IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO. 71 OF 2021

(Appeal from the ruling of the Resident Magistrate Court of Dar es salaam at Kisutu in Misc. Civil Appeal No. 132 of 2020 before Hon. H. Shaidi, **PRM** dated 04/02/2021, Originating from the Judgment and Decree in Civil Case No. 53 of 2017)

FRANCIS B. MNDOLWA.....APPELLANT

VERSUS

BANK OF AFRICA TANZANIA LIMITED.....1ST RESPONDENT

VIETTEL TANZANIA LIMITED.....2ND RESPONDENT

JUDGMENT

08th Sept, 2021 & 01st Oct 2021.

E. E. KAKOLAKI J

In this appeal the appellant is challenging the decision of the Resident Magistrate Court of Dar es salaam at Kisutu in Misc. Civil Application No. 132 of 2020 handed down on 04/02/2021, dismissing his application for extension of time within which to file an application for setting aside ex-parte judgment in Civil Case No. 90 of 2017 dated 18/03/2019. Prior to that dismissed application the 1st respondent vide Civil Case No. 90 of 2017 had

sued the appellant and 2nd respondent jointly and together for breach of loan agreement claiming for payment of Tshs. 61,934,321.05 being outstanding balance, unpaid up instalments and interest penalty following the loan of Tshs. 70,000,000/- advanced to the appellant and guaranteed by the 2nd respondent. It appears when the appellant was served with the plaint filed his Written Statement of Defence but defaulted appearance in court when the matter came for hearing, consequently the suit proceeded ex-parte and judgment entered against him. The 1st respondent being decree holder filed an Execution Application No. 51 of 2020 in the same court to execute the said ex-parted judgement. Upon its service to the applicant and having realised he was time barred to apply for setting aside the said ex-parte judgment, he preferred an application for extension of time within which to file an application to set aside ex-parte judgment through Misc. Application No. 132 of 2020, before the same court. As alluded to above the trial court found the said application unmeritorious hence dismissed it on 04/02/2021. It was reasoned by the trial court that, the appellant instead of advancing good and sufficient reasons accounting for his delay to file the application to set aside the ex-parte judgment, he raised serious allegations of fraud against the advocates who purportedly filed his defence and appeared in court several times on his behalf, claiming that he never engaged them and was not aware of existence of the said case against him, for not being served with summons to appear and defend the suit. It therefore ruled, the appellant was aware of the said case as he filed the defence through his advocates before he defaulted appearance which decision discontented him hence the present appeal raising four (4) grounds of appeal going thus:

1. That, the Honourable trial magistrate erred in law in finding and determining that the Appellant was served with the Plaint without there being proof of service according to law.
2. That, the Honourable trial magistrate erred in law in that the finding upon which the court decision is premised is not supported by the Court record.
3. That, the Honourable trial magistrate erred in law and in fact in finding and deciding that the Appellant instructed Counsels who filed defence there being proof of instructions from the Appellant.
4. That, the Honourable trial Magistrate erred in law on the applicability of the law on the burden of proof.

When the appeal was called for hearing both parties appeared represented whereby the appellant had representation of Mr. Leonard Masatu learned advocate while the 1st and 2nd respondents enjoyed the services of Mr. Mwang'enza Mapembe and Mr. Samwel Nyali learned counsels respectively. Both parties sought leave of the court to dispose of their appeal by way of written submissions. The filing schedule orders issued by the court were followed by parties save for the rejoinder submissions as up to 08/09/2021 when the matter was mentioned with view of fixing a judgment date neither the appellant nor his advocate appeared in court to tell as to why the said rejoinder submissions were not filed timely. This judgment will therefore consider the filed submissions only.

To start with the first and second grounds of appeal which look alike Mr. Masatu assailed the trial magistrate's decision when ruled that, service was effected to him without there being proof of service in the court record and in contravention of the requirements of Order V Rules 3, 5(1), 8 and 12 of

the Civil Procedure Code, [Cap. 33 R.E 2019] on the modes of services. He argued as per the case of **Remco Limited Vs. Mistry Jadva Pabat and Co. Ltd and Others** (2002) 1 E.A 233, if there is improper or no any service at all of summons to enter appearance, the resulting default judgment is an irregular one which the Court must set **ex debito justitie** without exercising discretion. To him improper or none service of summons tantamount to illegality of the decision which he alleged that alone sufficed to grant the application as per the case of **Tropical Air (T) Limited Vs. God so Eliona Moshi**, Civil Application No. 09 of 2017 (CAT-unreported). On the third ground Mr. Masatu submitted the appellant never attended in court to defend his case as the alleged Counsels who appeared on his behalf were never instructed by him. He relied on Order III Rule 1 of the CPC and Indian Supreme Court decision in the case of **Byram Pestonji Gariwala Vs. Union Bank of India** (1992) 1 S.C.C 31 (not attached) where the court held:

> *"...that client's counsel is not needed for a matter which is within the ordinary authority of counsel ...his consent will be inferred ...it will be prudent for counsel not to act on implied authority except when warranted by the exigency of circumstances."*

On the fourth ground he submitted, since under Order V Rule 27 of the CPC service is proved by affidavit of serving officer the burden of proving that the appellant was served lied on the 1st respondent who alleged to have served him and not the appellant as per the findings of the court. The court was referred to the case of **MB Automobile Vs. Kampala Bus Service** (1966) 1 E.A 480 (HCU) where ex-parte judgment was set aside on account of non-disclosure of the person who delivered summons or identified the defendant

during service of summons. As in this case there in no proof that the appellant was served, then the court was in error to dismiss the application Mr. Masatu concluded and prayed the court to allow the appeal by extending time to the appellant for him to file an application for setting aside the said ex-parte judgment with costs.

In his reply submission Mr. Mapembe for the 1st respondent on the first and second grounds of appeal submitted, the appellant's contention that he was not aware of the case is an afterthought as he was represented by counsels who appeared several times in court. On appellant's denial of his instruction to the said counsels allegedly represented him Mr. Mapembe argued, that being a serious allegation on the conducts of counsels this court was invited to pay a look on the appellant's WSD attached to his affidavit that bears his signature which unfortunately did not dispute its authenticity as his proof of filing his defence as the said signature is his. On the claim of illegality of the decision basing on the assertion of fraud of advocates to represent him he supported the trial court's findings that, the appellant ought to have proved the said fraud first for it to constitute an illegality of the decision in which case he failed to do, thus no good cause was ever established by him to warrant the court extend him time. As for the third ground he countered there was no reason for the advocates to instruct themselves since the appellant would want this court to believe as they had nothing to benefit from, thus that argument he said, is the kicks of dying horse. On the fourth ground he said, the issue of burden of proof as to whether the appellant instructed the advocate does not arise in this case as what the appellant was duty bound to do is to prove there was sufficient reasons for his delay to set

aside ex-parte judgment which duty he failed to discharge. He therefore urged the court to dismiss the appeal.

In riposte Mr. Nyari for the 2nd respondent on the 1st and 2nd grounds of appeal countered that, the trial court was justified in its findings that, the appellant was served as there was a proof he filed his WSD but failed to appear in court during hearing, consequently the suit proceeded ex-parte against him. He said the appellant failed to prove the allegation of fraud as the pleadings bore his signature and advocate's signature. Citing the case of **Abdallah Zarati Vs. Mohamed Omari,** (PC) Civil Appeal No. 150-D-68 (1969) HCD, he submitted the court is entitled to set aside the ex-parte order or judgment where there are existence of numerous causes that prevented the party from appearing in court to defend his case such as illness, bad weather, death of family member and the like. In this case there is none pleaded therefore the grounds are lacking in merits. As regard to the third ground of appeal he argued there was no illegality or irregularity of the decision established by the appellant on the contention of lack of proof of instruction of advocates warranting extension of time to the appellant. He echoed, if at all no instruction was ever issued by him to the said advocates the appellant was a liberty to take legal actions against them but failed to so do, thus no proof of illegality of the decision. On the fourth ground of burden of proof Mr. Nyari countered, the provisions of Order V Rule 27 of the CPC does not apply in this matter as there is no dispute over service of summons since the appellant's advocates appeared in court and filed a defence. To him the court was not bound to re-issue summons as the advocates who filed the WSD were full aware of the existence of the said case. For that matter he says, the onus of proof lies on the appellant to prove that he did

not instruct the said advocates. To that end it was his submission that, the appellant's grounds of appeal were lacking in merits and thus the same deserve dismissal with cost and so prayed.

I have taken time to travel through both parties arguments in their submissions, the impugned ruling and both pleadings and submissions before the Resident Magistrates Court and given them the required attention. What is discerned therefrom is that it is not in dispute before the trial court the appellant preferred an application for extension of time within which to file an application for setting aside ex-parte judgment under section 14(1) of the Law of Limitation Act, [Cap. 89 R.E 2019] to be referred as LLA herein. It is also uncontroverted fact that the Resident Magistrates Court's decision is premised on the following reasons. **One**, that the appellant was served with summons to appear and defend his case in Civil Case No. 90 of 2017. **Second**, that he instructed the advocates to defend his case who filed the WSD duly signed by them but failed to appear during the hearing thus was aware of existence of his case. **Third** that, instead of advancing sufficient cause and/or reasonable reasons that led to his delay to file the application to set aside ex-parte judgment, the appellant levelled allegations of fraud of advocates who filed the defence and made several appearance before the court on his behalf. Now the issue for determination before this court is whether the Resident Magistrates Court when arriving into such decision took into account the requirement of section 14(1) of LLA. It is the law under the said section that for the applicant to be granted extension of time has to advance before the court reasonable or sufficient cause explaining what delayed or prevented him from filing the application or appeal timely so as to enable the court exercise its discretion. Section 14(1) of LLA provide that:

14.-(1) Notwithstanding the provisions of this Act, the court may, for any reasonable or sufficient cause, appeal or an application, other than an application for the execution of a decree, and an application for such extension may be made either before or after the expiry of the period of limitation prescribed for such appeal or application.

It is the appellant's submission that the Resident Magistrates Court erred in dismissing his application when held, on **first** and **second** grounds that, the appellant was served with summons to appear and defended his suit without proof of those facts and in accordance with the law. **Third**, that the appellant instructed the advocates to defend his case while the alleged counsels who appeared on his behalf were never instructed by him something which constitute illegality of the decision. And **fourth** that, the burden of proving that the appellant was served lied on him instead of the respondents. The respondents on their side countered that the decision was justified after the court had considered all the available evidence. Having considered both parties fighting arguments on the four grounds of appeal this court is in agreement with the appellant though with different reasons that, the trial court erred in law and fact as there was misdirection on the part of the learned Principal Resident Magistrate on factors to be considered when determining whether the appellant/applicant had advanced sufficient or reasonable cause warranting the court exercise its discretion to grant extension of time as prayed. The trial court in my humble view ought to have examined and established whether the appellant accounted for the delayed days or advanced reasons that prevented him from filing the application for setting aside ex-parte judgment within time, instead it misdirected itself

when dealt with issues which it ought to have considered during hearing of the application for setting aside the said ex-parte judgment such as, whether the appellant was served with the summons to appear and defend suit or not, whether he engaged the advocates to defend him or not, whether he filed his defence or not and whether he was aware of the existence of the said case. The case cited by both sides therefore are inapplicable in the circumstances of this case. With such misdirection this court being first appellate court I hold has a mandate to re-examine the evidence considered before the lower court and make its own finding as it can do so after being satisfied that there is misdirection or non-evaluation of evidence tendered or misapprehension of the substance, nature and quality of evidence in the decision of the lower court. The powers of the 1st appellate court to interfere with the findings of the lower court under those circumstances are well explained by the Court of Appeal in the case of **Demaay Daat Vs. Republic**, Criminal Appeal No. 80 of 1994 (CAT-unreported) where had this to say:

> *"It is common knowledge that where there is misdirection and non-direction on the evidence or the lower courts have misapprehended the substance, nature and quality of the evidence, an appellate court is entitled to look at the evidence and make its own findings of fact."*

To fortify the above principle the Court went on to cite the case of **Peters V. Sunday Post Ltd.** (1958) E.A. 424, where the Court of Appeal for East Africa set out the principles in which an appellate court can act in appreciating and evaluating the evidence: Among other things, it was held:

Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusion of the trial judge should stand, this jurisdiction is exercised with caution if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate so to decide.

Having so found the next issue for determination is whether the decision of the Resident Magistrates Court when dismissing the application was justified. As alluded to above this court is entitled to appraisal of the evidence submitted before the lower court by the appellant for determination of the application. It is undisputed fact that under section 14(1) of LLA the appellant ought to have advanced reasonable or sufficient cause before the court accounting for what delayed or prevented him from filing the application for setting aside the said ex-parte judgment timely, so that time could be extended to him to apply for the same. On what amount to good or sufficient cause the Court of Appeal in the case of **Jumanne Hassan Bilingi Vs. Republic**, Criminal Application No. 23 of 2013 (CAT-unreported) stated as follows:

"...what amounts to good cause is upon the discretion of the Court and it differs from case to case. But basically ***various judicial pronouncements defined good cause to mean reasonable cause which prevented the applicant from***

pursuing his action within the prescribed time. "(Emphasis added).

On what should be considered by the court as good or sufficient cause the Court of Appeal in plethora of authorities though not exhaustively tried to set guidelines to be followed by the court when exercising its discretion to either grant or refuse to grant extension of time. See the cases of **Bushiri Hassan Vs. Latifa Lukio, Mashayo**, Civil Application No. 3 of 2007, **Lyamuya Construction Company Ltd Versus Board of Registered Trustee of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 and **Julius Francis Kessy and 2 Others Vs. Tanzania Commissioner for Science and Technology**, Civil Application No. 59/17 of 2018 (all CAT-unreported). In the case of **Lyamuya Construction Company Ltd** (supra) on the guidelines to be followed the Court of Appeal had this to say:

> *"As a matter of general principle, it is in the discretion of the Court to grant extension of time. But that discretion is judicial, and so it must be exercised according to the rules of reason and justice, and not according to private opinion or arbitrary. On the authorities however, the following guidelines may be formulated;*
>
> *(a) The applicant must account for all the period of delay*
> *(b) The delay should not be inordinate*
> *(c) The applicant must show diligence, and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take.*

(d) If the court feels that there are other sufficient reasons, such as the existence of a point of law sufficient importance, such as illegality of the decision sought to be challenged."

In a bid to advance reasonable or sufficient cause that delayed him to file the application to set aside ex-parte judgment in paragraphs 6,7,8 and 9 of his affidavit in support of the application before District Court the applicant stated and I quote:

6. The Applicant has never been informed of the institution of the case neither instructed any person to file defence and appear on his behalf. All persons appearing in the court record purporting to appear for the Applicant are not known to the Applicant.

7. That the Applicant has never been served with summons or plaint of the case that resulted into ex-pert hearing and ex-parte judgment.

8. That the Applicant was not aware of the existence of the case and was not made aware of the date of judgment. Became aware of the case upon being served with papers for execution on the 4th August, 2020.

9. That the Applicant stands to suffer than the Respondent should this application not be allowed, as the applicant shall be condemned unheard whereas if granted all parties will be heard.

Applying the principle in **Lyamuya's** case (supra) to the facts of this case it is evident to me and I hold the appellant failed to advance good cause warranting the Resident Magistrates Court grant him extension of time. I am of the view that he ought to have first accounted for the delay of more than

three (3) years and three (3) months which he alleges was never made aware of existence of the case against him and ex-parte judgment until 04/08/2020 when he was served with the application for execution of the judgment sought to be set aside which was duly entered on 13/04/2017. Even if the appellant's story is believed that he was made aware of ex-parte judgment on the 04/08/2020, still I would hold that does not amount to sufficient cause as he has failed to account as to why it took him another fourteen (14) days to file the application for extension subject of this appeal after coming into knowledge of existence of ex-parte judgment on 04/08/2020, which was filed on 20/08/2020. I so find as the appellant is duty bound to account for each and every day of his delay in filing the application for extension of time as it was held in the case of the case of **Bushiri Hassan Vs. Latifa Lukio, Mashayo**, Civil Application No. 3 of 2007 (CAT-unreported), where the Court of Appeal stated:

> *"Delay, even a single day, has to be accounted for otherwise there would be no meaning of having rules prescribing periods within which certain steps have to be taken."*

Similar stance was taken by the Court in the case of **Alman Investment Ltd Vs Printpack Tanzania and Others**; Civil Application No. 3 of 2003 (Unreported), where the Court said:

> *"Applicant ought to explain the delay of every day that passed beyond the prescribed period of limitation."*

Mr. Masatu for the appellant in his submission on the third ground argued that, the absence or improper service of the appellant by the 1st respondent tantamount to illegality of the decision which according to him is sufficient

ground for extension of time without even accounting for the time delayed. He relied on the case of **Remco Limited** (supra). It is true illegality of the decision or proceedings regardless whether a party has accounted for the delayed days or not constitute good or sufficient cause for extension of time. See the cases of Lyamuya Construction (supra), **Transport Equipment Vs. Valambia and Attorney General** (1993) TLR 91 (CAT) and **The Principal Secretary, Ministry of Defence and National Service Vs. Dervan P. Valambia** (1992) TLR 387 (CAT). It should however be noted that for the party to rely on the issue or point of illegality the same must be pleaded as the point at issue in the impugned decision. The Court of Appeal in the case of **Dervan P. Valambia** (supra) on the issue of illegality of the impugned decision as a ground for extension of time observed thus:

> *"In our view,* ***when the point at issue is one alleging illegality of the decision being challenged, the Court has a duty, even if it means extending the time for the purpose,*** *to ascertain the point and if the alleged illegality be established, to take appropriate measures to put the matter and record straight." (Emphasis supplied).*

Applying the principle in the above cited case to the facts of this case where the appellant never alleged illegality as a ground for extension of time as can rightly be observed from his dispositions in paragraphs 6,7,8 and 9 of the affidavit, I have no any other option than holding that no point of illegality was established by the appellant to warrant the court grant the application. I so find as the same has been raised in the submission not even at the trial level but during the appeal stage something which cannot be considered as evidence to prove the issue of illegality of the decision. It is the law

submission is a summary of arguments and cannot be used to introduce evidence. This position was reiterated in the case of **TUICO at Mbeya Cement Company Ltd Vs. Mbeya Cement Company Ltd and Another** (2005) TLR 41 where the Court of Appeal said:

> *"It is now settled that submission is a summary of arguments. It is not evidence and cannot be used to introduce evidence. In principle all annexures, except extracts of judicial decisions or text books, have been regarded as evidence of facts and where there are such annexures to written submissions, they should be expunged from submission and totally disregarded."*

All that said and done though with different reasons from that of the Resident Magistrate Court I find the appeal is wanting in merits. Before concluding I have however noted that, the learned Principal Resident Magistrate after his finding that the application was wanting rejected it with costs. To be precise on the order of the court I quote the same as hereunder:

> *Out of the aforesaid this Application is rejected with costs.*
>
> *I so order.*

Now when can a matter be rejected before the court of law that has to start with the definition of the term reject. My research of the definition of the term "reject" too me far as our laws do not define it. Collins, Dictionary & Thesaurus, (2011) 5th Edition at page 868 defines the term reject to mean:

> *"to refuse to accept, use or believe."*

According to the above definition and in my humble view the matter is rejected when the court refuses to entertain it for any sufficient and

reasonable grounds such as its incompetence for want of substance or being brought in violation of the law or for being vexatious and/or frivolous. It follows therefore that the matter is rejected at any stage before the court embarks on its hearing. In the like manner when the matter is incompetent before the court the remedy is to strike it out as once the same is heard on merit and found to be without merit it has to be dismissed. In the case of **Cyprian Mamboleo Hiza Vs. Eva Kioso and Another**, Civil Application No. 30 of 2010 (CAT unreported) the Court of Appeal had an opportunity express as to when can the matter be "strike out" or "dismissed". The Court said:

> *"...This court, accordingly, had no jurisdiction to entertain it, what was before the Court being abortive and not properly constituted appeal at all. What this court ought strictly to have done in each case was to "strike out" the appeal as being incompetent, rather than to have "dismissed" it; for the latter phrase implies that a competent appeal has been disposed of, while the former phrase implies there was no proper appeal capable of being disposed of."*

In light of the above authority and deliberations in this matter since the Principal Resident Magistrate heard and determined the application on merit it was wrong for him to reject the matter as the correct remedy was to dismiss it. That being the position I invoke the revisionary powers of this court under section 44(1)(b) of the Magistrates Court Act, [Cap. 11 R.E 2019] by quashing the order of rejection of the application and substitute the same with "dismissal" of the application.

In the premises and for the fore reasons it will be in the favour of justice to uphold the decision of the Resident Magistrate Court which I hereby do though with different reasons as stated above and proceed to order that this appeal is devoid of merits and is hereby dismissed with costs.

It is so ordered.

DATED at DAR ES SALAAM this 01st day of October, 2021.

E. E. KAKOLAKI

JUDGE

01/10/2021

The judgment has been delivered at Dar es Salaam today on 01st day of October, 2021 in the presence of the Mr. Kulwa Shitemba advocate for the Appellant, Mr. Victoria Greogory and Mr. Samwel Nyari Advocates for the 1st and 2nd respondents respectively and Ms. **Asha Livanga**, Court clerk.

E. E. Kakolaki

JUDGE

01/10/2021