IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR-ES-SALAAM DISTRICT REGISTRY)

AT DAR-ES-SALAAM

MISCELLANEOUS CIVIL APPLICATION NO. 255 OF 2022

(C/F from Civil Appeal No. 66 of 2021 in the District Court of Kinondoni at Kinondoni originating from Civil Case No. 324 of 2020 in the Primary Court of Kinondoni District at Sinza)

ACCESS MICROFINANCE BANK TANZANIA LTD ..... APPLICANT

VERSUS

ESTER WILLIAM NJIU ..... RESPONDENT

RULING

Date: 20/07 & 04/08/2023

NKWABI, J.:

The applicant was sued in the Primary Court of Kinondoni district sitting at Sinza for a sum of T.shs 40,000,000/=. The respondent had obtained a loan facility from the applicant. Out of an event that was out of her control, as the motor vehicle she was using to raise money to reservice the loan got a breakdown, the respondent failed to pay the instalments as required after she had paid several of them. She attempted to restructure the loan in vail. Her motor vehicle was seized, and she was informed by TRA that her motor vehicle would have its ownership changed. Then she sued the applicant.

In an ex-parte judgment dated 01/12/2021, the respondent obtained a decision in her favour that the motor vehicle be restored to her and failure

of which (if she had sold it) the respondent was to be paid T.shs 40,000,000/=. On 29th April, 2021 the respondent filed execution proceedings which execution order was granted on 6th July 2021. Then, the appellant appealed to the district court of Kinondoni against the denial of her purported application. The district court upheld the decision of the trial court. It dismissed the appeal with costs.

It is worth to note that the ground of appeal in the District Court was to the effect that and I quote:

> *"That the trial magistrate erred in law and fact by failure to consider sufficient grounds adduced by the appellant warranting the grant of the application for extension of time to set aside ex-parte judgment."*

In its judgement, delivered on 24th day of November, 2021 in the presence of both parties, the district court observed inter alia that:

> *"After five months from judgment, the respondent went for execution of decree at the trial court. The appellant was summoned to show cause on why the decree should not be executed against him. Then the appellant prayed for set aside ex-parte judgment and prayed the case to be heard interparty. ..."*

This application was filed in this Court on 17th June, 2022 in which the applicant is praying for orders below:

a. That this honourble Court be pleased to extend time within which the applicant will file an appeal before this honourable Court against the judgment and decree of the District Court of Kinondoni at Kinondoni in a Civil Appeal No. 66 of 2021.
b. Any other relief (s) this honourable Court may deem fit and just to grant.

The chamber summons is made under section 93 and 95 of the Civil Procedure Act, Cap. 33 R.E. 2019, section 14(1) of the Law of Limitation Act, Cap. 89 R.E. 2019. It is supported by an affidavit of Amon Meja, a principal officer of the applicant and an advocate of the High Court and subordinate Courts thereto.

The application is fought by the respondent who filed a counter affidavit which was duly sworn by herself. The matter did not end there, because the applicant filed an affidavit in reply to the counter-affidavit.

The hearing of this application proceeded by way of written submissions. Mr. Amon Meja, learned counsel, argued the application for the applicant. The

reply submission was drawn and filled by Mr. Juvenal Rwegasira, also learned counsel. Mr. Amon Meja finally lodged in Court a rejoinder submission. I am grateful to them for their powerful submissions.

The applicant's bases of this application are illegalities in the decisions of the trial court and the decision of the district court. The counsel for the applicant started by pointing out to the illegality in the decision of the trial court where he said that the primary court was not vested with jurisdiction to determine a commercial case because it was based on a loan advanced to the respondent who defaulted and the applicant conducted a public auction and sold the motor vehicle which was the collateral. Recourse being had to the provisions of section 2 of the Magistrate Courts Act which defines what a commercial case means. As the claim exceeded 30 million Tanzania shillings, then the trial court had no jurisdiction to entertain the matter, Mr. Amon opined. He cited **Saidi Musa Makolela v. Lilian John Mosha, & 2 Others**, Civil Appeal No. 222 of 2019 HC (unreported).

Then, Mr. Amon turned to express his views on illegality of the decision of the District Court on the grounds that it disregarded the raised point of law that the trial primary court lacked pecuniary jurisdiction to entertain the

matter without justifiable reasons and the district court decision disregarded the raised point of law suo motu that the trial primary court lacked pecuniary jurisdiction without giving parties the right to be heard on such issue.

It is stated that the issue of jurisdiction was raised at the district court when challenging the ex-parte judgment of the trial primary court, but the same was disregarded by the district court without justified grounds or availing parties to argue it where it decided that:

> *"If the case was a commercial matter, the appellant could have raised that issue during trial and the respondent could have argued on the same and ruling delivered."*

The counsel for the applicant referred me to the case of **Aloyce Gwae v. Theresia Philipo & Another,** Land Appeal No. 3 of 2020, HC (unreported) to the effect that the objection on jurisdiction can be raised any time even on appeal.

On the complaint that the trial court gave judgment ex-parte without summoning the applicant who was the defendant in the trial court, where it is argued that there was no summons to appear served to the applicant before the matter was heard ex-parte, it is stated that the affidavit attached to the counter-affidavit contains defects /errors including absence of the

name of the receiver of the summons and disputed the signature of the receiver, that there is no name of the person who served the summons and no date. The summons was issued on 3rd September 2020 while the case was heard on 4th September 2020 thus, no sufficient time to appear and defend.

On the 5th ground it is charged that there is illegality in the decision of the primary court by entering into decision and awarding the plaintiff 40,000,000/= without any justifiable reasons nor any supporting evidence of such claim from the respondent herein who was the plaintiff. It is argued that special damages must be specially pleaded and strictly proved.

In reply submission, apart from saying that the applicant had not accounted for each day of the delay, it is stated further that judgment was delivered on 1st February 2021 in the absence of the applicant. Execution proceedings were initiated by the respondent and summons was served to the applicant on 30th April 2021 but did not appear thus, the trial court was entitled to issue execution order. It is added that a summons served to the applicant on 3rd September, 2020 directed the applicant to appear in Court on 4th

September, 2023 sic at 8:30 am. A copy of the summons was attached to the counter-affidavit as annexure "A".

The alleged illegality on jurisdiction on the right to be heard are new issues in the present application, retorted Mr. Rwegasira. That the issues could have been raised in the trial court and the respondent would have argued them and ruling could have been delivered. It is beefed up that while every person has a right to be heard, yet, that person has responsibility to appear for hearing at the fixed time and place. The respondent is of the view that the applicant deliberately decided not to attend in court when the matter was due for hearing. It is prayed that the application be dismissed with costs for lack of merits.

The counsel for the applicant reiterated his submission in chief in the rejoinder submission. As a counter argument to the reply submission, it is stated that the illegalities suffice to justify the delay. The counsel for the applicant cited among other cases the case of **Ally Salum Said (as administrator of the estate of the late Antar Said Kleb) v. Iddi Athumani Ndaki,** Civil Application No. 450 of 2021 CAT (unreported) where it was stated that:

"In my considered view, the points of illegalities raised in the notice of motion, affidavit, and expounded on in the rival oral submissions constitute good cause for the Court to exercise its discretion to grant extension of time so that they can be determined in the intended appeal."

It is further added that in the counter-affidavit there is no effective prove of service which shows that the order of ex-parte hearing was entered the without proof by signature and stamp of the bank (the applicant). He criticised attaching the summons to the submission. He fortified his view with the decision in **Gulf Concrete & Cement Co. Ltd v. D.B. Sharprya & Co. Ltd,** Civil Appeal No. 88 of 2019 CAT (unreported). It is prayed the summons on the submission be disregarded.

It is also contended that the issue of jurisdiction was raised at the appellate district court because at the stage of the trial primary court the matter was heard ex-parte as the applicant was not aware of the existing case. He pointed out that jurisdiction can be raised at any stage even at appeal stage. For that position of the law, I was referred to **Aloyce Gwae v. Theresia Phillipo & Another,** Land Appeal No. 3 of 2020.

The counsel for the applicant summarised by saying that **first**, there is no dispute that the primary court had no jurisdiction to determine the matter for being commercial in nature, **second,** it is also undisputed that the matter proceeded ex-parte and no prove of service has been brought and **third,** it is also undisputed that the district court erroneously rejected the raised point of objection on the ground of jurisdiction without adducing good reasons nor availing the parties right of audience to argue on it. The counsel for the applicant pressed the application be granted.

It is clear that both parties have brought affidavit evidence (oral evidence) in conjunction with documentary evidence attached to the respective affidavits. It is the duty of the Court to analyse the evidence and come to its conclusion, whether to grant the application for being merited or dismiss it for want of merit. Treatment of the evidence, in an application like this is just like that in main case where a party is orally heard. In **Bahati Makeja v. R.** Criminal Appeal No. 118 of 2006, CAT, (unreported) it was said that:

> *"It is settled law that a witness who tells a lie on the material point should hardly be believed in respect of other points."*

The same position, in evidence on affidavit was underscored in the case of **Damas Assey & Another v. Raymond Mgonda Paula & 8 others,** Civil Application No. 32/17 of 2018, (CAT) (unreported) in which it is stated that:

> *"An affidavit which is tainted with untruths is no affidavit at all and cannot be relied upon to support an application. False evidence cannot be acted to resolve any issue"*

In this Court, the applicant gave false testimony that no summons was issued to her and she was not aware of the suit filed in the trial court. But there is a copy of the summons attached to the respondent's counter- affidavit which shows that the summons was served to the respondent and her officer signed it and stamped it with the stamp of the office of the applicant. Further there is falsehood that the applicant filed an application for setting aside the ex-parte judgment, but there is nothing to support assertion the by showing the copy of the form for the application and or exchequer receipt for the payment of filing fee. The procedure in the primary court in filing an application is provided under the Magistrates Courts (Civil Procedure in Primary Courts) Rules GN No. 310 of 1964 Rule 5 (1) where it is provided that applications may be written or oral. But under Rule 5(2) where an oral application is preferred, it shall be reduced into writing and signed by the

magistrate. There is no material in this application put forward by the applicant to enable this Court to extend time for appeal against the decision of the district court. Thus, if those documents are in the possession of the applicant, then, the applicant has failed to put to the Court all the materials that are needed for this Court to exercise its discretion to extend the time necessary for lodging the appeal sought by the applicant. See **Regional Manager TANROAD Kagera v. Ruaha Concrete Co. Ltd,** Civil Application No. 96 of 2007, CAT, (Unreported) where it was underscored that:

> *"What constitutes "sufficient reason" cannot be laid down by any hard and fast rules. This must be determined by reference to all the circumstances of each particular case. This means that the applicant must place before the Court material which will move the Court to exercise its judicial discretion in order to extend the time limited by the rules."*

One could also have reference to **Ratma v. Cumarasamy & Another** (1964) 3 All ER 933 where it was stated that:

> *"The rules of Court must, prima facie be obeyed, and, in order to justify a Court extending the time during which*

some step-in procedure requires to be taken, there must be some material on which the Court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation."

The above discussion disposes this application in favour of the respondent. However, in this application another concern that lingers with this Court is whether in the event one has used an incompetent or wrong avenue to seek his right can have time extended to appeal against a decision which arose from such incompetent application or wrong avenue. What I mean here is that according to the affidavit in support of the application and the supporting documents one of them being the ruling of the trial court which ordered execution to proceed, there was a purported application for setting aside the ex-parte decree of the trial court on top of an application for execution. It is mundane law that one cannot opt to seek an alternative remedy while there is that is already provided by the law. That is the position in **Kezia Violet Mato v. National Bank of Commerce & 3 Others,** Civil Application No. 127 of 2005 CAT (unreported) where it was stated that:

"It is our considered view that, where a party has no right of appeal but there is an alternative remedy provided by law, he cannot properly move the court to use its revisional jurisdiction. He must first exhaust all remedies provided by law before invoking the revisional jurisdiction of the court. The applicant who has not exhausted all remedies provided by law cannot invoke the revisional jurisdiction of the court. This application is incompetent."

Other decided cases that are relevant in the circumstances of this application are **Dangote Industries Ltd Tanzania v. Warnercom (T) Ltd,** Civil Appeal No. 13 of 2021, CAT (unreported) where it was stated that:

"The position of the law on that aspect is well settled. It is such that, a party to an ex-parte decision who is aggrieved by the motion to proceed ex-parte, cannot fault such decision in a higher court by way of appeal or revision before first attempting, at the court that pronounced the ex-parte decision, to have the same set-aside. He cannot as well combine, in the appeal or revision proceedings, as the case

may be, both the complaints on the justification to proceed ex-parte and the merit of the decision."

and **Tanzania Railways Corporation v. Deogratias Alex,** Civil Appeal No. 32 of 200 (unreported) CAT where it was held that:

"It is common knowledge that an executing court cannot turn itself to a trial court, granting new reliefs instead of giving effect to reliefs already granted in the original suit."

I am sure, as the applicant may be sure that a superior Court cannot entertain a revision application even if the impugned judgment of the lower court is fatally defective, where there is an alternative remedy for instance by way of appeal. In the same vein, I am convinced, an application for extension of time to set aside ex-parte judgment cannot be entertained on top of or within an application for execution order of the decree of the primary court in this matter.

In the circumstance, even if I grant the application for extension of time to appeal against the decision of the District Court, that extension eventually will be fruitless.

To wind-up, I find, as correctly argued by the counsel for the respondent, that the applicant has failed to demonstrated sufficient cause for extension of time within which to lodge the intended appeal, so the application is unmerited. The application is dismissed with costs. I so order.

DATED at **DAR-ES-SALAAM** this 4th day of August, 2023.

J. F. NKWABI

JUDGE