IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

PC CIVIL APPEAL NO. 47 OF 2021

(Arising from the decision in Civil Appeal No. 77/2020 of the District Court of Kinondoni at Kinondoni by Hon. E.A Mwakalinga -SRM, originated from Civil Case No. 43 of 2020 of Manzese/Sinza Primary Court)

COSMAS HALODI MLUNGU..... APPELLANT

VERSUS

CHAMA CHA MADEREVA WA BAJAJI VICTORIA (CHAMABAVI).....RESPONDENT

JUDGMENT

Date of Last Order: ***04/10/2021***

Date of Judgment: ***08/11/2021***

ITEMBA, J;

In Manzese/Sinza Primary Court Civil Case No. 43 of 2019, the above named respondent, successfully sued the appellant, Cosmas Halodi Mlungu, for payment of 11,753,841/=. The matter was heard *ex parte* against the appellant upon his failure to enter appearance. The respondent had filed an application of execution, nevertheless the appellant did institute an application to set aside the *ex parte* judgement basing on the ground that he was not properly been served with summons. The trial Court struck out the application to set aside the *ex parte* judgment for being time barred.

Aggrieved, the appellant unsuccessfully appealed to the District Court of Kinondoni vide Civil Appeal No. 77 of 2020. Dissatisfied with the

judgment and decree of the first appellate Court, the appellant appealed to this Court. Going by the memorandum of appeal, the appellant's complaints against the District Court decision, are predicated upon the following grounds namely:

1. *The trial Court erred in law and facts in proceeding to deliver judgement without affording the appellant with right to be heard.*
2. *That the trial Court erred in law and facts to proceeded hearing the case without considering that the appellant herein had never been properly served with the summons to appear to defend his case.*
3. *That the trial Court erred in law and fact for failure to consider the facts that the were adduced by the appellant herein in the application to set aside an ex parte judgment which was delivered by the trial Court in his absence.*

When the matter stood for hearing, the appellant appeared unrepresented whilst Mr. Benard Kabunga, learned advocate, represented the respondent. The parties prayed for the matter be disposed by way of written submission and they did comply accordingly with the scheduling order.

Submitting on the first ground of appeal, in essence, the appellant argued that the first appellate Court erred in law for not holding that the appellant's right to be heard as enshrined under Article 13 (6) (a) of the Constitution of the United Republic of Tanzania of 1977 (as amended time to time) was violated. He contended that before the trial Court, the case was heard *ex parte* without him being aware that the matter was

pending before the Court and he came to have knowledge of the same upon being served with the summons to appear to show cause why execution should not take place against him.

The appellant emphasized that his right to be heard was violated and to cement on his argument, he invited the Court to make reference to the decision of **M/S Darsh Industries Ltd vs. M/S Mount Meru Millers Ltd**, Civil Appeal No. 144 of 2015 (Unreported) in which it was decided that the right to be heard is of paramount importance and once denied the proceedings are subjected to nullification. The appellant further eloquently cemented that trial Court would have invoked the powers under Article 107 A (2) not to be tied up with technicalities to proceed to determine his application to set aside an *ex parte* judgement on merit.

On the second ground of appeal, the appellant complains that the appellate Court failed to realize that he was not properly served with summons to appear before the trial Court. He contended there is no proof of service vide affidavit by the process server which is contrary to the law. The appellant stressed that every member of CHAMABAVI (respondent) knows his whereabout but they did not take trouble to serve him. The appellant vehemently articulated that section 38 (2) of the Magistrate Courts Act, [Cap 11 R.E 2002] requires proof of service by the person who has effected service to the defendant but in the instant matter the respondent's had no proof of the same.

On the third ground of appeal, the appellant complains that when he was served with summons to show cause why execution should not be carried on against him, it was the time when he knew on the

existence of an *ex parte* judgment against him. That, the denial by the trial court to hear his application to set aside the said exparte Judgment on the grounds that if was time barred denied his right to be heard, denied his right to be. He then prayed that the appeal be allowed basing on the grounds so demonstrated.

In his brief but focused response, Mr. Kibunga for the respondent, with respect to all the grounds of appeal he argued that, the judgement of the trial Court was entered on 26/07/2019 however the appellant applied for it to be set it aside out of time. He also contended that the summons was properly published in the Mwananchi News Paper on 16/04/2019, hence, the appellant was properly served before the judgement was entered and thus the case of ***M/S Darsh Industries Ltd*** *(Supra)* is distinguishable.

In finality, Mr. Kibunga wound up his submission by accentuating that the application to set aside exparte judgment, filed by the appellant was hopelessly time barred and thus was properly struck out as the principle of law requires.

I have dispassionately considered the three grounds of appeal in the light of the submissions of both parties. Having so done, I think, all three (3) grounds of appeal are intertwined. They can, and will be, determined together.

The issue for determination that comes out of the three grounds is *whether the instant appeal has merit.*

I have examined the records and I am convinced that this appeal cannot detain me much to deliberate basing on the following enlightenments;

One, the initial case, **Civil case no. 43/2019** before the trial Court was instituted by the respondent and it was heard *ex parte* against the appellant for non appearance. The trial court rendered it's decision on 26/07/2019. It is apparent from the records that the respondent lodged an application for execution and the summons to the appellant to show cause why execution should not be carried on against him was issued on 6th April 2020 and 8th April 2020. The said summons required the appellant to appear before the Court on 24th April 2020 of which the appellant complied with. That from this point while in Court the appellant had contended to have been surprised to find a copy of judgement of which ordered him to pay **Tshs. 11,753, 841** to the respondent. Being aggrieved with that, the appellant lodged an application to set aside the *ex parte* judgment on 1/06/2020 which is almost a year from the date of the decision.

Two, the Law is very clear that the party (defendant) who is aggrieved by an *ex parte* judgment may make an application for it to be set aside subject to the law of limitation. This is according to **Rule 30 (1) of the Magistrate's Courts (Civil Procedure in Primary Courts) Rules, GN. 310/1963** which reads;

> *(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.*** [Emphasis is added]

From the above provision, the appellant was obliged to comply with the statutory time to lodge his application to set aside the *ex parte* judgement. Further, as expressively provided, the trial Court is the only forum which is mandated to set aside it's *ex parte* judgement upon realizing that the summons was unduly served to the defendant (appellant herein) or upon any other sufficient reason.

The time limitation for applying to set aside an *ex parte* judgement before the Primary Court is forty-five (45) days from the date of the decision as provided under **item 11 of PART III of the Schedule to the Law of Limitation Act, Cap 89 R.E 2019.** According to the records, the appellant's application to set aside the *ex parte* judgment therefore was lodged after almost a year from date of decision which makes it time barred and hence contravenes the mandatory requirement of the law. Actually, I am in agreement with the first appellate and the trial Court decision that the application was time barred save for the preposition that the two Courts referred **item 1 of the Schedule to the Magistrate's Courts (Limitation of Proceedings Under Customary Law) Rules GN. 311/1964** which is non applicable to the case at hand as the claim does not fall under customary Law.

Three, I am alive with the with the cardinal principle of Law and a of Constitutional right to be heard as enshrined under Article 13 (6) (a) of the Constitution of the United Republic of Tanzania *(Supra).*The appellant had argued that the trial Court would have invoked the powers under Article 107 A (2), do away with technicalities and proceed to

determine his application to set aside an *ex parte* judgement on merit. It is important to note that, the question as to limitation of time touches the jurisdiction of the Court to adjudicate the matter and therefore it cannot be considered as a technicality. [See the case of **DPP vs. Benard Mpangala & 2 Others,** Criminal Appeal No. 28 of 2001, CAT at Dar es Salaam (Unreported). As the matter of law, the appellant upon realizing that he was out of time, the remedy was to seek for an extension of time to lodge an application to set aside the said the said *ex parte* judgment.

In **Zuberi Mussa vs Shinyanga Town Council,** Civil Application No. 100 of 2004 (unreported) the apex Court of the Land addressed the purposive approach in interpreting article 107A (2) (e) of the Constitution as follows:

> *"... In our decided opinion,* ***article 107 A (2) (e)*** *is so couched that in itself it is both conclusive and exclusive of any opposite interpretation. A purposive interpretation makes it plain that it* ***should be taken as a guideline for court action and not as an iron clad rule which bars the courts from taking cognizance of salutary rules of procedure*** *which when properly employed help to enhance the quality of justice delivered."* [emphasis is added]

I fully subscribe to the said position and in the case at hand, with respect, I am not in agreement with the appellant because the issue of time limitation goes to the root of the matter. Again, under **article 107B** of the Constitution, the Courts are enjoined to follow the letter of the Constitution and the Law in the exercise of their judicial functions.

Hence forth, the case of ***M/S Darsh Industries Ltd*** *(Supra)* cited by the appellant is distinguishable.

Fourth, as to the complains that the summons was unduly served to the appellant, these could be the reasons for both extension of time and application to set aside the *ex parte* judgement before the trial Court. This being the second appeal the Court not in a position to set aside the *ex parte* judgement entered by the trial Court. The 1st appellate Court in similar terms was also not in a position to set aside the said *ex parte* Judgement but only the trial Court. Even if the two appellate Courts could have reached into a conclusion that the summons were unduly served to the appellant still, the question as to the time limitation upon which the appellant was obliged to comply, remains undisputable. The trial Court has no jurisdiction to entertain the applicant's application unless he first successfully applies for extension of time and not an appeal which he has opted for.

In the event, the issue is disposed negatively, I accordingly dismiss the appeal in its entirety as it is devoid of merit. Each party to bear its own Costs.

It is so ordered.

Rights of the parties have been explained.

L. J. Itemba

JUDGE

08/11/2021