

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE SUB REGISTRY OF KIGOMA)

AT KIGOMA

PC. CIVIL APPEAL NO. 04 OF 2022

(Arising from Civil Appeal No. 2 of 2022 in the District Court of Kigoma, original Civil Case No. 130 of 2021 Ujiji Primary Court)

SAID SULEIMAN MAZANA..... APPELLANT

VERSUS

OMARY MUSSA NKWARULO RESPONDENT

Date of last Order: 13/07/2023

Date of Judgement: 28/07/2023

JUDGEMENT

MAGOIGA, J.

The appellant, **SAID SULEIMAN MAZANA** aggrieved by the decision of the District Court of Kigoma in exercise of its appellate jurisdiction dated 27/05/2022 in Civil Appeal Case No.2 of 2022 now appeals against the said whole judgment and decree to this court.

In Civil Case No. 130/2021 at Ujiji Primary Court, the appellant applied to set aside ex-parte judgement entered in favour of the respondent in which he was ordered to pay Tshs.9,800,000.00 being compensation for loss building materials and destroying the fence wall. The respondent in the Primary Court had sought to recover the costs of building material and



destroyed wall destroyed by the appellant. The trial court after hearing the case ex-parte, decided in favour of the respondent herein.

Bemused by the said decision, the appellant herein appealed to the District court which upheld the trial court's decision and adjudged in favour of the respondent.

Still daunted, the appellant has preferred this appeal armed with three grounds of appeal faulting the 1st appellate District Court in the following language namely;

- 1. That, the appellate magistrate erred in law and fact by upholding the decision of the trial court while the appellant was condemned unheard by the trial court;*
- 2. That, the appellate magistrate erred in law and fact by holding that there was no need of serving the appellant with summons of hearing before the trial court proceeded ex-parte and determined the matter;*
- 3. That, the appellate magistrate erred in law and fact by holding that there was no need of serving the appellant with notice of date of delivery of judgement on 23.12.2022.*

On the above grounds, the appellant urged this court to allow the appeal with costs by quashing and set aside the decisions and orders of the trial court and first appellate court and order a fresh trial before another magistrate with competent jurisdiction to try the suit inter parties.



When this appeal was called on for hearing, the appellant was represented by Mr. Moses Rwegoshora, learned advocate whereas the respondent enjoyed the legal services of Mr. Elitha Kiviryo, learned advocate.

Arguing the first ground of appeal, Mr. Rwegoshora submitted that the appellant faults the appellate magistrate because the record is clear that on 15.12.2021 showed that there was an order for ex-parte hearing. On 17.12.2021 the record is as well clear the appellant was present but was addressed in terms of Regulation 29 of the Primary Court Civil Procedure Rules, a regulation which requires the court to call upon the appellant (defendant by then) to show cause or reasonable explanation as to why his previous non- appearance and the court is enjoined to upon satisfied to vacate it ex-parte order and hear the case inter parties. According to Mr. Rwegoshora, much as the trial court record that the appellant was not addressed in terms of that rule, then, this is other than that the appellant was condemned unheard. Not only that but also during the application for setting aside the ex-parte judgement, the trial magistrate conceded that the appellant was present but did not give reason.

On the above reasons, the learned advocate for the appellant prayed that this court allow this appeal on this ground.

Arguing the second ground of appeal, Mr. Rwegoshora pointed out that looking at the trial court proceedings, in particular, at pages 2 the



summons was given on 26/11/2021, which was received by the appellant. But, according to Mr. Rwegoshora, from thereon no summons was given to the appellant and without another notice, the appellant was not possible for him to follow the proceedings and as such condemned unheard in the circumstances of this appeal. Mr. Rwegoshora, thus, urged this court to find merits in this ground as well.

Mr. Rwegoshora dropped ground number three and same was so marked dropped.

On the strength of the above grounds of appeal argued strongly urged this court to allow this appeal as prayed.

On the other hand, Mr. Kiviryo for the respondent opposed the appeal by submitting that, the first appellate court was right in its decision because the right to be heard which is the main complaint in this appeal is basic but not absolute. According to Mr. Kiviryo, much as the record and the learned advocate for the appellant admitted that the appellant was served and actually received summons but without any reason decided not to show up, then, the provisions of regulation 29 of the Primary Court Civil Procedure Rules was complied with. Mr. Kiviryo pointed out that the appellant even when showed up in the subsequent dates, never moved the court to explain for his previous nonappearance nor did he applied for setting aside order.

On that note, the respondent's learned counsel strongly urged this court to find and hold that the first ground of appeal is devoid of any useful merits in the circumstances of this appeal.


Responding to the second ground of appeal it was the submissions of Mr. Kiviryo that on 1.12.2021 the case was scheduled for hearing after prove of summons was served and received, hence, the subsequent dates, the court was not obliged to issue other summons to the appellant who had failed to take any measure to revive his right to be heard.

On the above reason, the learned advocate for the appellant, on strong terms urged this court to dismiss this appeal with costs.

Mr. Rwegoshora had nothing to rejoined.

The noble task of this court now is to determine the merits or otherwise of this appeal.

Having carefully gone through the grounds and reply of appeal and also the submissions for and against this appeal, and after going through the evidence on record in the trial and first appellate proceedings, I find the central issue for determination in this appeal is whether the provisions of the Rule 29 of the **Primary Court Civil Procedure Rules, G.N. 310 of 1964** was not complied with as such denied the appellant right to be heard.



But before going into that, I wish to point out that right to be heard in any proceedings is so fundamental, basic, constitutional in our jurisdiction and natural dating back to our fore parents in the garden of Aden (see article 13 of the URT Constitution 1977 as amended from time to time, and the Bible in Genesis 3:8-13). See also the cases of **Tabu Ramadhani Mattaka Vs. Fauziya Haruni Said Mgaya, Civil Appeal No.456 of 2020, CAT (unreported), National Insurance Corporation Vs. Shengena Limited, Civil application No.230 of 2015, I.P.T.L. Vs, Standard Chartered Bank, Civil Revision No.1 of 2009**, all of which it was emphasized the effect in the following language that:

“it is a trite law that a decision in breach or violation of this principle, unless expressly or impliedly authorized by law, renders the proceedings and decision and/or orders therein a nullity even if same decision would have been reached had the party been heard.”

In essence, where the right to be heard if proved vitiates the whole proceedings and judgement resulting from such a breach unless it is proved that the party who claim to be condemned unheard was aware but absented himself from the proceedings in issue.

Further, Rule 29 of the Primary Court Civil Procedure Rules for easy for reference provides as follows:



Rule 29- Setting aside ex-parte proof:

"Where a court has given leave for claimant to prove his claim in the absence of the defendant and the defendant appears at any time before the proceedings is decided and gives a reasonable explanation for his previous non-appearance, the court shall commence the hearing afresh.

Provided that it shall not be necessary to record the evidence again which has already been recorded, if that evidence is read over to and confirmed the person who gave it."

Literal reading of the above provision, in my considered opinion, cast a legal duty to the appellant to move the court and give reasonable explanation for his nonappearance to entitle the court to vacate its previous order of ex-parte proof. In my further considered opinion, it is not the court which is casted with duty to move the appellant to give explanation because if the drafters of the law intended so they would have stated so in clear terms.

In this appeal, it should as well be noted that, there is no dispute that the appellant was served on 29.11.2021 requiring him to attend and answer the claim against him on 1.12.2021, a fact admitted by his learned advocate and himself in his letter applying to setting aside the ex-parte judgement. Therefore, an issue of service in this appeal is nonstarter.



Coming now to the merits of this appeal, in particular, on the first ground of appeal, having carefully followed the competing arguments of the learned counsel for the appellant and that of the respondent, and considered all argued and the record of appeal, in my considered opinion, I find the arguments by Mr. Rwegoshora far from convincing this court that, the appellant ever exercised his rights under that provision. Much as he was served and himself denied his right to be heard despite coming to court before the conclusion of the proceedings but his silence is that he had nothing to explain to the magistrate.

Further, it is my finding that the said provision does not cast to court with the mandatory legal duty to address the absented defendant but the opposite that it is the absented defendant who is duty bound to move the court to vacate its previous order of ex-parte hearing. Therefore, the argument by Mr. Rwegoshora that, the court was duty casted to move the appellant was argued out of ignorance as such misconceived on his part and are rejected.

That said and done, the first ground of appeal is found wanting in merits and is hereby dismissed.

On the second ground of appeal, the counsel for the appellant faults the 1st appellate court for failure to observe that the appellant was to be served with summons of hearing before the trial court proceeded with ex-



parte hearing and determine the matter. In this point, Mr. Rwegoshora was brief that much as no summons for hearing was served it was impossible for the appellant to follow the proceedings as such condemned unheard.

On the other hand, Mr. Kiviryo submitted to the contrary that on 1.12.2021 the case was scheduled for hearing after prove of service of summons to the appellant as such no need of the subsequent summons in the circumstances.

I have carefully considered these competing arguments and what exactly happened in these proceedings; and in particular, guided by the provisions of regulation 23 (b) of the **Civil Procedure in Primary Court Rules, G.N. 310 of 1964**, provides for duty of the court to direct that second summons be issued and served to the defendant if it is not satisfied that the first one was not dully served. However, this was not the case here. The summons was duly served and as already found herein above the issue of service was not an issue at all. So, the arguments by Mr. Rwegoshora that second summons was to be issued, is very much misconceived and as such rejected because unlike in the High Court, Resident magistrate or District Court of court where the Civil Procedure is applicable, under Rule 20 of the Civil Procedure in Primary Court Rules, G.N. 310 of 1964, the defendant upon dully served is supposed to appear



and answer the claim meaning is like entering defence but if he does not appear, the court is entitled to proceed as it did in this appeal.

On the foregoing reasons, I find the entire appeal with no merits and consequently proceed to dismiss this appeal in its entirety with costs.

It is so ordered.

Dated at Kigoma this 28st day of July, 2023.



A handwritten signature in blue ink, consisting of a series of vertical lines followed by a horizontal stroke and a flourish.

S. M. MAGOIGA
JUDGE
28/07/2023