

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IRINGA DISTRICT REGISTRY)

(LAND DIVISION)

AT IRINGA

CIVIL APPEAL NO. 01 OF 2019

(Originating from District Court of Iringa at Iringa in Miscellaneous
Civil Application No. 08 of 208)

YUSUPH LYANDALA APPELLANT

VERSUS

DEOGRATIAS MLAWA RESPONDENT

Date of Last Order: 21/04/2020

Date of Judgment: 12/05/2020

JUDGMENT

MATOGOLO, J.

In the District Court of Iringa, the appellant Yusuph Lyandala was sued by the respondent one Deogratias Mlawwa for Tshs. 7,000,000/= being specific damages suffered by the respondent following breach of contract. The respondent also claimed Tshs. 20,000,000/= as general damages, 10% interest for the defaulted payment, costs of the suit and any other relief the court deems fit. The appellant was duly served but did not enter appearance nor file written statement of defence. The respondent was permitted to prove the case ex-parte at the end ex-parte judgment was entered for the plaintiff/respondent.

The appellant did not immediately apply to set aside the said ex-parte judgment.

On 18th July, 2018, the appellant filed before the trial court an application for extension of time within which to set aside the ex-parte judgment. This was after one year four months and 21 days.

The application was dismissed on the ground that appellant did not advance reasonable cause for the delay.

The appellant was aggrieved hence this appeal. The appellant filed three grounds memorandum of appeal as follows:-

- 1. The Honourable court erred in law and facts for failing to consider properly the reason advanced by the appellant in his application for extension of time for filing an application for setting aside the judgment and decree of the trial court.*
- 2. The Honourable court erred in law and fact to deny the application for extension of time without considering the ground of illegality in the judgment of the trial court as stated in the affidavit to support the application for extension of time.*
- 3. The Honourable court erred in law and fact to deny an application without determining and resolving the question of failure by the trial court to issue notification to the appellant informing him when the judgment would be delivered.*

The appellant therefore prays for his appeal to be allowed with costs. The appeal was argued by written submissions. The appellant appeared in person.

The respondent was represented by Prisca Mtanga learned advocate.

Submitting in support of the appeal in respect of first ground of appeal he state that the trial court erred in law and facts for failure to consider the reasons he advanced in his application for extension of time to file an application for setting aside the judgment and decree of the trial court. He said in paragraph 4 of his affidavit he disposed that he was not properly served to appear to defend the suit. But the trial court decided differently. He mentioned for example at page 3 of its ruling the court stated that the demand notice was served to him before the respondent had lodged the suit and that substituted service through the News paper was made. He argued that the summons to appear was not served to him in accordance with the law and cited the case of ***Abutwalib Mussa Musuya and 2 Others vs Capital Breweries Ltd and 20 Others***, Civil Revision No. 02 of 2012 CAT at Dodoma to support his argument and to demonstrate how service should have been done.

Regarding the second ground of appeal, it is the argument by the appellant that the trial court erred to deny him extension of time without considering the ground of illegality in the judgment of the trial court as stated in his affidavit at paragraph 9.

In respect of the third ground of appeal, it is the submission by the appellant that the trial court erred in law and facts to deny an application without resolving the question of failure by the trial court to issue notification to him on the date ex-parte judgment was delivered. To that he cited the case of ***Cosmas Construction Co. Ltd vs Arron Garments Ltd [1992] TLR 127.***

He said, it was wrong for the trial court to dismiss the application despite the fact that from the conduct of the ex-parte trial, he was not notified on when the judgment would be delivered. Failure to so notify him on the date of delivery of ex-parte judgment is an apparent irregularity.

He therefore prayed for his appeal to be allowed with costs.

On her part counsel for the respondent Prisca Mtanga in reply submission submitted in respect of first ground that appellant's argument and appeal is misconceived. She said it is in the trial court record that the reason which was advanced by the appellant in his application for extension of time to file an application for setting aside ex-parte judgment, from the beginning he knew that there is case against him in court which is continuing through the demand notice which he received and signed. He also received the 1st summons dated 20/09/2017 but he did not want to appear in court. He later hidden himself until when service was made by publication in the newspaper but still he did not appear in court.

Regarding the second ground of appeal, it is the submission by the learned counsel that the trial court did not consider the issue of illegality. The counsel for the respondent did not agree with him as she said on 02/07/2018 the court broker affixed the notice at the appellant's house because he was not around except his wife. While the court broker made a call to him, he neglected to receive the phone. She said the appellant had all information concerning his case and is acknowledging that he owes the respondent. She said the respondent followed all requirements of service, he served the appellant and there was return of service. Even on the date of judgment he was notified. The appellant filed his application to set aside ex-parte judgment on 18th July, 2018 and not after 356 days as alleged.

She said the application for setting aside ex-parte judgment was not accompanied with sufficient reasons. The same was filed out of time. The trial magistrate could not grant an order which was not sought.

It is the respondent's counsel that there is no any illegality in the judgment. That the application was improper and could not move the court as it was held in the case of ***Milcafe Ltd vs. Norman Al-Mahboub***, Civil Application No. 82 of 2004 CAT in which it was held that for an application for an order under the Civil Procedure Code to set aside an ex-parte decree should have good cause.

Regarding the third ground on failure by the trial court to notify the appellant on the date of delivery of ex-parte judgment, it is the argument by the respondent's counsel that the appellant was nowhere to be found. Numerous summonses were issued and received by the court process

server. But appellant was not even picking phone calls from the process server knowing that there was a case against him. She said the appellant's act of seeking leave of this court is an abuse of the law.

The learned counsel said the appeal has no merit and prayed for it to be dismissed with costs.

Having gone through the court records, and after careful reading the submissions by the parties, the centre of controversy appears to be on the failure by the respondent to serve the appellant after he has filed the suit and failure by the trial court to notify him of the date of ex-parte judgment. This being the first appeal, is in a form of rehearing, I will therefore re-evaluate the evidence received. The duty of the first appellate court is to hear the parties on both the questions of law as well as evaluating evidence received.

Starting with the first ground, the trial court record is loud clear that the appellant was first served with a demand notice of the respondent's intention to sue him which was served to him, the appellant does not dispute that fact.

But the record also reveals that summons was issued to him as can be seen at page 2 of the trial court typed proceedings. The appellant endorsed on the summons for filing written statement of defence and endorsed the date he received it, that is on 20/01/2017. The date for mention indicated in the said summons was 30/01/2017. But there was no

service by publication in the newspaper before ex-parte hearing as was alleged by respondent's advocate. That was done at execution stage.

As the appellant was duly served and did not want to file written statement of defence, the trial court therefore properly acted under Order VIII rule (2)(b) of the Civil Procedure Code to proceed and allow the plaintiff/respondent to prove his claim ex-parte. The judgment was delivered on 27/02/2017. The counsel for the respondent pointed out in her reply submission that the appellant was evading service as he was not even picking phones from the process server.

I have gone through the trial court record, apart from the first summons served to him, there was no any other document received by him. If the appellant was evading service definitely he could not be found. This is likely to be true as after the judgment on 21/03/2017 the appellant wrote a letter to the Resident Magistrate District Court of Iringa applying for copies of judgment and court proceedings, that is after 22 days from the date ex-parte judgment was rendered.

The judgment was certified on 29/03/2017 which means from that date it was ready for collection. The appellant did not take any action to seek the ex-parte judgment set aside. On 08/11/2017 the respondent who was the decree holder filed an application for execution of the decree. It appears the appellant was evading service. On 4th December, 2017 the trial court issued to him notice to show cause as to why Warrant of Arrest should not issue under Order 4 Rule 37 of the Civil Procedure Code. The court record shows that he went to the chairman of Ilula Sokoni hamlet as

endorsed by the chairman of that hamlet on a copy served to him. That was on 11/12/2017. But there is also an affidavit of service by one Burton Ng'eve the process -server that he served the appellant the notice to show cause dated 9th day of January, 2018 requiring him to appear in court on 30th January, 2018.

But there is also a copy of the same notice to show cause dated 9th January, 2018 requiring him to appear in court on 31 day of January, 2018. But it was endorsed behind by the Village Executive Officer of Ding'inayo, Kilolo that the appellant's residence was unknown and he was traced through phone call but he was not picking the phone. The tendency by the appellant shows that he was evading service. But yet despite the fact that he became aware of when ex-parte judgment was rendered he could not file an application to set it aside promptly until on 19/07/2018 when he filed an application for extension of time in order to set aside ex-parte judgment. He did so after one year four months and 21 days from the date ex-parte judgment was delivered the district court found that delay was inordinate and no sufficient cause of delay was advanced by the appellant.

The reason by the appellant in his application for extension actually was not sufficient for the trial court to agree with his failure to appear in court and file written statement of defence but also he had no reasons able cause for the delay. The trial court was therefore justified to decline to grant the application for extension.

In order for an application for extension of time to be granted the applicant must show sufficient cause of delay. There is a long list of decided cases emphasizing on this requirement. There include:-

1. *Benedicto Mummello vs Bank of Tanzania Civil Appeal No. 02 of 2002 CAT.*
2. *Republic vs. Yona Kapanda and 9 Others (1985) TLR.*
3. *Yazid Khassim Mbakileki vs. CRDB (1996) Ltd Bukoba Branch and Another, Civil Application No. 421 PF 2018 (unreported) CAT.*
4. *Registered Trustees of Archdiocese of Dar es Salaam vs. The Chairman of Bunju Village Government and 11 Others, Civil Appeal No. 47 of 2006, CAT, and*
5. *Lymuya Construction Company Ltd. Vs Board of Registered Trustees of Young Women Christian Association of Tanzania, Civil Application No. 02 of 2010.*

Although sufficient cause has not been defined, but Nsekela JA in the case of ***Tanga Cement Company Limited vs. Jumanne Masangura and Amos A. Mwalwanda***, Civil Application No. 06 of 2001 has this to say:-

"What amounts to sufficient cause has not been defined, from decided cases a number of factors have to be taken into account including whether or not the application has

been brought promptly, such as illegality of the decision to be challenged”

But there are factors to be considered by the court before it decides to grant or not, to grant extension of time to an applicant to take any step which he did not take in time. Massati JA, as he then was in ***Lyamuya Construction Company Ltd*** (supra) formulated the following factors:-

(i) *The applicant must account for all the period of delay.*

(ii) *The delay should not be inordinate.*

(iii) *The applicant must show diligence, and not apathy negligence or dopiness in the prosecution of the action that he intends to take.*

(iv) *If the court feels that there are other sufficient reasons, such as the existence of a point of law of sufficient importance such as illegality of the decision to be challenged”.*

The appellant did not satisfy any of the factors cited above leave out the last factor which I will discuss it herein below. But the appellant did not show diligence in filing his application.

In the second ground of appeal the appellant alleged illegality of the ex-parte judgment, the reasons disclosed by the appellant on his allegation of illegality of the decision is that he was not notified of the date of delivery of ex-parte judgment.

However as I have pointed out above the appellant was evading service and he was nowhere to be seen. He was aware of the debt against

him. The respondent had served him with a demand notice. But he was also served after the respondent has filed a suit against him and was required to file written statement of defence but he did not do so, nor did he attend in court until the respondent applied to the court and allowed to prove his claim ex-parte. The appellant now cannot allege illegality of the decision basing on failure to be notified of the date of judgment.

Illegality in the decision complained of should be apparent on the face of it as it was held in the case of ***Zuberi Nasoro Mo'd vs. Mkurugenzi Mkuu Bandari Zanzibar***, Civil Application No. 93/15 of 2018 CAT.

Therefore the allegations that appellant was not aware of the proceedings against him and that he was not even notified of the date of ex-parte judgment are not correct by looking at the appellant's conduct from the beginning. This is nothing but an afterthought. This ground also fails.

The third ground is on failure by the trial court to notify the appellant of the date of ex-parte judgment and failure by the trial court to resolve that issue. I have adequately covered that point while discussing on grounds No. 1 and 2 and I need not to repeat the same.

In short, and as explained above, there are no good grounds of complaint in the appellant's appeal, even the submission he made in support of the appeal could not assist him. I have also given due consideration to the cases cited by the appellant but they are

distinguishable to the facts of this case. This appeal lacks merit. The same is hereby dismissed with costs.

DATED at IRINGA this 12th day of May, 2020.


F.N. MATOGOLO

JUDGE

12/05/2020

COURT:

Judgment delivered.




F.N. MATOGOLO

JUDGE

12/05/2020

