THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
MBEYA DISTRICT REGISTRY
AT MBEYA
CIVIL APPEAL NO. 22 OF 2020
(Originating from the Decision of the Resident Magistrate Court of Mbeya in Civil Case No. 74 of 2013

NIKO INSUARANCE (T) LTD.....APPELLANT

VERSUS

YAHAYA BROWN MWANJOKA (Administrator of the estate of the late Asia Yahaya, Fatuma Bahati and Abubakari Matia).....1ST RESPONDENT
CIPEX COMPANY LTD.....2ND RESPONDENT
ABDILAH BAKARI.....3RD RESPONDENT

JUDGMENT

Dated: 23rd June & 14 July, 2022

KARAYEMAHA, J

In civil case No. 74 of 2013 before the Resident Magistrate Court of Mbeya at Mbeya (the trial court), Yahaya Brown Mwanjoka (suing as an administrator of the estate of the late Asia Yahaya, Fatuma Bahati and Abubakari Matia) (1st respondent) sued Abdilah Bakari (1st defendant/respondent), Cipex Company (2nd defendant/ respondent) and Niko Insurance (Tanzania) LTD (3rd defendant/Appellant) jointly and severally for payment of Tshs. 47,000,000/=. In the said suit the 1st

respondent prayed for a judgment and decree against the appellant, 2nd and 3rd respondents jointly and severally as follows:

(a) *Payment of special damages and funeral expenses of Tshs. 47,000,000/=.*

(b) *Payment of Tshs. 200,000,000/= as general damages.*

(c) *Payment of interest on commercial rate of 23% on special damages from the date of filing this suit to the date of payment in full.*

(d) *Interest at the court rate of 12% of the decretal sum from the date of judgment up to the date of payment in full.*

(e) *Costs of this suit be provided for by the defendants.*

(f) *Any other relief as this honourable court may deem just and fit to grant.*

The defendants (2nd respondent, 3rd respondent and appellant) jointly and severally denied the claims. In the judgment handed down on 21/01/2016 (R. W. Chaungu - SRM) granted the suit and decreed against the 2nd respondent, 3rd respondent and appellant jointly and severally by awarding the sum of:

1. *Tshs. 5,000,000/= as special damages.*
2. *Tshs. 69,600,000/= as general damages.*
3. *Tshs 74,600,000/= subjected to interest at court's rate of 12% from the date of judgment till payment in full.*

4. *Payment of interest at commercial rate of 23% on the damages from the date of filing the suit to payment in full.*
5. *Defendants were held liable to pay costs of the suit.*

Apparently, the 2nd and 3rd respondents were not aggrieved by that decision. Conspicuously, it was the appellant who was aggrieved by the whole of the judgment and decree. She decided to climb a ladder to this court. Her memorandum of appeal raises seven (7) grounds to the effect that:

1. *That the whole of the proceedings by the successor Magistrate and consequential judgment is irregular and bad in law for denying the appellant a right to be heard and make her defence hence contravened rules of natural justice.*
2. *That the whole of the proceedings and consequential judgment and decree is irregular for failure to abide to the scheduling orders without any justification, there were no order to vacate its own previous standing orders made prior to the commencement of hearing of the suit.*
3. *That the successor Magistrate glossily erred in law for awarding the 1st Respondent special damages which were neither pleaded nor proved as required by the law.*

4. *That the successor Magistrate grossly erred in law for failure to analyze the evidence in records; had he properly scrutinized the same he could have arrived into a different premises with regard to the liability of the appellant on the 1st Respondent's claims.*

5. *That the learned successor Magistrate grossly erred in law for holding the Appellant equally responsible to the claims for compensation despite admission by the PW2 that the vehicle in question was not insured by the Appellant at the material time when it was involved in the accident.*

6. *That the whole of the findings made by the successor Magistrate are unreasonable under the law for failure to take into account the nature of the dispute before him, there were no justification for the successor Magistrate to rush in producing judgment, hence caused miscarriage of justice to all the parties.*

7. *That no findings were made to the issues framed the successor Magistrate did not consider all matters and issues raised by defence side during hearing of the plaintiff's case, the Magistrate made his findings as if the matter was heard ex-parte.*

The parties' contending arguments were, pursuant to the Court's order, presented by way of written submissions in conformity to the scheduling order drawn on 5th April, 2022. Ms. Mary Mgaya, learned Counsel from Ms. Mgaya Advocates represented and argued for the appellant. On the other hand, Mr. Tazan Keneth Mwaiteleke, learned Counsel from Eloquent Law Attorneys, represented the respondents.

In my comprehension of the grounds of appeal, it appears, in my view, that the 1st, 2nd and 6th grounds of appeal seek to challenge the decision of the trial court which was delivered *ex-parte* whereas grounds 3, 4, 5 and seven seek to challenge the *ex-parte* judgment on merit. It is now a settled position that the *ex-parte* judgment and order refusing to set an *ex-parte* order are appealable. See the case of **Dangote Industries Ltd. Tanzania vs. Warnercom (T) limited**, Civil Appeal No. 13 of 2021 CAT DSM (unreported), **Pangea Minerals Ltd. vs. Petroleum Limited and 2 others**, Civil Appeal No. 96 of 2015 and **Jaffari Sanya & another vs. Salehe Sadiq Osman**, Civil Appeal No. 119 of 2014 (all unreported).

Nevertheless, the appellant's counsel argued that the grounds 1, 2 and 6 tend to challenge the whole judgment and decree issued. That the respective grounds are substantially touching and challenging the

substance of the judgment. She wound up by contending that appeal can even be pursued when the judgment is rendered *ex-parte*. She argued further that dismissal of the application to set aside the *ex-parte* judgment cannot in law bar the appellant to seek recourse by remedying the situation by way of an appeal which sought to challenge the substance of the judgment.

For his part, Mr. Mwaiteleke submitted that grounds 1, 2 and 6 were canvased in the in **Misc. Civil Application Number No. 2 of 2016** which was lodged to set aside the judgment dated 21/01/2016 under **Order IX Rule 13 (1) and section 95 of the Civil Procedure Code [Cap. 33 R.E 2019]** (hereinafter, the CPC). The same was dismissed with costs on 06/06/2016. Mr. Mwaiteleke held the view that if the appellant was aggrieved by that ruling, he had to appeal to challenge it not to sneak those grounds in this appeal against the judgment dated 21/01/2016. It may appear that Mr. Mwaiteleke is arguing that the appellant was estopped from raising these grounds in this appeal but was to first attempt to challenge the ruling which refused to set aside the *ex-parte* judgment. The learned Counsel contended further that the approach adopted by the appellant in dealing with an *ex-parte* judgment is tantamount to riding two horses at the same time

which is logically impossible. In his view, once the appellant opted to make use of Order IX Rule 13 (1) of the CPC, he ought to have continued with the same avenue up to the level of the Court of Appeal. Mr. Mwaiteleke placed heavy reliance on the authority of **The Registered Trustees of Pentecostal Church in Tanzania vs. Magreth Mukama (A minor by Her Next friend, Edward Mukama)**, Civil Appeal No. 45 of 2015.

It worth of a note that, after the trial court had delivered a judgment on 21/01/2016 and same came into the knowledge of the appellant, she lodged Misc. Civil Application Number No. 2 of 2016 being the first attempt to set aside the judgment dated 21/01/2016 which was handed down without hearing her defence under Order IX Rule 13 (1) and section 95 of the CPC. Unfortunately, the same was dismissed with costs on 06/06/2016. Apparently, the appellant did not take a step to challenge it in any way. She is now, taking advantage of this avenue to challenge it through the present appeal by assailing a complaint that she was not given a chance to be heard.

Before addressing this pertinent issue, it may be valuable to make a brief elucidation of the law relating to *ex-parte* determination of a suit. It is a clear position of law, under Order IX of the CPC that, where the

defendant does not appear on the date of hearing, the trial Court may allow the plaintiff to proceed *ex-parte* and upon *ex- parte* hearing, it may pronounce an *ex-parte* judgment. Under Order IX Rule 13 (1) of the CPC, an *ex-parte* judgment may be set aside if the judgment debtor assigns good cause that prevented him to appear on the date when the Court allowed the decree holder to proceed *ex-parte*. It has to be noted that the remedy for setting aside an *ex-parte* judgment is only available if the judgment debtor has good cause to justify his non-appearance. In the event where the trial court refuses to set aside the *ex-parte* judgment, the judgment debtor can appeal under Order XL Rule 1 (d) of the CPC which provides as follows:

> *"1. An appeal shall lie from the following orders under the provisions of section 74, namely-*
> *(d) an order under Rule 13 of Order IX rejection an application (in a case open to appeal) for an order to set aside a decree or judgment passed ex parte;*

On the other hand, an *ex-parte* judgment is appealable under section 70 (2) of the CPC which provides that *"an appeal may lie from an original decree passed ex-parte*". Section 70 (2) of the CPC unambiguous as it is, does not impose any condition for appealing against an *ex-parte* judgment. Comprehending its wordings, I digest it

to be identical with section 70 (1) of the CPC which provides for an automatic right of appeal against an original decree of a subordinate court. Ms. Mgaya captured this position although she had no authority to back up her argument. But this was articulated in the case of **The Registered Trustees of Pentecostal Church in Tanzania** (supra).

I have keenly examined the authority and found nowhere the provision of Order XVII Rule 3 of the CPC is being considered. It is only the provision of Order IX Rule 13 (1) of the CPC which has been taken into account in the respective authority. Order XVII Rule 3 provide as follows:

> *"3. Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the court may, notwithstanding such default, proceed to decide the suit forthwith."*

The import of this provision is clear. It is that when the appellant without notice failed to appear in court to defend herself, the court was enjoined to proceed to decide the suit forthwith. The cases of **Hamis Rajabu Dibagula vs. Republic**, [2004] T.L.R 181 and **The**

Registered Trustees of Teresina Sister and 10 others vs. Lukia Lipangile and another, Land Appeal No. 2 of 2015 (unreported) cited by Ms. Mgaya did not discuss the provisions Order XVII Rule 3 of the CPC. There being no discussion of the said provision, it cannot be said that the same has been interpreted as to impose restrictions on the trial court not to proceed to decide the suit. This technically means deciding the suit *ex-parte*. Even if that was an error, since the appellant is complaining that she was not afforded a chance to defend her case, she still had ample time, I think she took proper steps of instituting Misc. Civil Application No. 2 of 2016 complying with Order 9 Rule 13 of the CPC in the first place.

This then brings me to the profound question whether it is appropriate to fault an *ex parte* judgment and an order refusing to set aside an *ex parte* judgment in one appeal. Given the position of the law, I have equally reasoned with the respondents' counsel that it was impossible. Reading Ms. Mgaya's arguments between lines, she agrees with this accepted position of law. In order to sail in this path, Ms. Mgaya had to make sure that she was challenging the substance of the judgment only not to fault the trial court for denying the appellant a right to be heard. In legal perspective, the two decisions are separate

and distinct. Hon. Maige, J. (as he then was) facing a similar predicament, with the assistance of excerpt from **Mullar on the Code of Civil Procedure, 16th Edition** held as follows:

> *"...I think the two actions cannot be preferred together. As correctly observed by the learned author Mullar, the right to appeal against the two decisions are separate and distinct. They are two different and independent statutory remedies established by different provisions of law. An appeal against a decision refusing to set aside an ex parte judgment if successful has the effect of maintaining the status quo by restoring the suit. It would thus follow that once the suit is restored, there remains nothing to be appealed against. Contrariwise, an appeal against an ex-parte decree if successful will have the effect of finally and conclusively disposing of the dispute. There is therefore, no way the two causes of action can be preferred together. Conceivably, that would be possible if our law allowed omnibus appeals in the same way as it is for omnibus applications. As much as I know our law does not allow one appeal against two appealable decisions."*

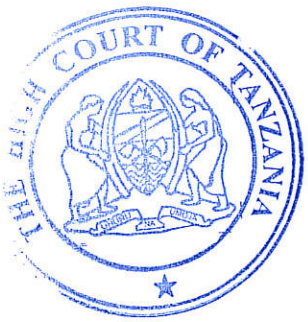
I subscribe to the above position as it reflects a correct legal position in the context of the matter under scrutiny. In my considered

view, therefore, since the appellant's application to set aside *ex-parte* judgment and be accorded a chance to be heard was dismissed, she had only to appeal against that ruling under in terms of Order XL Rule 1 (d) of the CPC or to appeal to challenge the merit of the *ex-parte* judgment. She was wrong to combine the two appeals in one appeal.

In the event, I find this appeal incompetent in law and it is hereby accordingly struck out with costs.

It is so ordered.

DATED at **MBEYA** this **14th** day of **July, 2022**



J. M. KARAYEMAHA
JUDGE