THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MOROGORO)

AT MOROGORO

CIVIL APPEAL NO. 40 OF 2022

(Arising from Civil Appeal No. 12 of 2022 before Kilosa District Court, Originating from Masanze Primary Court in Civil Case No. 96 of 2021)

YOHANA MICHAEL SENGASU .....APPELANT

VERSUS

FELISTA RICHARD MCHARO .....RESPONDENT

JUDGEMENT

Hearing date on: 27/06/2023
Judgement date on: 14/07/2023

NGWEMBE, J:

The appellant, preferred this appeal after concurrent decision of the subordinate courts denying his prayers to restore the exparte judgement entered by the trial court of Masanze Primary Court which decision was upheld by the District Court. The appellant being so aggrieved, preferred an appeal to this house of justice clothed with three grounds namely: -

1. The District Court erred in law and in fact for failure to hold the trial court that had no jurisdiction to try the case.
2. The District Court erred in law and in fact for disregarding the appellant herein evidence on the application to set aside the exparte judgement; and

3. The District Court erred in law and in fact for failure to consider the Appellant submission.

These being the grounds for appeal, I am settled in my mind that to underscore these grounds of appeal I have, briefly recap the genesis of it with a view to print out clear picture before I determine the merits of this appeal.

Briefly, the disputants are relatives, their feuds and tensions until they arrived to the corridors of justice was local financing best known as SACCOS involving a total of TZS. 21,240,000/=. The two entrusted each other in such loan agreement, but one of them failed to heed to the terms and conditions of that loan agreement. Hence the dispute landed before Masanze Primary Court. When the suit was scheduled for hearing, alas the appellant did not appear, hence the suit was heard ex-parte.

The ex-parte judgement was delivered by the trial court with effect of compelling the appellant to pay TZS. 18,240,000/= borrowed from SACCOS and TZS. 3,000,000/= as compensation to the respondent. Following such order, a new marathon erupted, the appellant rightly returned to the very primary court, seeking to set aside the ex-parte judgement. Unfortunate may be to the appellant, he was not successful due to his failure to satisfy the conscience of the trial magistrate for reliable reasons which caused his failure to appear on the hearing date.

Being so aggrieved with that ruling of the trial court, he preferred an appeal to the District Court, whereas the appellate magistrate upheld the decision of the trial court that the appellant lacked satisfactory reasons for his failure to appear in court during trial of his case. Thus,

his appeal was dismissed. Such dismissal necessitated this appeal to this house of justice.

At this house, the appellant found assistance from learned advocate Giray, while the respondent appeared in person. Advocate Giray abandoned the first ground and proceeded with the 2nd and 3rd grounds of appeal. That he argued forcefully that the appellant had sufficient cause for absence on the hearing date because he had another case at the Court of Appeal - Dar es Salaam. Summons of the Court of Appeal was admitted as an exhibit MK 2. Added that failure to appear in lower court because of appearance in superior court is a good cause. Thus prayed the appeal be granted by setting aside the decisions of the lower courts, thus let the appellant be heard.

In reply, the respondent briefly argued that the appeal lacks merits and is purely wastage of time. The appellant was issued summons to appear on the hearing date in the trial court but the appellant refused. Rested by a prayer that the appeal be dismissed forthwith.

Having summarized the arguments of both parties, the question for determination is whether this appeal is merited as prayed by the appellant? Second is whether the appellant has raised good ground upon which this court may depart from the decision of the lower courts.

Before going any further, I wish to point out that setting aside ex parte decision is one among the discretional powers of the courts which generally are to be exercised judiciously. Such discretion is usually respected when properly exercised but may be faulted by the superior court if the trial court erred at any point in its exercising the powers. In dealing with this appeal, I will follow this principle which among many

other cases, it was reiterated by the Court of Appeal in the case of **Lim Han Yung & Another Vs. Lucy Treseas Kristensen (Civil Appeal No. 219 of 2019) [2022] TZCA 400,** where it was held: -

> *"It is clear that the power given to the court in setting aside an ex parte judgment, is discretional. We are also mindful that generally the exercise of discretion by the lower court can rarely be interfered by a superior court. Such an exercise can only be interfered with where it is clear that the decision arrived at was a result of erroneous exercise of discretion through either the omission to take into consideration relevant matters or taking into account irrelevant extraneous matters and misdirecting itself"*

It follows therefore, if the trial court misdirected itself in dismissing the application for setting aside the ex parte decision, this court will not hesitate to interfere accordingly.

Tracing from the trial court's judgement, it is clear that the trial court decided to proceed with hearing ex-parte because the appellant was summoned to appear and defend his case but he refused. Quoting the words of the trial court at page 1 of the judgement said: -

> *"Mdaiwa alipelekewa hati ya wito wa mahakama ambayo aliisaini lakini hakufika kujibu madai hayo, na baada ya mahakama hii kujiridhisha kuwa wito wake umemfikia mdaiwa ipasavyo, lakini aliupuuzia, ilimruhusu mdai kuthibitisha madai yake upande mmoja"*

In brief it means the appellant was summoned to appear in court for trial, but he refused to heed to it. Thus, the court decided to order the

plaintiff to proceed with trial ex-parte. As such the respondent herein proved the case and the trial court awarded her claims against the appellant. What was done by the trial court, in general was a proper procedure under rule 23(a) of the **The Magistrates' Courts (Civil Procedure in Primary Courts) Rules, GN 119 of 1983** which provides that: -

> *"Rule 23. Where the claimant appears and the defendant does not appear when the proceeding is called on for hearing, then–*
>
> *(a) if the court is satisfied that the summons was duly served, the court may permit the claimant to prove his case by adducing such evidence as he may have in support of his claim and the court may, if it is satisfied that the claimant has proved his claim, give its decision in the absence of the defendant"*

In fact, that was the beginning of another unsuccessful marathon of applications and appeals to set aside the ex-parte judgement. From the beginning, the reason advanced by the appellant on his failure to appear for hearing was only one that on the same date of trial he appeared before the Court of Appeal. Rightly so, when two cases involving similar parties are called in two different courts of different hierarchy obvious the procedure is well developed and settled in our jurisdiction, the superior court takes precedence. Even if the courts are horizontally equal but seated with different judges, the most senior judge shall take precedent. This procedure is well settled even without referring to any decided case.

However, in this case, the appellant alleged to have appeared before the Court of Appeal on the very date when his case was tried by Primary Court of Masanze. Rightly, he was ought to appear before the superior court. The trial court seems to have not been moved by such reasons.

The rule is common that in order for the court to set aside the ex parte decision, the applicant must adduce sufficient cause for his non appearance. Rule 30(1) of the Civil Procedure Rules provides thus:

> *"Rule 30 (1) Where a claim has been proved and the decision given against a defendant in his absence, the defendant may, subject to the provisions of any law for the time being in force relating to the limitation of proceedings, apply to the court for an order to set aside the decision and* ***if the court is satisfied that the summons was not duly served, or that the defendant was prevented by any sufficient cause from appearing when the proceeding was called on for hearing****, the court shall make an order setting aside the decision as against such defendant upon such terms as it shall think fit."*

From the above provision, the court may set aside its ex parte decision if it is satisfied that; either summons was not duly served upon the defendant, or having been duly served, the defendant was prevented by any sufficient cause from appearing in court. In this case, if the defendant was to appear before the Court of Appeal as he alleged and the allegation be true, that would stand to be a sufficient cause.

However, the appellant had the duty to prove that fact. Specifically, such allegations, ought to be satisfied by documentary evidence. See the

decision of this court in the case of **Karato Massay Vs. Qwaray Massay and Another (Land Appeal No. 9 of 2020) [2021] TZHC 6816** where it was maintained that the said summons for appearance before another (superior) court must be produced in the court, before the date of hearing.

The appellant in this appeal solely relied to annexture MK2. I have endeavored to peruse inquisitively on that annexture to grasp the essence of failure of both subordinate courts to see the sense of such annexture. In fact, I was puzzled and I failed to properly interpret the sense of learned advocate Giray, to rely on that annexture when he vehemently argued this appeal.

Annexture MK2 is a written submission of the appellant herein, by then he was a 1st respondent he filed same to the Court of Appeal in Civil Appeal No. 71 of 2020 which same was filed in court on 9th June, 2020.

Unfortunate such submission was neither a court summons calling the appellant to attend before the Court of Appeal nor was it a court judgement for noting. Above all, there is no clear explanation as to whether the appellant on the said date appeared to the Court of Appeal for what purpose? Obvious mere allegations cannot satisfy the court to depart from its previous decision.

It is settled in principle and practice, which Mr. Giray must be aware, to prove that a party was required to appear before a superior court, any of the following can stand to be evidence; a court summons dully served upon the party on the same date or a notice of hearing or a cause list. See the decisions by this court in **Elizabeth Paul and Another Vs. Brac Tanzania Finance Limited (Labour Revision No. 60 of 2020)**

[2021] TZHC 5383 and **Genoveva Kiliba t/a Dage School of Hair Dressing and Decoration Vs. Abdullah Rashid Abdullah (Misc. Land Case Application 501 of 2022) [2023] TZHCLandD 16452.**

I think at this juncture, I need to outline some important legal principles which must be obeyed religiously by whoever intends to seek court's protection. *First,* every person is equal before the law and courts of law who deserve equal protection by law. Thus, no one is superior over another before the court of law, therefore, whoever has any issue before the court of law must comply with the court orders, unless such order is reversed or deleted by the superior court by way of appeal or revision. *Second,* failure to comply with court order must be accompanied with sufficient reasons capable of satisfying the consciousness of the seating judge or magistrate. *Third*, every party to the suit/application/appeal must show diligence and punctuality to heed to the court's orders. Any sloppiness or negligence cannot be entertained by any serious court of law. *Fourth*, time limitation is material to the ends of justice. Usually, justice delayed is equal to justice denied, this is the famous sayings of a century in every court of law. *Fifth*, justice can never wait for anyone who is negligent and inactive to heed to the court orders. *Sixth*, litigation must have an end, not only for the disputants' interest, also is for the public interest. Mere applications or appeals for purpose of wasting time is equal to busy bodies intended to frustrate the ends of justice. Courts in our jurisdiction should not entertain. Therefore, whoever comes to court should have a justifiable claim capable of being protected by the court order/decree. In this case, the trial court properly exercised its discretion, the district court likewise was right to have dismissed the appeal as the appellant failed totally to establish any sufficient cause for

his non appearance. Granting the appellant any of the relief sought, will be a disguised blessing of parties' recklessness which we have already condemned.

Having so said and for the above legal principles, I am satisfied that neither the trial court nor the district court committed any error capable of being revised or nullified by this house of justice. In other words, this appeal lacks merit same should be awarded dismissal.

Order accordingly.

Dated at Morogoro this 14th July, 2023.

P. J. NGWEMBE

JUDGE

14/07/2023

Court: Ruling delivered at Morogoro in chambers on this 14th day of July, 2023 in the presence of the appellant and in the absence of the Respondent.

Right of appeal explained.

Sgd: E. Lukumai

Ag, Deputy Registrar

14/07/2023