

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF
TANZANIA**

(SONGEA DISTRICT REGISTRY)

AT SONGEA

MISC. CIVIL APPLICATION NO. 4 OF 2019

(Arising from Civil Case No. 2 of 2017 of Songea District Court)

CASTO KABEREGE APPLICANT

VERSUS

OLESTAS MALINGO..... 1ST RESPONDENT

WESLAUS MBOGORO 2ND RESPONDENT

Date of Last Hearing: 23/06/2020

Date of Ruling: 17/07/2020

RULING.

I. ARUFANI, J.

This ruling is for the application filed in this court by Casto Kaberege. He is beseeching the court to inspect the record of the District Court of Songea (hereinafter referred as the trial court) in Civil Case No. 2 of 2017 and revise or correct errors material to the merit of the case involving substantial injustice and make such decision or order therein as it deem fit. The application is made under section 43 (2) and 44 (1) (b) of the Magistrates Courts' Act,

Cap 11 R.E 2002 and is supported by the affidavit sworn by Edson Mbogoro, learned counsel for the applicant. The respondents resisted the application by filing in the court the counter affidavit sworn jointly by them.

The background of this matter is to the effect that, the respondents were arraigned before the Primary Court of Mahanje which is within Songea District, vide Criminal Case No. 158 of 2016 with an offence of stealing one cow of the applicant. After the applicant who was a complainant before the Primary Court failed to appear before the Primary Court the charge was dismissed under Rule 26 of the Primary Court Criminal Procedure Code for want of prosecution and the respondents were discharged.

Having been discharged the respondents instituted a suit against the applicant before the trial court. In the said suit which was registered as Civil Case No. 2 of 2017 the respondents prayed the trial court to order the applicant to pay them TZS 100,000,000/= being general damages for defamation caused to them. They also prayed for punitive or exemplary damages as the trial court may deem just and equitable to determine, interest on the decretal amount at court rate, costs of the suit and any other order and relief the trial court may deem just and equitable to grant.

The applicant was served with summons to file a defence against the respondents' claims but when the matter was called for mention on 19th April, 2017 it was found the applicant had not filed his written statement of defence hence a default judgment was entered on the same date against him and in favour of the respondents. The applicant was dissatisfied by the order of the trial court and is now beseeching the court to revise the proceedings of the trial court to see its correctness, propriety and regularity and if it will find any error to correct the same as it may deem fit.

When the application came for hearing the applicant was represented in the matter by Mr. Edson Mbogoro, learned advocate the respondents were represented by Mr. Vicent P. Kassale, learned advocate. The counsel for the parties prayed and allowed to argue the application by way of written submissions. Therefore the application was argued by way of written submission. The counsel for the applicant adopted the affidavit he filed in this court to support the application and continues to state in the submission of the applicant that, the errors which gave rise to the application at hand are listed at paragraph 9 of the affidavit supporting the application.

He stated the first error which they want the court to direct its mind is whether the trial court was correct in law in entering

default judgment against the applicant without hearing ex parte evidence from the respondents. He referred the court to Order VIII Rule 14 (2) of the Civil Procedure Code, Cap 33 R.E 2019 (hereinafter referred in short as CPC) and stated that, as the claims before the trial court were not for a liquidated sum of money not exceeding one thousand shillings the trial court was not required to enter a default judgment but to allow the respondents to prove their claims ex parte under order 14 (2) (b) of the CPC.

He went on arguing that, apart from the above stated irregularity there is another irregularity. He stated that, although it is averred at paragraph 3 of the plaint filed in the trial court by the respondents that their cause of action is founded on tort of defamation but what is pleaded at paragraphs 5 to 9 of the plaint shows the cause of action is based on tort of malicious prosecution. He submitted that, the court is empowered under Order VII Rule 11 of the CPC to reject a plaint if it is found to be not disclosing a cause of action. He stated the power of the court to reject a plaint which is not disclosing a cause of action is exercisable at the stage of admitting the plaint. He submitted that, in view of the above stated defect the respondents' plaint ought to be rejected at the admission stage.

He stated another error material to the merit of the case is in respect of what transpired in the court proceedings when the applicant appeared in court for the first time on 24th March, 2017 in compliance with the summons served to him. He stated that, as provided under Order VIII Rule 2 of the CPC the applicant was required to file his written statement of defence in the court on or before 14th April, 2017. He stated that, on 19th April, 2017 when the case was coming for mention the applicant was late in filing his written statement of defence by five days.

He went on arguing that, the proviso to Order VIII Rule 2 of the CPC empowers the court to extend the time for filing written statement of defence for another 21 days from the expiration of the first 21 days on application by the defendant. He stated that, although it was correctly stated by the trial court that the applicant was required to apply for extension of time to file his written statement of defence but as the applicant was unrepresented peasant from a rural area and he was English language illiterate the trial court ought to have granted the said extension of time suo moto.

He stated that, as deposed at paragraph 8 of the affidavit supporting the application the applicant says he believed the summons served to him on 24th March, 2017 was for him to appear

before the court on 19th April, 2017 which he complied with and he didn't know he was required to file his written statement of defence in the trial court. He prayed that, in view of all what he has argued hereinabove the proceedings of the trial court be quashed and order which entered judgment by default be set aside and substituted with an order the court may deem fit and just for the ends of justice.

In reply the counsel for the respondents stated in his submission that, after going through the applicant's application and his written submission and after going through Order VIII Rule 14 (2) of the CPC they are conceding it was wrong for the trial court to enter default judgment in favour of the respondents without requiring the respondents to prove their claim. He submitted that, the trial court was required to order the respondents to prove their case ex parte so as to be able to determine whether the alleged defamation was proved and what damages suffered by the respondents.

He vehemently disputed the submission by the counsel for the applicant that the plaint of the respondents offended Order VII Rule 11 of the CPC and ought to be rejected. He said the clear interpretation of the mentioned provision of the law is that, the court is required to reject the plaint which does not disclose the

cause of action; or where the relief claimed is undervalued; or the plaintiff has failed to rectify the valuation after being required by the court to do so and where the suit appears to be barred by any law.

He stated that, under the mentioned provision of the law the court has discretionary power to allow the plaintiff to amend the plaint. He went on arguing that, as paragraph 3 of the plaint is disclosing cause of action is defamation and there are other facts in the plaint constituting the stated cause of action, if the trial court was satisfied the plaint did not disclose the cause of action it would have ordered the plaint to be amended and not to reject it.

He submitted that, as they have conceded to the first irregularity they are praying the proceedings dated 19th April, 2017 and its order be quashed and set aside and the suit proceed from where it had ended before the mentioned date. He prayed that, as the applicant has always been fighting for his right of being heard and as the respondents were denied right of being heard the applicant be directed to file his written statement of defence and the suit be ordered to proceed on merit so that the parties can be given their right of being heard.

The court has carefully considered the submissions made to the court by both sides and it has gone through the proceedings of the trial court. The court has found the issue to determine in this matter is, whether the record of the trial court contains errors material to the merit of the case which resulted into substantial injustice to the parties which this court is required to exercise revisionary powers conferred to it by the law to correct them.

I will start with the second error which the counsel for the applicant states that, the respondents' plaint ought to be rejected under Order VII Rule 11 of the CPC for not disclosing a cause of action. The court is in agreement with the counsel for the applicant that, position of the law as provided under Order VII Rule 11 (a) of the CPC is that, where a plaint does not disclose a cause of action the step which can be taken by the court is to reject it. That position of the law was clearly stated in the case of **John M. Byombalirwa V. Agency Maritime Internationale (Tanzania) Ltd**, [1983] TLR 1.

However, the court has considered the argument by the counsel for the applicant that the plaint of the respondents ought to be rejected but failed to see merit in his argument. The court has arrived to the above finding after seeing that, his argument that paragraph 3 of the plaint of the respondents' suit shows their

claims were founded on tort of defamation while paragraphs 5 to 9 of the plaint discloses a tort of malicious prosecution cannot be a ground for rejecting a plaint under Order VII Rule 11 of the CPC.

The court has found the respondents' plaint should have not been rejected under that provision of the law after seeing that, the gist of the argument by the counsel for the applicant is not that the plaint is not disclosing a cause of action upon which the respondents' claims are founded which would have moved the trial court to reject the plaint under the cited provision of the law but is to the effect that, the respondents' cause of action is not clear as to whether is founded on tort of defamation or tort of malicious prosecution. The above finding of this court that the respondents' suit should have not been rejected on that ground is getting support from the book by C. K. Takwani, titled **Civil Procedure with Limitation Act, 1963**, seventh Edition where the author states at page 240 that:-

"The power to reject a plaint on this ground (where plaint does not disclose cause of action) should be exercised only if the court comes to the conclusion that even if all the allegations set out in the plaint are proved, the plaintiff would not be entitled to any relief."

The above excerpt makes the court to come to the view that, as the respondents have averred at paragraph 3 of the plaint that their claim was founded on tort of defamation and the reliefs clause shows their claims were based on tort of defamation it cannot be said if the allegations in paragraph 3 of the plaint were proved the respondents would have not been entitled to the reliefs claimed in the relief clause. To the view of this court a mere fact that there is averment of tort of malicious prosecution in the plaint cannot be sufficient ground to establish the plaint is not disclosing cause of action upon which the respondents' claims are founded.

It is the view of this court that, if the averments in the plaint were disclosing tort of malicious prosecution while the claims were based on tort of defamation the right step to be taken as rightly argued by the counsel for the respondents would have not been to reject the plaint but to order the plaint to be amended. The power of the court to order the plaint which if, is amended will disclose a cause of action is provided under the proviso to Order VII Rule 11 of the CPC. That provision of the law allows the court to order the plaint which is not disclosing a cause of action to be amended so as to disclose the cause of action in the plaint. In the premises the court has found the second error alleged is in existence in the plaint of the respondents raised in the submission of the applicant as a

ground for the court to revise the proceedings of the trial court has no merit.

As for the third error that the trial court ought to grant the applicant extension of time to file his written statement of defence *suo moto* the court has found that, the file of the respondents' suit was placed before the trial court's magistrate for the first time on 20th March, 2017 when all the parties were not present before the court. The trial magistrate ordered the matter to come for mention on 19th April, 2017 and the applicant to be served with summons to file his defence.

When the file of the suit was placed before the trial court magistrate on 19th April, 2017 the respondents who were plaintiffs in the matter were represented by Mr. Kabyemela, advocate and the applicant who was a defendant appeared in the court in person. The applicant is recorded to have stated to the trial court magistrate that, he was served with the summons attached with all documents on 24th March, 2017. He said he failed to file in the trial court his written statement of defence as he failed to understand what is written in the documents served to him as they are in English language and denied to be responsible with the claims of the respondents.

The trial court magistrate found the applicant had no valid ground for failing to file his written statement of defence in the trial court. The trial magistrate stated in the record of the matter that, the applicant had failed to pray for extension of time within which he should have filed his written statement of defence in the court and proceeded to enter a default judgment. That being the position of the matter the court has found the law governing filing of written statement of defence in a suit like the one filed in the trial court by the respondents is Order VIII Rule 1 (2) of the CPC. That provision of the law requires a party wishing to defend himself in a suit filed in a court against him to file in the court his written statement of defence within twenty one days form the date of being served with summons to file his defence.

That being the position of the law, the court has found as rightly argued by the counsel for the applicant, the applicant who said he was served with summons to file his defence on 24th March, 2017 he was required to file his defence in that court on or before 14th April, 2017. Therefore on 19th April, 2017 when the parties appeared before the trial court magistrate the applicant was out of time within which he would have filed his defence in the trial court by five days. However, the proviso to Order VIII Rule 1 (2) of the CPC allows the court to extend that period of time for more twenty

one days if a party who is required to file his written statement of defence in the court applied for such extension of time within the period of next twenty one days. [See the case of **National Bank of Commerce Limited V. Partners Construction Co. Ltd**, Civil Appeal No. 34 of 2003, CAT at DSM (unreported)].

The court has found the trial court magistrate stated in the record of the matter that, despite the fact that the applicant was questioned about seeking for extension of time to file his written statement of defence in the matter out of time but he failed to apply for the same. However, the court has found what was stated by the trial court magistrate in the proceedings of the matter is not featuring anywhere in the record of the matter. To the views of this court and as it was stated the applicant is illiterate in English language if he was really questioned by the trial court magistrate about exercising his right to apply for extension of time to file his defence and the consequences of not filing the same he would have not failed to apply for extension of time to file his defence in court.

Even if it will be taken the applicant was questioned about exercising his right to apply for extension of time to file his defence in the matter and failed to apply for the same the court has found the right step to take as argued by the counsel for both sides would have not been to enter a default judgment. The right step to take

as argued by the counsel for the parties and as provided under Order VIII Rule 14 (2) (b) of the CPC was to order the respondents to prove their claims ex parte. That is because the claim of the respondents was not for a liquidated sum not exceeding one thousand shillings which the trial court would have power to enter a default judgment under Order VIII Rule 14 (2) (a) of the CPC. The above finding of this court is getting support from the case of **Petrades Godwini V. Marlene Samiath**, Civil Appeal No. 17 of 2017, HCT at Bukoba, (unreported) where the court stated *enter alia* that;

"... the law under Order VIII Rule 14(2) of the Civil Procedure Code (supra) is clear that a default judgment can only be entered without ex parte proof for claim of liquidated sum not exceeding tsh 1000/=. Accordingly, in any other case and when the liquidated sum exceed tsh 1000/=, the trial court must after the proof of service of summons fix a day for ex parte proof of the claim and pronounce the judgment in favour of the plaintiff only upon such proof."

In the light of what is stated in the above case which this court has found is a correct position of the law in our country the court has found the above stated error which was raised in the

written submission of the applicant as the first error material on the face of record of the trial court has merit and resulted into miscarriage of justice to the parties. The above traversed errors make the court to find is bound to invoke revisionary powers conferred to it by section 44 (1) (b) of the Magistrates Courts Act under which the application at hand is made to revise the proceedings of the trial court and correct the stated errors.

In the premises the application filed in this court by the applicant beseeching the court to revise and correct the record of the trial court in Civil Case No. 2 of 2017 is hereby granted. The proceeding of the trial court dated 19th April, 2017 is quashed and the order of entering default judgment granted in favour of the respondents without proof of their claim is set aside. The court is ordering the file of the trial court to be remitted to that court and the matter to proceed from where it had reached before the proceeding of 19th April, 2017.

After the file of the trial court being remitted to that court and the parties appear before the magistrate who will be assigned to try the matter the applicant will be at liberty to apply for extension of time to file his written statement of defence in that court as provided under the law. For avoidance of misinterpretation of the order of this court the time from 19th April, 2017 up to when the

parties will appear before the magistrate who will be assigned to try the matter will be excluded from the time within which the applicant would have a right of seeking for extension of time to file in that court his written statement of defence. As the errors caused the court to arrive to the above decision were not caused by any party in the matter, the court has found proper to make no order as to costs in this matter. It is so ordered.

Dated at Songea this 17th day of July, 2020.

I. ARUFANI

JUDGE

17/07/2020

Court:

Ruling delivered today 17th day of July, 2020, in the presence of Nestory Nyoni, advocate holding brief of Mr. Edson Mbogoro, advocate for the applicant and brief of Mr. Vicent Kassale, advocate for the respondents. Right of appeal is fully explained.

I. Arufani

I. ARUFANI

JUDGE

17/07/2020