IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO. 113 OF 2019

(Originating from Misc. Civil Appl. Case No. 247 of 2018, Residdent Magistrate Court of Dar es Salaam at Kisutu)

ZANZIBAR INSURANCE.....APPELLANT

VERSUS

EMMANUEL PASCHAL MSUMBA.....1ST RESPONDENT
INNOCENT MULONGO.....2ND RESPONDENT
DEUSDEDIT D. DAMIAN.....3RD RESPONDENT

JUDGMENT *(EXPARTE)*

The appellant above mentioned is dissatisfied with the ruling of the trial court which dismissed her application for extension of time to set aside ex *parte* judgment in Civil Case No. 6 of 2016. In the memorandum of appeal, the appellant grounded that: first, the trial court erred in law and fact by not considering the proper remedy of the application; secondly, the trial court erred in law and fact by not considering substantive justice; thirdly, the trial court erred in law and fact by considering the requirement of affidavit regarding information which is in the personal knowledge of

a person; fourth, the magistrate erred in law and fact by not considering that the appellant and other parties herein were not served with summons; finally, the magistrate erred in law and fact by dismissing the case.

This appeal was argued by way of written submission and it proceeded *ex-parte* against all respondents after they had defaulted to appear.

Arguing for the first and fifth ground, the learned Counsel for appellant submitted that the magistrate failed to consider that the application was not determined on merit thus the proper remedy was to struck out the application and not to dismiss it. He cited **Ngoni-Mitengo Cooperative Marketing Union Ltd vs Alimahomed Osman** (1995) EA 577; **Cyprian Mamboleo Hizza vs Eva Kioso & another**, Civil Application No. 3/2010 C.A.T.; **Seleman Zahor & another vs Fiasal Ahmed Abdul** (BK. Civil Appl. No. 1 of 2008) 2015 TZCA 2; **Wengert-Windrose Safari (T) Limited & others vs Biduga & Company Ltd & another**, Civil Appeal No. 39/2000. That the magistrate confined himself on the technical part but there is no legal reason given as to why he did refuse to grant extension of time. That although extension of time is discretionary, but the court has to act reasonably and judiciously.

Arguing for the second ground, the learned Counsel submitted that it was not proper for the learned resident magistrate to give decision without considering the substantive justice based on the nature of the application with grounds adduced by the applicant. That the magistrate would have expunged the defective paragraphs of the affidavit as in the case of **Uganda vs Commissioner of Prison ex *parte* Matovu** (1966) EA 514 which was followed by **D.P. Shapriya & Co. Limited vs Bish International**, Civil Appl. No. 53 of 2002 C.A.T. DSM and **Phantom Modern Transport (1985) Limited vs D.T. Dobie & company Limited**, Civil Reference No. 15 of 2001 and 3 of 2005 C.A.T. (unreported). He also cited Civil Appl. No. 185/17 of 2018 **Sanyou Service Station Ltd vs BP Tanzania Ltd** (now **PUMA Energy (T) Ltd**) (unreported).

Regarding the third ground, he submitted that the magistrate ought to have evaluated the evidence on record and drew his own findings and conclusion, where the decision might have been different. That the appellant is an artificial person, thus the senior officer is in a capacity to have knowledge of all staff through records of employees. He cited **Shabir Bhaijee & 2 others vs Selemani Rajabu Mizano**, Civil Appl. No. 161 of 2006 C.A.T. (unreported); Civil case No. 166 of 2004

Gayatri Industries Limited vs Harambee Sacco Limited; Charles S. Kimambo vs Clement Leonard Kusudya *(as an administrator of the estate of the late Leonard Kusudya & another)*, Civil Appl. No. 477/03 of 2018 C.A.T.

Arguing the fourth ground, he submitted that there was no proof of service by the first respondent to the appellant and other defendants on the ex *parte* judgment. That only the first defendant was served with summons by way of publication. He cited **Cosmas Construction Co. Ltd vs Arrow Garments Ltd** 1992 TLR 127 (CA); **Principal Secretary, Minisrty of Defence, National Service vs Devram Valambhia** 1992 TLR 185 (CA); **Amour Habib Salim vs Hussein Bafagi**, Civil Appl. No. 52 of 2009 (unreported); **Jehangir Aziz Abdulrasul vs Balozi Ibrahim Abubakar & another**, civil Appl. No. 79 of 2016 (unreported).

It is true that the learned Principal Resident Magistrate attacked paragraphs 8, 9, 10 and 11 to the affidavit sworn by Mr. Abdulfatal that it contains a lot of hearsay information from Abdul Aziz Bais and Fatma Hadija. The learned Magistrate faulted the same on the ground that the duo ought to file affidavits in support of what Abdulfatah had deposed. The learned magistrate went on to rule that, the affidavit in support of the chamber summons is revealing the

execution proceedings which are pending in the trial court contrary to the prayers sought in the chamber summons. The trial magistrate made a conclusion that the applicant (appellant herein) failed totally to advance good reasons to warrant grant orders sought.

I had an opportunity to peruse records of the trial court, specifically the impugned affidavit sworn by Abdulfatah A. Al-Bakry who introduced as an advocate of the applicant (appellant herein). Nowhere it reflects that the deponent is the senior officer of the appellant as the learned Counsel was trying to persuade this Court. According to a verification clause, paragraphs 9,10 and 11 are among the paragraphs which the deponent verified being true to his knowledge, while its contents reveal matters pertaining to third parties and the deponent did not reveal source of information. Now assuming that paragraphs 9, 10 and 11 of an affidavit are expunged as suggested by the learned Counsel, which I do, the resultant is that an application will be taken as having no sufficient reason for prayers made. Actually paragraph 8 is self-defeating, as it suggests that the applicant (appellant herein) was present in the trial court throughout the plaintiff's case. This support the contention by the first respondent who

stated in the counter affidavit that, the applicant (appellant herein) deliberately abandoned the case for no good reason.

Actually the trial court is faulted for nothing, the appellant's absenteeism was attributed by his negligence to participate in the proceedings.

As such the trial court was justified to rule that no good reason was advanced by the appellant to warrant granting prayers sought.

The appeal is dismissed. No order as to costs.

THE HIGH COURT OF TANZANIA

E.B. Luvanda
Judge
4.9.2020