

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MWANZA

AT MWANZA

CIVIL APPEAL No. 37 OF 2020

(Arising from Misc. Civil Application No. 09/2020, arising from DC civil Case No. 19 of 2019 at Nyamagana District Court)

JUVENARI AUGUSTIN APPELLANT

VERSUS

SABAS PHILIPO RESPONDENT

JUDGMENT

7/3/2022 & 22/4/2022

ROBERT, J:-

On 26th day of March, 2020, the Respondent, Sabas Philip, filed Misc. Civil Application No. 09 of 2020 at the District Court of Nyamagana moving the District Court under Order VIII Rule 20(2) of the Civil Procedure Code, as amended by GN No. 381 of 2019 to set aside its order to strike out the respondent's defence in Civil Case No. 19 of 2019 and accord the respondent herein an opportunity to defend the suit. After the hearing, the District Court allowed the application and set aside the ex-parte Judgment in Civil Case No. 19 of 2019. Aggrieved, the appellant,

Juvenari Augustin, preferred an appeal to this Court against the decision of the District Court.

Prior to the Respondent's application at the District Court, on 11th April, 2019 the respondent herein, who was the first Defendant in Civil Case No. 19 of 2019, filed his Written Statement of Defence against the said case. Thereafter, on 17th June, 2019 the District Court scheduled the date for the first pre-trial Conference to take effect on 8/7/2019. However, the 1st defendant (respondent herein) failed to enter appearance on that date and the subsequent dates fixed for first pre-trial conference. On 13/8/2019, the District Court gave an order to proceed ex-parte against the defendant (respondent herein) and on 25th September, 2019, the District Court delivered its ex-parte judgment against the respondent herein. However, on 26th day of March, 2020 the Respondent moved the District Court successfully through Misc. Civil Application No. 09 of 2020 to set aside the ex-parte Judgment in a ruling delivered on 8/6/2020.

Aggrieved with the ruling of the District Court, the appellant preferred an appeal to this court on the following grounds: -

- 1. That, the honourable trial court erred in law by setting aside the ex-parte judgment delivered on 25/09/2019 while the respondent had prayed for setting aside the struck-out order reached on 25/09/2019 to allow pre-trial conference to proceed thereof.*

2. *That, the honourable trial court erred in law and fact for failure to ascertain that the prayed order of setting aside the struck-out defence in civil case No. 19 of 2019 given on 25/09/2019 was already overtaken by events since the trial court had already reached the final stage of giving out the ex-parte judgment.*
3. *That, the honourable trial court erred in law and fact by setting aside the ex-parte judgment under the wrong provisions of the law*
4. *That, the honourable trial court erred in law and fact to grant what was not prayed by respondent.*

At the hearing date of this appeal, the appellant was represented by Ms. Mary Melchior, learned counsel whereas the respondent was represented by Stephen Muhoja, learned counsel. Hearing proceeded orally.

Submitting in support of the appeal, Ms. Melchior joined and argued together the 1st, 2nd, and 4th grounds of appeal while the 3rd ground was argued separately.

Submitting on the 1st, 2nd, and 4th grounds, she faulted the trial Court for setting aside ex-parte judgment because the respondent did not pray for an order to set aside the judgment. She maintained that the prayer made by the respondent was for the District Court to set aside its order to strike out the defence by the applicant and to accord the applicant a chance to defend her suit. She insisted that, a prayer to set aside an

order to strike out the defence was equally not proper under Order VIII Rule 20(2) of the CPC because it was filed out of the prescribed time.

She clarified that, the respondent's application was made under Order VIII Rule 20(2) of the CPC which was supposed to be filed within 14 days from the date of an order sought to be challenged.

In response to the 1st, 2nd and 4th grounds, Mr. Muhoja submitted that, it is not true that by setting aside the ex-parte order the District Court granted a prayer which was not prayed for. He maintained that, the respondent's application at the District Court was made under Order VIII Rule 20(2) of the Civil Procedure Code, Cap. 33 (R.E. 2002) and the prayer was that, the court be pleased to set aside its order to strike out the applicant's defence in Civil Case No. 19 of 2019 and accord him an opportunity to defend his suit. He argued that the applicant did not raise an argument with regards to the application being filed out of time. Therefore, raising the argument at this stage is an afterthought.

These grounds raise a few questions for determination by this Court. The first question is whether the District Court was at fault for setting aside ex-parte judgment because the respondent did not pray for an order to set aside the judgment. The respondent's application at the District Court in Misc. Civil Application No. 9 of 2020 was made under Order VIII

Rule 20(2) of the CPC as amended by G.N. No. 381 of 2019. Order VIII

Rule 20 of the CPC reads as follows:-

20.-(1) Where at the time appointed for the pre-trial conference, one or more of the parties fails to attend, the court may

(a) dismiss the suit or proceedings if a defaulting party is the plaintiff;

(b) strike out the defence or counter-claim if a defaulting party is a defendant;

(c) enter judgment; or (d) make such other order as it considers fit.

(2) An order made by the court in the absence of a party concerned or affected by the order may be set aside by the court, on the application of that party within fourteen days from the date of the order, on such terms as it considers just.

(3) Subsequent to the first adjournment, if all parties fail to attend the pre-trial conference, the court shall dismiss the suit.

It is important to note that, the quoted provision is applicable where one or more of the parties fails to appear at the time appointed for pre-trial conference. In the case at hand, records indicate that on 13/8/2019 when the matter came up for the first pre-trial conference, the first defendant (respondent herein), who was the only defendant remaining, failed to enter appearance. Consequently, the trial Court decided at page 9 of the typed proceedings that:-

"Court: - As defendant not in court, court proceed exparte, and plaintiff has a right to prove her case."

Order VIII Rule 20(2) of the Civil Procedure Code allows the court to set aside an order made in the absence of a party who failed to enter appearance on the date appointed for pre-trial conference, on application of the party affected by the order within fourteen days. This means the cited provision allowed the trial court to set aside its order made on 13/8/2019 when the defendant (respondent herein) failed to enter appearance on the date appointed for first pre-trial conference if the application was made within the prescribed time of 14 days from the date of that order. Unfortunately, in Misc. Application No. 9 of 2020, the trial Court used the cited provision to set aside ex-parte judgment in civil case 19 of 2019 which was delivered on 25/10/2019. For reasons stated herein, this Court is in agreement with the learned counsel for the appellant that the cited provision did not allow the trial Court to set aside ex-parte judgment.

This takes this Court to the question, whether Misc. Application No. 9 of 2020 was filed out of the prescribed time. It is not disputed that the cited application was filed under Order VIII Rule 20(2) of the Civil Procedure Code which allows the aggrieved party to file an application within fourteen days from the date of the order. In the case at hand, an order of the Court was made on 13/8/2019 when the defendant


(respondent herein) failed to enter appearance on the date appointed for first pre-trial conference). However, the respondent filed his application on 26/3/2020 which is more than seven months from the date of the said order and six months from the date of judgment. Thus, the application was filed out of the prescribed time and therefore not competent before the court.

The last question for determination is whether the trial Court's decision to set aside ex-parte judgment was made under a wrong provision of the law. On the basis of analysis given above, this Court is in agreement with the learned counsel for the appellant that the trial Court was misdirected in setting aside the ex-parte judgment under Order VIII Rule 20(2) of the Civil Procedure Code.

On the basis of the foregoing, I find merit in this appeal and proceed to allow this appeal with costs. As a consequence, I hereby set aside the ruling of the trial Court dated 8th June, 2020.

It is so ordered.




K.N.ROBERT
JUDGE
22/4/2022