

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(MWANZA SUB-REGISTRY)**

AT MWANZA

HC CIVIL APPEAL NO.30 OF 2022

(From the Ruling and Order of the District Court of Nyamagana in Misc. Civil Application No. 14 of 2022 (before Hon. J.I. Ryoba, RM))

LETSHEGO BANK (T) LTD.....APPELLANT

VERSUS

MATHIAS JAMES BUSAJO.....RESPONDENT

JUDGMENT

5th & 25th April, 2023

DYANSOBERA, J:.

By a Memorandum of Appeal filed on 15th June, 2022, the appellant herein seeks to impugn the ruling of the District Court of Nyamagana delivered on 20th May, 2022 dismissing her application to set aside the ex parte judgment delivered against her in RM Civil Case No. 95 of 2020.

The time line of events leading to this appeal is apothegmatic. The respondent sued the appellant in a Court of Resident Magistrate at Mwanza vide RM Civil Case No. 95 of 2020 praying for a number of reliefs including the refund of Tshs. 60, 000, 000/= being a purchase price of the mortgaged house situated on Plot No. 442 Block D, Nyegezi and 24% of interest per year of the purchase price from 17th February, 2018 to 17th December, 2020 amounting to Tshs. 43,200,000/= as well

as payment of Tshs. 82,476,538/= as interest to be paid by the appellant and the interest of the amount claimed at a commercial rate from the date of judgment to the day of full satisfaction on the decree, damages and loss of the profit and costs of the suit. The suit proceeded ex parte after the appellant defaulted appearance. The trial court, in the end, found the claims proved to the required standard and awarded the respondent the claims as indicated in the judgment. The judgment was delivered on 1st March, 2021. It seems, the appellant did not seek for setting aside the ex parte decree in time. She, however, on 1st June, 2021 made an application under a certificate of urgency seeking to have the ex parte judgment set asides vide Misc. Civil Application No. 46 of 2021. The appellant's application was found to be devoid of any merit and was, consequently dismissed with an order that each party bore their own costs. The appellant was not satisfied with the dismissal his application for extension of time in which to apply for setting aside the ex parte judgment. She successfully preferred an appeal to this court. The appeal was registered as Civil Appeal No. 32 of 2021. In allowing the appeal, this court (Hon. Tiganga, J.) gave the appellant 14 days' time period in which to make an application for setting aside the ex parte judgment. The Deputy Registrar was directed to return the original record to the Court of Resident Magistrate for necessary action

and the time of 14 days had to start running on a day the original case file was received by the said court. That judgment was handed down on 10th February, 2022.

In compliance with the court's directives, the appellant filed Misc. Civil Application No. 14 of 2022 praying for an order to set aside the ex parte judgment delivered on 1st January, 2020 in RM Civil Case No. 95 of 2020. After hearing both parties, the learned Resident Magistrate found that the appellant had failed to adduce sufficient reasons warranting the court to set aside its ex parte judgment. The application was, accordingly, dismissed with costs to the respondent.

Dissatisfied, the appellant has preferred this appeal on the following grounds: -

1. That, the Honourable Trial Court erred in law and facts for usurpation of his discretionary powers in setting a side exparte judgment.
2. That, the Honourble Trial Court erred in law and facts to hold that the appellant did not adduce sufficient reasons to set a side exparte judgment.
3. That, the Honourable Trial Magistrate erred in law and facts to entertain RM Civil Case No. 95/2020 without satisfied himself whether the court is clothed with requisite jurisdiction to proceed with the dispute.

4. That, the Honourable Trial Magistrate erred in law and facts to dismiss the application while the appellant was not summoned to appear on the date of judgment.
5. That, the Honourable Trial Magistrate erred in law and facts for failure to consider that, the ex parte order was prematurely entered in exercising his discretionary powers.

At the time of hearing the appeal, the appellant was represented by Mr. Innocent Michael, learned Advocate while for the respondent, stood Mr. Constantine Mutalemwa, learned Counsel. The appeal was heard by way of written submissions.

Arguing in support of the appeal, learned Counsel for the appellant, starting with the first ground of appeal on the usurpation of the discretionary powers by the trial court, submitted that in setting aside the ex parte judgment under O. IX rule 9 of the CPC, the court has to consider whether the applicant has demonstrated a sufficient cause which might have prevented him/her from appearing when the suit was called for hearing. Citing the case of the Supreme Court of India in **Parimal v. Veena Alias Bharti**, (2011) 3 SSC 545, Counsel for the appellant submitted that the trial magistrate usurped his discretionary powers for disregarding reasons adduced by the appellant. Clarifying on this ground, Counsel for the appellant contended that the non-appearance of the appellant was occasioned by negligence and

unprofessional conducts of her previous advocate for failure to act upon a communication that was made via electronic mail which had instructed his appearance to defend the appellant on the original civil case. It was further submitted on part of the appellant that the non-appearance was very much attributed by her lawful reliance on her previous advocate who had both contractual and professional duty to attend on her behalf or otherwise to inform her about such attendance where a need had arisen and that such professional misconduct by the appellant's Counsel could not be received at a detriment to the appellant by the court of justice. The appellant complains that her former advocate's conduct resulted into loss of opportunity to defend her substantial rights against the respondent's claims. In putting emphasis to his stance, Counsel for the applicant asked this court to borrow the wisdom from the United Republic of Uganda in the case of **Banco Arabe Espanol v. Bank of Uganda**, SCCA No. 8 of 1998 where it was held: -

*'A mistake, negligence, oversight or error on the part of counsel should not be visited on the litigant. Such mistake, or as the case may be, constitutes just cause entitling the trial judge to use his discretion so that the matter is considered on its merits'. Cited also was **Ghania J. Kimambi v. Shedrack Ruben Nga'ambi**, Misc. Application No. 692 of 2018 where it was held:-*

'It sounds unfair and inequitable in my considered opinion for a part to civil litigation to be punished for an error committed by the advocates and more specifically where the error is within the domestic affairs of the advocate. Throughout history, court of law have assumed the position of custodian of justice. It therefore comes as a surprise and indeed it lowers down the reputation and respect of the court when the parties submitting themselves to the jurisdiction of the court loses their cases for wrongs committed by their advocates or representatives.'

Counsel insisted that the appellant has a right of hearing otherwise that would amount to a breach of natural justice.

With regard to the failure to notify the appellant on the commencement of ex parte hearing and subsequent delivery of ex parte judgment, Counsel for the appellant contended that it is now settled law that a party whose ex parte proceeding is about to commence against him must be notified on the date of ex parte hearing and on the date of delivery of ex parte judgment. The court was referred to the case of **Cosmas construction Co. Limited v. Arrow Garments Limited** The other cited cases on this issue were **Niko Insurance (T) Ltd v. Basila Benedict Chuwa and two others**, Civil Appeal No.155 of 2019 and **Sadiki Athman v. R.** [1986] TLR 235.

Regarding the nature of transaction/ cause of action of Civil Case No. 95 of 2020, Counsel for the appellant argued that it was a result of sale agreement between the respondent and Nkwaya Ndambo Shukia (a former customer of the bank who was in serious default). The respondent entered into sale agreement with Nkwaya Ndambo Shukia to buy a mortgaged house deposited in the appellant's financial institution which the respondent agreed to deposit to Nkwaya Ndambo Shukia's loan account whereas in that contract the appellant was neither a witness nor a party thereto. It was contended on part of the appellant that there are triable issues.

Submitting on the second ground of appeal, Counsel for the appellant disputed the finding that the appellant failed to adduce sufficient reason to set aside ex parte judgment. He contended that the appellant, by way of affidavit, set out circumstances and matters which prevented her from attending and the circumstances under which the ex parte judgment was entered. But that, despite all this, the trial magistrate poses the blames to the appellant for failure to make further inquiry. Counsel for the appellant maintained that the appellant offered a candid and frank explanation as to why she did not attend court and that it was owing to the failure on part of her former advocate to appear to the court.

On the third ground on the jurisdiction of the trial court, Mr. Innocent Michael submitted that the cause of action emanated from the mortgaged house situated at Plot No. 442 Block D Nyegezi- Mwanza City. It is his argument that since the subject matter is land, it has to be regulated by land laws and determined by Land Courts. Reference was made to Section 167 (1) of the Land Act [Cap. 113 R.E.2019] and Section 33 of the Land Disputes Courts Act [Cap. 216 R.E.2019]. Counsel for the appellant was of the view that reading the plaint and the documents attached to the plaint entail the cause of action as well as the source of the dispute to be a mortgaged house which means that the trial court lacked jurisdiction to try the matter.

Responding to the submission made by Mr. Innocent Michael, Mr. Constantine Mutalemwa had the following to submit. With regard to the 1st ground of appeal, he contended that the failure for a party to appear and defend their case cannot be construed as the sufficient ground for setting aside an ex parte judgment passed in due course and that more so, the aggrieved party cannot benefit out of the misconduct/negligence committed by their advocate on the gist of the application of the principle of equity. According to learned Counsel for the respondent, equity cannot operate against the law and that parties are bound by misdeeds done by their advocates. This court was invited to decline to

follow the *ratio decidendi* in **Ghania's** case. Counsel for the respondent maintained that the District Court was correct in refusing the application for setting aside the ex parte judgment based on misconduct or negligence by the appellant's former advocate as such misdeed is not construed as the sufficient cause/reasons for setting the relevant ex parte judgment.

On the appellant's contention on failure to be notified on the date of commencement of ex parte hearing/proceedings and subsequent delivery of ex parte judgment and the invitation to this court to decide this appeal based on the nature of transaction /cause of action in Civil Case No. 95 of 2020, Mr. Mutalemwa contended that those contentions are neither covered in the grounds as stated in the amended memorandum of appeal nor were the same argued and decided by the District Court and are, therefore, misplaced.

Responding to the cited two cases of **Cosmas Construction Co. Ltd vs. Arrow Garments Ltd** [1992] TLR 127 and **Niko Insurance (T) Ltd vs. Basila Benedict Chuwa & 2 Others**, Civil Appeal No. 155/2019 HCRT, DSM Registry, Mr. Mutalemwa expressed that those cases have been cited out of context and are, therefore, not only distinguishable and irrelevant to the appeal at hand but also set a requirement for a party to be notified of a date of delivery of judgment

as such a party may wish to exercise his right to appeal against the ex-parte judgment and the decisions do not set down the principle that such a failure is good reason for setting aside an ex-parte judgment.

With regard to the appellant's third ground of appeal on the argument that the cause of action in RM Civil Case No. 95/2020 emanated from the mortgaged house situated at Plot No. 442 Block "D" Nyegezi Mwanza, that the dispute at hand originated from the Land Act whose proceedings, are determined by the Land Court and the argument that District Court has no jurisdiction adjudicate upon such cases, Counsel for the respondent maintained that the material facts/cause of action as pleaded in the plaint in RM Civil Case No. 95 of 2020 in paragraph 3 thereof, clearly reveal that the respondent claims for a refund of Tshs. 60,000,000/= being refund of the purchase monies in respect of the mortgaged house situated at Plot No. 442 Block "D" Nyegezi Mwanza City with Title No. 39794 LR Mwanza which commercial transaction did not materialize and in the reliefs' clause the respondent (being the plaintiff) prayed and claimed for the payment of Tshs. 60,000,000/= as refund of the purchases of un-completed house but not delivered to the plaintiff. It is Mr. Mutalemwa's submission that, **guided** by the above pleaded facts and kind of a relief claimed, the respondent claimed for refund of money of Tshs. 60,000,000/= arising out of

aborted purchase transaction and not possession of the landed property. It is his view that the case was of the commercial case to which the District Magistrate Court has pecuniary jurisdiction under section 40 (3)(b) of the Magistrate Courts Act [Cap. 11 R.E. 2019 – as amended; which jurisdiction does not exceed Tshs. 70,000,000/=]. In buttressing his argument, Counsel for the respondent cited the decision of the Court of Appeal of Tanzania in the case of **National Bank of Commerce Limited Versus National Chicks Corporation Ltd & 4 Others**, CAT, Civil Appeal No. 129 of 2015, DSM Registry, where, at page 33 it was held that;-

"...it must be understood that any litigation whose cause of action accrued from mortgage transaction or a commercial contract, regardless of its aftermath to the landed property/real property is not necessary a land matter... it is a result of commercial transaction and it has to be dealt with by the Commercial Division of the High Court not the Land Division unless the transaction is conveyance..."
(Source: tanzlii)

It is the argument of Counsel for the respondent that the claim of purchase monies of Tsh. 60,000,000/= by the respondent falls within the ambit of a commercial claims to which the District Court has the pecuniary/commercial jurisdiction by the virtue of section 40(3)(b) of the Magistrates Court Act [Cap. 11 R.E. 2019 – as amended]. He

clarified that the type of the relief claimed in a particular legal action is a yard stick in determining the jurisdiction of a court of law as well stated in the case of **Olam Tanzania Limited & 3 Others Versus Seleman S. Seleman & 4 Others**, CAT Consolidated Civil Redivisions Nos. 2 – 6 of 2020, Mtwara Registry, unreported at page 10 as that;-

"... in the narrow and strict sense, the jurisdiction of a validity constituted court connotes the limits which are imposed upon its powers to hear and determine issues between persons seeking to avail themselves of its process by reference".

- (1) To subject matter of the issue or.*
- (2) To the persons between whom the issue is joined.*
- (3) To the kind of reliefs sought ... or to any combination of these factors.*

On this point, Mr. Mutalemwa submitted that based on the above legal understanding the District Court had the jurisdiction to adjudicate upon the relevant case as filed by the respondent.

On the second ground that the trial court erred in law and facts for holding that the appellant failed to adduce sufficient reason to set aside the ex-parte judgement on the account that the appellant instructed her previous advocate to appear in the case via e-mail which

was not timely acted upon by the relevant counsel, quoting the trial court's finding at p. 6 of copy of the ruling, Mr. Mutalemwa highlighted that the District Court justifiably refused such an excuse. This court was called upon to take Judicial notice that the appellant's former Advocates – KZR Law Chambers have their office in Mwanza City and the appellant Bank Branch office is located within the same City hence failure to have a close follow ups and timely communication worked to the detriment of the appellant for non-appearance in the District Court to defend her case.

It was further submitted on part of the respondent that once a case is set for ex parte hearing, if it does not involve the Government, involved, the defendant deserves no notification to that effect. Reliance was placed on the case of Transport **Equipment's Ltd Versus D.P. Valambia** [1993] TLR 91 where the Court of Appeal held:-

"...it is the duty of parties to keep themselves informed as to when their cases will be tried..."

Counsel for the respondent concluded urged the Court to find this appeal lacking in merits and, therefore, be dismissed with costs.

I have carefully considered the submissions by the learned Counsel for the parties. As rightly submitted by Counsel for the respondent, this application lacks legal merit. To my mind the learned

Resident Magistrate acted properly in dismissing the application for setting aside the ex parte judgment. My course is clear.

To begin with, I have to revisit the law relating to setting aside ex parte judgment or decree against the defendant. It is provided under O. IX rule 13 (1) of the Civil Procedure Code that: -

*'(1) 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 the summons was not duly served or 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:...*'

According to the above provisions of law, for the court to set aside judgment and decree passed *ex parte*, the defendant must satisfy the court that either the summons was not duly served or that he was prevented by 'sufficient cause' for his non-appearance when the suit was called on for hearing. What may constitute sufficient cause will depend on the circumstances of each case. In Kenyan case of **Ecksteen v. Kutosi Bukua** [1951] 24 (2) KLR 90], it was observed that:

'To constitute sufficient cause, it must be shown that there was some element of an intervening cause which the suitor was reasonably unable to prevent or overcome and that a mere fact that an advocate forgot the hearing date does not constitute a sufficient cause.'

In our jurisdiction, the Court of Appeal was, as well, clear on what amounts to good or sufficient cause when in **Jumanne Hassan Bilingi v. R.**, Criminal Application No. 23 of 2013 (unreported) stated as follows: -

'What amounts to good cause is upon the discretion of the court and it differs from case to case. But basically, various judicial pronouncements defined good cause to mean reasonable cause which prevented the applicant from pursuing his action within the prescribed time.'

Now, the issue calling for determination in this appeal is whether the appellant had adduced sufficient causes for her failure to make appearance before the trial court when the suit was called on for hearing. The appellant admits that her non-appearance was occasioned by negligence and unprofessional conduct of her previous advocate for failure to act upon communication that was made via electronic mail which had instructed his appearance to defend the appellant on the original civil case.

In dismissing the appellant's application for setting aside the ex parte decree, the learned Resident Magistrate observed at p. 6 of the ruling, *inter-alia* :-

'In paragraphs 4 and 5 of the applicant's affidavit, it is alleged that counsel for the applicant failed to appear before the court due to miscommunication between the applicant and her advocate, and the miscommunication was caused by undelivered e-mail sent from the applicant to her former counsel. To me this is not a sufficient that would have hindered the applicant and/ or her counsel to attend the court. I am of the opinion because the applicant would have been expected to take further steps to make enquiry as to whether the said e-mail was indeed delivered to her counsel as he would call him through mobile phone or other means of communication apart from e-mail.

With respect, I agree that the appellant is to blame for her non-appearance occasioned by negligence and unprofessional conduct of her previous advocate. It is trite that normal parties are supposed to be vigilant and be kept informed themselves of the dates of trial/hearing of their cases, the position echoed in **Transport Equipment's Ltd Versus D.P. Valambia [1993] TLR 91 (CA)** in which it was stated that; -

"...it is the duty of parties to keep themselves informed as to when their cases will be tried..."

Regarding the appellant's complaint that he was denied of the right to be heard, although the law of this country prohibits the condemnation of a person without his being given an opportunity to be heard, it is trite, however, that if the person is given such an opportunity and does not make use of it, he cannot be heard to complain that he was condemned unheard. This is so because the right does not take away the power of the decision –maker to hear the matter ex-parte when a party duly notified of the hearing elects not to take a part in it or without good cause absents himself.

With respect to the appellant's complaint that the cause of action emanated from the mortgaged house situated at Plot No. 442 Block D Nyegezi- Mwanza City and that since the subject matter is land, it has to be regulated by land laws and determined by Land Courts and therefore, that the trial court lacked jurisdiction to try the matter, I find this complaint devoid of any substance. The legal position is as was stated by the Court of Appeal of Tanzania in **National Bank of Commerce Limited Versus National Chicks Corporation Ltd & 4 Others**, CAT, Civil Appeal No. 129 of 2015, DSM Registry, at page 33 that; -

'It must be understood that any litigation whose cause of action accrued from mortgage transaction or a commercial contract,

regardless of its aftermath to the landed property/real property is not necessary a land matter... it is a result of commercial transition and it has to be dealt with by the Commercial Division of the High Court not the Land Division unless the transaction is conveyance'

On the argument that it is now settled law that a party whose ex parte proceeding is about to commence against him must be notified on the date of ex parte hearing and on the date of delivery of ex parte judgment and the reference to the decisions in the cases of **Cosmas construction Co. Limited v. Arrow Garments Limited** (supra), **Niko Insurance (T) Ltd v. Basila Benedict Chuwa and two others**, (supra) and **Sadiki Athman v. R** (supra), the law does not bear out what Counsel for the appellant is stating, that is, a party whose ex parte proceeding is about to commence against him must be notified on the date of ex parte hearing, rather, that

'a party whom a proceeding has conducted exparte must be notified of the date set for the delivery of judgment so that he may, if he wishes, attend to receive it and, then, consider to exercise his right of appeal'.

The Indian case of **Parimal v. Veena Alias Bharti** (supra) and the Ugandan case of **Banco Arabe Espanol v. Bank of Uganda** (supra) were cited out of context as they are not applicable in the circumstances of the case and are not binding.

With the foregoing reasons, I am satisfied as was the trial court, that the appellant failed to adduced sufficient causes for setting aside the ex parte judgment. The decision of the trial court was justified and there is no material upon which it can be overturned.

.....The appeal fails and is dismissed with costs to the respondent.


W.P. Dyansobera

Judge

25.4.2023

This judgment is delivered at Mwanza under my hand and the Seal of this Court on this 25th day of April, 2023 in the presence of Mr. Tumaini Korogo, learned Advocate for the appellant and holding brief for Mr. Constantine Mutalemwa, learned Counsel for the respondent.




W.P. Dyansobera

Judge