IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY OF SHINYANGA

AT SHINYANGA

PC. CIVIL APPEAL NO. 10 OF 2019

(From Civil Rev. No.5 of 2019, Shinyanga District Court, Original Kizumbi Primary, Civil Case No. 71/2017)

CHARLES SHIGINO.....APPELLANT

VERSUS

ALFRED KAILEMBO t/a KAL HOLDING CO.LTD.....RESPONDENT

JUDGMENT

9th September & 2nd October, 2020

Mdemu, J.;

Charles Shigino, the Appellant in the instant appeal, appealed to this court to challenge the decision of the District Court of Shinyanga which dismissed his application for revision. The intended revision to the District Court was to revise the decision of Kizumbi Primary Court, in Civil Case No.71of 2017.

Briefly, the Appellant lodged a claim in the Primary Court of Kizumbi requiring the court to order the Respondent to pay Tshs. 3,368,000/= being costs incurred by him for debt collection to the District Executive Director of Meatu. The trial commenced in which, the Appellant testified as SM1. Sometimes in the cause of trial, the Appellant defaulted appearance consequently, his suit got dismissed under Rule 24 of the Magistrates' Courts (Civil Procedure in Primary Courts) Rules, 1964 GN.No.310. This was on 17th of September, 2018.

Aggrieved, the Appellant lodged an application to the District Court of Shinyanga so that proceedings leading to dismissal order be revised. The court heard parties and ultimately resolved that, the trial court was justified to dismiss the suit for nonappearance without assigning reasons and that, the remedy open to the Appellant was to apply for restoration of the dismissed suit and not to request for revision. This was on 15th of July, 2019. Aggrieved further, the Appellant preferred the instant appeal on the following grounds:

1. *That the 1st Appellate District Court grossly erred on point of law by not warning itself and to consider that, a ruling was not delivered to the parties in civil case No.71 of 2017 at the trial court.*
2. *That the 1st Appellate District Court erred both on points of law and facts when it failed to consider that civil case No.71 of 2017 was dismissed by the trial Court without any reason provided in the court record for the dismissal.*
3. *That the 1st Appellate District Court grossly erred both on points of law and facts by saying that, the remedy for dismissing the case was to file an application for restoration and not revision. The court failed to warn itself that, at the trial court there was illegality, impropriety and incorrectness.*

On 4th of August, 2020 this appeal got scheduled for hearing. Parties agreed unanimously to dispose it by way of written submissions. Parties duly complied with scheduling order. As usual, the Appellant commenced, in which,

on 17th of August, 2020 through Geofrey Tuli Advocate, duly filed his written submissions.

The learned counsel commenced his submission by abandoning the 2nd ground of appeal. Submitting in the 1st ground of appeal, Mr. Tuli stated that, primary court civil procedures were contravened by the trial court as there is nowhere in the proceedings is indicated that, the said ruling was delivered. In this regard, he cited the provisions of Rule 53(2)(c) (d) of the Magistrates' Courts (Civil Procedure in Primary Courts) Rules, GN No.310 of 1964 requiring a magistrate to pronounce judgment in an open court and inform parties on their rights to appeal accordingly.

He further submitted that, the ruling itself do not indicate when it was delivered, apart from the date it was composed and signed, which was 18th of August 2018. He thought therefore the Appellant's rights got prejudiced by the said irregularities.

As to the 3rd ground of appeal it was his submission that, as the Appellant had already testified in court, the remedy open to court on his nonappearance was to close the prosecution case and not to dismiss the application under the provisions of Rule 24 of GN No.310 of 1964. He also cited Item 3(1)(i) of the 4th Schedule to the Magistrate's Court Act, Cap. 11 insisting that, the court ought to have closed the prosecution case and require the Respondent to commence his defence. To the learned counsel, revision to the District Court was a proper forum and not application for restoration of the dismissed suit as observed by the magistrate who determined revision proceedings. He thus thought the appeal has merits and the same be allowed.

In reply, Mr. Audax Theonest Constantine filed his written submissions on 28th of August, 2020. He resisted the 1st ground of appeal because, the Appellant has not shown what the 1st appellate court erred. All through, his written submissions attacked the decision of the trial court, Mr. Audax added. He also submitted that, in civil case No.71/2017, specific at page 12, the trial court made an order such that, on 30th of August, 2018, a ruling on disqualification will be delivered. He added that, on that date, the said ruling got pronounced. As to prejudicial of the said ruling to the Appellant, it was his submissions that, the Appellant was not prejudiced because the ruling was on disqualification while the case was dismissed for nonappearance.

With regard to the 3rd ground of appeal, the learned counsel submitted that, as it was to the 1st ground of appeal, the Appellant did not state what the 1st appellate court erred. He however commented that, in terms of the provisions of Rule 28 of the Magistrate's Courts (Civil Procedure in Primary Court) Rules, GN No.310 of 1964, a suit dismissed in terms of Rule 24 may be restored upon application by a part, subject to limitation period. He thus urged that, the Appellant was supposed to comply with that mandatory provisions instead of revision to the District Court sought for.

In rejoinder, the learned counsel for the Appellant filed his rejoinder on 9th of September, 2020. He reiterated his position regarding violation of rule 53(2) (c) (d) of GN No.310 of 1964. He further reiterated that, as the Appellant had already adduced his evidence in court, it was improper for the court to dismiss the suit for nonappearance under Rule 24 of GN No.310 of 1964. Parties concluded their written submissions this way.

Having gone through the record and after duly considered submissions of the two learned counsels, I will also deliberate on one ground after the other as they did. Beginning with the first ground of appeal, I am inclined to the views of the learned counsel for the Appellant that, in the ruling of the learned trial Magistrate it is not indicated that parties were present at the pronouncement of the ruling. However, as per the record and also as stated by the learned counsel for the Respondent, on 27th of August 2018, parties, the Appellant inclusive, were present when the matter was scheduled for ruling. In fact, the learned trial Magistrate pronounced the ruling as intimated.

I have careful gone through the submissions of the learned counsel in support of ground one (1). The basis of his complaint is that, the court did not indicate that, parties were present when the ruling was delivered. However, in essence the Appellant has not fronted that he was not present. Even when it is correct that he was not present, yet, as submitted by Mr. Audax, the Appellant has failed to demonstrate how delivery of the ruling in his absence prejudiced him.

Of essence perhaps is want of coherence between the ruling delivered and dismissal of the case for nonappearance. As contained in the record, the impugned ruling was on the issue of recusal of the trial magistrate while the suit was dismissed for nonappearance of the claimant. I do not see any substance in this ground of appeal and is accordingly dismissed.

With regard to the 3rd ground of appeal on the fate of the suit for nonappearance of the claimant, the legal position is as stated in Rule 24 of GN No. 310 of 1964 which reads as hereunder:

24. where the defendant appears;

Where defendant appears and the claimant does not appear *when the only proceeding is called on for hearing,* ***the court shall order that the proceeding be dismissed,*** *unless the defendant admits the claim or any part thereof, in which case the court shall make such order as may be appropriate (emphasis mine).*

From the above legal position is clear that, the suit shall be dismissed where the Claimant does not appear and the Defendant in attendance has not admitted the claim in full or in part. In the instant appeal, the Appellant, who was a Claimant did not appear in court on 17th of September 2018 thus, the court was compelled to dismiss the suit. He also missed in court on 6th of August, 2018 and 12th of September, 2018.

I have taken the concern of the Appellant's counsel that, the court should have closed the prosecution case instead of dismissing the suit. However, that assertion will have no place to stand because the Rule as cited above is devoid of such requirement. It has not been prescribed in the Rule that, where the court has heard part of the claimant's case, then it is precluded to dismiss the suit for nonappearance. It neither allows the court to close the claimant's case.

Last in this ground is observation of the learned counsel for the Appellant that, it was wrong for the court to observe that the Appellant was to apply for restoration of the dismissed suit instead of opening revision proceedings. Regarding this, the legal position is as provided for in Rule 28 of GN. No.310 of 1964 that:

28. Restoration of proceeding

Where a proceeding has been dismissed by reason of the non-attendance of the claimant, ***the claimant may, subject to the provisions of any law for the time being in force relating to the limitation of proceedings, bring a fresh proceeding or he may apply for an order to set aside the dismissal****, and if the court is satisfied that it is reasonable having regard to all the circumstances of the case to make such order, the court shall make an order setting aside the dismissal and shall appoint a day for the hearing of the proceeding (emphasis mine).*

It is obvious from the above legal position that, where the suit is dismissed for nonappearance, the claimant may either, file a fresh suit or apply to the primary court that dismissed a suit to set aside the dismissal order. The learned Appellate Magistrate, Ms. Massesa, Senior Resident Magistrate, who heard the revision correctly observed that, the remedy open to the Appellant was to have the suit restored through his application and not revision. She said at page 5-6 of her ruling that:

I also find that this is not ground for revision because the remedies for dismissing a case are to file an application for restoration and not a revision.

In this, I have nothing to fault her because there is nothing in the dismissal order of impropriety or illegality in nature calling for revision by the District court.

In the totality of all what was stated above, I find no merit to the instant appeal, and according, the appeal is hereby dismissed with costs.

It is so ordered.

Gerson J. Mdemu
JUDGE
2/10/2020

DATED at **SHINYANGA** this 2nd day of October, 2020

Gerson J. Mdemu
JUDGE
2/10/2020