IN THE HIGH COURT OF TANZANIA

(IN THE DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL REVISION No. 38 of 2018

(Arising from Civil Case No. 228 of 2015)

ALLIANCE INSURANCE COMPANY LIMITED .....APPLICANT

VERSUS

EDSON JACOB MKISI.....RESPONDENT

RULING

Last Order: 4/10/2021
Date of Ruling: 4/11/2021

MASABO, J.:

The applicant has moved this court by way of a chamber summons made under section 43(3) and section 44(1)(a) and (b) of the Magistrate Courts Act [Cap 11 RE 2019]. Her prayers are for this court to call for, examine and revise the proceedings of the Resident Magistrate's Court for Dar es Salaam at Kisutu in execution of Civil Case No. 228 of 2015 owing to errors material to the merits of the case occasioning injustices to the applicant. Accompanying the application is an affidavit deponed by Dr. Alex Thomas Nguluma, counsel for the applicant in which the following factual background is discernible.

The applicant was the defendant in Civil Case No. 228 of 2015 instituted by the respondent in the Court of the Resident Magistrate for Dar es Salaam at Kisutu. Upon being served with the plaint for this suit, she prepared and filed her written statement of defence (WDS) in court within the time schedule. The same was served to the respondent who upon receipt, raised a preliminary objection on a point of law to the effect that the pleadings were incompetent as the counsel who drew and filed the WSD had no valid practicing certificate as he had not renewed it contrary to section 35 of the Advocates Act, Cap 341. Both parties were heard in writing. On 18/10/2016, the court entered a ruling upholding the preliminary objection. It subsequently thereafter, entered a default judgment and decree which condemned the applicant to pay the respondent the claimed sum of USD 17,154. The applicant is disgruntled by the default judgment and decree. She is now before this court challenging the default judgment and decree on the following grounds:

1. The trial court erred in entering a default to an amount of USD 27,040 which is more and above than the amount prescribed by the law;
2. The lower court erred in not requiring the respondent to prove his case;
3. The lower court entertained evidence in the respondent's written submission in support of his preliminary objection instead so solely on a point of law.

Hearing of the revision was ordered to proceed in writing ex parte the applicant after it was proved that the respondent was served but defaulted appearance. Submitting in support of the application, Dr. Alex Nguluma, counsel for the applicant cited the provision of section 44(1) (a) and (b) of the Magistrate Courts Act, Cap 11 RE 2019 and proceeded to argue that this court is vested with revision powers over subordinated courts where there are material errors on the record involving injustices.

Having set the ground, he proceeded to submit that the decision of the trail court is marred by irregularities thus it merits the correction by this court by way of revision. The first irregularity, is that the amount ordered to be paid to respondent in the default decree was far above the legal minimum threshold of Tshs 1000/=. It was his argument that the court could only enter a default decree if the claim was not above Tshs 1000/=. For all other claims, it ought to have conducted an ex parte proof for the respondent to prove his claims if any against the applicant.

On the second ground, it was argued that, in entering a default judgment, the trial court lucidly errored as it ignored a mandatory legal provisions of Order VIII Rule 14(2)(a) and (b) of the Civil Procedure Code (supra). He contended that the omission to require the respondent to prove his claims contravened the provisions of the law pertaining to the burden of proof. Lastly on the last point, without divulging further details, the applicant briefly submitted that the preliminary objection raised by the respondent. This marked the end of the submission.

I have considered the submission and the lower court record placed before me. Section 44(1) (b) of the Magistrate Court Act, Cap. 11, under which this application is filed, vests the High Court with powers to revise the proceedings of courts subordinate to it and make necessary orders if it appears that there has been an error material to the merits of the case involving miscarriage of justice. In the first two grounds, the applicants alleges that the proceedings of the subordinate court were inconsistent with the provision of Order VIII Rule 14(2). His major complaint is that, in total disregard of Rule 14(2)(b) which mandatorily required *ex parte* proof in all claims exceeding Tshs 1000/=, having struck out the written statement for being filed by an incompetent person, the trial court hurriedly entered a default judgment and condemned the applicant to pay a sum of USD 17,154. From the outset, it is to be noted that there has been legal reform in this area. The provision of Order VIII Rule 14(2)(a) and (b) which were amended through GN. No. 381 of 2019. The provision of this rule prior to the amendment and which was still in force when the court made the impugned default judgment provided as follows:

> **Rule 14**
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> (2) In any case in which a defendant who is required under subrule (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 subrule, within the period of such extension, the court may–

(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. [underlining added]

Following the amendment, the phrase *"claim is for a liquidated sum not exceeding one thousand shillings"* appearing in the first line of paragraph (a) which is the kernel of this application was deleted while the remaining content of this paragraph was merged with paragraph (b). Thus, unlike in the past, the issue of pecuniary value of the claim is no longer relevant. The contention between the parties herein would not have arisen had the default judgment made after the amendment.

With this preface, I will now revert to the merit of the application. I have keenly securitized the records to see whether there was any non-compliance with the above provisions. As it could be vividly seen in these provisions, the consequences for default filing of WSD were premised on the pecuniary value of the claim. Depending on the pecuniary value default filing of WSD attracted a default judgment or an order for ex parte proof. In claims for a liquidated sum not exceeding Tshs 1000/= the failure to file WSD attracted a default judgment whereas in all other claims, it attracted an order for ex

parte proof. The consequences were also dependent upon the nature of the summons served upon the defendant.

In the instant case, much as I did not find the copy of the summons served upon the applicant, the proceedings and the ruling demonstrate that she was served with a summon requiring her to file a WSD. By filing an incompetent WSD, he contravened the provision of rule 1(2) and, depending on the nature of the claim in the plaint, he risked the consequences prescribed under Rule 14(2) (a) or (b). From paragraph 3 and 11(i) of the plaint filed in court on 2nd September 2015, it is gathered that, the respondent's claim was for USD 17,154 being an outstanding legal fees payable to the respondent for legal services provided in respect of Civil Suit No. 149 of 2009 which was amicably resolved in this court. Certainly, the claim of USD 17,154 was far above the threshold of the liquidated sum of Tshs 1,000/= on which the court could enter a default judgment without requiring proof from the plaintiff.

Under the premise, I join hands with the applicant's counsel that since the respondent's claim was far above the threshold of Tshs 1,000/=, it was certainly wrong for the court to enter a default judgment without requiring the respondent to provide proof for his claims. The irregularity is apparent hence suffices for this court to invoke its revision powers to rectify the irregularity. I thus proceed to allow the application. The proceedings of the Court of the Resident Magistrate for Dar es Salaam at Kisutu in Civil Case No. 228 of 2015 are hereby quashed and set aside pursuant to section

44(l)(b) of the Magistrates' Courts Act (supra). Consequently, I remit the case file and order re-trial de novo of Civil Case No. 39 of 2015 to be conducted by another magistrate with competent jurisdiction. In the circumstances, I make no order as to cost.

Ordered accordingly.

DATED at DAR ES SALAAM this 4th November 2021.

X

Signed by: J.L.MASABO

J.L. MASABO

JUDGE