

**IN THE HIGH COURT OF TANZANIA  
(DAR-ES-SALAAM DISTRICT REGISTRY)**

**AT DAR ES SALAAM**

**CIVIL APPEAL NO. 124 OF 2020**

**THE MANAGING DIRECTOR**

**MWANANCHI COMMUNICATIONS LIMITED.....1<sup>st</sup> APPELLANT**

**THE EXECUTIVE DIRECTOR THE CITIZEN.....2<sup>nd</sup> APPELLANT**

**THE MANAGING EDITOR THE CITIZEN.....3<sup>rd</sup> APPELLANT**

**THE PUBLISHER THE CITIZEN.....4<sup>th</sup> APPELLANT**

**LOUIS KOLUMBIA .....5<sup>th</sup> APPELLANT**

**VERSUS**

**CHRIS MAINA PETER.....RESPONDENT**

(Arising from the decision of the Court of Resident Magistrates of Dar- es salaam at  
Kisutu)

**(Mbandu, Esq- SRM)**

Dated 17<sup>th</sup> March 2020

in

Misc. Civil Application No. 147 of 2019

**JUDGEMENT**

31<sup>st</sup> May & 13<sup>th</sup> July 2021

**Rwizile, J.**

The appellants are challenging the decision of the trial court which dismissed the application to set aside an exparte judgement issued by the same court in Civil Case No. 341 of 2016. The record has it that, the

respondent commenced an action against the appellants. It was a claim of publication of a detailed apology among many others following the appellants' publication in the Citizen newspaper, false and malicious statements against him. The respondent's case at the trial, was heard exparte following none appearance of the appellants. An exparte judgement was given on 23<sup>rd</sup> July 2019. They were aggrieved by the same, as the result, the impugned application was filed to set it aside. It was however, dismissed for failure to show sufficient cause as to why they did not appear on 29<sup>th</sup> November 2017 when the matter was called for hearing.

Before this court, the appellant advanced two grounds of appeal coached in terms that;

- i. The trial Magistrate erred in law and in fact by not understanding that the confusion and failure to appear on 16<sup>th</sup> November 2017, when the matter was called and on 29<sup>th</sup> November 2017 when exparte hearing was conducted, was caused by the cause list issued by the Magistrate in Charge of the RM'S Court of DSM at Kisutu for special clean-up session for the cases which had delayed finalization on one hand and the other hand the magistrate setting hearing contrary to the cause list issued by the Magistrate in charge of RM'S Court of DSM at Kisutu.*
- ii. The trial Magistrate erred in law and in fact by holding that there is no record of the appellants alleging not to have been served with summons, while appearance was based in the cause list issued by the Magistrate in charge of the RM'S Court of DSM at Kisutu.*

I was therefore asked to allow this appeal by setting aside the exparte judgement and decree dated 23<sup>rd</sup> July 2019.

The appeal was heard by written submissions. Bora Nicholas of APEX Attorneys Advocates submitted for the appellant while Mr. Atlay Thawe of NW Law Associates Advocates did it for the respondent.

At this juncture, I have to hold that the only remedy for an exparte order, is to set it aside. This is governed by order 1X. Rule 9 of the CPC. It states as follows;

*"In any case in which a decree is passed exparte against a defendant, he may apply to the court by which the decree was passed for an order to set it aside; and if he satisfies the court that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the court shall make an order setting aside the decree as against him upon such terms as to costs, payment into court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit:*

*Provided that, where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also"*

It can be discerned from the above that the only legal requirement set on the appellant was to show sufficient cause as to why the appellants did not appear on the day fixed for hearing of the case. From the submissions of the appellants, all the blame is pushed on the conduct of the court and the trial Magistrate.

It was argued, that the appellants were called, on a date fixed for the hearing, but could not appear due to the confusion of the hour the matter was called for hearing. For the appellant the court of appeal has been instrumental on this point that mistakes committed by the court should not be attributed to the parties. This was vivid in the cases of **Mount Meru Flowers Tanzania Limited vs Box Board Tanzania Limited**, civil Appeal No. 260 of 2018, CA (Unreported) as submitted in chief by the appellant and in the case of **Victor Rweyemamu Binamungu vs Geoffrey Kabaka and Another** Civil Applicant 602/08 of 2017.

After scanning the record of the impugned proceeding, it seems to me that the whole transaction commenced with what happened on the two dates stated in the memo of appeal and consistently repeated in the submissions of the appellant both in chief and in rejoinder.

To begin with, on 16<sup>th</sup> November 2017. The appellants were absent in court. To know, if their absence was justified, the record of the previous date speaks much than what was stated in the submissions of the parties. This was on 5<sup>th</sup> November 2017. On that date, Mr. Nyange who appeared for the respondent made prayers for additional of two issues before the matter could proceed for hearing. Mr. Daffa was present for appellants.

Since the matter could not proceed with a hearing on that date. The order of the trial magistrate was as clear as crystal, that by consensus from the both advocates, a case be fixed for hearing on 16<sup>th</sup> November 2017 at 11.00 hours. Come 16<sup>th</sup> November 2017, definitely at the time assigned, it is only Mr. Godson Nyange who appeared for the respondent. The lenient trial court did not proceed to hear the case on that day. It only awarded the costs of adjournment to the respondent and went on to fix

another hearing date that is on 29<sup>th</sup> November to 4<sup>th</sup> December 2017 at 9.00hrs. Again, on 29<sup>th</sup> November 2017, the appellants and their advocate did not show up for second time. This is when the trial court proceeded *exparte* and a hearing was made

From the above, it is apparently clear that the submission by the appellant that the trial court was to blame for change of hearing time is not proved by the court record. The same were absent twice without cause. Assuming that the case was called on 16<sup>th</sup> November before the assigned time, still, the court did not proceed *exparte* on that day. It only made an order for costs. That done, it was another day which is on 29<sup>th</sup> when the matter was called on for hearing and this time it was at 9.00hrs.

Going by the court record which I believe presents the true picture of what happened. I am bound to say that the appellants' allegation that time and date were confused by the court is neither here nor there. If, I may add, the court record as clean as it is, at least for this matter cannot simply be impeached through unfounded allegations.

When I pen of because I see no much to deal with, it is an equitable principle that, *when one goes to equity must go with clear hands*. The allegation stated by the appellants are not backed by evidence and therefore the appeal is bound to fail. I do not see anything to fault the decision of the trial court. I therefore dismiss this appeal with costs.



Recoverable Signature

X

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Signed by: A.K.RWIZILE