

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO. 92 OF 2020

*(Originating from Civil Case No. 237 of 2016 in the Resident Magistrate's Court
of Dar es Salaam at Kisutu)*

SHARIFA SWAIBU APPELLANT

VERSUS

CRDB BANK PLC RESPONDENT

JUDGMENT

15th April & 21st May, 2021

BANZI, J.:

This appeal emanates from the judgment of the Resident Magistrate's Court of Dar es Salaam at Kisutu following a suit filed by the Appellant claiming among other things, payment of TZS 150,000,000.00 being damages for libel. At the end of the trial, the suit was dismissed for want of merit. Aggrieved with that decision, the Appellant brought this appeal on four grounds, thus;

- 1. That the trial court erred in law to grant the Respondent herein an extension of time to file the written statement*

of defence for an application that was filed well beyond the forty two days allowed by the law.

- 2. That the trial court erred in law and fact in determining only one issue leaving the rest of the issues that were framed and agreed for determination.*
- 3. That the trial court erred in fact to hold that at the time of publication of the Appellant's photograph in the newspaper, the Appellant was still indebted to the Respondent.*
- 4. That the trial court erred in law and fact for failure to analyse all the Appellant's evidence in support of her case leading to a wrong conclusion of the real issue before the court.*

Before determining the appeal, it is pertinent to give background of the matter albeit briefly. In June, 2008, the Appellant was employed by the Respondent in a position of Finance Officer, the position she held until in May, 2013 when she resigned from her employment with a view of pursuing further studies. During her employment, she was among the beneficiaries of loan services provided by the Respondent to her employees. According to the testimony of the Appellant, at the time of resignation, she had outstanding debt of TZS 13,824,384.01 from the loan advanced to her. After completion her studies, she applied for re-engagement but her request was

rejected through Exhibit PE2. Following the rejection, she requested to repay the loan by using her terminal benefits whereby on 23rd December, 2015, the Respondent received a cheque from Parastatal Pensions Fund (PPF) to the tune of TZS 9,125,096.30. Nonetheless, on 29th December, 2015 the Appellant received calls from different persons with the information that, her photograph is in Mwananchi newspaper as among debtors of the Respondent's employees who resigned without repaying their loan. After seeing the newspaper, she approached the Respondent but the latter did not apologise. According to her, she has failed to be employed due to such publication by the Respondent.

When the appeal was called for hearing, Mr. Abubakar Salim, learned counsel appeared for the Appellant while Mr. Nobert Mwaifwani, learned counsel appeared for the Respondent. By consent, the appeal was argued by way of written submission whereby counsel for both sides complied with the scheduled order.

Addressing the first ground, learned counsel for the Appellant submitted that, the trial Magistrate erred in law by granting the application for extension of time to file Written Statement of Defence (WSD) that was filed beyond forty-five days as prescribed by law. Expounding further, he

submitted that, upon receiving a copy of plaint on 2nd September, 2016, the Respondent filed her WSD on 30th September, 2016. After realising that the WSD was filed out of time, the Appellant raised an objection which was conceded by the Respondent who proceeded to apply for extension of time. The trial court dismissed the application for want of reason for the delay and ordered the case to be heard *ex parte* under Order VIII, rule 14 (b) of the Civil Procedure Code [Cap. 33 R.E. 2002] ("the CPC"). He added that, after almost one year, the Respondent filed Misc. Civil Application No. 146 of 2017 seeking extension of time to file WSD. Despite the objection on the ground of *functus officio* after former application being dismissed, the trial court proceeded to grant the extension of time to the Respondent. By doing so, the trial court acted without jurisdiction, and thus, he prayed for the WSD and all proceedings referring the Respondent to be expunged from the record. To support his argument, he cited the case of **National Bank of Commerce Limited v. Partners Construction Co. Ltd**, Civil Appeal No. 34 of 2003 CAT (unreported).

Reverting to the second ground, he submitted that, there were four issues agreed between the parties and framed by court. However, in the judgment, the trial court made its decision on one issue leaving behind three issues undetermined. To him, it was a fatal irregularity which vitiates the

whole judgment. He supported his argument by citing the case of **Sosthenes Bruno and Another v. Flora Shauri**, Civil Appeal No. 81 of 2016 CAT (unreported). The third and fourth grounds were argued jointly. He submitted that, the trial magistrate did not consider and apprehend the evidence adduced by the Appellant. According to him, at the time the Respondent published the Appellant's photograph as among the defaulters, the latter had already repaid more monthly instalments than she was required to repay. Had this being considered, the trial court would not have arrived into the wrong decision. In that regard, he prayed for the judgment of the trial court to be quashed and the reliefs claimed in the plaint been granted with costs.

In his reply, counsel for the Respondent began his submission by challenging the competence of the appeal claiming that, the ruling concerning extension of time complained in the first ground was missing in the proceedings attached with the memorandum of appeal. To him the ruling is important for this court to determine the first ground, thus, non-inclusion is fatal and is as good as filing the appeal without attaching judgment and decree. He cited the decision of the High Court, Land Division in the case of **The Registered Trustees of the Evangelistic Assemblies of God Tanzania v. Ibrahim Said Ibrahim (Administrator of the Estate of**

Rashid Selemani) and Seven Others, Land Appeal No. 51 of 2017 (unreported) to support his argument and prayed for first ground of appeal to be struck out.

Replying to the first ground, he stated that, the submission by learned counsel for the Appellant in respect of this ground is misconceived, misleading and it is against the spirit of Order VIII, rule 2 of the CPC which ensures speedy disposal of suits and prevents endless litigations. He went on to submit that, the trial court exercised its discretion properly by granting extension of time to file WSD so that both parties can be heard. According to him, the Appellant is seeking for a second chance of prosecuting her case in the absence of the Respondent which is contrary to the spirit of Order VIII, rule 2 of the CPC. The cases of **National Housing Corporation v. Etienes Hotel**, Civil Application No. 10 of 2005 [2005] TZCA 18 and **Afriscan Group (T) Ltd v. Said Msangi**, Misc. Commercial Application No. 299 of 2017 (unreported) were cited to support his argument. In that view, he prayed for the first ground to be dismissed. Concerning the second ground, it was his submission that, the trial court did not commit any wrong by deciding the case on the first issue only because determination of other issues depended on the first issue. Since the first issue was negatively answered, the remaining issues became redundant. As far as the third and

fourth grounds are concerned, it was his view that, the same were misconceived and devoid of merit. He added that, the Appellant in her testimony admitted that, she was still indebted to the Respondent. According to him, the trial court properly evaluated the evidence on record before reaching into the decision. In that regard, he prayed for the appeal to be dismissed with costs.

In his rejoinder, counsel for the Appellant was of the view that, the purported preliminary objection was raised without following the procedure and he asked this Court to disregard the same. He cited the High Court decision in the case of **Alex Dinka Ndibalema and Another v. CRDB Bank PLC and Two Others**, Land Case No. 19 of 2010 (unreported). According to him, the appeal is competent as the provisions of Order XXXIX, rule 1 (1) of the CPC have been complied with as the memorandum of appeal was attached with the copies of judgment and decree. It was also insisted that, the Respondent acted against the law as they applied for extension of time to file WSD after lapse of one year following their oral application being dismissed. It was further insisted that, had the trial magistrate determined the other issues after evaluation of evidence, the third issue would have been answered positively. Thus, he reiterated his prayer in his chief submission.

Having thoroughly considered the record of the trial court and the submissions by counsel for both sides, I find it prudent to begin with the first ground which, in the considered view of this Court suffices to dispose of the appeal. Nevertheless, before determining the same, I find it necessary to comment on the issue raised by the Respondent concerning failure to attach the ruling in Misc. Civil Application No. 146 of 2017. I find no substance on issue in question because, apart from being raised without following the procedure, it is not the requirement of Order XXXIX, rule 1 of the CPC. Besides, the ruling in question is included in the original record forwarded before this Court.

It is the requirement of the law under Order VIII, rule 1 of the CPC that, upon receiving summons to file a defence, the Defendant shall within 21 days file his WSD. Prior to the amendment of the CPC through GN No. 381 of 2019, the court under the proviso to rule 1 (2) had given the discretion to extend time of filing WSD on application by the Defendant within 21 days of expiration of the prescribed time. See also the case of **National Bank of Commerce Limited v. Partners Construction Co. Ltd** (*supra*). However, such extension is granted upon showing good cause for failure to file the same in time.

In the matter at hand, the records show that, the summons for filing WSD was issued on 30th August, 2016 and duly received by the Respondent/Defendant on 9th September, 2016. Upon receiving the same, on 30th September, 2016, the Respondent/Defendant filed her WSD which was beyond 21 days prescribed by law. No extension was sought by the Respondent/Defendant until 4th July, 2017 during the hearing of the preliminary objection raised by counsel for the Appellant/Plaintiff. Apart from conceding the preliminary objection, learned counsel for the Respondent/Defendant without assigning any reason, prayed for leave to file WSD out of time. In its ruling dated 1st August, 2017 and delivered on 3rd August, 2017, after finding that the WSD was filed out of time, the trial court expunged it from the record and went on to determine the oral application of extension of time. At the end, the trial court dismissed the application for extension of time for want of reasons for failure to file the WSD within time. After dismissing the application, the trial court made an order for the suit to proceed *ex parte* under Order VIII, rule 14 of the CPC.

It is also on record that, three weeks after the former application being dismissed, on 25th August, 2017 the Respondent/Defendant filed another Application No. 146 of 2017 seeking extension of time to file the WSD. The application in question was heard by the same trial Magistrate whereby, on

18th May, 2018, he delivered his ruling and granted the application. Now the question to be answered is whether the trial court acted properly.

It is undisputed that, on 4th July, 2017, despite expiration of prescribed time for extension, the trial Magistrate entertained the oral application made by the Respondent but dismissed the same for want of reason of delay. Since the first application was determined on merit and dismissed, the trial court had no jurisdiction to entertain another application of the same nature. In other words, it became *functus officio*. This is a fatal irregularity and not just technicality as suggested by counsel for the Respondent.

Apart from that, there is another fatal irregularity which need a comment. As stated herein above, on 3rd August, 2017, after expunging the WSD from record and dismissing the application for extension of time, the trial court ordered the suit to proceed *ex parte*. Surprisingly, it went on to hear the suit inter parties without vacating the *ex parte* order. I have thoroughly examined the proceedings of the trial court but I have not seen any order which vacated *ex parte* order of 3rd August, 2018. This is another fatal irregularity which vitiates the proceedings.

That being said, since the trial court had no jurisdiction to entertain Misc. Civil Application No. 146 of 2017 after it had determined and dismissed

prior application with the same nature and considering the fact that it proceeded to hear the suit inter parties the presence of *ex parte* order, I find safe to hold that, everything that transpired from 12th September, 2017 until 31st January, 2020 including the proceedings in Misc. Civil Application No. 146 of 2017 is nothing but a nullity. Thus, the first ground has merit and it suffices to dispose of the appeal.

Consequently, I allow the appeal by nullifying the proceedings of Civil Case No. 237 of 2016 from 12th September 2017 to 31st January, 2020, quashing the judgment and setting aside the decree. The ruling in Misc. Civil Application No. 146 of 2017 is also quashed. I order the trial court to proceed with *ex parte* hearing as per order dated 3rd August, 2017. Each party to bear its own costs.

It is so ordered.



I. K. BANZI
JUDGE
21/05/2021

Delivered by the Deputy Registrar this 21st May, 2021 in the absence of the Appellant and in the presence of Mr. Francis, learned counsel for the Respondent.

A handwritten signature in blue ink, appearing to be 'I. K. Banzi', written in a cursive style.

I. K. BANZI
JUDGE
21/05/2021