

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN THE SUB-REGISTRY OF DAR ES SALAAM**

**AT DAR ES SALAAM**

**CIVIL APPEAL NO. 10 OF 2022**

**ROSE MONICA ONGARA ..... APPELLANT**

***VERSUS***

**AZANIA BANK LIMITED ..... RESPONDENT**

***(Appeal from the decision Resident Magistrate's Court of Dar es Salaam at Kisutu in Misc. Civil Application No. 85 of 2021)***

**JUDGMENT**

14 and 15<sup>th</sup> July, 2022

**KISANYA, J.:**

This appeal by Rose Monica Ongara is against the ruling of the Resident Magistrate's Court of Dar es Salaam at Kisutu dismissing her application that sought to set aside an *ex-parte* judgment of the same court in Civil Case No. 216 of 2018.

The background facts giving rise to the present appeal is that, the respondent, Azania Bank Limited sued the appellant for breach of consumer loan agreement. It claimed, among others, for payment of Tshs. 59,160,342.67 being the outstanding amount and remaining unpaid in respect of the loan facility provided to the appellant. The matter proceeded in the absence of the appellant on the account that she and or her advocate defaulted to appear after filing her defence. Finally, a judgment was entered in favour of the respondent.

Dissatisfied, the appellant filed an application for setting aside the *ex-parte* judgment. The application was dismissed for want of reason for non-appearance of the appellant and/or her advocate.

Still aggrieved, the appellant has filed the instant appeal which is based on two ground of complaints to the following effect: -

- 1. That, the trial court erred in law and fact for failure to consider the reasonable cause advanced by the appellant.*
- 2. That, the trial court erred in law and fact by denying the appellant of her constitutional right to be heard.*

The appeal was disposed of by way of written submissions filed by Messrs. Lugiko John and Mbagati Nyarigo, learned advocates for the appellant and respondent, respectively.

Addressing ground one, Mr. John faulted the trial court for failing to consider that the appellant had advanced sufficient reason for her non-appearance. He contended that the fact deposed by the appellant that the appellant's former counsel failed to inform the appellant of her withdraw of instruction to represent her was a sufficient reason. The learned counsel further submitted that the appellant resides in Kilimanjaro and that she believed that her counsel would make appearance.

Mr. John went on submitting that the appellant was not negligent in making follow-up of the matter as held by the trial court. His submission was based on the contention that the appellant lives away from Dar es Salaam and

that she could not attend the court's session because she is unemployed. He reiterated that the appellant's non-appearance during the first PTC was due to her honest belief that her advocate was in total control of the case. He also contended that the order to proceed *ex-parte* was a result of non-communication of the former advocate's abandonment of the case. Making reference to the case of **Yusuf Same and Another vs Hadija Yusuf**, Civil Appeal No. 1 of 2002 and **Felix Tumbo Kisima vs TTC Limited and Another** [1997] TLR 57 he submitted that an error made by an advocate is a sufficient cause.

On the ground two, Mr. John argued that the trial court's decision of dismissing an application for setting aside an *ex-parte* judgment denies the appellant's right to be heard. He further argued that the duty of courts of law is to resolve and not to be the punitive machineries. That said, the Court was asked to quash the decision of the trial court and set aside the *ex-parte* judgment and decree of the trial court in Civil Case No. 216 of 2018.

In reply, Mr. Nyarigo argued that the appellant was required to satisfy the trial court that she and/or her advocate were prevented by any sufficient reason from appearing when the suit was called on for first PCT on 10<sup>th</sup> December, 2020, 27<sup>th</sup> January, 2021 and 18<sup>th</sup> February, 2021. He went on to submit that the reasons that the appellant failed to appear after engaging her counsel and failure by the advocate to inform the appellant on the progress of the case were not sufficient reasons. To bolster his submission, the learned

counsel cited the case of **Lim Han Yun and Another vs Lucy Theseas Kristensen**, Civil Appeal No. 219 of 2019. He was of the view that the case of **Yusuf Same** (supra) is distinguishable to the circumstances of this case on the ground that it was related to extension of time to appeal.

With regard to ground two, Mr. Nyarigo submitted that the trial court considered that the appellant failure to enter appearance was actuated by her own negligence when she failed to follow-up the progress of the case. He was of the firm view that the appellant's failure to enter appearance cannot be termed as denial of her right to be heard. It was also his submission that the appellant waived her right to be heard when she failed to enter appearance. Therefore, he prayed that the appeal be dismissed with costs.

I have considered the submissions from the counsel for the appellant and respondent. The main issue for my determination is whether the appeal is meritorious.

It is common ground that this appeal stems from the application for setting aside the *ex-parte* judgment. The law is settled law that, in an application to set aside the *ex-pate* judgment or decree, the applicant is duty bound to assign sufficient cause for his or her non- appearance when the suit was called on for hearing. Further to this, it is the trial court which passed the *ex-parte* judgment which has mandate to determine the same. The foresaid requirement is provided for under Order XIX, Rule 9 of the Civil Procedure Code,

Cap. 33, R.E. 2019 cited in the chamber summons filed before the trial court.

It reads:-

*"In any case in which a decree is passed ex parte against a defendant, he may apply to the court by which the decree was passed for an order to set it aside; and if he satisfies the court that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the court shall make an order setting aside the decree as against him upon such terms as to costs, payment into court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit: Provided that, where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also."*

Since, the mandate to set aside the *ex-parte* decree is vested in the trial court, the decision by the trial court can only be interfered upon demonstrating that that the said court erroneously exercised its discretion. This stance was taken by the Court of Appeal in the case of **Lim Han Yung** (supra) which considered the above cited provision and went on holding as follows:-

*"Going by the wording of the above reproduced provisions, it is clear that the power given to the court in setting aside an ex parte judgment, is discretionary. We are also mindful that generally the exercise of discretion by the lower court can rarely be interfered by a superior court. Such an exercise can only be interfered with where it is clear that*

*the decision arrived at was a result of erroneous exercise of discretion through either the omission to take into consideration relevant matters or taking into account irrelevant extraneous matters and misdirecting itself.*

In view of the above position, my duty is to consider whether the trial court exercised its discretionary powers judiciously when dismissing the application to set aside the ex-parte judgment. In her ruling, the learned trial Magistrate considered the above position of law. This is reflected at page 7 of the typed judgment when the learned trial magistrate held:-

*"It has been argued in a number of cases that for the court to set aside Ex-parte judgment and decree sufficient reasons must be adduced for failure to attend hearing on the scheduled date...*

*Therefore, as per the above provision of law, it has made clear that the Applicant is mandatorily required to furnish sufficient cause to facilitate the court to consider whether to set aside on (sic) Ex-parte judgment and decree."*

Thereafter, the learned trial magistrate went on to apply the stated position of law in the circumstances of the case before her. She did so by considering the facts deposed in the supporting affidavit that the appellant failed to appear after engaging an advocate. Considering further that the appellant had not stated how she was making follow up on the status and progress of the case, the learned trial magistrate held the view that the appellant was negligent. For better understanding of the discussion at hand,

the trial court's consideration is reproduced as follows: -

*"Failure of the Applicant to make follow-up on the progress of her case depicts outright negligence therefore the reason advanced is an afterthought and has no merit. It is worth noting that the Applicant is also to blame. It is the practice that every client keeps track of his/her record case being handled by Advocate. If there were follow-ups made by the Applicant regarding his case, there would have been an affidavit to the effect. The non-actions show nothing but laxity and negligence on the part of the applicant."*

In the light of the above consideration, I was inclined to go through the affidavit in support of the application. Having done so, I am at one with the learned trial Magistrate and Mr. Nyarigo that the appellant did not demonstrate how she made follow-up of the matter after engaging her attorney. Let the facts deposed in paragraph 3, 4, 5, 6, 7 and 8 paint the picture as hereunder:

- 3. That, upon served with summons, I engaged Kasel Law Chambers (Agness Advocate) who on 12<sup>th</sup> December, 2018 filed in this Court Written Statement of Defence.*
- 4. That the dispute in Civil Case No. 216 of 2018 is a result of termination of employment between National Health Insurance Fund (NHIF) and me...*
- 5. That, I had established 'advocate-client relationship' with the named advocate in paragraph 3 herein, thus, I understood that she would appear in this Court at any material time in my absence in my absence before the date the Court schedule for hearing.*
- 6. That, unfortunately and surprisingly, I received summons*

*via Mwananchi Newspaper calling me to appear in this Court on 17<sup>th</sup> day of May, 2021.*

*7. That, instantly, I communicated with my advocate on the same, unfortunately she was outside Dar es Salaam.*

*8. That, on 17<sup>th</sup> May, 2021, I contacted one Lugiko John Hindishi, who appeared for me in this Court and on the same date Hon. A.W. Mmbando, SRM delivered an ex-parte judgment against me."*

Flowing from the above averment, it is clear that the appellant blamed her advocate for failure to appear before the trial court. However, as rightly held by the trial court, the appellant did not demonstrate on how she made follow-up of the matter after engaging the said advocate. She did not state whether she ever communicated with her advocate after filing the defence. The affidavit is to the effect that the appellant communicated with her former advocate after noticing that the matter had been fixed for *ex-parte* judgment. Indeed, paragraph 14 of the appellant's affidavit suggests that she dumped the matter with her lawyer when she deposed that:

*"That, when Civil Case No. 216 of 2018 was pending in this Court, my former advocate was in total control of the case.*

It is now settled that a person who engage an advocate to represent him or her in the court is duty bound to make close follow-up on the status of the case. That does not necessarily mean that he or she should come with the advocate in the court whenever the case is called on for hearing or order. Where it is not possible to come to the court, a party to the case should not relax. He



must make sure the status of the case is known to him or her by asking the respective counsel or cause perusal of the case file where need arise. Failure by the party to make follow-up on the status of his case is not a sufficient cause warranting the trial court to set aside the ex-parte judgment or decree. I am fortified by the decision of the Court of Appeal in **Lim Han Yung** (supra) where it was held: -

*"The appellants cannot throw the whole blame on their advocates. We think that a party to a case who engages the services of an advocate, has a duty to closely follow up the progress and status of his case. A party who dumps his case to an advocate and does not make any follow ups of his case, cannot be heard complaining that he did not know and was not informed by his advocate the progress and status of his case. Such a party cannot raise such complaints as a ground for setting aside an ex parte judgment passed against him."*

Being guided by the above position, I find no cogent reason to interfere with the trial court's decision. It is clear that the law governing the issue at hand was properly considered by the trial court. Thus, I find no merit on ground one.

Moving to ground two, the appellant's grief is to the effect that she was denied the right to be heard. This issue should not detain me. To start with, I agree with the appellant's counsel that parties to the case are entitled to the right to heard. However, that right is not absolute. It is exercised in accordance

with the law.

In the instant case, the appellant admitted that she was duly served. She also filed her defence to dispute the suit filed against him. Upon her and/or her advocate's failure to appear when the matter was called on for first pretrial conference and later hearing, the trial court was justified to proceed in her absence. Given that the appellant failed to advance any sufficient cause which prevented her to appear before the trial court, she cannot claim that she was denied the right to be heard. Thus, ground two lacks merit as well.

For the reasons stated afore, I find the appeal devoid of merit. It is hereby dismissed with costs.

DATED at DAR ES SALAAM this 15<sup>th</sup> day of July, 2022.



**S.E. Kisanya**  
**JUDGE**  
**15/07/2022**