IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

CIVIL APPEAL NO. 16 OF 2020

(Arising from the Exparte Judgement of the Musoma District Court in Civil Case No. 3 of 2012 and ruling in Misc. Civil Application No. 30 of 2020)

FINCA TANZANIA ..... APPELLANT

VERSUS

LEONARD ANDREW KOROGO ..... RESPONDENT

JUDGEMENT

27th July and 28th August, 2020

KISANYA, J.:

In its decision dated 23rd May, 2015, the District Court of Musoma at Musoma passed an *ex-parte* judgement against the appellant, **Finca Tanzania**. That was through Civil Case No. 3 of 2012 filed by the respondent, **Leonard Andrew Korogo**. He claimed for Tshs. 10,350,000, interests and costs against the respondent. Aggrieved, the appellant filed an application to set aside the *ex-parte* judgement. Her application was supported by the affidavit sworn by **Wilbard R. Kilenzi**, learned counsel for the applicant on 16th May, 2015. The reasons for failure to appear when the case was called on for hearing were adduced in the said affidavit. At the end, the trial court dismissed the application for want of merit on 19th August, 2015.

Upon seeking leave for extension of time to appeal against the said decision, the appellant has filed the present appeal. The petition of appeal is premised on the following grounds:

1. *That the court erred in law and fact to set aside dismissal order, restore, hear, and determine Civil Case No.3 of 2012, ex-parte in the absence of proof of service to the applicant.*
2. *That the court erred in law and fact to dismiss Misc. Civil Application No. 30 of 2015 in total disregard of the Applicant's right to be heard and other principles of law governing hearing and determination of the suits on merit.*
3. *That the Court erred in law by delivering exparte judgement without summons to the appellant to appear and take it for she was the one to suffer the consequences of the said ex-parte judgement.*
4. *The Court erred in law and fact by failing to analyze and evaluate evidence and consequently awarding unproved damages.*
5. *That the court erred in law by dismissing Misc. Civil Application No. 30 of 2015 to set aside ex-parte judgement in the absence of proof that appellant was acting mala-fide calculated to delay justice.*

When this appeal came up for hearing, the appellant was represented by Ms. Tupege Anna Mwambosya, learned advocate. On the other side, Mr. Thomas Makongo, learned advocate appeared for the respondent.

Submitting on the merit of the appeal, Ms. Mwamboysa argued that the appellant was not served with summons to appear at the hearing of the application for setting aside the dismissal order and restoring of Civil Case No. 12 of 2012. She went on to submit that, the court was duty bound to consider whether the appellant was duly served. The learned advocate cited

the case of **Mwanza Director Co. Ltd vs Mwanza Regional Manager Tanesco and Another 2006 TLR 329** to support her argument.

On the second ground, Ms Mwambosya argued that the trial court disregarded the appellant's right to be heard at the time of determining Misc. Civil Application No. 30 of 2015. He cited the case of **Fabian Muraha vs Lukaya Muraha** (1996) TLR 150.

Ms Mwambosya went on to submit in support of the third ground. She argued that there was no proof of service to the appellant to appear and defend Civil Case No 30 of 2012. The learned counsel was of the view that, had the appellant been served to appear and supplied with copy of ruling, she would have she would have appeared for the trial. Therefore, Ms Mwamboysa contended that, the appellant's right to be heard on merit was curtailed as the trial court dismissed the application to set aside the *ex-parte* judgement.

On the fourth ground of appeal, the learned advocate argued that the trial court did not evaluate evidence adduced by the respondent that the damages awarded thereto were not proved. She referred the Court to the case of **Chui Security Company Ltd vs Outdoor (T) Ltd**, Commercial Case No. 141 of 2018 (Unreported).

Regarding the last ground of appeal, Ms Mbambosya reiterated that the trial court failed to consider that, the appellant was not served to appear when Civil Case No. 3 of 2012 was set for hearing after its restoration. She therefore faulted the trial court for holding that, the appellant acted mala-fide calculated to delay justice. That said, Ms Mwambosya asked the Court to quash the *ex-parte* judgement and the ruling of the trial court in Civil Case No. 3 of 2012

and Misc. Application No. 30 of 2015 and, order retrial of Civil Case No. 3 of 2012 before another magistrate. She also prayed for costs of this appeal.

In rebuttal, Mr. Makongo was of the view that the appeal was omnibus. His argument was based on the reason that, this Court had allowed the appellant to appeal out of time, against Misc. Civil Application No. 30 of 2015 and not Civil Case No. 3 of 2012. The learned counsel went on to submit that this Court has no jurisdiction to determine the application for to set aside the *ex-parte* judgement.

With that position, Mr. Makongo argued that there was no good cause for the trial court to set aside the *ex-parte* judgement. He contended that the appellant was duly served to appear in Civil Case No. 3 of 2012.

The learned counsel went on to submit that, Misc. Civil Application No. 3 of 2015 was heard on merit in the presence of the appellant. Thus, he was of the firm view that, the appellant was not denied the right to be heard as contended in his appeal.

Mr. Makongo submitted further that, an *ex-parte* judgement cannot be lifted through this appeal. He averred that such issue is determined in the application to set aside an *ex-parte* judgement. In that regard, the learned counsel urged the Court to dismiss the appeal with costs.

In her rejoinder submission, Ms. Mwambosya replied that, the appeal was not omnibus. She argued that, Miscl. Application No. 30 of 2015 was based on Civil Case No. 3 of 2012 and hence the need to consider both matters. She reiterated that the appellant was not duly served.

I have dispassionately considered the evidence on record and rival submissions by both parties. It is not disputed that, this Court granted the leave to appeal out of time against the decision of the trial court in Misc. Civil Application No. 30 of 2015. As rightly argued by Mr. Makango, the power to set aside an *ex-parte* judgement is vested in the court which passed it. This is provided for under O. IX, Rule 13(1) of the Civil Procedure Code, Cap. 33, R.E. 2002 (the CPC) which was in force at that time. See also, **Antipus Pius Ishebabi vs Hassan Issa Likwedembe,** Civil Appeal No. 5 of 2019, CAT at Mtwara (unreported) where the Court of Appeal held that:

> *"...where a defendant against whom an ex-parte judgment was passed, intends to set aside that judgment ... the proper course for him is to file an application to that effect in the court which entered the judgment"*

In the event the application for an order to set aside the judgement passed *ax-parte* is rejected, an aggrieved party is entitled to appeal against that decision. This is pursuant to O.XL, Rule 14 of the CPC. In the course of determining the appeal, the appellate Court has to consider whether the trial court was right in dismissing the application for setting aside the *ex-parte* judgement and issue the necessary order.

The law is clear on the ground to be considered in deciding whether to grant the application for setting aside the judgement passed *ex-parte*. The trial court has to consider whether the applicant was duly served or prevented by any sufficient cause from appearing when the case was called on for hearing. These grounds are provided for under O. IX, Rule 13(1) of the CPC. It is the duty of the applicant or his advocate to prove the sufficient cause for his non-appearance or that he/she was not duly served. Such ground has to be stated

in the affidavit in support of the application. In other words, the application is proved by evidence adduced by the applicant as held in **Antipus Pius Ishebabi** *(supra)* that:

> *"..the reasons for the defendant's absence involve matter which require to be established by evidence."*

Led by the above position of law, I am healthy to consider the merit or demerit of this appeal. I will do so by considering the grounds advanced by the appellant in the affidavit in support of the application, the evidence on record and submission by the learned counsels.

In the first ground of appeal, Ms Mwambosya contended that there was no proof of service to the appellant to appear when the application to set aside dismissal of Civil Case No. 3 of 2012 was called on for hearing. This ground was raised in paragraph 8 of the affidavit in support of the application. Right to be heard is one of the cardinal principle. According to Article 13 (6)(a) of the Constitution of the United Republic of Tanzania, 1977, a person whose right is being determined by the court is entitled to a fair hearing. This include the right to know the claims levelled against him. In that regard, such right can be exercised if the person to be affected by the said decision is duly served and made aware of the suit against him.

It is on record that, Civil Case No. 3 of 2012 was dismissed for want of prosecution on 21/10/2014. However, the applicant applied for an order to set aside the dismissal order. That was through Misc. Application No. 52 of 2014 which was admitted on 28/10/2014. The records reveals that the appellant was duly served with the summons. She was served through

Musoma Branch on 16/01/2015. A rubber stamp/seal was sealed on the summons to acknowledge receipt. The summons informed the appellant to appear in Court on 15/02/2015. The trial court proceeded *ex-parte* because the appellant failed to appear without assigning reasons. In that regard, I find the first ground of appeal devoid of merit.

The appellant stated in the second ground of appeal that, Miscl. Civil Application No. 30 of 2015 was dismissed in total disregard of her right to be heard. I have gone through the record to explore whether the appellant was denied the right to heard. What I have gathered is that, the appellant's application was filed on 18/5/2015 and admitted on 19/05/2015. Thereafter, it came for mention on 11/06/2015. On that day, the respondent appeared in person while the appellant failed to appear. It was then fixing for hearing on 01/07/2015. This time the appellant appeared. However, hearing could not proceed as the trial was magistrate was indisposed. The Court adjourned the application to hearing on 10/08/2015. Again, the appellant failed to appear. However, the trial court did not dismiss the application for want of prosecution. At last the application was heard on 19/08/2015. Mr. Rwechungura, learned advocate, appeared for the appellant. He submitted in support of the application. At the end, the trial court delivered its ruling on 5/10/2015. The application was dismissed for want of merit.

With such findings, I hold that the appellant was not denied the right to be heard. The trial court adhered by all principles of natural justice. The fact that the ruling was not decided in favour of the appellant should not be taken to imply that her right to be heard was disregarded. Thus, the second ground is meritless as well.

I now move to the third and fifth grounds of appeal. The appellant stated in both grounds that, she was not served to appear upon restoration of Civil Case No. 3 of 2012. This ground was also stated in the affidavit in support of the application for setting aside the *ex-parte* judgement. As stated herein, non-service of summons is one of the grounds for setting aside the *ex-parte* judgement. In the instant appeal, the appellant was served with the application for restoration of the case but failed to appear. I have discussed at length this issue while addressing the first ground of appeal. In my opinion, the said summons alerted the appellant that, Civil Case No. 3 of 2012 might be restored. Further, as rightly stated in paragraph 10 of the appellant's affidavit, when the case was called on for hearing on 18/3/2015, the respondent informed the Court that, the appellant was duly served. Although, copy of summons is not in the case file, I am convinced that the appellant was aware that, Civil Case No. 3 of 2012 had been restored and fixed for hearing 18/3/2015. I say so basing on letter dated 13th March, 2015 annexed to the affidavit in support of the application for setting aside the *ex-parte* judgement. In that letter which was received at the trial court on 16/3/2015, the appellant's counsel one, **W. R. Kilenzi** requested for an adjournment of Civil Case No. 3 of 2012 to 7th and 8th April, 2015. This is what he stated:

> ***"RE: REPORT OF ABSENCE OF MR. W. KILENZI IN CIVIL CASE NO. 03/2012, LEONARD ANDREW Vs FINCA (T) LTD.***
>
> *Reference is made in the above captioned subject matter. Our firm has been acting for the respondent in the above civil suit which is scheduled for mention on 18th March, 2015.*

Unfortunately our counsel Mr. W.R. Kilenzi who has been assigned to defend this case on the mention date will be appearing at the High Court- Labour Division before Honourable Madam Judge Nyerere.

In the circumstances, we therefore praying for adjournment and scheduling of hearing date and on the strength of the Court's advice, that the matter be scheduled for two consecutive dates to allow each party a day to be heard on its part we propose the matter to be heard on 7th and 8th April, 2015 and each party should come prepared to continue with the hearing of the case…

In the light of the above, it clear that the appellant was aware that Civil Case No. 3 of 2012 had been restored and set for mention 18/3/2015. That is why he wrote the letter praying for an adjournment. He even proposed the date convenient on his schedule and encouraging the parties to prepare themselves. The case was set for hearing on 8/4/2015 as prayed by the appellant's counsel. However, he failed to appear. That is when the court decided to proceed *ex-parte*. Hence, the argument that, the appellant was not served or aware of restoration Civil Case No. 2 of 2012 is unfounded.

Lastly, the fourth ground of appeal is to the effect that the trial court awarded unproved damages. This ground should not detain us for so long. It is an appeal against the *ex-parte* judgement in Civil Case No. 3 of 2012 passed on 23/05/2015. In Misc. Civil Application No. 21 of 2019, this Court granted the appellant leave to appeal out of time against Misc. Application No. 30 of 2015. This ground was neither raised nor determined by the trial court in Misc. Application No. 30 of 2015. Therefore, even if it is argued that, the appellant has right to appeal against the *ex-parte* judgement, I will not

determine this ground. Otherwise, I will be falling into a trap into of discussing appeal on the merit of the *ex-parte* judgement through the backdoor.

For the aforesaid reasons, I hold the appeal to be meritless. I accordingly dismiss it. Costs to be borne by the appellant.

Dated at MUSOMA this 28th day of August, 2020.

E. S. Kisanya
JUDGE
28/8/2020

Court: Judgement delivered in Chamber this 28th day of August, 2020 in the presence of the respondent in person and in the absence of the appellant.

E. S. Kisanya
JUDGE
28/8/2020

Court: Right of further appeal is explained.

THE HIGH COURT OF TANZANIA
MUSOMA

E. S. Kisanya
JUDGE
28/8/2020

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

CIVIL APPEAL NO. 16 OF 2020

(Arising from the Exparte Judgement of the Musoma District Court in Civil Case No. 3 of 2012 and ruling in Misc. Civil Application No. 30 of 2020)

FINCA TANZANIA ..... APPELLANT

VERSUS

LEONARD ANDREW KOROGO ..... RESPONDENT

DECREE IN APPEAL

WHEREAS, the appellant filed an appeal praying for this Honorobale Court to issue the following orders:

1. *That the proceedings, judgment and decree of the District Court of Musoma District in Civil Case No. 3 of 2012 and Ruling and orders of the same Court in Misc. Application No. 30 of 2015 be quashed and set aside.*
2. *The main suit be heard denovo before another competent Magistrate.*
3. *That costs of the suit be borne by the respondent.*

AND WHEREAS, on **28th** day of **August, 2020** this Appeal is coming for final disposal before **Hon. E.S. Kisanya, Judge** in the presence of the respondent in person and in the absence of the appellant.

THIS COURT HEREBY ORDERS AND DECREES THAT;

1. The appeal is hereby dismissed.
2. Costs to be borne by the appellant.

Given under my **Hand** and **Seal** of the Court this **28th day of August, 2020**.

THE HIGH COURT OF TANZANIA
MUSOMA

E.S. Kisanya
JUDGE

1