

IN THE HIGH COURT OF TANZANIA
SHINYANGA DISTRICT REGISTRY
AT SHINYANGA

PC CIVIL APPEAL NO. 16 OF 2021

MANDEGE MILIKUDUHU..... APPELLANT

VERSUS

JUSTINE ALPHONCE

[BIOSUSTAIN (T) LTD SINGIDA].....RESPONDENT

[Appeal from the decision of the District Court of Kishapu at Kishapu.]

(Hon. A. K. Ismail RM.)

dated the 22nd day of April, 2021
in
Civil Application No. 02 of 2020

JUDGMENT

23rd May & 25th August, 2022.

S.M. KULITA, J.

This is an appeal from Kishapu District Court. The story behind this appeal in a nut shell is that, the respondent had instituted a Civil Case No. 2 of 2018 at Kishapu Primary Court claiming for Tsh. 12,576,950/= from the appellant and his guarantors. Due to non-appearance of the appellant, the case was heard *ex-parte* against him. Thus, the trial court delivered

an *ex-parte* judgment in favor of the respondent. That was 18th day of June, 2018.

Consequently, the respondent initiated the execution proceedings. In it, he prayed to make attachment and sell of the appellant's house which is situated at Kigoma. The application was granted.

When the execution process started, the appellant stormed in to rescue the situation. He prayed first, to stay the ongoing execution and secondly, to set aside the *ex-parte* judgment. That was on 18th September, 2020.

The appellant's application to set aside the *ex-parte* judgment was dismissed on 19th October, 2020 because the same was filed out of time, and his application to stay execution proceedings was struck out.

Following the said attempts failure at the trial court, the appellant resorted to take a different way. He approached the District Court with an application for extension of time to file a revision application. That was done through, Misc. Civil Application No. 11 of 2020. The same was granted on 16th November, 2020.

Consequently, the appellant instituted a Civil Application No. 2 of 2020 at the Kishapu District Court, seeking for among other things, to revise the *ex-parte* judgment in Civil Case No. 3 of 2018 of the Kishapu Primary Court. This revision application too proved failure. It got struck

out for being incompetent. In a ruling delivered on 22nd April, 2021 the Presiding Magistrate at the District Court ruled out that the appellant herein was not entitled for revision, rather, to appeal against the decision that refused his application to set aside the *ex-parte* judgment.

That decision aggrieved the appellant, hence this appeal with a total of four grounds of appeal. **One**, the District Court erred to strike out the appellant's application for revision as in *ex-parte* judgment there is no right of appeal but revision, **two**, the District Court misdirected itself in holding that the appellant was supposed to appeal against refusal to set aside the *ex-parte* judgment while the appellant is not aggrieved with it, **three**, the presiding Magistrate was functus officio to overrule his learned sister's Ruling for the grant of extension of time to file revision, **four**, the trial court erred for failure to notice that the respondent is not a legal person capable to sue or being sued.

On the 23rd day of May, 2022 the matter was scheduled for hearing. Mr. Phares Malengo, Advocate appeared for the appellant whereas the respondent appeared in person.

Submitting in support of the appeal Mr. Malengo firstly, consolidated the 1st and 2nd grounds of appeal. To them, he submitted that, the law allows revision application to be filed when there is no venue for appeal

or where it is available, but the same has been blocked by judicial process. He cited the case **Moses J. Mwakibete v. The Editor Uhuru Shirika la Magazeti ya Chama and Another [1995] TLR 134** to strengthen his argument. With this position, he stated that the appellant had no right to appeal on the *ex-parte* judgment and as long as he tried unsuccessfully to set it aside, then the only chance available was to apply for revision.

To cement his position Mr. Malengo stated that, in her application for extension of time to file revision, via Civil Application No. 11 of 2020, the appellant was allowed by the Magistrate with the same jurisdiction to the presiding Magistrate in the impugned case, to file the said Application for Revision. He contended that, the act of the presiding Magistrate to declare that the application for revision is incompetent was wrong, as he was *functus officio*. To bolster his position, he cited the case of **Scolastica Benedict v. Martine Benedict [1993] TLR 1**.

On the last ground of appeal, Mr. Malengo submitted that, the trial court erred in law and fact for failure to notice that the respondent is not a legal person with capacity to sue and being sued. He gave the reason being that the respondent is just a branch of a company whose head office is located at Kinondoni in Dar es Salaam. To him, a branch has no legal capacity to sue or being sued. To cement his position, he cited the case

of **Novoneca Construction Co. Ltd and Another v. National Bank of Commerce and Another, Commercial Case No. 8 of 2015, HC – DSM** (unreported).

In reply, the respondent had nothing relevant to submit concerning the raised grounds of appeal. Thus, paved way for rejoinder, whereby Mr. Malengo was of view that, as the respondent has not submitted on the last ground of appeal, he formed an opinion that, the respondent admits on it. He further contended that, there was no proof of service in the Primary Court that resulted into the *ex-parte* judgment.

That was the end of submissions from both parties in respect of this appeal.

I have earnestly gone through both parties' submissions and the available records. The issue is whether the appellant's appeal is meritorious.

It is not in dispute that the cited case of **Moses J. Mwakibete** (supra) provides for the revision may be made where there is no venue for appeal or where the venue for appeal is there but it has been barred by judicial process.

"In our view this Court can be moved to use its revisional jurisdiction under sub-section (3) only in cases where there is no right of appeal or where there is, it has been blocked by judicial process".

The said sub-section (3) mentioned in the above quotation was quoted from section 2 of the Appellate Jurisdiction (Amendment) Act No. 17 of 1993 which was then incorporated into section 4(3) of the Appellate Jurisdiction Act [Cap 141 RE 2019]. From the above cited authorities, it is undisputable that the appellant is barred to appeal on the *ex-parte* judgment. It is also the position of the law that, the available remedy that the appellant herein had, was to make application for setting aside the *ex-parte* judgment before the trial court. The records provide that, the appellant actually tried to set aside the said *ex-parte* judgment. As alluded earlier that the said application to set aside *ex-parte* judgment was dismissed for being filed out of time.

According to the principle set out in the Court of Appeal case, namely **Hashim Madongo and 2 Others v. Minister for Industry and Trade and 2 Others, Civil Appeal No. 27 of 2003, CAT at DSM** (unreported) the appellant is barred from seeking for extension of time to appeal on the refusal to set aside the *ex-parte* judgment. On those

premises, it therefore goes without saying that, the appellant was rightly allowed to apply for revision in the Civil Application No. 11 of 2020 by that same court, as per **Moses J. Mwakibete's** case (supra)

Addressing on the similar situation in labour laws, the court in **Fresho Investment Co. Ltd vs BARAKA P. Mvungi, Revision No. 25 of 2013, High Court Labour Division, at Shinyanga**, had this to say: -

*"The remedy available to the applicant is to apply to the CMA to set aside its ex-parte Judgement / award and to hear them interparty on merits if the CMA will be justified with the reasons for setting aside the ex-parte award rather than this court to hear revision. And that **the applicant could have right to file his revision in this court if the application to set aside the ex-parte award at CMA was refused or denied.**" (emphasis is mine)*

In view of the above quoted cases, I find it that, the appellant's application for revision was properly filed at the District Court of Kishapu. This ground of appeal being meritorious, I find no need to determine the remaining grounds.

On that account, the **appeal is hereby allowed**. It is ordered that the case be remitted back to the trial court for determination of the application for revision on merits relying on the submissions that had already been made. The **presiding Magistrate should compose the judgment on merit regarding the said submissions**. Each party to bear his/her own costs.



S.M. KULITA
JUDGE
24/08/2022

DATED at Shinyanga this 24th day of August, 2022.



S.M. KULITA
JUDGE
24/08/2022