IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

PC CIVIL APPEAL NO. 1 OF 2020

(Appeal from the judgment of Ruangwa District Court in Misc. Civil Appeal No. 3 of 2019)

SIFUNI YONI MWENDI.....

VERSUS

YUNUS MOHAMED MBAGA..... RESPONDENT

JUDGMENT

24 June & 12 August, 2021

DYANSOBERA, J:

This appeal is directed against the decision of the District Court of Ruangwa given on 14th day of November, 2019 dismissing the appellant's appeal. In his three-ground memorandum of appeal, the appellant's complaint are the following:-

1. That the District Court erred in law and facts by determining the appeal that was before it by making reference to the provisions of the Civil Procedure Code Cap.33 R.E.2002 while the procedural rules applicable in the primary court are that of the Magistrate's Courts (Civil Procedure in Primary Courts) Rules'

2. That the District Court erred in law and facts by holding that the primary court was not bound by law to notify the appellant the date the case was fixed to come for hearing after the appellant had requested for an adjournment through a letter while Rule 23 (a) of the Magistrate's Courts (Civil Procedure in Primary Courts) Rules requires the primary court to direct notice to be given to the defendant.
3. That the District Court erred in law and facts by holding that the trial primary court was right in holding that the appellant had no sufficient cause for his non-appearance.

The brief background of the matter is that the respondent successfully sued the appellant before the Primary Court of Ruangwa District at Ruangwa Urban in a suit for compensation of adultery. The suit was decided ex parte. The appellant's efforts to have the exparte order set aside and the suit heard on merit was dismissed. He lost his appeal he had filed to the District Court in Misc. Civil Appeal No.3 of 2019. In dismissing the appellant's appeal, the first appellate District Court agreed with the trial Primary Court that the appellant had failed to give sufficient cause for his non- appearance and that his non-appearance was out of his neglect or irresponsibility.

During the hearing of this appeal, parties argued the appeal by way of written submissions.

In his written submission in support of the appeal, the appellant, through his learned counsel Mr. Joseph Kipeche of Kipeche Royal Attorneys, combined the 1st and 2nd grounds of appeal and argued them together. He

submitted that the appeal originated from primary court which had decided the case ex parte against the appellant under rule 23 (a) of the Magistrate's Courts (Civil Procedure in Primary Courts) Rules. After his application for setting aside the ex parte order was dismissed he appealed to the District Court. In determining the appeal, the District Court made reference to the to the provisions of the Civil Procedure Code which were inapplicable to the primary court.

On the third ground of appeal, the appellant maintained that he was not notified of the date and he was sick undergoing treatment. He was of the view that he had sufficient cause for non-appearance.

In the Written Submission against the appellant's submission in support of the appeal, the respondent contended that the appellant had failed to adduce sufficient reasons for non-appearance. He explained that the appellant was aware of the existence of the case against him. He had asked for adjournments and the requests were granted but he deliberately absconded. The respondent further argued that there was a detailed discussion by the court on the reasons of advanced by the appellant for his non-appearance but the court was satisfied that no sufficient grounds were forthcoming from the appellant to warrant the court interfere with the decision of the trial court since the appellant was served with summonses, was aware of the existence of the case but purposely defaulted appearance. He cannot be heard to complain.

With respect to the 1st and 2nd grounds of appeal on the complaints that the District Court determined the appeal by making reference to the

provisions of the Civil Procedure Code, Cap. 33 R.E.2002 while the procedural rules applicable in the primary court are that of the Magistrates' Courts (Civil Procedure in Primary Courts), Rules and that it was wrong for the District Court to hold that the primary court was not bound by law to notify the appellat the date the case was fixed to come for hearing after the appellant had requested for adjournment while rule 23 (a) of the said Rules requires the primary Court to direct notice to be given to the defendant.

Having dispassionately perused the record of the District Court I think the appellant's complaints are based on the observation of the District Court at pages 2, 3 and 4 of the printed copy of the judgment where section 23 and Order IX rues (1) and 13 (1) of the Civil Procedure Code [Cap. 33 R.E.2002] were referred to. Precisely, section 3 of the said Code states that, 'where a suit has been duly instituted, a summons may be issued to the defendant to appear and answer the claim and may be served on the manner prescribed'. Order IX rule 1 () of the said Code enjoins the court to hear the suit where the defendant is duly served and attends at the court on the day so fixed for hearing while rule 13 (1) of the same Order stipulates that:-

> 'Where a summons to appear has been issued on the day fixed in the summons for the defendant to appear or where a summons to file a defence has been issued and a day of the hearing is fixed in accordance with the provisions of rule 15 of Order VIII, on the day so fixed for hearing, the parties shall be in attendance at the court house in person or by their respective recognized agents or advocate and the suit shall be heard unless the hearing is adjourned to a future day fixed by the court. It is also provided under Order IX rule 13 (1) of the Code that,

'in any case in which a decree is passed ex parte against a defendant, he may apply to the court by which the decree was passed for an order to set aside; and if he satisfies the court that the summons was not duly served or 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 at it thinks fit and shall appoint a day of the proceeding with the suit'.

(1) When a proceeding has been instituted, the court shall issue a summons requiring the defendant to appear and answer the claim at the time and place mentioned in such summons, and shall cause the same to be served on the defendant.

27. When party ordered to appear in person fails to do so

Where a claimant or defendant who has been ordered to appear in person, does not so appear, the court may proceed under such of the foregoing rules relating to the non-appearance of parties as may be appropriate.

30. Setting aside ex parte decision

(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 proceeding 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.

(2) Where an application is made under this rule, the court shall appoint a day for the hearing of the application and shall give the claimant and other parties to the proceeding, if any, notice of such hearing.

20. Parties to appear on the day fixed in summons

On the day fixed in the summons for the defendant to appear and answer, the parties shall attend at the court together with such witness as the defendant may wish to call on behalf and the proceeding shall be heard, unless the hearing is adjourned to a future day fixed by the court.

23. When claimant only appears

Where the claimant appears and the defendant does not appear when the proceeding is called on for hearing, then–

(a) if the court is satisfied that the summons was duly served, the court may permit the claimant to prove his case by adducing such evidence as he may have in support of his claim and the court may, if it is satisfied that the

claimant has proved his claim, give its decision in the absence of the defendant:

Provided that where the court is not satisfied that the summons was served on the defendant in sufficient time to enable him to appear and answer on the day fixed in the summons, or where the court is satisfied that other circumstances exist which may have rendered it difficult for the defendant to appear and answer, the court shall adjourn the hearing to a future day to be fixed by it and shall direct that notice be given to the defendant;

(b) if the court is not satisfied that the summons was duly served, the court shall direct that a second summons be issued and served on the defendant.

At p. 3 of the typed printed judgment of the District Court, the learned Resident Magistrate observed, and rightly so, that:

From the records and evidence adduced the trial court served summons as requied by the law, where the appellant appeared before the court for him to answer the claim brought by the defendant and the hearing started until the closure of the claimant's case, therefore, no doubt as to the requirement of summons to the appellant was duly served that is to say the trial court observed that. When summons to the defendant duly served and the matter fixed for hearing on-appearance of the defendant the law allows the court to proceed ex parte hearing which means hearing without the

presence of the defendant as stated under O.IX rule 1 (1) of the Civil Procedure Code which states that:-

For instance, in the case of of **Amratlal Damodar and Another versus A. H. Jariwalla** [1980] TLR 31 had this to say:-

> *"Where there are concurrent findings of the facts by the two courts, the court of appeal as a wise rule of practice, should not disturb them unless it is clearly shown that there has been a mis apprehension of evidence, a miscarriage of justice or violation of some principle of law or procedure".*

In the case under consideration, I am satisfied that neither misapprehension of evidence, miscarriage of justice nor violation of some principles of law or procedure has been established. I will explain. The issue, at the trial court and before the first appellate District Court was whether the appellant had adduced sufficient cause for his non-appearance. as justified in declaring what was and what was not the property of the deceased.

(c) Civil Application No. 54/98 – Pantaleo Lyakurwa vs Leokadia Lyakurwa. CAT at Dar. -The law of this country prohibits the condemnation of a person without his being given an opportunity to be heard. If, however, the person is given such an opportunity and does not make use of it, he cannot be heard to complain that he was condemned unheard. -the audi alteram paartem rule does not take away the power of the decision – maker to hear the matter ex-parte when a party duly notified of the hearing elects not to take a part in it or without good cause absents himself, or where because of the urgency of the matter an interim order must immediately be made. -A party who, having been duly notified of the hearing, absents himself at the hearing is deemed to have waived his right to be heard in the matter.

It is my humble but considered view that the principle *audi alteram partem* does not take away the right and power of the decision maker to make a decision on the material available before him. Indeed, this is what the 1st respondent did.

I have examined the circumstances leading to the writing of this letter, the reasons for the complaints and the consequences to parties of this case. I have found that the complaints have no proper, reasonable, adequate grounds and are an afterthought. There is also lack of seriousness and diligence on the complainants and their advocates.

The complaints are not bonafide but a manifestation of the desire to manipulate the administration of justice system by orchestrating the delay.

In coming to the conclusion, I have considered two factors. One, fairness to the parties in the sense that I have accorded them the right to be heard and assessed the prejudice which might underlie the parties in delaying the proceedings. Two, public interest in timely justice as regard must be had to the efficient administration of justice, wise use of court's and parties' resources in terms of precious time and expense and the fact that delays are scandalous and brings law into disrepute. I must admit that courts want their business to go ahead and justice cannot be allowed to be subverted lest the authority and dignity be lowered.

For those reasons, I find the complaints without any legal merit and I, accordingly, dismiss them.

A default judgment is normally a judgment entered against a party who has failed to defend against a claim that has been brought against him in a court of law.

In our jurisdiction, the law governing such procedure is contained in the Civil Procedure Code [Cap. 33 R.E.2002], Order VIII rule 14, in particular.

It is provided under Order VIII rule 14 (1) and (2) (a) (b) of the Code as follows:

> **(1) Where any party has been required to present a written statement under sub rule (1) of rule 1 or a reply under rule 11 of this order and fails to present the same within the time fixed by the court, the court shall pronounce judgment against him or make such order in relation to the suit or counterclaim, as the case may be, as it thinks fit.**
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> **(2) In any case in which a defendant who is required under sub rule (2) of rule 1 to present his written statement of defence fails to do so within the period specified in the summons or, where such period has been extended in accordance with the proviso to that sub rule, within the period of such extension, the court may–**
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> **(a) where the claim is for a liquidated sum not exceeding one thousand shillings, upon proof by affidavit or oral evidence of service of the summons, enter**

judgment in favour of the plaintiff without requiring him to prove his claim;

(b) in any other case, fix a day for ex parte proof and may pronounce judgment in favour of the plaintiff upon such proof of his claim.

Order VIII rule 1 sub rule (1) of the same Code on written statement of defence provides that:

(1) Where a summons to appear has been issued, the defendant may, and if so required by the Court shall, within seven days before the first hearing, present a written statement of his defence.

(2) Where a summons to file a defence has been issued and the defendant wishes to defend the suit, he shall, within twenty-one days of the date of service of the summons upon him present to the court a written statement of his defence:

Provided that the Court may, within twenty-one days of expiration of the prescribed period, grant an extension of time for presentation of the written statement of defence on application by the defendant.

My understanding of the provisions of Order VIII rule 14 (1) of the Code is that pronouncing judgment against the defendant where he has failed to present a written statement of defence under sub-rule (1) of rule 1

presupposes that the court must, under rule 1(1) of Order VIII have first issued a summons to appear. Here, the defendant has an option of filing a written statement of defence or not filing it hence the word, '**may**'. However, where the court requires him to file his written statement of defence, he has no discretion but to file it. This he has to do within 7 days before the first hearing.

The record of the trial court reveals that the amended plaint was filed on 4th May, 2016 as evidence by ERV No. 62256604 dated 4.5.2016. There was neither proof of service of summons to appear nor an order requiring the appellants to file their written statements of defence within 7 days of the first hearing. There is, however, an order of the court dated 12th May 2016 requiring them to file amended written statement of defence on 16.5.2016, within two days only! Nonetheless, the appellants filed their joint written statement of defence on 17th May, 2016 vide ERV No. 6225641. The record is silent on when was the first hearing so that it could be said that the appellants did not file their written statement of defence within 7 days of the first hearing. The preliminary objection raised at the trial by counsel for the respondent that the written statement of defence was filed out of time was a misconception and the striking out of the written statement of defence by the trial court was unjustified and illegal. The judgment by default entered against the appellants was illegal and occasioned miscarriage of justice as the appellants were condemned unheard. I agree that the judgment entered purportedly under Order VIII rule 14 (1) of the Civil Procedure Code was legally improper. I think this first ground of appeal is sufficient of disposing

of the whole appeal and discussing the rest grounds would amount to a mere academic exercise, the move I decline to take.

The appeal is allowed, the decision of the trial court is quashed and set aside. The respondent is at liberty to pursue his legal rights in accordance with the laws of the land, if he so desires.

The appeal is allowed dismissed. The respondent is awarded costs in this court and in the courts below.

Order accordingly.

W. P. Dyansobera

Judge

12/8/2021

Delivered this 12th day August, 2021 in the presence of the appellant and respondent.

Rights of appeal explained.

W. P. Dyansobera,

Judge

12/8/2021