IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO. 155 OF 2019

(Arising from the ruling of Resident Magistrates Court of Dar es salaam at Kisutu in Misc. Civil Application No. 143 of 2016 dated 07th August, 2019 before Hon. W.A. HAMZA, **SRM** – Original Civil Case No. 198 of 2013 – Resident Magistrates Court at Kisutu)

NIKO INSURANCE (T) LTD ..... APPELLANT

VERSUS

BASILA BENEDICT CHUWA ..... 1ST RESPONDENT

MAMBOLEO S. MAMBOLEO ..... 2ND RESPONDENT

BOSANDRA INSURANCE AGENCY AND CONSULTANCY ...3RD RESPONDENT

JUDGMENT

2nd June 2020 & 30th June, 2020.

E. E. KAKOLAKI J

In this appeal the appellant is challenging the decision of the Resident Magistrate Court of Dar es salaam at Kisutu in Misc. Civil Application No. 143 of 2016 that dismissed her application for extension of time within which to file an application to set aside ex-parte judgment. It is equipped with one ground of appeal as registered hereunder:

1. That, the learned trial magistrate erred in law and facts by dismissing the application for extension of time with costs while the Appellant managed to advance and signpost good and sufficient reasons or grounds for extension of time within which to set aside the ex-parte judgment.

Briefly the facts that gave rise to this appeal may be narrated as follows. The appellant together with the 3rd Respondent were sued by the 1st and 2nd Respondents for payment of Tshs. 3,040,000/=being outstanding costs for repair of the respondents (plaintiffs) motor vehicles which they had insured with the appellant after being involved in accident, Tshs. 60,000/= per week for loss of business from the date of accident on the 12th December, 2008 and Tshs. 10,000,000/= as general damages in Civil Case No. 198 of 2013 before the Resident Magistrate Court of Dar es salaam at Kisutu. On the 30/09/2015 when the case was called for hearing the defendants defaulted appearance to defend their case as a result of the prayer made by the counsel for the respondents (plaintiffs) an ex-parte hearing order was entered by the court and hearing scheduled to proceed on 21/10/2015 before Hon. Kisoka, RM and later on the 05/11/2015 and 07/12/2015. On the 07/12/2015 the plaintiffs' case was heard and closed as a result judgment was scheduled to be delivered on the 22/12/2015 but on that date was adjourned and delivered on the 25/12/2015 by Hon. Kaluyenda, RM. The trial court entered judgment in favour of the 1st and 2nd respondent and the appellant was ordered to pay the respondents Tshs. 3,040,000/= as outstanding amount claimed for repair of the motor vehicles and Tshs. 60,000,000/=for loss of business. The judgment was pronounced in presence of the advocate for the respondents (plaintiffs) and in absence of the appellant. Following that judgment the respondents initiated execution proceedings and the

appellant was served with a notice to show cause why the said ex-parte judgment and decree should not be executed against her. The notice that required her to appear in court in 21/06/2016 is the one that made her aware of the existence of judgment against her as she was never given a notice of ex-parte judgment pronouncement date. As the time for application of setting aside ex-parte judgment had lapsed the appellant was forced to file an application for extension of time within which to file the application for setting aside ex-parte judgement via Misc. Civil Application No. 143 of 2016. In that application the appellant advanced three grounds namely failure to notify the appellant the date set for ex-parte judgment, Illegality of the impugned decision and confusion brought by the transfer of the presiding magistrate. The said application was heard on merit and dismissed hence this appeal.

Both parties in this appeal are represented. The appellant is advocated by Mr. Mudhihir Magee learned advocate and the respondents are defended by Mr. Symphorian R. Kitare learned advocate. It was agreed to dispose the appeal by way of written submission and both parties complied with the filing schedule.

Submitting on the sole ground Mr. Magee for the appellant faulted the learned Trial Magistrate for not appreciating the three grounds raised to support the application as they were strong ones to warrant the court to grant the application. He contended that the first ground is founded under Order XX rule 1 of the Civil Procedure Code, which puts a mandatory requirement that a notice shall be given to the parties or their advocates before pronouncing the judgment. And that the appellant was not issued with notice of judgment before pronouncement of the judgment in Civil Case No. 198 of 2013 which is sought to be set aside had the application

for extension of time been granted. To support his stance he cited the cases of **Chausiku Athuman Vs. Atuganile Mwaitege**, Civil Appeal No. 122 of 2007 (HC) which cited the case of **Cosmas Construction Co. Ltd Vs. Arrow Garments Ltd** (1992) TRL 127, **Egin M. Mujwahuzi Vs. Praygod K. Petro**, Misc. Land Case 653 of 2015 (HC) and **Ilala Municipal Council Vs. Twaha Rwehabura and 3 Others**, Misc Land Case Application No. 552 of 2016.

Secondly was on the issue of illegality of the decision sought to be set aside. Mr. Magee presented that what is termed as judgment in Civil Case No. 198 of 2013 is illegal as it offended the provisions of Order XX rule 4 which provides for the contents of judgment. That the said judgment lacked points for determination and reasons for the decision. He relied also on the case of **People's Bank of Zanzibar Vs. Suleman Haji Suleman** (2000) TRL 347 stressing that court has to make specific findings on each and every issue framed. He added that where the ground of illegality is pleaded and proved in an application for extension of time that alone suffices to establish a reason for extension in order to give opportunity to the party to challenge the decision. To stem his argument he cited to court the cases of **Principal Secretary Ministry of Defence and National Services Vs. Dervam Valambhia** (1992) TRL 189 and **Arunaben Chaggan Minstry Vs Naushad Mohamed Hussein**, Civil Application No. 6 of 2016 (CA-Unreported).

Thirdly is on the confusion brought by the transfer of the presiding magistrate in which Mr. Magee submits that the trial court misunderstood the ground. That as there was re-assignment of the case file to Ho. Kisoka RM who also proceeded ex-parte, the appellants were not informed of the change till 01/03/2016 as a result applied for the copies of judgment and

decree late on the 12/04/2016 in which the time for application of setting aside the ex-parte judgment had lapsed. For the foregoing reasons he prayed for this court to allow the appeal and grant the extension of time sought with costs.

On the respondents' side Mr. Kitare apart from challenging the merits of the appeal he before replying to the submission in support of the appeal by Mr. Magee he brought to attention of the court that the appeal is defective due to contravention of the provisions of Order XX rule 20 of the CPC which states that copies of judgement and decree shall be supplied to the parties on application to the court and at their expenses. That in this appeal the appellant did not apply for the copies of ruling and drawn order appealed against nor does she indicate in the memorandum of appeal that she applied for the said document. He said the requirement to apply for a copy of the decision was over emphasized in the case of **Akiba Commercial Bank Vs. Peter Joseph Mushi**, Civil Appeal No. 140 of 2013 (HC-unreported). For that reason he was of the submission that this appeal is bound to fail.

Having so noted, Mr. Kitare on the first ground concerning none issue of notice of delivery of ex-parte judgment he submitted that on the 12/08/2015 when the case was scheduled for hearing the counsel for the appellant was present and therefore there was no need for notifying him. With regard to the second ground on the illegality of the judgment he said Mr. Magee's submission was misleading as the claims were not pleaded in the affidavit in support of the application thus contravening the general law of pleadings which prevents the appellant to travel outside the pleading. He relied on the case of **Funke Ngwagilo Vs. AG** (2004) TLR 161 where the court rejected appellant's evidence which were not pleaded

in the plaint. He was therefore of the submission that the claims that the trial court framed no issues and never addressed on them were an afterthought as they were not pleaded by the appellant before.

On the third ground which based on transfer of the former magistrate, he submitted that appellants failed to link the transfer of the former trial magistrate with the delay to file an application to set aside the ex-parte judgment. That if was informed on the 01/03/2016 why writing a letter on the 12/04/2016 to request for the copies of judgment and decree. He added that, it is trite law that before exercising its discretion for extension of time, the court is enjoined to consider not only the reason for delay but also the length of such delay together with accounting for each day of delay. He relied on the case of **Sebastian Naura Vs. Grace Rwamafa,** Civil Application No. 4 of 2014 (CA-unreported). He therefore invited the court to dismiss the appeal with costs as the magistrate was right to dismiss the application.

In a brief rejoinder submission Mr. Magee with regard to the failure to apply for the copies of ruling and drawn order subject of this appeal he said memorandum of appeal and submissions are not evidence thus annexures cannot be attached to them. That it is on record that the appellant applied and was supplied with the said documents that is why she attached them to the memorandum of appeal. Had they been missing then could invalidate the appeal. He added that even if the same were not requested this minor anomaly is curable under section 3A(1) and (2) if the CPC which discourages objections and encourage the substantive justice. He cited the case of **Yakobo Magoiga Gichele Versus Peninah Yusuph**, Civil Appeal No. 55 of 2017 (CA – unreported). With regard to

the submission in opposition of rest of the grounds he almost reiterated his submission in chief and prayers thereto.

Having narrated both parties submissions in extensor let me now turn to consider and determine them. I will start with the concern raised by Mr. Kitare for the respondents concerning the non-compliance of the provisions of Order XX rule 20 of the CPC in that the appellants failed to apply for the copies of ruling and drawn order as a result this appeal is rendered invalid. He relied on the case of **Akiba Commercial Bank** (supra) Mr. Magee is of the different view that the appellant applied for the same and that is why she attached them to the memorandum of appeal. And that had she failed to attach the same then it could invalidate the appeal. He however put it that even where the same are not applied still could not vitiate the proceedings or invalidate the application as the omission could be taken care under the provisions of section 3A(1) and (2) of the CPC. In treating fairly this point I fill enjoined to quote the alleged controverted provision of Order XX rule 20 of the CPC:

> *"**20**. Certified copies of the judgment and decree shall be furnished to the parties on application to the court and at their expense."*

Reading from the cited provision it is my interpretation that the provision was designed to provide the procedure under which certified copies of judgment and decree can be obtained. That in order for the party to obtain it he/she has to apply for it in court at his/her own expenses. However, there in nowhere it is stated that appellant has to indicate that he applied for copies of ruling and drawn order before filing the appeal. What remains the mandatory requirement is that the appellant when appealing must attach the impugned decision which the appellant in this

"A party who fail to enter an appearance disable himself from participating when the proceedings are consequently ex parte, but that is the furthest extent he suffers. Although the matter is therefore considered without any input by him he is entitled to know the final outcome. He has to be told when the judgment is delivered so that he may, if he wishes to attend it as certain consequences may follow."

The same was the position in the case of **Dar es salaam Water and Sewage Authority Vs. Salima Pili Tamaambele**, Misc. Land Appeal No. 5 of 2013 (HC – unreported) where the Court had this to say:

*"It is the law, as stated in **Cosmas Construction Co. Limited Vs. Arrow Garments Limited**, that a party whom a proceeding is conducted ex-parte must be notified of the date set for delivery of the judgment so that he may, if he wishes, attend to receive it and, then, consider whether to exercise his right of appeal. That the trial Tribunal served no notice of the scheduled delivery of its judgment upon the appellant is evident in the trial record. This, to say the least, was an irregularity. It would be unfair to assume that the limitation period started running against the appellant immediately after such delivery of judgment, which fact he was unaware of."*

From the two above cited cases there is no dispute that it is mandatory for the court to issue the notice of judgment pronouncement to the party whom the case proceeded ex-parte against. From the record it is clear and undisputed by Mr. Kitare that the appellant was not issued with a notice which like the in the case of **Dar es salaam Water and Sewage**

Authority (supra) I also find the omission an irregularity. However, that irregularity does not in itself amount to reasonable cause as rightly found by the learned magistrate. The applicant ought to have accounted from the time when he received the copies of judgment and decree up to the time he file the application of late on 15/07/2016 something which he failed to do. He has also failed to do so when submitting to justify the ground on the confusion of transfer of the trial magistrate. He has therefore left with one ground to consider and this is illegality.

It trite law that when illegality is claimed is a good ground for extension of time regardless of whether or not reasonable explanation has been given by the applicant. This position was stated by the Court of Appeal in the case of **VIP Engineering and Marketing Limited and Two Others Vs. Citbank Tanzania Limited**, Consolidated Civil Reference No. 6,7 and 8 of 2016 (Unreported) when held that:

> *"It is settled law that a claim of illegality of the challenged decision constitutes sufficient reason for extension of time under Rule 8 (now Rule 10) of the Court of Appeal Rules regardless of whether or not a reasonable explanation has been given by the applicant under the Rules to account for the delay."*

It is not sufficient to only plead illegality but also that illegality must be apparent on the face of record. This was the position the Court of Appeal in the case of **Lyamuya Construction Company Ltd Vs. Board of Registered Trustees of Young women's Christian Association of Tanzania**, Civil Application No. 2 of 2010, when the Court observed:

> *"Since every party intending to appeal seeks to challenge a decision either on point of law or facts, it cannot in my view, be said that in VALAMBIA's case, the court meant to draw a*

general rule that every applicant who demonstrates that his intended appeal raises appoint of law should, as of right, be granted extension of time if he applies for one. The Court there emphasized that such point of law must be that if sufficient importance and, I would add it must be apparent on the face of the record, such as the question of jurisdiction; not one that would be discovered by a long drawn argument or process".

In his second ground Mr. Magee claimed a ground of illegality as the judgment in Civil Case No. 143 of 2013 sought to be set aside is in violation of Order XX rule 20 of the CPC, which Mr. Kitare responded that it is an afterthought as it has never been pleaded by the appellant before. It is true as submitted by Mr. Kitare that the said illegality was not pleaded in the applicant's affidavit in support of their chamber summons. However, the point raised is not of fact that requires evidence as it was in the case of **Funke Ngwagilo** but rather of law which in my opinion is apparent on the face of record. To deny the applicant with an opportunity to address the court when making an application for setting aside the ex-parte judgment in my opinion would be going against the spirit of section 3A(1) and (2) of the CPC that seeks to further the overriding objective of the Code by encouraging substantive justice and facilitate the just, expeditious, proportionate and affordable resolution of civil disputes.

There is no dispute that the judgment in Civil Case No. 143 of 2013 has no points for determination and the reasons for decision, the points of law which are apparent on the face of record thus qualify to amount to good cause. The appellant has managed to show good cause to warrant the court grant her with extension of time. The magistrate therefore erred in making a finding that the applicant could not take advantage of the

provision of Order XX Rule 1 of the CPC to establish illegality of the judgment.

In the circumstances and for the foregoing reasons, I would allow the appeal as I hereby do. I quash the decision of the District Court in Misc. Civil Application No. 143 of 2016 and set aside the orders meted. The appellant is ordered to file the application for setting aside ex-parte judgment within 21 days from the date of this ruling. Costs to follow the event.

It is so ordered.

DATED at DAR ES SALAAM this 30th day of June, 2020.

E. E. KAKOLAKI

JUDGE

30/06/2020

Delivered at Dar es Salaam this 30th day of June, 2020 in the presence Ms. **Dorothea Rutta** advocate for the appellant Ms. **Edina Henry** advocate for the 1st and 2nd respondent and Ms. **Lulu Masasi,** Court clerk and in the absence of the 3rd respondent.

Right of appeal explained.

E. E. Kakolaki

JUDGE

30/06/2020