

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SONGEA DISTRICT REGISTRY)

AT SONGEA

CIVIL APPEAL NO. 01 OF 2023

(Originating from the District Court of Mbinga at Mbinga in Misc. Civil Application No. 01 of 2022)

SUCASTAINABILITY TANZANIA LTD APPELLANT

VERSUS

DAIBU SALUM RESPONDENT

KILIMO KWANZA GROUP RESPONDENT

SABRI DAIBU SALUM RESPONDENT

JUDGMENT

Date of Last Order: 25/04/2023

Date of Judgment: 09/05/2023

U. E. Madeha, J.

As a matter of fact, this appeal emanates from the decision made by Mbinga District Court in Miscellaneous Civil Application No. 01 of 2022 in which the Court set aside an *ex-parte* judgment in Civil Case No. 26 of 2016. In fact, the brief background of this appeal, in albeit are as follows; sometimes in the year 2016 the Appellant filed Civil Case No. 26 of 2016 before the District Court of Mbinga. The said civil case was heard and determined *ex-parte* against the first Respondent as the effort to serve him

with a summons to appear proved futile. On the same note, the Appellant was ordered to serve the summons through substituted service by publishing it in a local circulating newspaper and it was published in Nipashe Newspaper. Despite the summons been served through substituted service the first Respondent failed to appear, as a result, the Court ordered the suit to be heard and determined *ex-parte*. Its decision was delivered on 8th September, 2017.

In that regard, being aware of the existence of the said *ex-parte* judgment, under Order XX, Rule 9 and section 95 of the *Civil Procedure Code* (Cap. 33, R. E. 2019), the first Respondent filed an application to set aside before the Trial Court via Miscellaneous Civil Application No. 01 of 2022 which is the subject of this appeal. In fact, the Application was made after seeking for an extension of time.

The reasons advanced by the first Respondent in his application to set aside the *ex parte* judgment included the fact that before and during the hearing of the case he used to live and work for gain in Yemen. That it was up to the 31st May, 2018 when he came back in Tanzania. He further alleged that he was not served with a summons to appear and defend the claims tabled against him.

The Trial Court found the reasons adduced by the first Respondent were strong enough to warrant it to set aside the *ex-parte* judgment and it ordered for an inter-parte hearing. Being aggrieved by the decision reached by the Trial Court the Appellant preferred this appeal on the following grounds:

- i. That, the decision was illegally procured and in contravention of administration or dispensation of justice.*
- ii. That, the honourable Magistrate erred in law to entertain matters which the Court had no jurisdiction.*
- iii. That, the Honorable learned Magistrate erred in law and fact to entertain the application which was incurably defective.*

As a matter of fact, this appeal was argued by way of written submissions. At the hearing of this appeal, the Appellant was represented by none other than; the learned advocate Mr. Walter Shayo whereas the first and third Respondents enjoyed the services of none other than; Mr. Hilary Ndumbaro, the learned advocate. On the other hand, the second Respondent failed to make an appearance that is to say, he never argued in this appeal.

Arguing on the first ground of appeal, Mr. Walter Shayo, the learned advocate for the Appellant submitted that it is the requirement of the law

that the inherent and discretion powers vested to the Courts must be exercised judiciously and in accordance with the rules of justice and contrary of which is an abuse of the Court process. He added that in his effort to set aside the *ex-parte* judgment dated 8th September, 2017, the first Respondent herein moved the District Court of Mbinga for an order for extension of time vide Miscellaneous Civil Application No. 1 of 2019. The application was heard and determined whereby on the 22nd day of November, 2019 the Court delivered its ruling granting fourteen days to the first Respondent (then Applicant) to file his application in order to set aside *ex-parte* judgment in Civil Case No. 26 of 2017. But for the reasons well known to himself, the first Respondent chose not to exercise the right to file his application to set aside the *ex-parte* judgment until 2021 when he filed a similar application, Miscellaneous Civil Application No. 16 of 2021, seeking for extension of time seeking to set aside *ex-parte* judgment dated 8th September, 2017 in Civil Case No. 26 of 2017. He argued that what was required was for the first Respondent to seeking for extension of time from the fourteen days granted in Miscellaneous Civil Application No. 1 of 2019.

To cement his argument, he made reference to the case of **Mohamed Enterprises (T) Limited v. Masoud Mohamed Nasser,**

Civil Application No. 33 of 2012, Court of Appeal of Tanzania, at Dar Es-Salaam (unreported), in which the Court held that:

"We do so bear in mind that there should be no room open to the High Court and courts subordinate thereto whereby one judge would enter judgment and draw up a decree in one case (thus bring such a case to a finality) only to find another judge of the High Court soon thereafter setting aside the said judgment and decree and substituting thereof with a contrary judgment and decree in a subsequent application. To do so in our considered opinion, amounts to a gross abuse of the court process. Such abuse should not be allowed to win ground in this jurisdiction".

In the view of the above holding, he submitted that in the case at hand an application for extension of time was granted by Honourable A.H. Mbadjo in Miscellaneous Civil Application No. 1 of 2019. Also, a similar application Miscellaneous Civil Application No. 16 of 2021 for the second time granted for extension of time to the first Respondent file application to set aside the *ex parte* judgment. He concluded that allowing an application and ruling emanating from this ruling to stand will result not only to great violation and abuse of the rules of justice of our jurisdiction but also being contrary to the sound public policy of *interessei reipublicae ut fins litium*

(litigation should come to an end). To buttress his argument, he made reference to the case of **Jehangir Aziz Adulrasul, Rhino Auction Mart & Court Broker and M/S Benandy's Co. Limited v. Balozzi Ibrahim Abubakari and Bibi Sophia Ibrahim**, Civil Application No. 265/01 of 2016, Court of Appeal of Tanzania, at Dar Es - Salaam (unreported) in which the Court held that:

"The logic behind this rule, I think, is that if such applications are allowed by the Court there would be multiplicity of applications and the litigation will never come to an end. It means that since this Court determined an application for review through Civil Application No. 8 of 2016 on the decision in Civil Revision No. 6 of 2015, by virtue of rule 66 (7) of the Rules, it cannot entertain another application for review on the same decision".

In addition, he contended that the Court of Appeal in discussing the abuse of Court process in the case of **The Registered Trustees of Kanisa la Pentekoste Mbeya v. Lamson Sikazwe, Andondile Mwakanyamale, Isaack Mpagama, Nsanganufu Shabani, Ambindwile Kamage**, Civil Appeal No. 210 of 2020, the Court of Appeal of Tanzania, at Mbeya (unreported), the Court had this to state:

*"Indeed, this was a clear case of abuse of court process frowned upon by this Court in **East African Development Bank v. Blue Line Enterprises Ltd, Civil Appeal No. 101 of 2009 (unreported)**. We should let the excerpt in that case speak for itself as below; there is another aspect of the matter before us which we think we should address Prof. Fimbo contended that what happened in this case was an abuse of court process. Although Prof. Fimbo did not elaborate on the point, we are nonetheless satisfied that there was an abuse of court process in the following sense. As already stated, the appellant filed an application for extension of time to file a petition for an order to set aside the award. Instead of pursuing this application, the appellant sought to withdraw it on 14/09/2006 before Mandia, J. Having done so, the appellant went to the same court and filed the petition to set aside the award which was eventually dismissed by Mandia, J. On 22/06/2007 for being time barred. After the dismissal the appellant went back to the same Court (Sheikh, J.) And filed an application for extension of time similar to the one which was earlier marked withdrawn! Surely by the above sequence of events the appellant exhibited what we may safely term as "forum shopping". This was no doubt, an abuse of Court process.*

It is from the above stance he submitted that the act of the first Respondent being granted time by the District Court and chose not to exercise that remedy and making a similar application before the same Court after a period of more than a year and the same being entertained was an abuse of the court processes and strange in our legal litigations. Thus, the application and ruling that emanated from the second ruling was unprocedural and procured contrary to the rules of administration of justice.

As much as the second ground of appeal is concerned, he argued that the Trial court erred in law to entertain an application which had already been heard and determined by the same court. Thus, the Court was *functus officio* and that lack of jurisdiction invalidates all the subsequent proceedings that emanate from it. He added that the application to set aside *ex parte* judgment which its ruling is the subject of this appeal is invalid since it emanates from the matter which the Court had no jurisdiction to entertain. He cited with approval the case of **Mohamed Enterprises (T) Limited v. Masoud Mohamed Nasser**, Civil Application No. 33 of 2012, Court of Appeal of Tanzania, at Dar Es Salaam (unreported), in which the Court had this to say:

"Once judgment and decree are issued by a given court, judges (or magistrates) of that court become functus officio in so far as that matter is concerned. Should a new fact arise, which should have been brought to the attention of the court during trial, then Cap 33 provides for procedures for Review (Order XLII) and where appropriate, Revision before a higher court, i.e. this Court (Section 4 of Cap 141). An aggrieved party may, if he so wishes institute a new suit challenging the findings in the earlier one".

To crown it all, he concluded that the Trial Court illegally entertained a matter which it ought not to entertain since it lacked jurisdiction.

It worth considering that, on the third ground of appeal, Mr. Walter Shayo submitted that the application which is the subject of this appeal was supported by an affidavit sworn by Zahir Ameir Salum who was given the power of attorney by the first Respondent. In that regard, the first Respondent in his affidavit claimed that he was out of the country working for gain until 2018 when he came back. Although, the application was filed on the 24th day of March, 2022, when he was in Tanzania, thus he had no genuine reason as to what prevented him from prosecuting his claims. In addition, he contended that the condition for use of power of attorney

were well established by the Court of Appeal that Power of Attorney can be used when the person is outside the country or when the person is sick and such sickness prevented him from being able to prosecute his claims. To buttress his submission, he made reference to the case of **Rayah Salum Mohamed (By Virtue of Special Power of Attorney from Sherdelghulam Rend) v. The Registered Trustees of Masjid Sheikh Albani**, Civil Application No. 340/18 of 2019, Court of Appeal of Tanzania, At Dar Es Salaam (unreported), in which the Court held that:

"It is apparent from the reproduced rule that, in the present application, even if the alleged special power of attorney could have been properly granted to the applicant, still there is no evidence that, Sherdell Ghulam Rend whose address is in Temeke District is not a resident of Tanzania."

It is important to note that, the Appellant's learned advocate contended that the application for setting aside the judgment was incurable defective as the person suing under power of attorney lacked *locus standi* since he didn't qualify to sue under power of attorney as the first Respondent was present in person. Lastly, he prayed for this appeal to be

allowed, the proceedings and decision made by the Trial Court to be nullified.

On the other hand, the learned advocate for the first and third Respondents that is none other than; Mr. Hilary Ndumbaro in his submission in this appeal stated that there was no any illegality procured by the Trial Court which contravened the administration of justice. Moreover, he added that the court was satisfied with the reasons advanced by the first Respondent when it set aside the *ex-parte* judgment. To add to it, he further stated that the first Respondent was not idle for the whole period as he had filed several applications to set aside *ex-parte* judgment after been granted an order for extension of time, however, the applications were encountered with preliminary objections which made the applications to be struck out. Finally, he succeeded in the application which is subject to this appeal.

He submitted that, filing second application for extension of time after the expiry of time granted in the first application was inevitable. That is why he filed an application for extension of time vide Miscellaneous Application. No. 16/2021. Mr. Hilary Ndumbaro further argued that the case of **Mohamed Enterprises (T) Limited v. Masoud Mohamed Nasser,**

Civil Application No. 33 of 2012, Court of Appeal of Tanzania at Dar Es Salaam (Unreported), which was referred by the Appellant's learned advocate is irrelevant to the matter at hand. Principally, since the court stated that; it will be a gross abuse of court process once one judge enter judgment and draw up a decree in one case (thus bring such case to finality) only to find another judge soon thereafter setting aside the said judgment and decree by substituting with a contrary judgment and decree in a subsequent application.

To add flavour to it, he further submitted that the facts referred in that case are "judgment and decree" while the issue in this appeal is the Court order for the extension of time to be granted twice which is quite different and strange. He added that in the case referred by the Appellant's advocate it was based on the proper way of challenging consent judgment and decree which resulted from settlement order in which the Court of Appeal found unprocedural for the judge of the High Court to set aside a consent judgment and decree.

On the second ground of appeal, he argued that the Trial Court has jurisdiction to entertain the matter and the principle of *functus officio* does not apply in application for extension of time since it is upon the discretion

of the court to grant or not. He added that the case of **Mohamed Enterprises (T) Limited v. Masoud Mohamed Nasser** (supra) which was cited by the Appellant's learned advocate does not apply in the instant appeal.

In regard to the third ground of appeal he contended that it is baseless due to the fact that the power of attorney was executed on 30th March, 2021 and registered on 1st April 2021 and the reasons of issuing power of attorney were that the first Respondent at the time of issuing it he was outside the territorial boundaries of Tanzania (in Yemen) which was a good genuine reason to grant the power of attorney.

To add flavour to it, he made reference to the case of **Monica Danto Mwansasu (by Virtue of Power of Attorney from Atupakisye Kapyele Tughalaga) v. Esrael Hosea and Another**, Land Revision No. 2 of 2021 High Court of Tanzania at Mbeya (unreported) in which it was held that:

"In finding of the court it has been established that the genuine reasons in the eyes of law for one to use power of attorney is to establish long-standing absence from the

country and inability for prolonged serious illness or old age”.

Basing on the above stance, he contended that the case of **Raya Salum Mohamed (By Virtue of Special Power of Attorney from Sherdelghulam Rend) v. The Registered Trustee of Masjid Sheikh Albam**, Civil Application No. 340/18 of 2019, Court of Appeal of Tanzania at Dar es Salaam (unreported) which was referred by the Appellant's advocate does not apply in the present appeal since the first Respondent has a good genuine reason of granting the power of attorney.

To put it in a nutshell, he concluded that this appeal is of the lesser weight due to the fact that the Appellant entered appearance in Miscellaneous Application No. 1/2022 and had enough time to argue on that however, he did not exercise that right. Lastly, he prayed for this appeal to be dismissed with costs since allowing this appeal will lead to several applications as the matter are not yet heard on merit.

Basically, in his rejoinder submission the Appellant's learned advocate argued that the Respondents' submissions on the first ground of appeal that the Trial Court correctly granted extension to the first Respondent in the ruling in Miscellaneous Civil Application No. 16 of 2021 is not proper

since in the same ruling (in Miscellaneous Civil Application No. 16 of 2021) the court admitted that the first Respondent had been granted extension of time as it stated:

"... even though as it appears in the records, the applications (as sought) were sometimes granted or rejected by the court and ancillary orders given".

Besides, he added that the said order for extension of time was never set aside or vacated by the court. He added that it is the requirement of the law that where a valid order of the court can only be invalidated by another lawful order of the court. On the same note, he stated that allowing the ruling in Miscellaneous Application No. 01 of 2022 will result to great violation and abuse of the rules of justice of our jurisdiction but also being contrary to the sound public policy of *interessei reipublicae ut sit finis litium* (litigation should come to an end). On the second ground of appeal the Appellant's learned advocate reiterated what he submitted in his submission in chief.

On the last ground of appeal, he submitted that the power of attorney is valid as it was executed on the 30th March, 2021 and registered on the 1st of April, 2021 the same is contrary to the Trial's Court records

whereby the first Respondent stated that the first Respondent was back in the country since May, 2018. Also, he stated that there were several applications filed by the first Respondent in his personal capacity except the subsequent application which was preferred under power of attorney. Lastly, he prayed for this Court to nullify and quash both the proceedings and ruling of the District Court of Mbinga in Miscellaneous Civil Application No. 01 of 2022 with costs.

With the foregoing, I will now proceed on considering the merit or otherwise of this appeal. In dealing with this appeal, I will discuss each ground of appeal separately as the parties did in their submissions.

To start with the first ground of appeal that the decision given by the Trial Court was illegally procured and it was in contravention of administration of justice, the Appellants learned advocate arguments were premised on the fact that the decision was made after and order for extension of time issued twice by the same Court. He argued that that was an abuse of the discretion power of the Court which is against the law. The Appellant's learned advocate referred this Court to Miscellaneous Application No. 01 of 2019 and 16 of 2021 which granted extension of time

to file an application to set aside *ex-parte* judgment in Civil Case No. 26 of 2016.

To put in a nut shell, the Appellant's submission is on the claim that the Trial Court faulted to grant an extension of time on Miscellaneous Application No. 16 of 2021 as the same was already granted in Miscellaneous Application No. 01 of 2019.

Basically, the Respondents' learned advocate conceded that the Respondent filed Miscellaneous Application No. 01 of 2019 for extension of time. In fact, he was granted fourteen (14) days however time lapsed before they succeeded to set aside the *ex-parte* judgment. This is, for the reasons which the Trial Court found sufficient it granted extension of time in Miscellaneous Application No. 16 of 2021. He was on the view that the Trial Court exercised its discretion power accordingly and there was no any legal contravention.

In view of the submissions made by both parties, I find the main complaint which the Appellant has in this argument is in the decision of the Trial Court on the ruling in Miscellaneous Application No. 16 of 2021, that it

was not correctly decided since the same decision was made in Miscellaneous Application No. 01 of 2019.

It is important to note that, the Appellant is on the view that the matter was *res judicata* and the Trial Court had no jurisdiction to entertain. From the Appellant's complaint, I find there are two main issues which needs to be addressed on the first ground of appeal. **One;** is whether this Court has a power to discuss on the propriety of the decision reached in Miscellaneous Application No. 16 of 2021 in this appeal; and **two,** is whether the Trial Court decision setting aside the *ex-parte* judgment in Miscellaneous Application No. 01 of 2022 was properly procured.

On the first issue, I find that the answer is not in affirmative since in this appeal the Appellant moved this Court in respect to the decision of the Trial Court in Miscellaneous Application No. 01 of 2022 and not on the decision made in Miscellaneous Application No. 16 of 2021. The act of the Appellant's advocate to argue on the propriety of the decision which is not subject to this appeal is trying to ride two horses at the same time which is not proper. If the Appellant was not satisfied with the decision reached in Miscellaneous Application No. 16 of 2021, she would have preferred an

appeal in respect of that decision and not arguing it in this appeal in which this Court has nothing to do with it.

On the second issue, I find the Trial Court in setting aside the *ex-parte* clearly explained its reasons for doing so. As much as I am concerned, I find there is no need for this Court to toil itself by reiterating them. In my view, I concur with the decision reached by the Trial Court since there is nothing to be faulted on it.

On the second ground of appeal, the Appellant's advocate was on the view that the Trial Court has no jurisdiction to determine the application since an order which granted an extension of time to file the application to set aside the *ex-parte* judgment was granted by the Court while having no jurisdiction as it was *functus officio*, thus the subsequent proceedings including the decision which is subject to this appeal are void. On the contrary the Respondents' learned advocate was on the view that, an application for extension of time is on the discretion of the court to grant or not, thus the Trial Court has discretion to grant or not.

It is the view of this Court that the Trial Court has jurisdiction to deal with an application to set aside the *ex-parte* judgment since an order

granting extension of time was not challenged and it remained valid. To the best of my knowledge, I don't agree with the Appellant's advocate submission that the Trial Court has no jurisdiction to determine the same since an order granting the application to be heard out of time was improperly procured.

As I have discussed above, the Appellant has to challenge that decision in a proper channel. Arguing in this appeal on the propriety of that decision in this appeal is not proper. Notably, the decision of the court in **Mohamed Enterprises (T) Limited v. Masoud Mohamed Nasser** (supra), which was cited by the Appellant's learned advocate is not relevant in this appeal.

On the third ground of appeal the Appellant's learned advocate submitted that the application which is subject of this appeal was supported by an affidavit sworn by Zahir Ameer Salum who was given power of attorney by the first Respondent and in that power of attorney, the first Respondent claimed that he was out of the country working for gain until 2018 when he came back. However, the application was filed on the 24th day of March, 2022, when he was in the country and there was no reason which prevented him from prosecuting his claims. The Respondents'

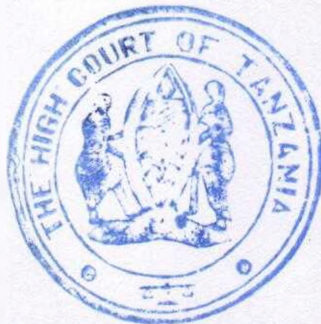
learned advocate argued that the power of attorney was executed on 30th March, 2021 and registered on 1st April, 2021, and the reasons of issuing power of attorney was to the effect that the first Respondent at the time of issuing it he was in Yemen (outside Tanzania) which was a good and genuine reason to grant power of attorney.

From the arguments made by the parties this Court has also passed through the records of the Trial Court and I find the Appellant's submission that the first Respondent was in Tanzania at the time of issuing the power of attorney is not proper. As a matter of fact, the records of the Trial Court show that, at the hearing of the case the passport of the first Respondent was tendered and admitted as evidence that he was not in Tanzania. Basically, the arguments made by the Appellant's advocate that the first Respondent was back in Tanzania since May, 2018 and he was in Tanzania at the time when the application was heard is not proper since the power of attorney was granted on 30th March, 2022 and it was clearly stated in the power of attorney that the first Respondent was not within the local limit of our country. Also, the finding made in the case of **Monica Danto Mwansasu (by Virtue of Power of Attorney from Atupakisye Kapyele Tughalaga) v. Esrael Hosea and Another** (supra), which was

referred by the Appellant's advocate are not relevant in the instant appeal since it was proved before the Trial Court that the first Respondent was not within the territorial jurisdiction of Tanzania.

Conclusively, having discussed all, I find this appeal has no merit. I hereby uphold the decision of the Trial Court and dismiss this appeal with costs. Order accordingly.

DATED and **DELIVERED** at Songea this 9th day of May, 2023.

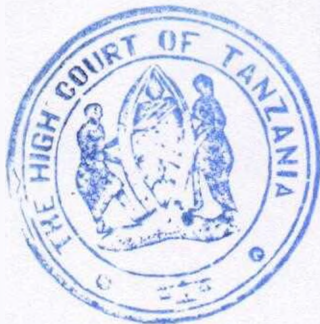



U.E MADEHA

JUDGE

09/05/2023

COURT: Judgment delivered on this 9th day of May, 2023 in the presence of Mr. Lazaro Simba for the Appellant and in the absence of the Respondents. The Respondents to be notified. Right of appeal explained.




U. E. MADEHA

JUDGE

09/05/2023