IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CIVIL APPEAL NO. 40 OF 2021

(C/F Misc. Civil Application No.22 of 2020 at the Resident Magistrates' Court of Arusha at Arusha Originating from Civil Case No. 64 of 2018 at the Resident Magistrates' Court of Arusha at Arusha)

AGAPE SANCTUARY MINISTRIES (T) LTD.....APPELLANT

Vs

WIMA ENTERPRISES E.A LTD.....RESPONDENT

JUDGMENT

Date of last Order:15-9-2022
Date of Judgment :19-10-2020

B.K.PHILLIP,J

Aggrieved by decision of Resident Magistrate's of Arusha at Arusha dated 23rd July 2020 in Misc. Civil Application No. 22 of 2020, the appellant lodged this appeal on the following grounds:

i).That, the Hon. trial Magistrate erred both in law and fact by stating that the appellant failed to advance good cause to warrant extension of time despite the fact that summons to defend and summons for ex-parte judgement was not issued and served to the appellant.

ii).That, in the strict alternative to ground number one above, the Hon. trial Magistrate erred in law and facts by her refusal to grant extension of time despite its (sic) records being tainted with illegalities.

iii).That, the Hon. Magistrate erred in law and facts by continuing curtailing the appellant's right to be heard.

iv).That, Hon. trial Magistrate erred in law and fact for failure to appreciate that the principal officer of the appellant was incarcerated at Arusha main prison and thus the appellant was unaware of all transpired in his absence.

A brief background to this appeal is that the respondent (who was the plaintiff at the trial Court) filed Civil Case No. 64 of 2018 at the Resident Magistrate's Court of Arusha at Arusha claiming for a sum of Tshs. 290,213,845/=being value of the contract ,specific and general damages for breach of contract for construction of the appellant's church at Hydom Dongobeshi, in Manyara Region . The suit was heard ex-parte since the appellant (who was the defendant at the lower Court) did not enter appearance in Court . On 20th June 2019, the trial Court delivered its ex-parte judgment in favour of respondent. The appellant was ordered to pay the respondent a total of Tshs. 184,889,845/= being expenses incurred for accomplishment of the 1st and 2nd phases of contractual work, general damages to a tune of Tshs. 3,000,000/=, interest on decretal sum at the Court rate of 7% from date of judgement till payment in full and the costs of the suit. On 16th July 2020 the appellant filed Misc. Civil Application No.22 of 2020 at

the Resident Magistrate's Court of Arusha praying for extension of time for setting aside the ex-parte judgement. The application was heard on merit and at the end of the day trial Court ruled out that the appellant failed to show sufficient cause to move the Court to exercise its discretion in his favour. Thus, it dismissed the appellant's application with costs.

Aggrieved by the dismissal of his application, the appellant appealed to this Court on the grounds enumerated at the beginning of this judgement.

In this appeal the Appellant was represented by Mr. Martin Wilson Gwila, the appellant's principal officer whereas the respondent was represented by Mr.Fredrick Isaya Lucas, a learned Advocate. This appeal was disposed of by way of written submissions.

Submitting on the first ground of appeal, Mr.Gwila argued that the appellant was not aware of the existence of Civil Case No. 64 of 2018 until on the 25th June 2020 when he was served with the notice of execution of the Court decree at Arusha Central Prison through the officer in charge of prison. Furthermore, he contended that he is the principal officer of the appellant. Unfortunately, he was incarcerated and charged with several offences including economic crimes and the respondent is among the people who lodged the complaints at Dodoma Police Station against him. He added that it is a well settled principle of law that lack of knowledge on existence of the case by the applicant constitutes a good reason for extension of time.

Mr. Gwila submitted for the 2nd 3rd and 4th grounds of appeal conjointly. He raised the following arguments; that the appellant being an institution could have been represented by its principle officers apart

from the appellant but the respondent did not inform the appellant's principal officers about the existence of the suit. He lied before the Court that the appellant was unavailable.

Moreover, Mr. Gwila questioned the way the service of summons to the appellant was allegedly done on the ground if at all is true that the appellant's principal officer was duly served with summons , how come there was an order for publication of summons in the newspaper? .He maintained that there was ill intention to against the appellant ,something which the trial Court failed to consider in the determination of the appellant's application.Mr. Gwila insisted that the respondent moved the trial Court to issue an order for publication of the summons while quite aware that the appellant was incapable of accessing any newspaper since he was incarcerated.

Furthermore, relying on the case of **Jesse Kimani Vs Mc Cornel and Another (1966) E.A 547,** Mr. Gwila argued that if this application is granted the respondent will not suffer any irreparable injury. Also, he added that the appellant was denied his right to be heard and the trial Court dismissed his application, the subject of this appeal in total disregard of the fact the trial Court's proceedings were tainted with illegalities. He cited the case of **Zainab Mkama Petro Vs Leveri Elinaza, Land Appeal No. 54 of 2019** (unreported) to cement his arguments.Mr. Gwila also referred this Court to the case of **Ahmed Bauda Vs Raza Hussein Ladha Damjir & Others , Civil Application No. 215 of 2016** (unreported) ,but did not supply the same to this Court , thus I was unable to go through it.

In rebuttal, Mr.Lucas argued that the Court's records clearly show that summons was properly served to the appellant and the Court process server swore an affidavit to the effect. Further, he stated that summons was also published in a wide circulating newspaper.It is on record that first summons was served to the appellant's principal officer ,that is, the chief construction manager on 18/9/2018 and was signed by the said officer namely Peter Mlacha who also signed applicant's submission in chief in Misc. Civil Application No. 22 of 2020 but no one entered appearance in Court, contended Mr.Lucas. He went on submitting that thereafter the trial court ordered the issuance of another summons. However, the Court process server was unable to effect service of that summons to the appellant's principal officer because the appellant's office which was located at Meserani, Arusha was closed that is why the Court had to order the summons to be published in wide a circulating newspaper.

Furthermore, Mr. Lucas argued that the appellant is an institution with more than one officer. The first summons that was served to the appellant was signed by the appellant's principal officer, Mr. Peter Mlacha, the one who signed the appellant's submission in chief in the said Misc.Civil Application No. 22 of 2020. He added that the appellant's accusation that the signature was forged is an afterthought and need to be proved in a criminal case .

Moreover, Mr. Lucas submitted that it is apparent on the face of the record that the appellant was accorded with opportunity to defend his case but for reasons known to himself he decided not to enter appearance in Court.He refuted Mr. Gwila's contention that the

proceedings of the trial Court were tainted with illegalities for failure to point out the alleged illegalities.

Moreover, he submitted that the principle of natural justice does not apply when a party to a case is accorded the right be heard and fails to utilize it. He contended that if a party to a case opts not to enter appearance in Court while he has been dully notified on the existence of the case, the Court has discretional powers to proceed with the hearing of the case in appropriate way in accordance with the law as it deems fit.

In concluding his submission Mr. Lucas maintained that Mr. Gwila's contention that if this appeal is allowed the respondent will not suffer any irreparable loss is baseless and is aimed at entertaining abuse of Court's process because the appellant's failure to enter appearance after being notified on the existence case was done at his own peril.

In rejoinder , Mr. Gwila reiterated his submission in chief and added that Mr. Peter Mlacha was not the one who signed the summons and there was no proper proof of service by a process server. Further, he added that Peter Mlacha was not the principal officer of the appellant. That appellant as institution has a seal . The same was missing on the summons to prove that the process server served the summons to the appellant. He insisted that the appellant's appeal has merits.

After carefully reading the trial Courts' records, memorandum of appeal and dispassionately analyzed the submissions for and against the appeal, I am of a settled view that the issue for determination in this appeal is whether or not the appellant adduced sufficient cause for delay in filing the extension of time to set aside the ex-parte

judgement. The main argument raised by the appellant for delay in applying for the order to set aside the ex-parte judgment is that appellant's principal officer, Mr. Gwila was in remand prison and was not aware on the existence of the said Civil Case No. 64 of 2018. He became aware of the ex-parte judgment in Civil Case No. 64 of 2018 after being served with summons for execution of the judgment in that case. The trial Court declined to grant the extension of time on the ground that the appellant was duly served with summons in respect of the said Civil Case No 64 of 2018 through his principal officer and another summons was published in the newspaper but failed to appear in Court. In my opinion the pertinent question which arises here is ; whether or not any of the appellant 's principal officers apart from Mr. Gwila who alleged that he was incarcerated, were notified of the date for judgment. In his submission Mr. Lucas did not show in any way that the appellant's principal officer was notified of the date of delivery of the ex-parte judgment. Even if , for the sake of argument it is assumed that the appellant was notified about the existence of the case and the hearing date , and defaulted to enter appearance in Court, since this application is not an application for setting aside the ex-parte judgment , the respondent was supposed to prove before the trial Court that the appellant was notified of the date of delivery of the ex-parte judgment or was aware of the existence of the ex-parte judgment. It is noteworthy that the days for delay for filing the application for setting aside the ex-parte judgment starts to run from the date the appellant became aware of the same.

With due respect to the trial Magistrate, what I have noted is that she treated the appellant's application as an application for setting aside the

ex-parte judgment. That is why her decision was based on the fact that the appellant was served with the summons for hearing of the case. I got opportunity to peruse the proceedings in Civil Case No. 22 of 2020.The same shows that the ex-parte judgment was delivered on 20th June 2022 in the absence of the appellant and no order was issued to notify him the date for judgment.

From the foregoing, I am satisfied that the appellant was not notified of the date for delivery of the ex-parte judgment, thus he was not aware of the same. In addition, the annextures in affidavit in support of the application for extension of time filed by the appellant shows that the appellant was served with notice for execution of the Court decree by the Court broker on 25th day of June 2020 and he filed the application , the subject of this Ruling on 16th July 2020. In my opinion there was no inordinate delay in filing the application for extension of time bearing in mind that the respondent did not dispute that Mr. Gwila, being one of the appellant's principal officer was incarcerated. Under the circumstances, it is the finding of this Court that the appellant has managed to account for the days of delay and adduced good cause for the delay. Thus, I hereby grant this appeal and set aside the ruling of the trial Court. The appellant is granted twenty one days (21) from the date of this Judgment within which he has to file the application for setting aside the ex-parte judgment. Each party will bear his own costs.

Dated this 19th day of October 2022

B.K.PHILLIP

JUDGE