

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

**(MWANZA SUB-REGISTRY)**

**AT MWANZA**

**CIVIL APPEAL NO.66 OF 2021**

*(Arising from the whole proceeding, Exparte judgment and Decree, Hon. S.I. Maweda- SRM dated 2<sup>nd</sup> February 2021 in Civ. case No 16 of 2020 of the Resident Magistrates Court at Geita)*

**G4S SECURE SOLUTIONS(T) LTD .....APPELLANT**

**VERSUS**

**MULTINATIONAL PROCUREMENT SERVICE (T) LTD.....RESPONDENT**

**EXPARTE-JUDGMENT**

**24<sup>th</sup> Nov & 16<sup>th</sup> Feb., 2023**

**DYANSOBERA, J:.**

The respondent Multinational Procurement Services (T) Ltd sued the appellant, G4S Secure Solutions (T) Ltd before the trial District Court of Geita in Civil Case No. 16 of 2020 claiming a declaratory order, payment of Tshs. 33, 173,576, interests, general damages and costs of the suit. The suit proceeded exparte after the defendant's written statement of defence was struck out during the First Pre-Trial Conference. The respondent carried a day. The appellant was aggrieved hence this appeal.

According to the memorandum of appeal filed on 28. 12.2022, the following six ground grounds of appeal have been set out: -

1. That the learned Trial Magistrate erred in law and in facts to proceed with ex parte hearing and enter ex parte judgement while being aware that the Appellant was never served with notice to attend the First Pre- Trial Conference.
2. That the learned Trial Magistrate erred in law to deliver the ex parte judgement without notifying the Appellant.
3. That, learned Trial Magistrate erred in law and in facts for holding the Appellant liable basing on insufficient evidence tendered by the Respondent.
4. That, the learned Trial Magistrate erred in law and in facts for failure to properly analyse the evidence, hence arrived to a wrong decision.
5. That, the learned Trial Magistrate erred in law and in facts for granting the General Damages without good cause.
6. That, the learned Trial Magistrate erred in law and facts for condemning the Appellant unheard without any legal justification.

Before me, the appellant, through his learned Advocate one Maduhu Ngassa, appeared. The respondent defaulted appearance despite being served. The learned Counsel for the appellant argued on the grounds of appeal.

Submitting on the 1<sup>st</sup> ground of appeal, learned Advocate argued that by proceeding with ex parte hearing and entering ex parte judgment while being aware that the appellant was never served with a notice to attend the 1<sup>st</sup> Pre-Trial Conference, the learned trial Magistrate contravened Order VIII rule 19 (1) of the Civil Procedure Code. It was his view that there had to be notification to the appellant on the date and time of holding the 1<sup>st</sup> Pre-Trial Conference.

With regard to the second ground, Counsel for the appellant complained that the appellant was never informed of the date of ex parte hearing and the delivery of judgment and that this was in contravention of Order XX rule 1 Civil Procedure Code. He insisted that parties to a suit must be notified of the date of delivery of judgment.

Arguing jointly the 3<sup>rd</sup> and 4<sup>th</sup> grounds of appeal, Mr. Maduhu strongly submitted that the respondent did not adduce evidence to prove the case to the required standard. He contended that the award of damages alleged to have been incurred were not proved.

Respecting the fifth ground of appeal, it was argued on part of the appellant that the general damages were awarded without good cause as they were not reasonable and did not reflect the reality. According to learned Counsel for the appellant, the aim of awarding

damage is to compensate and not to enrich the victim. In support of this argument, learned Counsel cited the case of **Zanzibar Insurance Corporation v. Suleiman Mohamed Malilo and 3 others**, Civil Appeal No. 122 of 2020 on the grounds which the court has to consider before awarding general damages. Counsel for the appellant urged this court to interfere and reduce the assessed general damages since they are too excessive. To buttress his argument, referred this court to the cases of **Mbaraka Willam v Adam Kisute & Another**, (1983) TLR 35 and **Haji Associates Co. (T) Ltd & Another v. John Mhundwa** (1986) TLR 107 in which the court reduced general damages which seemed to be excessive.

In the last ground of appeal, the appellant is complaining that she was condemned unheard without legal justification in that she was not notified of date of ex parte hearing and the date of judgment. Counsel for the appellant was of the opinion that this violated **Article 13(6)(a) of Constitution of United Republic of Tanzania**; the requirement which was re-stated in the case of **Hussein Khanbai v. Kodi Ralph**, Civil Revision No.25 of 2014(CAT) Arusha at pg 55.

With this submission in support of the grounds of appeal, it is prayed that this appeal be allowed and the judgment and decree of

the lower court be quashed and set aside and issue any other necessary order for the ends of justice.

It is undisputable that this appeal owes its original from RM Commercial Case No. 16 of 2020 of the Resident Magistrate at Geita. According to the record of the trial court, on 26<sup>th</sup> November, 2020, Mr. Kabonde, learned Counsel for the respondent told the trial court that the service to the appellant had not been properly done owing to the fact that the process server was bereaved. He prayed for issuance of another summons. An order was made by the court to that effect and the matter was set for mention on 21.12.2020. On that date, that is on 21.12.2020, Mr. Kabonde informed the trial court that they had effected service to the defence on 10.12.2020 and prayed to file proof of service. The court granted the prayer and the proof of service was filed in court. Counsel for the respondent then notified the court that no written statement of defence had been filed but that the appellant had still the time to file the same. A prayer for another mention date was made and granted. The matter was set to 5<sup>th</sup> January, 2022. On the said date, Mr. Kabonde made appearance and informed the court that the defendants were duly served and had filed their written statement of defence since 30.12.2020 but were absent without notice. Counsel for the respondent prayed for a date of hearing of 1<sup>st</sup> PTC.

The trial court set the 1<sup>st</sup> PTC to be on 11.1.2021. On 11<sup>th</sup> January, 2021 when the was called for hearing of the 1<sup>st</sup> PTC, Mr. Kabonde appeared for the respondent. The appellant was, as usual, absent without notice. Mr. Kabonde addressed the court that the matter was for hearing of 1<sup>st</sup> PTC but that the defendant was absent despite the fact that she was aware of the suit and had filed the written statement of defence. Counsel for the respondent invited the trial court to invoke the provisions of O.VIII rule 20 (1) (b) and (d) of the Civil Procedure Code which is to the effect that the defendant's defence or written statement of defence be struck out and the court to order the plaintiff to provide ex parte proof.

Granting the prayer made by Counsel for the respondent, the learned trial Resident Magistrate struck out the appellant's written statement of defence and ordered the plaintiff to prove her case ex parte on 19.1.2021.

When the matter came up for ex parte proof as ordered, Victus Venance Moolo testified for the respondent. At the end of the day, the trial court found for the respondent.

In her first ground of appeal, the appellant is complaining that the learned trial Magistrate erred in law and in fact to proceed with ex

parte hearing and enter ex parte judgment while being aware that the appellant was never served with a notice to attend the First Pre-trial Conference.

On this issue, the law is clear. Rule 19 (1) of Order VIII of the Civil Procedure Code [Cap. 33 R.E.2019] (as amended by the Civil Procedure Code (Amendments of the First Schedule) Rules, 2019 GN No. 381 of 2019 published on 15<sup>th</sup> May, 2019 provides that parties are to be informed as to the date and time for the said pre-trial conference either in their presence or through notices to be issued accordingly.

Rule 20 (1) of the same Order of the CPC stipulates on the consequences of failure to appear for the Pre-trial Conference which are to the effect that if the defaulting party is the plaintiff, then the suit shall be dismissed and **if the defaulting party is the defendant, the written statement of defence shall be struck out** and judgment shall be entered or any other order made that the court shall deem fit and just to make.

In the instant case, the appellant's written statement was struck out and ex parte proof ordered. Although the appellant in the first ground of appeal complains and contends that the learned trial Magistrate erred in law and in fact to proceed with ex parte hearing



and enter ex parte judgment while being aware that the appellant was never served with a notice to attend the First Pre-trial Conference, the issue for determination is not whether or not the learned trial Resident Magistrate was aware that the appellant was never served with a notice to attend the First Pre-trial Conference but whether the appellant has pursued the right course prescribed by law in filing this appeal to this court.

I think not. Rule 30 of the said Order allows an aggrieved party to apply to the court within 14 days of the order against him being issued to either restore the suit or the written statement of defence. Then the court is required to hear and determine the application within 14 days of the same being lodged.

In the matter under consideration, the appellant was required to apply to the trial court within 14 days of the order against her being issued to have her written statement of defence which was struck out to be restored. The law does not provide an automatic right of appeal. The aim of the said provision cannot be overemphasised. It is to prevent delays and protraction of litigation in our courts. Since the law is clear on that aspect, the appellant side stepped it and came to this court. That was wrong and the application is not competently before

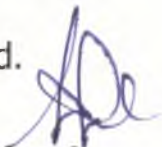


this court. The cases cited by the appellant in support of his grounds of appeal are inapplicable to the facts of this case and, therefore, distinguishable.

Since this first ground of appeal alone is sufficient to dispose the whole appeal, I find no need to delve into the rest grounds of appeal as that would amount to an academic exercise, the course into which I cannot venture.

In the final analysis, the appeal fails and is struck out for being incompetent. No order as to costs is made as the respondent made no appearance during the hearing of this appeal and at the delivery of this judgment.

The Right of Appeal Explained.

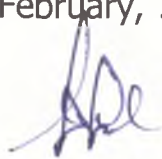


**W.P. Dyansobera**

**Judge**

**22.2.2023**

This Judgment is delivered at Mwanza under my hand and the Seal of this court on this 22<sup>nd</sup> day of February, 2023 in the presence of the absence of all parties.



**W.P. Dyansobera**

**Judge**

