

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MUSOMA SUB-REGISTRY
AT MUSOMA
MISCELLANEOUS CIVIL APPLICATION NO. 8811 OF 2024

JAMES RUTA MUGYABUSO 1ST APPLICANT

BAYA KUSANJA MALAGI.....2ND APPLICANT

VERSUS

**PETER KERO KAJINATUS (As administrator of the Estate of the late
KAJINATUS KARISTO KERO).....RESPONDENT**

RULING OF THE COURT

20/05/2024 & 06/06/2024

Kafanabo, J.:

This is an application for an extension of time filed by chamber summons supported by a joint affidavit of the Applicants. It is made under section **14(1) of the Law of Limitation Act, Cap. 89. R.E. 2019** and section 95 of the **Civil Procedure Code, Cap. 33 R.E. 2019** (hereinafter the 'CPC').

In the chamber summons the Applicants are applying for the following substantive order:

This honorable court be pleased to extend the time within which the Applicants may file their application to set aside ex parte judgement and decree of Civil Case No 12/2022 issued on 24/7/2024.

The background of the matter is straightforward. As may be gathered from the affidavit supporting the Application, the Applicants were the Defendants in the Civil Case No 12/2022 which was filed by the Respondent in the High Court of Tanzania. The case was heard *ex parte* and the *ex parte* Judgement was delivered on the 24th day of July 2023, in favour of the Respondent.

However, the Applicants alleged that they were not aware of the judgment until when the Respondent had filed an application for execution number 86299/2023; and on the 7th day of April 2024, the Applicants were served with the notice to show cause before this Honorable court. Then they followed up on the matter and on the 16th day of April 2024, the Applicants applied for perusal of the Court file. After the perusal of the court file, they became aware that the matter was heard *ex parte*, and judgment was delivered 24th day of July 2023. However, the Applicants had neither notice of *ex parte* hearing nor *ex parte* judgement.

The Respondent filed a counter affidavit disputing the facts as deposed by the Applicants in their joint affidavit supporting the Application. The Respondent also stated that the Applicants were aware of the matter and on the 10th day of October 2022, the Applicants filed in court their joint written statement of defence. It was further stated that under the circumstances which the *ex parte* hearing was ordered to proceed in Civil Case No. 12 of 2022, the law does not provide for the party who failed to attend to be notified by the notice of *ex parte* hearing or *ex parte* Judgment

When the matter was called for hearing Mr. Godfrey Goyayi, learned Advocate appeared for the Applicants and Mr. Emmanuel Mng'arwe, Advocate entered an appearance for the Respondent.

In support of the Application, Mr. Goyayi submitted that the first reason for the extension of time is that no notice was issued to the Applicants before pronouncement of the *ex parte* judgment and decree. He submitted that the omission was contrary to **Order XX Rule 1 of the Civil Procedure Code, Cap. 33 R.E. 2019** which requires that when the case is heard, before delivery of the judgment, the parties shall be notified. It was further submitted that the Respondent did not challenge the fact that the Applicants were not notified of the date of pronouncement of the judgment. It was also submitted that since the Applicants were not given notice before delivery of the *ex parte* judgment, it was an infringement of the Applicants' right to be heard. The cases of **Ms. Casco Technologies Co. Ltd vs Kal Holding Co. Ltd (Misc. Civil Application 8 of 2021) [2022] TZHC 12025** (6 May 2022), and that of **Joflo Company Limited & Others vs Bank of Africa Tanzania Limited (Misc. Civil Application 562 of 2021) [2022] TZHC 12891** were cited in bolstering the submission.

On the other hand, the Respondent's counsel submitted that Order XX Rule 1 of the CPC does not apply to the circumstances of this case where the case was ruled to proceed *ex parte* at the stage of the First Pre-Trial Conference because of the Applicants' failure to attend. The court ordered the Respondent's written statement of defence to be struck out and proceeded to hear the matter *ex parte* under Order VIII Rule 20(1)(a) and (b) of the CPC. It was the Respondent's submission that the said Order VIII,

Rule 20(1) of the CPC suffices and Order XX Rule 1 of the CPC does not apply under the circumstances mentioned in Order VIII Rule 20(1) of the CPC as it requires the issuance of a notice of pronouncement of a judgment which is not in Order VIII Rule 20(1).

After hearing the submissions of the parties as regards a complaint on delivery of the judgment without notifying the parties it is important, first, to review the position of the law in light of the submissions by the parties.

Commencing with Order VIII Rule 20(1) of CPC, relied upon as a cornerstone of the Respondent's counsel's submission, provides that:

20.-(1) Where at the time appointed for the pre-trial conference, one or more of the parties fails to attend, the court may:

(a) dismiss the suit or proceedings if a defaulting party is the plaintiff;

(b) strikeout the defence or counter-claim if a defaulting party is a defendant;

(c) enter judgment; or

(d) make such other order as it considers fit.

Having reproduced the above provision, it was argued by the Respondent's counsel that the said provision is independent or self-governing and that the provisions of Order XX Rule 1 of the CPC on pronouncement of the judgment does not apply under the situations covered by VIII Rule 20(1) of CPC. However, this court is not prepared to agree with the Respondent's counsel in that respect as Order VIII Rule 20(1) of CPC

speaks for itself. The said provision does not provide on how and when the judgment and/or ruling of the court should be pronounced.

However, Order XX Rule 1 of the CPC provides that:

The court, after the case has been heard, shall pronounce judgment in open court, either at once or on some future day, of which due notice shall be given to the parties or their advocates.

The above provision makes it imperative that parties to the proceedings should be notified of the date of judgment. The said provision does not provide an exception to the requirement that parties should be notified if the judgment is not pronounced at once after the case has been heard. This means that even when the matter proceeded *ex parte* the requirement of notifying the parties is not exempted as regards the party who had no right of audience after the matter has been ruled to proceed *ex parte*. This position of the law has been sanctioned by the Court of Appeal not on a few occasions. In the case of **Cosmas Construction Co. Ltd v. Arrow Garments Ltd 1992 T.L.R. 127** the Court of Appeal held that:

*"Dr.Lamwai has submitted before me that the High Court had no obligation to notify the applicant of the date when judgment was going to be delivered. With respect, that view cannot be correct. **A party who fails to enter appearance disables himself from participating when the proceedings are consequently ex parte; but that is the farthest extent he suffers. Although the matter is therefore considered without any input by him he is entitled to know the final outcome. He has to be told when the***

judgment is delivered so that he may, if he wishes, attend to take it as certain consequences my follow. In the present matter the applicant was not present and there is no proof that he was served with a copy of the notice of judgment dated 7th October 1991."

The foregoing decision of the Court of Appeal falls squarely on the circumstances of the present case. This makes it clear that the Applicants, who had no right of audience after the case was ruled to proceed *ex parte* against them, were entitled to be notified of the date of delivery of the judgment. Also the decision of the Court of Appeal in the case of **Awadhi Idd Kajass vs Myfair Investment Ltd (Civil Application 281 of 2017) [2020] TZCA 181** (9 April 2020) is also relevant. Moreover, this court's decisions in **Ms. Casco Technologies Co. Ltd vs Kal Holding Co. Ltd (Misc. Civil Application 8 of 2021) [2022] TZHC 12025** (6 May 2022), and **Joflo Company Limited & Others vs Bank of Africa Tanzania Limited (Misc. Civil Application 562 of 2021) [2022] TZHC 12891** put the icing on the cake.

The rationale of notifying a party of the judgment date even when the matter proceeded *ex parte* against him, as alluded in the case of **Cosmas Construction Co. Ltd** (*supra*), is to enable that particular party, or any other dissatisfied person to take immediate action in pursuance of their rights after delivery of the judgment. This means that if a party is not notified timely of the date of delivery of the judgment, the remedies available in law may be barred by time limitation, and thus rights may be lost or may be obtained by an unnecessarily lengthy and expensive process, or a party may

be deprived of their right to challenge the decision they are not satisfied with.

Therefore, reverting to the present case, on the face of the record it is manifest that the judgment was delivered in the absence of the Applicants who, as per the record, were not notified. It is also a firm view of this court that notifying a party of the date of ruling or judgment is a point of law of sufficient importance. The Court of Appeal cases of **Lyamuya Construction Co. Ltd vs Board of Registered of Young Women's Christian Association of Tanzania (Civil Application 2 of 2010) [2011] TZCA 4** (3 October 2011) and **Hamza K. Sungura vs The Registered Trustees of Joy in the Harvest (Civil Application No.90/11 of 2022) [2023] TZCA 17324** (12 June 2023) offer guiding principles to consider.

Besides, the Respondent's affidavit, apart from a general denial, did not categorically state or prove that the Applicants were served with the notice of delivery of the judgment. The Respondent's counsel also simply submitted that the provisions of Order XX Rule 1 of the CPC are not applicable in the circumstances of this case because the matter was ordered to proceed *ex parte* in compliance with Order VIII Rule 20(1)(b) of the CPC.

Conversely, the provisions of the law above and the authorities of the Court of Appeal guide otherwise. There is no exception as regards the requirement of notifying a party to the case before delivery of a judgment.

Under the circumstances, this court finds that the Applicants have demonstrated sufficient cause for an extension of time in terms of section 14 (1) of the **Law of Limitation Act, Cap. 89. R.E. 2019**. This application

is thus allowed, the time that had lapsed is hereby extended by fourteen (14) days from the date of this ruling.

Since the above finding is sufficient to dispose of the application, considering other grounds and submissions thereof would be a waste of treasurable resources.

Moreover, since the Applicants prayed for each party to bear their costs in their submissions, and this application has tilted in their favour, each party shall bear their costs.

It is so ordered.

Dated at Musoma this 6th day of June 2024.



K. I. Kafanabo
Judge

The ruling was delivered in the presence of Ms. Suzana Gibai, Advocate for the Respondent and in the absence of the Applicants whose advocate was aware of the ruling date.

K. I. Kafanabo
Judge
06/06/2024