

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
ARUSHA SUB REGISTRY
AT ARUSHA**

MISC. LAND APPLICATION NO 162 OF 2022

(Arising from Land Case No. 09 of 2019)

EDWIN MTEI **APPLICANT**

VERSUS

FINN CONSTRUCTION COMPANY LIMITED **1ST RESPONDENT**

FINNAGRI LIMITED **2ND RESPONDENT**

FINN VON WURDEN PETERSEN **3RD RESPONDENT**

RULING

24th April & 19th June 2023

KAMUZORA, J.

This application intends to set aside ex-parte judgment and decree delivered by this court in Land Case No. 09 of 2019. The Application was brought under the provision of Order IX Rule 9 of the Civil Procedure Code Cap 33 R.E 2019 and supported by an affidavit deponed by the Applicant. The Respondents on the other side filed joint counter affidavit deponed by Mr. Innocent Frank Mwanga, learned advocate contesting the application.

As a matter of legal representation, Mr. John Mushi, learned advocate appeared for the Applicant while the Respondents were ably

represented by Mr. Peter Nyamwero, learned advocate. Hearing of the application was by way of written submissions and parties complied to the submissions schedule.

The Applicant's counsel adopted the contents of the affidavit filed in support of application and submitted that the Applicant being an old man has been constantly sick and had never entered appearance in person before the court in Land Case No. 9 of 2019. That, after the suit was filed in court, the Applicant instructed an advocate named John Mallya to enter defence and the Applicant believed that the matter was still in court until 06th December 2021 when he was served with copies of Execution Application No. 31 of 2021 and Taxation Cause No. 39 of 2021 only to find out that they arise from an ex-parte decree in Land Case No. 09 of 2019. That, immediately the Applicant made an application for the extension of time so as to file the current application.

It is the claim by the Applicant's counsel that failure of the Applicant to enter appearance in Land Case No. 09 of 2019 resulted from the negligence of John Mally who defaulted from appearance in court and represent the Applicant as instructed. He invited this court to find that the advocate negligence constituted a sufficient cause for setting aside ex-parte judgment and decree. To back up his submission

he referred the cases of **Glory Shifwaya Samson Vs. Raphael James Mwinuka**, Civil Application No 506/16 of 2019, **Cropper Vs. Smith** (1884) 26 CL.D. 700, **Standard Chartered Bank (Tanzania) Ltd Vs. Bata Shoe Company Ltd**, Civil Application No 101 of 2006 CAT at Dar es Salaam.

The other reasons advanced by the counsel for the Applicant for setting aside the ex-parte decree is illegality of the impugned decision so to be challenged. The counsel for the Applicant referred this court to the case of **Principle Secretary, Ministry of Defence and National Service Vs. Devram Valambia** [1992] TLR 185, **Transport Equipment Ltd Vs Dp. Valambia** [1993] TLR 91.

Pointing at paragraph 10 (a) (b) (c) (f) and (g) of the affidavit in support of application the Applicant's counsel claimed illegality based on the jurisdiction of this court in determining the suit without the aid of assessors as required by Rule 5F and 5G of the High Court registries (Amendment) Rules GN. No 63 of 2001. He was of the view that since the parties did not exercise their right to decide whether to sit with assessors or not, the court was not properly constituted. The Applicants counsel referred this court to the decision of the Court of Appeal in **Exaud Gabriel Mmari (Suing as Legal and Personal**

representative of the Estate of the late Gabriel Barnabas Mmari) Vs. Yona Seti Akyoo and 9 others, Civil Appeal No 91 of 2019 (Unreported).

Another illegality pointed out is that there was no sufficient proof for the award of Tshs 1,044,859,500/= as specific damages which the same must be specifically pleaded and proved as in the case of **Zuberi Augustino Vs. Ancient Mugabe** [1992] TLR 137. That, there was no justification for the award of Tshs 5,000,000 as exemplary damages and Tshs 10,000,000/ as general damages as it was awarded by the court without any justification of the same.

Another illegality is that, notice for ex-parte judgment was not issued to the Applicant as per Order XX Rule 1 of the Civil Procedure Code Cap 33 R.E 2019. To cement on this issue, the counsel for the Applicant cited the case of **Cosmas Construction Co. Ltd Vs. Arrow Garments Ltd** [1992] TLR 127 CAT.

The last illegality pointed out by the counsel for the Applicant is that two decrees were issued in respect of the same judgment the first titled Decree and the other titled Ex-parte decree as per annexure EM3 to the affidavit filed in support of application. In concluding, the Applicant's counsel prayed for the application to be allowed.

In challenging the application, the counsel for the Respondent adopted the contents of the counter affidavit and submitted that, the Applicant has advanced three reasons for the court to exercise its discretion to set aside the ex-parte decree. He pointed out those reasons as; sickness, illegality and lack of diligence and inaction on the part of his advocate. Referring the decision of the Court of Appeal in **Elias Masinja Nyangoro and others Vs. Mwananchi Insurance Company Limited**, Civil Appeal No 278 of 2019 CAT at Dar es Salaam (Unreported) the counsel insisted that the law requires the Applicant to advance reasons which prevents him from appearing in court on the date scheduled for hearing.

Regarding the claim for sickness as a fact which hindered the Applicant from appearing during hearing, the Respondents submitted that, there is no evidence brought before this court to prove that on the day the matter was scheduled for hearing the Applicant was sick. He was of the view that sickness cannot be presumed as the same has to be proved as it was held in the case of **Ester Manonga Vs. Esther Lohay**, Misc. Civil Application No 74 of 2022 HC Arusha (Unreported). He was of the view that, since the Applicant has not attached a medical

chit or report to indicate that he was sick on the date that the matter was scheduled for hearing then the reason for sickness is unjustifiable.

On the second reason based on the negligence of the Applicant's advocate, the counsel for Respondents submitted that the inaction, inadvertence, negligence and lack of due diligence by the counsel for the Applicant is not a sufficient cause and there is no time a court has set aside ex parte judgment basing on negligence and lack of diligence on part of the advocate. Reference was again made in the case of **Elias Masinja Nyang'oro(Supra)** and the case of **Lim Han Yung and another Vs. Lucy Treseas Kristense**, Civil Appeal No 219 of 2019 CAT at Dar es Salaam (Unreported) to insist that the negligence of an advocate is a negligence of a party as the party has duty to make follow up of his case.

The Respondents counsel distinguished the case of **Glory Shifwaya Samson (Supra)** cited by the Applicant and stated that in that case what was cited was an obiter dictum and not the decision of the court hence not binding. That, the Applicant's son one Mahinda Mtei claimed to have power of attorney to stand for the Applicant and was asked to submit the said power of attorney but did not submit the same and the matter proceeded ex-parte against the Applicant herein.

Responding to the claim of illegality as reason for setting aside the ex-parte judgment, the counsel for the Respondent submitted referred the case of **The Board of Trustees of the Free Pentecostal Church of Tanzania Vs. Asa Selemani Chambanda and another**, Civil Application No. 63/07 of 2023 CAT at Mtwara (unreported) and submitted that the points which are termed as illegality were supposed to be raised as grounds of appeal to challenge the ex-parte judgment and decree. That, the Applicant was supposed to raise good cause or sufficient reasons which prevented him from appearing in court on the date set for hearing.

On the argument that the court lacked jurisdiction for it tried the matter without aid of assessors, the counsel for the Respondents submitted that the suit was instituted in Arusha District Registry and not Land Division hence, there is no any requirement for the High Court registries to seat with assessors. That, the Chief Justice had not established Land Division in Arusha and composition of court with the aid of assessors applies only to Land division. He insisted that the court was properly composed with no any aid of assessor's and had jurisdiction to entertain Land Case No. 09 of 2019. In concluding, the Respondents' counsel prayed for the application to be dismissed for lack

of merit as the Applicant was supposed to demonstrate sufficient cause which prevented him to appear in court.

In a brief rejoinder submission, the Applicant's counsel insisted that each case must be determined according to the circumstance of the case as it was held in **Elias Masija Nyangoro & 2others Vs. Mwananchi Insurance Company Limited**, Civil Appeal No 278 of 2019. That, since the Applicant engaged advocate John Mallya to defend him in court, he was made to believe that the matter was still pending in court and was well taken care of and it was the reason that the Applicant had not entered appearance before the court. Distinguishing the current case with that of **Elias Masinja and Liam Han Yung** (Supra) which was cited by the Respondents' counsel, the counsel for the Applicant stated that in that case, the Appellant's counsel was present when the case was fixed for hearing unlike in this matter where the Applicant was neither present nor served with summons for ex-parte judgment.

On the issue of illegalities, the Applicant's counsel added that what they raised are pure points of law as they appear on face of record. It is the Applicant's prayer that this court to do away with technicalities and instead determine case justly by giving opportunity for all parties to be

heard as the Respondents will not suffer any injustice or prejudice if the ex-part^e judgment is set aside unlike the Applicant. The Applicant reiterated his prayer that the application be granted.

Having heard the submissions by counsel for the parties, the pertinent issue for adjudication by this court is whether the Applicant has adduced sufficient reasons for this court to set aside the ex-part^e judgment and decree. The Law under order IX Rule 9 of the Civil Procedure Code Cap 33 R.E 2019 to which this application was made under states that,

"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 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" Emphasis mine.

Being guided by the above provision, this court is empowered by the law to make an order setting aside the ex-part^e judgment and decree upon being satisfied that the Applicant was prevented by sufficient cause from appearing when the suit was called for hearing.

In the instance application, as well pointed out by the counsel for the Respondents and reading through the affidavit in support of the application, the Applicant advanced three reasons for non-appearance when the matter was set for hearing; sickness, negligence on part of his advocate and illegalities of the proceedings of this court. Having onboard these reasons, the issue is whether they are well demonstrated and they amount to sufficient cause for this court to set aside ex parte judgment.

Starting with ground of sickness, the Applicant claimed at paragraph 3 of the affidavit that being an old man he has been constantly sick thus, he engaged an advocate one Mr. John Mallya to file his defence and represent him in court. It is unfortunate that apart from stating that the Applicant was an old man who has been constantly sick, no evidence was attached to prove sickness and how the same prevented him from appearing before the court when the matter was set for hearing. It was held in number of cases by this court and the Court of Appeal that where a party allege sickness as ground for not pursuing his right on the prescribed time limit, that party must demonstrate with evidence the said sickness. I align myself with the decision of this court in **Ester Manonga** (supra) at page 9;

"I also agree with the counsel for the Respondent that mere allegation of sickness is not enough, the Applicant must produce concrete evidence which are normally required to be presenting the affidavit filed in support of the application filed. The reasons and ground should not be assumed, or presumed, the same must, as a matter of guiding principle be proved or justified by evidence."

Subscribing to the above decision, I find that the Applicant's unsupported claim that he is an old man who has been constantly sick cannot stand a good reason to set aside ex-parte judgment.

Regarding the reason for negligence on part of the Applicant's counsel, there is no dispute that the Applicant engaged the service of an advocate to appear and defend his case. It was deponed in the affidavit that while believing that his case was being handled by assigned advocate, the Applicant came to learn that there was an ex-parte judgment against him when he was served with copies of application for execution and taxation cause. He therefore thinks that the court should consider that it was not his fault not to enter appearance and allow the application by setting aside the ex parte judgment.

It is settled that negligence, lack of diligence or inaction on the party's advocate cannot constitute a ground for setting aside ex parte judgment/decree. This was well insisted by the Court of Appeal sitting at

Dar es salaam in Civil Appeal No. 219 Of 2019, **Lim Han Yung and Another Vs. Lucy Yreseas Kslisthnsen**, at page 22 where it held: -

"It is also our considered view that even if the appellants were truthful in their allegations against their erstwhile advocates' inaction, negligence or omission, which generally, does not amount to good cause, they themselves share the blame. The appellants cannot throw the whole blame on their advocates. We think that a party to a case who engages the services of an advocate, has a duty to closely follow up the progress and status of his case. A party who dumps his case to an advocate and does not make any follow ups of his case, cannot be heard complaining that he did not know and was not informed by his advocate the progress and status of his case. Such a party cannot raise such complaints as a ground for setting aside an ex parte judgment passed against him."

Being guided by the above decision we find that the claim that the Applicant was not informed by his advocate about the progress in his case is not justifiable ground to set aside ex-parte judgment.

The last ground refers to illegalities in the proceedings of this court resulting to ex-parte decision. The Applicant pointed out the following illegalities; that, the court was not properly constituted for it did not sit with assessors, that there was no sufficient proof for award of special damage and no justification for award of exemplary damage, that pre-trial conference was conducted in the absence of the Applicant, ex parte

hearing proceeded on the same day ex-parte order was issued and notice was not issued to the Applicant and finally, that two decrees were issued in the same suit.

Point of Illegality may constitute sufficient ground for setting aside an ex-parte decree but only if successfully argued that the court acted illegally for want of jurisdiction, or for denial of right to be heard, or that the matter was time barred. That was the holding of the Court of Appeal in **Charles Richard Kombe Vs. Kinondoni Municipal Council**, Civil Reference No. 13 of 2019.

On that basis, I do not see how illegality based on award of special damage and exemplary damage or conducting pre-trial conference in the absence of the Applicant, or proceeding with ex parte hearing on the same day ex-parte order was issued or failure to issue notice to the Applicant or existence of two decrees can be interpreted to oust jurisdiction of the court in determining the matter or to render the suit time barred or to deny the Applicant right to be heard. Award by the court of whatever kind is usually based on evidence thus the claim that there was no justifiable reason for the award is likely suggesting that this court should assess evidence in an application to set aside ex parte judgment. That can only be determined while evidence is determining

the merit of the case. I also do no entertain the argument that ex parte hearing was conducted on the same day ex-parte order was issued. The Applicant was unable to point out the provision which restrict the court from proceedings with hearing after it has issued an order for ex-parte proof. Whether notice was issued or not is immaterial as the Applicant admitted in his affidavit that they filed defence meaning that they were aware of existence of the suit in court. A notice becomes necessary if proved that the circumstance of the case is that the Applicant could not been aware of the date the case was set for hearing. On the issue over existence of two decrees, I dealt with this issue in Misc. Land Application No. 111 of 2021 between the same parties, see page 15 of the ruling. In addition to that, I will be guided by the decision of the Court of Appeal in **Aristibes Pius Ishebabi Vs. Hassan Issa Likwedembe and 3 Others** Civil Appeal No. 5 of 2019, where it was held;

It is a trite position that a defect in a decree can always be rectified by issuing a properly drawn one. Its defect cannot invalidate a judgment.

Turning to illegality based on failure to sit with assessors, it is clear from the record that the matter was heard ex-parte and parties were not addressed on the option for the proceedings to be conducted with or without aid of assessors. Since the composition of the High Court in land

matters requires a judge to sit with assessors upon parties' option, I agree that issue of assessors' touches jurisdiction of the court in determining land cases.

It was argued by the counsel for the Respondent that composition of court with the aid of assessors applies only to Land division as per the High Court Registry Rules. He was of the view that, since the suit was instituted in Arusha District Registry and not Land Division there is no need to sit with assessors. That, the court was properly composited without aid of assessor and had jurisdiction to entertain Land Case No. 09 of 2019. I find this argument wanting for the reasons put hereunder.

I agree that the High Court Registries (Amendment) Rules, 2001, G.N. No. 63 of 2001, which amended the High Court Registries Rules, 1984 refers to **land division** as a court for land cases at High Court level. It stipulates that the properly constituted court consists of a Judge sitting with two assessors. GN. No 63 of 2001 was amended through GN. No. 364 of 2005, the High Court Registries (Amendment) Rules 2005 and the requirement to sit with the aid of assessors still stand as mandatory obligation, but counsel and parties have an option of choosing the hearing to be with the aid of assessors or not. However, that does not mean that the requirement to sit with assessor applies to

High Court Land Division only. Those rules govern composition of the court in land matters and the jurisdiction of the court in land matters is provided for under the Land Disputes Court Act, Cap 216. The Act was amended by Miscellaneous Amendment Act No. 2 of 2010 and under section 19 of the amending act, section 2 of the Land Disputes Court Act was amended to remove the exclusivity of the High Court land division in handling land cases. Thus, High court sitting in adjudicating land matters will also apply the same principle as land division by sitting with assessors while adjudicating land matters.

In the final analysis, and being guided by the Court of Appeal decision in **Charles Richard Kombe Vs. Kinondoni Municipal Council**, Civil Reference No. 13 of 2019, and in considering that issue of assessors touches the jurisdiction of the court in determining land matter, I allow the application. The ex-parte judgment and decree passed by this court in Land Case No. 09 of 2019 is hereby set aside. Parties shall bear their respective costs.

DATED at ARUSHA this 19th day of June, 2023.




D.C. KAMUZORA

JUDGE