IN THE HIGH COURT OF TANZANIA

AT TABORA

CIVIL REVISION NO. 1 OF 2013

(Arising from URAMBO District Court of URAMBO Original Civil Case No. 7 of 2012)

THE GENERAL MANAGER

NYANZA BOTTLING CO. LTD .....APPLICANT

VERSUS

LIBERATUS N. TIBAITIRWA .....RESPONDENT

RULING

29th August & 2nd October, 2014

RUMANYIKA, J

Under O.XLII Rule 2 of the Civil Procedure Code Cap 33 RE 2002 and Section 44 (1) (b) of the MCA Cap 11 RE 2002 the application is brought at the instance of Mr. C. Mutalemwa Learned Counsel for the Applicants. That this court be pleased to revise the exparte judgment and decree dated 3rd April, 2013 of the District Court Urambo (the trial court) in Civil Case No. 7 of 2012. Mr. Y. Mwangazambili Learned Counsel appears for the Respondent.

Just before the matter took off on 29th August 2014, Mr. Mwangazambili took a preliminary point of objection (p.o) that the matter was improperly before this court. As the Applicants should have appealed against it. Not coming alternatively by way revision. Counsel refered me to Section 70 of the Civil Procedure Code Cap 33 RE 2002 (CPC), Mr. Mutalemwa blamed the learned counsel not having raised the point formally to enable the Applicant also prepare. Mutalemwa asked on the basis for an adjournment and, Mr. Mwangazambili be condemned for the costs while preparing to come with a formal p.o. I promised to pronounce the ruling emboned in this main ruling. I allowed the counsel to argue on merits of it. Court proceeded as such. Here are the two rulings.

Indeed it is trite law that an application for revision is no appeal indisguise. Nor were the two substitute of each other. Except in some special circumstances. (See the case of TRANSPORT EQUIPMENT LTD V DEVRAM P VALAMBHIA (1995) TLR 161 (CA). Infact exparte judgment without preliquisite proof of service on the defendant and as will see shortly herein after, improperly admission in evidence of exhibits were, with no doubts, exceptional to the general rule in the Transport Equipment case (supra). I am sure the Highest fruntain of justice in the country intended that logically, the rule binds this court also. The application not misplaced, I will overrule the p.o. It is overruled.

Now on the merits of it.

The application is supported with an affidavit of Anthony Ikongo. Whose contents were whorily adopted during the hearing by Mr. Mutalemwa. That Section 44 (1) (b) of the Magistrate's Court Act Cap 11 RE 2002 (MCA) requires that any materially erred exparte judgment be quashed. That whereas the civil case was on 18/10/2012 adjourned to 13th November, 2012 and ordered service on the defendants (now the Applicants) absent then, the trial court simply dispensed with the latter's appearance on the very 13th November, 2012. Without any, proof of service on the Applicants' Advocate or at all. Contrary to what was required of its former order. Even if the said Lawrean Kanyama (purported agent of the Applicatnt was in court) whose status it appears the trial magistrate doubted, hence order of service on the Applicants. It was, given the mode of service required in law of such corporate bodies, no service proper. The omission occassioned injustice. Stressed Mr. Mutalemwa.

That assuming the exparte hearing was proper, yet still admission by the court of the six (6) exhibits in evidence contravened the provisions of Order XII rule 4(1) of the Civil Procedure Code. Having been not signed/initialed, dated and infact duly endorsed by the trial magistrate. Thus a material error occasioning injustice. The purported exhibits might have been just slotted therein after. Leave alone the trial Magistrate not signing his order of admission in

evidence of the said documents. That the same were actually not admitted at law. This also occasioned injustice. Submitted the learned counsel.

That the learned trial magistrate austed the pecuniary jurisdiction. Having entertained, then he awarded shs. 300,000,000/= general damages to the Respondent. Far beyond the sh 150.0million limit (Section 11 of the MCA). However, Mr. Mutalemwa readly admitted that it was not general but specific damages claimed that counts consider in establishing their pecuniary jurisdiction. The trial magistrate should have observed the pecuniary limit. That it all touches on the trial court's descence. It was more than mere legal technicalities. Insisted Mr. Mutalemwa.

Last but not least I suppose, Mr. Mutaalemwa was sort of at loss. On the status of a judgment where by no mediation was ever attempted by the trial court. That it was contrary to the provisions of Article 107 of the Constitution of the United Republic of Tanzania and Order VIII of the Civil Procedure Code. Should the omission be fatal this court direct as such. Counsel sought guidance.

In reply, but starting with the issue of pecuniary jurisdiction, Mr. Mwangazambili submitted that it was only a substantive claim not general damage, which counts.

As regards admission in evidence by the court of the six (6) exhibits, Mr. Mwangazambili contends that unless one questions merits of the case, in which case one should have appealed against it, the trial magistrate was justified as it occasioned no injustice.

On the issue of non service on the Applicants, the Learned Counsel was of the view that based on illegular attendances of the Applicants, an order for exparte proof and judgment were justifiable in the day. That having been duly served on 13.8.2012, any order of service subsequently made by the trial court on 18/10/2012 were respectfully so inadvatent so improper.

Responding to the point of the trial court having attempted no mediation, Mr. Mwangazambili averred that it was practically impossible. As much as the Applicants remained keeping apart. Nevertheless counsel urged this court not be tied up by undue legal technicalities.

The law relating to applications of this nature is ambiguity free:

Section 44 (1) (b) of the MCA:-

"In addition to any other powers

in that behalf conferred upon the High Court, the

High Court.

.....may, in any proceedings of a civil nature

determined in a district court ..... on application being made in that behalf by any party ....., if it appears that there has been an error material to the merits of the case involving injustice, revise the proceedings and make such decision, or order therein as it sees fit" (the underline is mine).

The pivotal issue is whether there are material errors on record such that the exparte judgment and decision be reversed.

All was good until on the 13.11.2012 when the trial court ordered exparte proof. Without proof of service on the defendants (the present Applicants). Much as it had been on the immediate date ie. 18/10/2012 ordered that the latter be served. Leave alone duly served. There could be in court, one Lawrean Kanyama or else body purportedly an agent of the Applicants (whose title was not even established, and it is with this uncertainty it appears, as Mr. Mutalemwa argued it rightly so in my considered opinion, that the learned trial magistrate ordered service on the Applicants. Be as it may, the service should have been effected not through middlemen but on their lawyer. ie. Mr. Mutalemwa. It is very unfortunately that the trial court took no trouble with a view to satisfying itself about how proper was the service.

I think once a party appears represented in court by an agent recognized under the law, any service in respect of such person be directed to his agent only. Doing otherwise like it happened in this case it amounts to a constructive denial by court of the party's right of legal representation. Which indeed goes to the roots of the principles of natural justice. Right to be heard in particular. To round up the point, no court order is made for cosmetic purposes. Once made be strictly complied with. As said, the 18th October, 2012 order wasn't complied with. Instead the trial court just short circuited it against the Applicants.

Indeed it is worthy noted that admission in evidence by the trial court of the six (6) purported exhibits was respectfully premature. Therefore of no legal effects in the day. The provisions of Order XII rule 4(1) of the CPC are intended, among others, that no exhibits shall get way to evidence on record not filtered, uproved and adopted by the presiding judge as part of it. All this is possible upon the judge signing, putting dates, marking it as exhibit so much. They do or cause it to be done, whatever might be reasonable defined as endorsement of the exhibit. Leave alone acknowledgment by him in the end, by an order admitting the same as exhibit.

As regards the trial magistrate like having ousted pecuniary jurisdiction by awarding shs 300,000,000/= general damages beyond the shs 150.0million limit (Section 11 of the MCA), I will on this one,

not receive the point home. Because with all intents and purposes, general damagess however big or small might be were no movables within the context of Section 11 of the MCA. No party is required to prove general damage, claimed by him. It being arithmetically or by justification. Only the presiding judge has the discretionary powers to assess and grant whatever deemed just and judicious by him. Nor is the judge on that one bound by the usual limits related to of movable or immovable property. As it is not general but specific damages that count in establishing the court's pecuniary jurisdiction. As such there is nothing so far, upon which to fault the learned trial magistrate awarding the sh. 300.0million general damages.

Yet again as said, Mr. Mutalemwa raised a noble issue. Whether by itself, omission by judge to conduct mediation was fatal. Capable of vitiating the proceedings. On this one, I will only hold that the rationale behind the mediation process, and this I think the law makers had in mind, was to promote it for the least costs of litigation, accelerated trials and therefore timely justice. Leave alone bringing harmonious atmospheres for the litigants. This spirit by the law makers would have been defeated should courts of law declare the omission to conduct mediation fatal. Because courts doing so, untimely justice and higher litigation costs will always remain. Possibly even of the higher degree. However, this should not be mistaken for condoning inaction by court annexed mediators. Provided that nothing

shall be attempted at a station maned by a single judge. Because should the mediation fail matter will always stuck waiting for appointment from the other stations, of another judicial officer to try it. In which case therefore, much more time, moneys and such other resources will be required.

Similarly of more importance, I wish to say few wards in passing mediating skills are professional, but more of individual's art and tolerance. It is whenever applicable not simply a question of one marking it as "failed". But the reasons assigned therefore are equally paramount. Date of mediation be duly communicated to the parties for them to prepare. In which case whenever the defendant defaults appearance it will be taken as refusal of mediation. Provided that an order of failure to mediate shall be acceptable to any reasonable mediating judge. Infact nothing on record will suggest that mediation was attempted but failed.

All said, the application is granted. The exparte judgment/decision quashed. Records remitted to the trial court for a fresh trial interpates before another competent magistrate other than O.J. Burugu. Mr. Mutalemwa very wisely asked for no costs. Each party will bear their own costs.

R/A explained.

S.M. RUMANYIKA

JUDGE

27/09/2014

Delivered under my hand and seal of the court in chambers this 2nd October, 2014. In the presence of Mr. C. Mutalemwa Learned Counsel and the Respondent.

S.M. RUMANYIKA

JUDGE

2nd October, 2014