IN THE HIGH COURT OF TANZANIA

TABORA DISTRICT REGISTRY

AT TABORA

PC. CIVIL APPEAL NO. 4 OF 2019.

[Arising from Civil Revision No.2 0f 2018 at Urambo District Court and originating from Civil Case No. 30 of 2017 at Kashishi Primary Court.]

WASHA SIYAMTEMI BARU.....APPELLANT

VERSUS

MOSHI KOMISHA..... 1ST RESPONDENT

WARD EXECUTIVE OFFICER

OF KONANNE .....2ND RESPONDENT

JUDGMENT

Date of Last Order: 02/07/2021

Date of Delivery: 16/07/2021

AMOUR S. KHAMIS, J.

In this appeal Washa Siyamtemi Baru challenges ruling and orders of the District Court of Urambo in Civil Revision No. 2 of 2018 between same parties.

In the said application, Washa Siyamtemi Baru had moved the District Court of Urambo to call, revise, quash and set aside the proceedings, judgment and order given by Kashishi Primary Court in Civil Case No. 30 of 2017.

Further, Washa Siyamtemi Baru prompted the District Court of Urambo, to stay execution of the Judgment in Kashishi Primary Court's pending final determination of the said revisional proceedings.

In a ruling dated 10/07/2018 (A.E. Chilongola, RM) the District Court of Urambo was pleased to order stay of execution of the Kashishi Primary Court's Judgment in Civil Case No. 30 of 2017 pending final determination of Civil Revision No. 2 of 2018.

Further on 13/02/2019, the learned presiding magistrate delivered a ruling on preliminary objection raised by Moshi Komisha who contended that the application was legally incompetent and misconceived as it was omnibus contrary to law and to preferring application for revision instead of an application for setting aside an exparte Judgment in the trial Primary Court.

In her decision, the presiding magistrate ruled that in terms of Rule 30 of the Magistrates Courts (Civil Procedure in Primary Courts) Rules, the party against whom an exparte Judgment was entered should apply to the Court that entered an exparte Judgment for an order to set aside the decision explaining the reasons which prevented him or her to appear before the Court.

In the second limb of objection, the learned magistrate was satisfied that combining application for stay of execution and for revision rendered the application to be omnibus and thus incompetent

In the final result, the application was struck out with costs.

Aggrieved by that ruling, Washa Siyamtemi Baru filed the present appeal fronting two grounds, namely:

1. That the learned magistrate grossly erred in law and facts to hold that the appellant right to have applied to set aside an exparte Judgment while there was iota of statutory mandatory (requirement) to that effect, hence the application for revision was properly before the Court as one of the remedies available for the aggrieved party to the suit.
2. That the learned magistrate grossly erred in law and facts to hold that there was an omnibus application while at time of filing of the respondent's counter affidavit on 17/9/2018 the same was already overtaken by events.

Throughout this appeal Washa Siyamtemi Baru was represented by Mr. Hassan Kilingo, learned advocate while Moshi Komisha enjoyed legal services of Mr. Method R.G. Kabuguzi, learned advocate. The Ward Executive Officer of Konanne was unrepresented.

With parties consent, the appeal was canvassed by way of written submissions which were timely filed by the appellant and the first respondent. The second respondent did not abide by the Court's order.

I have read the exhaustive submissions filed by Mr. Hassan Kilingo, learned advocate for the appellant and Mr. Method R.G. Kabuguzi, learned advocate for Moshi Komisha, the first respondent.

For clarity reasons, I intend to refer to relevant parts of the submissions in the course of addressing the fitting issues in this appeal.

The grounds of appeal can be condensed into two main issues: whether the District Court of Urambo erred in law and in facts in

finding that Washa Siyamtemi Baru ought to have applied to Kashishi Primary Court to set aside the exparte Judgment and whether the District Court of Urambo erred in law and facts for ruling that the application was omnibus.

In support of the first issue, Mr. Hassan Kilingo contended that the learned magistrate wrongly relied on Rule 30 of the Magistrates Courts (Civil Procedure in Primary Courts) instead of Section 22 of the Magistrates Courts Act, Cap. 11, R.E. 2002 which created an avenue for revision in the District Court.

He asserted that Rule 30 of the Magistrates Courts (Civil Procedure in Primary Courts) Rules was not mandatory.

The learned advocate justified the appellant's move by stating that the judicial process at Kashishi Primary Court was surrounded by secrecy, irregularities and incorrectness that resulted to exparte Judgment against the appellant.

To that end, the learned advocate cited ***MOSES MWAKIBETE V THE EDITOR UHURU AND TWO OTHERS (1995) TLR 134.***

Responding on that ground of appeal, Mr. Method R.G. Kabuguzi, submitted that the learned magistrate applied the correct law in relevant situation and cited ***KWEKA AND OTHERS V NGURUKA BUS SERVICES AND TRANSPORT COMPANY LTD, CIVIL APPEAL NO. 129 OF 2002 (2006) – TZCA 10*** (4th October, 2006) in advancing his stance.

The principles guiding setting aside exparte Judgments were stated in ***PATEL V E.A CARGO HANDLING SERVICES LTD (1975) EA 75, SHAH V MBOGO (1967) E.A 75, SEBEI DISTRICT ADMINISTRATION V GASYARI (1968) E.A 300*** and reproduced

in ***REMCO LTD V MISTRY JADVA PARBAT AND COMPANY LTD AND OTHERS, (2002), E.A. 233*** thus:

> *"1. If there is no proper or any service of summons to enter appearance to the suit, the resulting default Judgment is an irregular one, which the Court must set aside ex debito just time (as a matter of right) on the application by the defendant and such a judgment is set aside in the exercise of direction but as a matter of judicial duty to in order to uphold the integrity of the judicial process itself.*
>
> *2. If the default judgment is a regular one, the Court has an unfettered discretion to set aside such judgment and any consequential decree or order upon such terms as are just as ordered by order IX A, Rule 10 of the Civil Procedure Rules (Kenya)."*

In ***CMC HOLDINGS LTD V JAMES MUMO NZIOKI, CIVIL APPEAL NO. 321/2001*** (unreported) the Kenyan Court of Appeal held that;

> *"1. In an application before a Court to set aside exparte Judgment, the Court exercises its discretion in allowing or rejecting the same and that discretion must be exercised upon reasons and must be exercised judicially and on appeal from that decision, the appellate Court would not interfere with the exercise if that discretion unless the exercise of the same discretion was wrong in principle or that the Court did act perversely on the facts.*
>
> *2. On appeal from an order refusing to set aside exparte Judgment the superior Court should ignore the Judgment on record and look at the matter afresh considering the pleadings*

and see if on their fall value a prima facie triable issue (even if a week one), was raised by the defence and counter claim and if the same was raised, whether the reason for the applicant's appearance were weak she was in law bound to exercise her discretion and set aside exparte Judgment so as to allow the appellant to put forward its defence and of course in such a case, the applicant would be condemned in costs or even thrown away costs."

In ***MANAGING DIRECTOR OF NITA CORPORATION V EMMANUEL L.T. BISHANGA (2005) TLR 378***, this Court held that:

> *"An appeal does not lie from a Judgment of a Court passed exparte, the proper course for the appellant to take was to apply to the Resident Magistrate Court under Order IX, Rule 13 (1) the Civil Procedure Code for setting aside the Judgment."*

The legal principle obtained from these cases is that a party against whom an exparte Judgment has been entered, may apply to the Court by which the decree was passed for an order to set it aside and that he cannot challenge the said exparte Judgment by way of appeal or revision to a superior Court unless the trial Court makes a decision to grant or refuse a prayer for setting aside the exparte Judgment.

Rule 30 of the ***MAGISTRATES COURTS (CIVIL PROCEDURE IN PRIMARY COURTS) RULES, G.N. NO. 310/194*** as amended by G.N. NO. 119 of 1983 provides that:

> *"30 (1) Where a claim has been proved and the decision given against a defendant in his absence, the defendant*

may, subject to the provisions of any law for the time being in force relating to the limitation of proceedings, apply to the Court for an order to set aside the decision and if the Court is satisfied that the summons was not duly served, or that the defendant was prevented by any sufficient cause from appearing when the proceedings was called on for hearing, the Court shall make an order setting aside the decision as against such defendant upon such terms as it shall think fit."

Whereas it is true that the word "may" was used in the provision, its presence was not meant to create a choice for the defendant against whom an exparte Judgment has been entered, to prefer an appeal or revision in the District Court before an application for setting aside the exparte Judgment is determined by the Court that pronounced it.

In the circumstances, the appellant improperly moved the District Court of Urambo to revise proceedings of the trial Kashishi Primary Court without first pursuing an application to set aside the exparte Judgment in the trial Court. The first ground of appeal thus collapses.

The second issue relates to the District Court's decision in holding that the application for revision and stay of execution was omnibus and thus incompetent.

This issue was tackled by the Court of Appeal in ***MOHAMED SALMINI V JUMANNE OMARY MAPESA, CIVIL APPLICATION NO. 103 OF 2014*** (unreported) wherein it was held that different and distinct applications should be filed separately and that lumping

them together renders the application incompetent and liable to be struck out.

Mr. Hassan Kilingo contended that the learned magistrate erred to hold that the application was incompetent whereas at the time of ruling so, the application for stay of execution was already determined.

Mr. Method Kabuguzi asserted that combining an application for stay of execution and the application for revision rendered the application defective.

I have examined the impugned application and found that indeed it encompassed two different applications: an application for revision and application for stay execution of the Judgment of Kashishi Primary Court in Civil Case No. 30 of 2017.

It should be noted that an application encompassing more than one prayer or distinct applications is said to be omnibus by the manner of its filing, i.e. a Chamber summons containing more than one request to the Court and not by the stage it has reached in the course of Proceedings as suggested by Mr. Hassan Kilingo.

Having found that the learned magistrate in the District Court of Urambo properly struck out the appellant's application for revision, I hold that this appeal is devoid of merits and thus dismissed in its entirety.

I make no order for costs. It is so ordered.

Dated at Tabora this 16th day of July 2021.

AMOUR S. KHAMIS
JUDGE

ORDER:

Judgment delivered in chambers in presence of Mr. Amos Gahise, advocate for the first respondent and Mr. Siraji Musa Kwikima holding brief of Mr. Hassan Kilingo for the appellant. The second respondent is absent.

Right of Appeal explained.

AMOUR S. KHAMIS

JUDGE

16/7/2021