IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

(IN DAR ES SALAAM REGISTRY)

CIVIL APPEAL NO 254 OF 2016

(ORINATING FROM MISC CIVIL APPLAICATION NO 203 OF 2016 BY HON. KASAILO, RM OF KINONDONI DISTRICT COURT)

ASHA ALLY MATEKE ..... APPELLANT.

VERSUS.

ABDALLAH SALIM MAGANGA ..... RESPONDENT.

Last date of the order 12/06/2018.

Date of the judgment 25/06/2018.

JUDGMENT

MAGOIGA, J.

On 1st April, 2015 the Resident Magistrate Court of Kinondoni delivered an ex-parte judgment in Matrimonial Cause no 101 of 2014 against the respondent in this appeal. The respondent in this appeal preferred Misc. Civil Application no 203 of 2016 under section 14 (1) of the Law of Limitation Act, Cap 89 [R.E. 2002] read together with section 95 of the Civil Procedure Code, [Cap 33 R.E 2002] praying for orders that the honorable court of Kinondoni District be pleased to extend time within which the applicant can apply for orders to set aside the ex-parte judgment and decree of the court by hon Kasailo, RM, and an order that the suit be heard inter-parties and be determined on merits. The respondent prayed for costs and the usual prayer of any other reliefs this court deems appropriate, just and equitable to grant. The application, according to the trial court's record, was on 18/10/2016 ordered to be argued by way of written submissions to be filed in the following order: -

The applicant to file on 1st November, 2016

The respondent to reply on 15th November 2016.

Rejoinder, if any, on 22nd November, 2016,

And a mention was fixed on 24.11.2016.

On 02nd day of December, 2016 the District Court delivered its ruling on Misc. Civil Application no 203 of 2016 with the following orders: -

(i) Application granted.
(ii) The applicant to file his written statement of defense within 21 days from the date of the judgment
(iii) Each party to bear hi own costs.

Aggrieved and dissatisfied, the appellant has come to this court armed with three grounds of appeal namely; -

1. That the honorable Magistrate erred in law and facts in granting the respondent application while the respondent filed his written submission out of time without leave of the court and extension of time to do so.
2. That the honorable Magistrate erred in law and facts in entertaining the respondent application filed in the wrong court and wrong registry.
3. That the honorable Magistrate erred in law and facts in disregarding and violating the law.

When this appeal was called for hearing the applicant appeared in person and was enjoying the legal services of Juma Mtatiro, Learned Advocate. The Respondent appeared in person and was too enjoying the legal services of Mohamed Tibanyendera, Learned Advocate. All parties were ready for hearing.

At first, I hereby commend the learned counsel for their tremendous and ingenious arguements on this appeal.

Mr. Juma Mtatiro Learned Advocate, argued all the three grounds raised, starting with the first ground to the third in the order they appear in the memorandum. Submitting on the first ground, he started with its history to

the point of the court ordering same be argued by way of written submission, on 18/10/2016 the court ordered and set schedule of filing as follows: -

The Applicant on 30/10/2016

The Respondent on 15/11/2016

Rejoinder on 22/11/2016

Mention on 24/11/2016.

The counsel for appellant strongly submitted that the applicant filed his submission on 8/11/2016 instead of 30/10/2016 hopelessly out of time, he insisted. It was his stance that since the written submission by the applicant was filed out of time, the district court was supposed to dismiss the application for want of prosecution but it granted despite that glaring disobeying court orders. He insisted the issue of time limit has no compromise. He continued submitting that if you are late, unless you seek leave, you cannot be entertained and in conclusion he said the law does not operate retrospectively. To bolt up his submission on this point he cited the case of **MARUNGU NICHOLAUS V. HABIBA AMRAN, MISC. LAND APPEAL NO 18 OF 2016 (HC) DAR ES SALAAM (UNREPORTED)** which an application was dismissed for non- compliance with the schedule of filing submissions.

On the second ground of appeal, the learned counsel was brief by submitting that the application by the respondent was filed in the wrong court of Kinondoni District court, while the impugned decision was granted by Kinondoni Resident Magistrate's court. He pointed out that these are two different courts with different registry. According to him there was no application in the eyes of law and the lower court was supposed to dismiss the application wrongly filed in a wrong court and registry.

On the third and last ground of appeal, the learned counsel submitted that the application that was before the court was an application for extension of time, so if granted, it was to pave way for bringing an application to set aside ex-parte judgment. But surprisingly, the trial magistrate misapprehended the application and went to grant prayers not envisaged in the application. The trial court went overboard, he strongly lamented. According to him there was

no application to set aside the ex-parte judgment but he granted it and ordered that WSD be filed within 21 days and a mention date was fixed. He further pointed out that the setting of ex-parte judgment was done without due regards to the law and procedure. Mr.Mtatiro further submitted that the trial Magistrate disregarded the law and procedure and invented his own law and procedure at the detriment of the appellant, he lamented bitterly. Mr. Mtatiro concluded by inviting this court to see merits in this appeal and allow it by setting aside the ruling subject of this appeal with costs, he concluded.

On the other hand, Mr Tibanyendera, learned counsel for respondent, in reply started with the second ground by strongly submitting that he agrees with the concern of the appellant counsel regarding the title of the court that there is Resident Magistrate's Court of Dar es salaam at Kinondoni. And there is the District Court of Kinondoni. He submitted the trial Magistrate Hon Kasailo, Rm is presiding over all these courts. The issue of the title of the court is true that ex-parte judgment was of Resident Magistrate Court of Kinondoni, but in between, the court was misdirecting itself as District Court. There are some documents such as Misc. Civil Application no 165 of 2015, which is in the case file. This bears a title of the District Court of Kinondoni but originating from Matrimonial Cause No 101 of 2014. So the court has been entertaining them interchangeably. This is well evidenced in Misc. Civil Application no 203 of 2016, which has been assigned to be presided over by honourable Kasailo,RM, of the District Court. The ex-parte judgment it was titled in the Resident Magistrate's Court of Kinondoni and it has been presided over by the same magistrate. Mr Tibandenyera in sum submitted that if there are any errors; they are errors that cannot occasion injustices. It is the same Magistrate who presides over in both courts. He begged to differ with Mtatiro that if really there is a remedy is to reject not to dismiss. In case the court does not reject the court is convinced the matter is proper, he wound up on this ground.

As to the first ground of appeal Mr. Tibandenyera, learned advocate submitted that it is true the application was ordered to be heard by way of submission on 18/10/2016. He was quick to challenge the counsel of the appellant that he was not present on that particular day as such might have been misled. He went to submit that of importance the applicant's written

submission was to be filed on 1st November, 2016. There is exchequer receipt no 11999181 dated 31/10/2016, evidencing the date when written submission were filed. It is on record to support that the application before the District Court was filed a day before the scheduled time. This issue arose in the trial court and it was explained to the satisfaction of the court. He went to on say that if any mishappening occurred, it was not on their part but court's business. He concluded that this ground is baseless. The allegations that our written submissions were filed out of time are unfounded.

Mr. Tibandenyera, submitted further that on the day they filed and issued with a court's receipt, the court clerk of the trial magistrate was not on duty. She was bereaved on the day we paid for. In most cases in pleadings/application contain a part to be signed by registry officer to show when were they filed and that is a prima facie evidence as to date of filing, but not conclusive evidence because when supported by other evidence that prima facie proof can change. Mr. Tibandenyera humbly submitted that a signature of the registry is not enough but the exchequer receipt. No contention over the exchequer. Our submission was filed in time, he concluded on ground number one.

On the third ground of appeal, Mr. Tibandenyera submitted that in application number 203 of 2016, they agree that the substantive prayer was for extension of time to file an application to set ex-parte judgment. What the trial court granted was that order. But in the course, the trial court went to order for granting the order setting the ex-parte judgment. Unfortunately, no provision of the law was cited for grant of the same, however, section 95 was there. He further submitted that the prayer of extension of time once granted if there is any error by scheduling the conduct of the main suit was a procedural error. This can be rectified by staying proceedings of Matrimonial cause no 101 of 2014. He urged this court being a supervisory court to give directions that deem fit or give proper directions to correct the error. The learned counsel said since the appellant has no problem with the extension of time, I pray this court to give proper direction in the circumstances. He concludes by asking the court to give directions to correct the errors.

In rejoinder, Mr. Mtatiro submitted that ignorance of the law is no defense. He urged the court not to condone illegality or unlawful proceedings and decision. The whole decision emanating from Misc. Civil Application no 203 of 2016 Kinondoni District Court is a nullity. Mr. Mtatiro maintained that the two courts are different and one has to be vigilant and careful where to file and to blame the court is to be unfair. It is the duty of the parties to make sure their documents are properly titled and filed in a proper court.

Replying to what advocate Tibanyendera called errors, the learned counsel replied the impugned ruling is not about errors but is illegal for disregarding the law and procedure. Responding to the proof of when the document was filed he submitted the proof come from the documents itself.

In winding up he submitted that the court went over board to grant what was not in the chamber summons and the available remedy is to set aside the ruling of the court which is illegal in all intents.

He invited this court to find merits of the appeal and allow it with costs. This marked the end of the hearing.

After hearing both parties' submissions in support and opposing the raised grounds of appeal, I now have one task to see the merits or demerits of the appeal. In ground number one the main complaint of the appellant was that the written submission in support of the application were filed out of time and without an extension of time from the court, hence the grant was tainted by granting something that was not according to court's orders. I have taken my time to peruse the court file on what transpired on 18/10/2016 and it revealed that the order of filing was that the applicant to file on 01/11/2016, the respondent on 15/11/2016 and rejoinder on 22/11/2016. Mr. Mtatiro submitted that the applicant was to file on 30/10/2016, this is not supported by the court record and as rightly submitted by Mr Tibenyendera that on that day Mr. Mtatiro was not in representation of the appellant. He might have been misled. I advise counsel to peruse court files especially on matters that are engaged in between than taking things for granted from laymen clients. On this ground am persuaded to agree with the argument by Mr Tibenyendera that the exchequer receipt is conclusive proof unless same is disputed or challenged. Throughout the arguments by Mr. Mtatiro he is not

challenging the exchequer receipt at all. His main complaint is that date when the registry officer signed is the date of filing. It is my considered opinion that this point need not detain this court too much. Much as the exchequer receipt shows it was for filing the written submission in respect of application no 203 of 2016 and same is dated 31/10/2016, I strongly hold that it makes this ground to fail on the part of the appellant. The explanation offered by Mr. Tibanyendera is plausible and with the date of exchequer receipt not challenged I strongly believe the submission were filed in time. The case of MARUNGU NICHOLAUS V. HABIBA RAMADHANI, (supra) cited by Mr. Mtatiro is distinguishable from this case for the reasons I have explained above as in that case there was no written submission at all. In this case there is, the only contention is when was it filed and for the reason I have explain I do hold that the written submission was filed within time and were proper before the trial court.

This takes me to the second ground that the honorable magistrate erred in law and facts for entertaining the respondent's application filed in the wrong court and registry. I have noted that this issue was not raised at the lower court but at this appeal. This has tasked my mind a great deal as to whether an issue not raised in lower court, can be entertained at an appeal stage. However, it is trite law that issue of jurisdiction and limitation or any other pure point of law can be raised at any stage, even on appeal. Looking closely with a legal eye, one cannot fail to grasp that throughout, the counsel for appellant submission he is not challenging the jurisdiction of the District Court of Kinondoni in determining a matter of this nature that has been registered and determined in the Resident Magistrate's Court but he is saying it was wrong to file a matter in a wrong court and registry. It could be something different if he was challenging the jurisdiction of the court, but here the confusion is on court and, in particular, the registry.

From the trial court record it is crystal clear that **Matrimonial cause no 101 of 2014** was filed and determined in the **Resident Magistrate's Court of Kinondoni**, on 1st April, 2015. It is equally clear from the trial court's record that **Misc. Civil Application no 203 of 2016** the subject of seeking an extension of time to file an application for setting aside the ex-parte judgment was filed in **District Court of Kinondoni.**

Mr. Mtatiro was of the strong view and submission that this was wrong and in legal terms these are two different Courts with a different Registries that cannot be mixed up the way parties think. To him, in law there was no application at all. Though he never cited any law to back up his argument. In his further submission he said that what matters is the court regardless of who preside over. He blamed the respondent for not being vigilant to know where to file their documents and anything blaming the court is unfounded in the circumstances. He invited the court to quash all the proceedings for being illegal for violating the law and procedure.

On the other hand, Mr. Tibanyendera concede that these are two different courts but so long as are presided over by the same trial Magistrate he sees no serious problem and the errors, if any, are errors that cannot occasion injustices. It is the same Magistrate who presided over in both courts, he submitted vehemently. According to him the available remedy was to reject the application but since it was admitted and acted upon, the trial court found it to be with no problem. To him there is nothing to fault the trial record just on this ground. That was all from the counsel for parties.

Let me point out that, jurisdiction of any court is expressly conferred by the statute or the law. In the instant appeal I find prudent to be guided by the law on the purpose of registries, in particular, the Magistrates' Courts Act [Cap 11, R.E. 2002]. Section 11 of the MCA is relevant and easy of reference will produce it hereunder: -

Section 11. Registers and returns

(1) Subject to subsection (2) each magistrates' court shall keep such register or registers of all the proceedings entered, heard and determined in the court as may ***be prescribed.***

(2) Where sittings of the court are regularly or customarily held at more than one place, a separate register or set of registers shall be kept for each of such places, and proceedings heard and determined at any place other than a regular or customary place of sitting shall be entered in the principal register or registers of the court.

(3) Each magistrates' court shall–

(a) with respect to all civil proceedings, submit to the Registrar of the High Court annual returns of all proceedings; and

(b) with respect to all criminal proceedings submit to the Registrar of the High Court annual returns of all proceedings specifying–

(i) the number of persons prosecuted for the year of returns;

(ii) the nature of the charges;

(iii) the results of the proceedings taken therein and any other particulars relating to the state of crime in the area or areas of jurisdiction of the court.

Guided by the provision of subsection (1) of section 11, it is clear as day light that **Each Magistrate's Court shall** keep such register or registers of **ALL** proceedings entered, heard and determined in the court as may be prescribed. (Emphasis mine). Further the section is talking and referring with strong terms the Magistrate's Court not individual who presided over matters in that court. Moreover, section 11 to my opinion is/was intended for administrative purpose because at the end of each year, returns are prepared and submitted to High Court for administrative purposes. So on that noting that this not a pure point of law am declining to entertain this ground anymore because it was not among the matters that were canvassed in the trial court and it raises no serious legal issue that can be raised at any stage of the proceedings, even on appeal.

However by the way (as an obiter) the argument by counsel for respondent that a mere confusion of register is a procedural error that can be rectified especially and practically when the matter is presided over by same magistrate given the fact that the district court and the court of Resident Magistrate's Court are deemed to be courts of the same grade as per section 13 of the CPC, [Cap 33, R.E.2002] make sense and for interest of justice this confusion is an error that can be rectified without any injustices to the parties. May be the next question is; can a matter that has been registered in the Resident Magistrate's Court of Kinondoni be registered and be determined in District Court of Kinondoni? The answer is big YES! It is on the same vein I quite agree with the counsel for respondent and am of the settled opinion that registries are purely for administrative purposes, they don't confer jurisdiction to courts. The District Court of Kinondoni had no Matrimonial Cause no 101 of 2014 in its register, yes, but where they are in same location and building with the Resident Magistrate's Court's principal

register for administrative purposes one registry can cater for all and accommodate the same but notwithstanding the Resident Magistrate with jurisdiction to entertain presided over of the matter.

I now come to ground number three which basically hinges on legality of the trial court's order dated 2/12/2016, in particular, that of setting aside the ex-parte judgment and ordering the respondent to file written Statement of defense. There is no dispute that what was before the court was an application for extension of time to file an application to set aside the ex-parte judgment. This can be evidenced from the application of the parties in particular the chamber summons. The chamber summons was preferred under the provisions of section 14(1) of the Law of Limitation Act, [cap 89 R.E 2002] read together with section 95 of the Civil Procedure Code, {Cap 33 R.E 2002]. Definitely, the court was properly moved to grant the orders sought in the chamber summons. But going by the record of the trial court there is nowhere in the ruling the trial court categorically gave an order to set aside the ex-parte judgment dated 1st April, 2014. What is gathered in the record is that immediately the trial court granted the prayer as prayed in the chamber summons, it gave ***suo motu*** an order for applicant to file his written statement of defense within 21 days from date of delivering its judgment.

Now what is the remedy in the circumstances? Was the trial court entitled to grant the order of filing written statement of defense "***suo motu***"? Mr. Mtatiro learned Advocate has strongly urged this court to quash and set aside the entire ruling with costs. According to him the granted order was in abrogation of the law and procedure. Though he never cited the law nor case law to support his stance.

On the other hand, Mr. Tibenyendera has totally a different view. To him the correct measure will be to correct the errors in the ruling and pave way for solving this matrimonial proceeding to be concluded between parties under the supervisory powers of this court. Though he never cited case law and any law to support his argument.

My tireless research has come across the case of **AIDAN CHALE V. THE REPUBLIC, CRIMINAL APPEAL NO 130 OF 2003, (unreported)**

Mbeya, (CAT) which has a similar situation like the instant appeal, where the judge gave ***suo motu*** orders not envisaged in the application in its ruling and the Court of appeal held that "**it is not proper for the High Court, in the absence of any application to it, to imagine the existence of an application, to create reasons for the application and agree that those reasons amounted to good cause.....**"

The Court of appeal in the above cited case went on to hold that "**a court should not act *suo motu* in favour of a party by assuming the existence of a request to it to extend the period limited by statute..... To do so could lead to a subversion of the very purpose for which limitation period.....was statutorily fixed for all parties".**

In sum the Court of Appeal of Tanzania concluded that the High Court judge erred in assuming the role of an applicant and finding that a good cause existed for admitting the appeal out of time.

Guided by the above reasoning and holding of the highest Court of the land, am constrained to hold that the trial court, as correctly submitted by the Mr. Mtatiro in the instant appeal, was equally wrong and erred to grant the order of the applicant to file his written statement of defense in the absence of any application after the application of extension was granted is wrong and I proceed set aside that order.

The reasons of my holding as I have done above are not far to fetch. One, going by the application that was before him, the cited provisions of the law were not meant to grant orders of setting aside the impugned ex-parte judgment. Therefore, he acted without due regards to what was before him on the problematic order of filing WSD.

Two, Even the citing of section 95 of the CPC, still could not serve the purpose as the said section gives the court inherent powers only where there is no specific provision of the law. In our case there are specific provisions for setting aside ex-parte judgments.

Having hold so, the next question is what is the effect of my holding above? This matter came to this court by way of appeal. During the hearing Mr.

Tibanyendera learned advocate, invited this court to correct the errors, if any, and leave the matter to proceed without affecting the ruling of the trial court in question. While on the other hand, Mr. Mtatiro asked this court to allow the appeal, quash and set aside the ruling. These two rival arguments have prompted this court to revisit the provisions of the Magistrates' Courts Act, [Cap 11 R.E.2002], in particular, sections 43 (3) and 44 (1) (a) and (b) and see what is the proper course in the circumstances. I have devoted my legal eye in the said provisions but am unable to see in an appeal like this where revision or supervisory can come in. In the event, I decline to make revision, and agree with Mr. Mtatiro as such I partly allow this appeal to the extent I have explained above by setting aside the order of filing the written statement of defense and I order a return of the case file to proceed from where it ended with proper direction by the trial court to give what next subject to law of limitation.

Given the nature of the matter no order as to costs.

It is so ordered.

Dated at Dar es salaam this day of 25th day of June 2018.

THE HIGH COURT OF TANZANIA

S.M. MAGOIGA.

JUDGE.

25/06/2018