C. Josephine

Order: Hearing 8/11/99 Defendants be notified".

On 8/11/1999 the following proceedings took place:-

Date 8th November, 1999

Coram: Mr. G.K. Rwakibarila PRM

For the Plaintiff – Ms Ringo for Marandu

Defendant: Absent

C.C. Josephine

Ms. Ringo. Mr Marandu has agree with defendant for a Mention on 03/12/1999

Court: Noted that up to this juncture, defendant has not filed Written Statement of Defence

Order:

1. *Mention on 03/12/99*
2. *Defendant is granted more time in absence to file Written Statement of Defendant by 03/12/99 or risk judgment for plaintiff in defiance to file the same*
3. *Ms. Ringo to notify the parties".*

Up to this stage, the court had not addressed the issue of whether or not the Defendant had been served or whether the Defendant was "notified" of the date of the proceedings which took place on 8/11/99, as the court had ordered on 15/10/99.

On the 3/12/99 the following proceedings took place:-

Date 3rd December, 1999

Coram: Mr. Mafuru PDM

For the Plaintiff Mr. Marandu for the

For the Defendant: In person

C.C. Josephine

Order: Hearing 14/1/2000

As I have observed earlier on, the Defendant is a corporate body. The Principal District Magistrate recorded that the Defendant who is the Dar es Salaam city Commission was "Present in person" A number of questions can be asked. Was this possible for the Defendant to be present? Did Ms Ringo notify the Defendant of the proceedings which took taking place on 3/12/99 as ordered by the court on 8/11/99 so that the defendant e made could aware and be present?

On 18/12/2000 the record shows that both parties were absent and M.M.J. Luguru PRM made the following order:-

Order: Hearing 24/3/2000 Parties be notified" (emphasis mine).

The proceedings of 24/3/2000 are as follows:-

"Date 24th March, 2000

Coram: Mr. G.K. Rwakibarila PRM

For the Plaintiff – Mr. Marandu

For the Defendant – Absent

C.c. Josephine

Mr. Marandu: Defendant was supposed to file Written Statement of Defence by 14/10/99. But the same has not been filed. In a position like this I pray for judgment under Order 8, Rule 14(1) as amended by GN 422/94.

RULING

There is overwhelming evidence in this suit show how on 29/09/99 defendant was ordered by the court to file the W.S.D by 14/10/99. From that time, he has not filed the same although on 08/11/99 he was granted more time in absence to file the same by 03/12/99. In a position like that, defendant appears to have grossly abused the process of the court. So that judgment is hereby entered in favour of the plaintiff with costs as stipulated under Order 8, Rule 14 (1) of the civil Procedure code, 1966, as amended by GN 422/94".

The record does not show if the Defendant had been notified of the proceedings taking place on 24/3/2000, as the court had ordered on 18/3/2000 that "**parties be notified**". As the

proceedings which have been reproduced in this ruling show, there is no evidence on record of service on the Defendant and where it is recorded that the Defendant was present, it shows that the Defendant who is a corporate body was present "in person" which is practically impossible.

In the present application the applicant has alleged that they were not served with the pleadings, meaning that they were not aware of the proceedings and of the ruling by which the exparte judgment was entered. The record of the proceedings which has been reproduced in this ruling would appear to support the applicants allegation.

As I have stated earlier on in this ruling, the applicant had the opportunity to apply to the court which passed the decree to set aside the exparte judgment and they have not given any reasons for not doing so. For this reason the application for extension of time in which to appeal against the exparte judgment cannot succeed, and it is accordingly dismissed.

Notwithstanding the dismissal of the application for extension of time in which to appeal, the record of the proceedings are

fraught of material errors which go to the merits of the case and involving injustice. Apart from the fact that there was no evidence of service on the Defendant at any stage of the proceedings up to the time the exparte judgment was entered, the reason for entering the exparte judgment, included the failure of the Defendant to file a written statement of defence by 14/10/99 as ordered by KIOBONA Principal District Magistrate. Since the suit was filed in the court of the Resident Magistrate of Kisutu the court presided over by Kibona Principal District Magistrate, was not properly constituted, in accordance with the provisions of section 6(1)(c) of the Magistrates court Act, 1984. The section provides:-

6-(1) subject to the provisions of section 7, a magistrates court shall be duly constituted when held by a single magistrate being –

a).....

b).....

c) in the case of a court of a resident magistrate, a resident magistrate" (emphasis mine)

Since the court which made the order that the Defendant files a Written statement of Defence by 14/10/99 was not properly constituted, that order was null and void. Since that order was null and void, the time in which to file the written statement of defence under that order, could not be extended. The exparte judgment having proceed from the order a file a Written Statement of Defence which was null and void, it cannot be allowed to stand.

In the exercise of the power of revision conferred upon the High court under section 44(1) (b) of the Magistrates Court Act cap. 11 RE.2002, the proceedings in the Resident Magistrates Court of Dar es Salaam at Kisutu Civil Case No. 267 of 99 ,including the execution proceedings and the warrant of attachment, are set aside. It is ordered that the record be remitted to the trial court for the proceedings to commence **de novo**, subject to compliance with the provisions of Section 54(4) of the LAND DISPUTES COURTS ACT, 2002.

Each party to bear own costs in the proceedings before this court.

It is ordered accordingly.

J.I. MLAY

JUDGE

Delivered in the presence of Mr. Marando Advocate for the Respondent and in the absence of the Applicant this 1st day of March, 2007.

J.I. MLAY

JUDGE

01/03/2007

3,842 Words