IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

TANGA SUB-REGISTRY

AT TANGA

DC CIVIL APPEAL NO. 22 OF 2022

LUDOVICK SERIAMAKA TARIMO & ANOTHER ..... APPELLANTS

VERSUS

EPAFRAS EPIMARCK MREMA ..... RESPONDENT

(Arising from the Misc. Civil Application No. 03 of 2022 in the District Court of Korogwe at Korogwe)

JUDGMENT

14/03/2024 & 19/04/2024

NDESAMBURO, J.:

Before the District Court of Korogwe at Korogwe, appellants Ludovick Seriamaka Tarimo and Edwin Ludovick Tarimo lodged Civil Application No. 03 of 2022, seeking an extension of time to file an application to set aside the *ex parte* judgment entered against them by the court in Civil Case No. 11 of 2014. The application was found without merit and consequently dismissed with costs.

The origins of this case date back to 26th August 2014, when the respondent, then the plaintiff, initiated legal proceedings against the appellants in the District Court of Korogwe. The respondent filed the aforementioned civil suit against the appellants, jointly and severally, seeking compensation, including general damages, for the pain and suffering resulting from a car accident caused by a motor vehicle owned by the first appellant and driven by the second defendant. As previously mentioned, the case proceeded ex parte, and the court's judgment did not favour the appellants. Upon realizing their failure to meet the deadline to contest the *ex parte* judgment, the appellants filed Misc. Application No. 22 of 2018 before the same court, seeking an extension of time to challenge the *ex parte* judgment. However, this application was withdrawn by the appellants with leave to refile following their prayer. Undeterred, the appellants pursued the matter by filing Misc. Civil Application No. 03 of 2022 before the same court, only to have it dismissed with costs on the 30th of September 2022.

Aggrieved by the findings of the District Court on the above application, the appellants preferred this appeal which is predicated on the following four grounds:

i. *That, the honourable court erred in law for failure to consider the ground of illegality which was apparent on the face of records as the requirements of the law as regards issuance of summons and right to be heard before conducting ex-parte hearing and judgment were not complied.*

ii. *That, the honourable court erred in law and fact for failure to consider the pleaded ground of sickness as a sufficient ground for extension of time.*

iii. *That, the honourable court erred for failure to observe that the appellant was sick and thus failed to make a follow-up of his case and that the advocate who was instructed did not appear hence the appellant was not heard.*

iv. *That, the learned magistrate erred in law and facts for holding that the medical letters presented before him were forged without further proof.*

Mr. Julius Damas Focus, a learned counsel is representing the appellant, while Ms. Ernesta Chuwa also a learned counsel, is advocating for the respondent. The proceedings were conducted through written submissions.

Regarding the first ground of appeal the learned counsel submitted that in the eyes of the law, the District Court failed to consider the ground of illegality raised to extend the time while the same was evident and that there was a series of procedural irregularities which went into the root of the matter. That the point of illegality was manifestly on the face of the record as depicted and admitted that there was no summons issued and also the decision was tainted with irregularity because the third-party procedure was not followed and hence erroneous. In supporting this position, he referred the decision of the Court of Appeal in the case of **Principal Secretary, Ministry of Defence & National Services v Devram**

Valambia [1992] TLR 185 and **VIP Engineering and Marketing Limited & 3 Others v Citibank Tanzania Ltd**, Consolidated Civil Reference No. 6, 7 and 8 of 2006.

On the second and fourth grounds, which were consolidated and argued together, the appellant's counsel contended that the learned trial magistrate failed to consider sickness as a valid reason for an extension of time, despite the appellant's submission of medical documentation. The appellant had provided both a medical checkup form from KCMC Hospital and a letter from Karume Health Center, indicating that the appellant had been attending clinics regularly and had been restricted from travelling for almost seven years from 2015 to 2022. He faulted the trial magistrate for questioning the authenticity of the medical report without providing any evidence to support such an assertion. At this juncture, he strengthened his argument by referencing a decision of the Court of Appeal in the case of **John David Kashekya v The Attorney General**, Civil Application No. 1 of 2021

On the third ground of appeal, the appellant's counsel submitted that the trial District Court failed to consider that the appellant was not afforded the opportunity to be heard, thereby violating the principle of natural justice (Audi Alteram Partem). This violation was compounded by the appellant's illness and the actions of an individual who identified himself as the appellant's advocate, Nicodemus, without the appellant's knowledge of whether he was indeed a qualified advocate. Furthermore, Nicodemus withdrew his services without informing the appellant.

The counsel emphasized that this situation resulted in the appellant being deprived of his fundamental right to be heard, a principle firmly established in this country, as highlighted by the Court of Appeal in the case of **Mbeya Rukwa Auto Parts and Transport Ltd v Jestina George Mwakyoma**, Civil Appeal No. 45 of 2001.

Based on the identified shortcomings outlined above, the appellant's counsel requests this court to allow the appeal and to issue an order for an extension of time.

On her part, Ms. Chuwa did not support the appeal. She argued that the appellants failed to provide sufficient reasons to support his appeal. She asserted that there was no substance in any of the grounds of complaint presented by the appellant.

In response to the first ground, she distinguished the cases attached by the appellant's counsel, stating that the circumstances which occurred in those cases are entirely distinguishable from the case at hand in this court.

She contended that the counsel for the appellant is misleading this court by arguing that a summons was required to be issued. She argued that during the scheduled final pre-trial conference the appellant's advocate named Nicodemus was present. However, he failed to appear without any prior notice on the date fixed for the final pre-trial conference, leading the presiding magistrate to make an order for an *ex parte* hearing. She cited Order VIII Rule 20(a), (b), (c) and (d) of the Civil Procedure Code, Cap 33 R.E 2019. She insisted that the law is clear and there is no requirement in the law

for the court to notify the opposite party or to issue summons to the defaulting party on the date fixed for an *ex parte* hearing.

She further argued that it was the duty of the appellant's advocate to make follow-ups with the court. Since the appellant had engaged an advocate, he stood on behalf of the parties. Therefore, the appellant was afforded the right to be heard. She cited Article 13(6)(a) of the constitution of the United Republic of Tanzania of 1977 as amended from time to time and the case of **Agness Simbambili Gabba v David Samson Gabba,** Civil Appeal No. 26 of 2008 CAT (unreported).

She finalized this ground by arguing that for illegality to be accepted as a reason for extension, it must constitute sufficient grounds. The failure to issue a summons, she contended, does not amount to an illegality apparent on the face of the records because there is no legal provision or precedent mandating the issuance of summons to defaulting or negligent parties. She cited the case of **Mtengeti Mohamed v Blandina Macha**, Civil Application No. 344/17 of 2022 to support her argument.

She submitted that the appellants were negligent and inactive in their efforts to set aside the *ex parte* judgment within a reasonable timeframe. Therefore, she requested that this ground be dismissed and that costs be awarded to the respondent.

In response to the second and fourth grounds of appeal, the respondent's advocate contended that according to section 110(1) of the Evidence Act, Cap 6, R.E 2022, the appellant bears the burden of proof. However, she argued that the appellant failed to establish that the sickness was a reason that barred him from filing an application for setting aside the *ex parte* judgment within the prescribed time. She added that the documents annexed to support this assertion were insufficient. The document does not contain all the details of the sickness of the appellant from 2014 to 2022, it does not even disclose dates and months in which the 1st appellant was in the hospital and no medicine prescriptions were attached.

In finalizing the third ground of appeal, Ms. Chuwa asserted that the dismissal of this application does not transgress the appellant's fundamental right to be heard as submitted by the

appellant's advocate as the law does not serve the negligent parties. She cited the case of **Selcom Gaming Ltd v Gaming Management (T) Ltd and Gaming Board of Tanzania**, Civil Application No. 175 of 2005, CAT.

She emphasized that the appellant failed to substantiate his claim for the requested relief, as his case lacked documentary proof. Furthermore, only that the appellant delayed almost 7 years, but also failed to discharge that duty. She cited the precedent of She cited the case of **Lyamuya Construction Company Ltd v Board of Registered Trustee of Young Women's Christian Association of Tanzania**, Civil Application No 02 of 2010

Furthermore, Ms. Chuwa contended that the lower court did not contravene the principles of natural justice, emphasizing that the enjoyment of rights necessitates the fulfilment of legal obligations. In this instance, the appellant was obligated to appear in court or notify the court of their absence before being afforded his right. Therefore, the presiding magistrate's decision was justified.

With the foregoing arguments and cited authorities, Ms. Chuwa concluded by urging this court to dismiss the appeal and with costs.

The appellant filed a rejoinder submission reiterating his submission in chief.

I have evaluated the opposing arguments presented by both parties in this appeal, taking into account the records of appeal, grounds of appeal, and the essence of written submissions. The crucial question at hand is whether the appeal holds merit.

Beginning with the initial ground, which hinges on the alleged illegality apparent on the face of the record, specifically concerning the appellant's purported lack of summons during the *ex parte* hearing and the failure to adhere to third-party procedural requirements. The respondent countered this assertion by arguing that the appellant's advocate was indeed present when the *ex parte* hearing was scheduled. Consequently, the court, according to the respondent, was not obligated to issue a summons to the appellant.

Before addressing the aforementioned ground, it is essential to establish a fundamental principle: an appellant cannot introduce issues that were not previously addressed and ruled upon by the lower court. Such an action is considered an afterthought, and as a guiding principle, the appellate court is devoid of jurisdiction to entertain such grounds. This principle finds support in the case of **Halid Maulid and Another v The Republic**, Criminal Appeal No. 342 of 2020, CAT (unreported). Consequently, this court will refrain from considering the second point regarding the alleged non-adherence to the third-party procedure, as it constitutes a new point that was not raised and determined during the application's hearing.

Turning to the first ground, a scrutiny of the court's records unveils the following sequence of events: The respondent/plaintiff initiated the proceedings by lodging the plaint on the 26th of August 2014. Summonses were served on the defendants and duly acknowledged by them, both dated 5th of September 2014. In response to the plaint lodged, the appellant/defendants submitted a joint written statement of defence accompanied by a notice of

preliminary objection on the 15th of September 2014. Subsequently, Mr. Nicodemus appeared on behalf of the defendants, including the current first appellant, on the 23rd of September 2014, and again on the 3rd of October 2015, when the matter was convened for the first pre-trial conference. He once more appeared on the 29th of April 2015.

In addressing this ground of appeal, the learned magistrate found sufficient evidence to ascertain that the appellant/defendants were indeed represented by an advocate who had entered an appearance on their behalf. Moreover, it was established that the appellant/defendants had been duly served with summonses. Consequently, the magistrate rejected the appellant's assertion that their advocate had withdrawn from representation, as there was no evidence in the record to support such a claim. Therefore, based on these findings, the appellant's argument of not being summoned was deemed untenable.

After a thorough review of the record, rulings, and submissions presented, this court is convinced that the learned magistrate's

decision to reject this ground was justified. There exists ample evidence demonstrating that the appellant was duly summoned, as evidenced by the two summonses filed in the court record. Not only that, the appellant lodged a joint written statement of defence accompanied by a notice of preliminary objection. Furthermore, the appellant was represented by an advocate who identified himself as Nicodemus.

In addition, this court cannot entertain the appellant's contention that he was not informed by his advocate about his decision to cease representing them, thereby preventing his attendance in court. The appellant had a responsibility to actively monitor his case and cannot be absolved of this obligation. This principle finds support in case law, such as **Lim Han Yung and Another v Lucy Treseas Kristensen**, Civil Appeal No. 219 of 2019, CAT (unreported) where the Court of Appeal held that 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.

From the above reasoning, the appellant cannot now claim that he was not summoned when the matter was scheduled for an *ex parte* hearing. Consequently, this ground is dismissed.

Next for consideration are the consolidated grounds number two and four, which centre on the alleged failure of the learned magistrate to take into account the appellant's illness and medical documentation in his application. The respondent contends that the appellant did not sufficiently substantiate his claims.

The ruling of the District Court on this matter determined that the appellant did not account for the delay. The court noted that the medical report, dated 13th of January 2022, indicated that the appellant was admitted to KCMC from 2015 to 2022. However, the report failed to establish the appellant's illness dating back to 2014. Additionally, there were doubts cast upon the validity of the medical report from Karume Health Centre.

Upon reviewing the ruling and the medical documents provided, the appellant stated in his amended affidavit that he has been unwell since 2014 and sought medical attention at KCMC and Karume Health Centre. The document from KCMC indicates that the appellant was admitted on the 16th of January 2021, and discharged on the 18th of January 2021. However, this document only covers the specific days of admission and cannot account for all the days the appellant was unable to attend court. Similarly, the document from Karume Health Centre, dated 13th of January 2022, is not a discharge form but a mere letter which lacks sufficient detail. Like the District Court, I find that this document cannot substantiate the appellant's claim adequately. Therefore, the appellant has failed to provide a comprehensive account of each day of delay, rendering the two grounds of appeal untenable.

The third ground pertains to the right to be heard, where the appellant argues that the District Court failed to consider that the appellant was not afforded the opportunity to be heard, thus violating the principle of natural justice (Audi Alteram Partem). The

respondent counters this by asserting that, the appellant enjoyed that right and he was obligated to appear in court or notify the court of his absence before being afforded his right to be heard could be exercised. It is sufficient to state that the appellant was not denied his fundamental right to be heard as claimed. The appellant was duly served to appear before the court and submitted a joint written statement of defence along with a notice of preliminary objection, and he was represented by advocate Nicodemus. As established in the case of **Lim Han Yung and Another**, (supra) the appellant having engaged an advocate, was still under obligation to closely follow up on the progress and status of his case. Therefore, the appellant cannot claim that he had no knowledge when when his advocate withdrew his services, and thus, his right to be heard was not violated when the case proceeded *ex parte*. Consequently, the third ground lacks merit and is dismissed.

That said, and for the foregoing reasons, I do not find any basis to fault the findings of the District Court. Consequently, the

appeal is dismissed. Bearing the nature of the appeal and the age of the appellant, each part is ordered to bear its costs.

It is so ordered.

DATED at **TANGA** this 19th Day of May 2024.

H. NDESAMBURO

JUDGE