IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT ARUSHA

MISCELLANEOUS COMMERCIAL APPLICATION NO. 09 OF 2019

(Original Commercial Case No. 04 of 2018)

BETWEEN

ARUSHA CITY COUNCIL.....APPLICANT

Versus

NMK PROJECT SERVICES.....RESPONDENT

Last Order: 07th Nov, 2019

Date of Ruling: 12th Feb, 2020

RULING

FIKIRINI, J.

The applicant, Arusha City Council sued the respondent NMK Project Services in Commercial Case No. 04 of 2018, where the respondent (then defendant) raised a counter-claim against the applicant (then plaintiff). The applicant failed to enter appearance and the Court struck out the defence and order the counter claim to be proved *ex parte* pursuant to Rule 31 (1) (b) of the High Court (Commercial Division) Procedure Rules, 2012 as Amended by GN. No. 107 of 2019 (the Rules).

The *ex parte* proof was heard on09th August, 2019. Through its 1 (one) witness and several documents, the respondent proved her case and the Court on 07th October, 2019 entered *ex parte* judgment in her favour, which the applicant Seeks to set aside under Rule 31 (2) of the Rules.

The respondent raised a preliminary point of objection that the Court was not properly moved as the chamber summons was brought under wrong enabling provision of the law. Parties were ordered to file written submissions to dispose of the preliminary point of objection. Through Mr. Sabato Ngogo counsel for the respondent, it was brought to the Court attention that the provision of Rule 31 (2) of the Rules was applicable for applications to set aside orders made under the provision of Rule 31 (1) of the Rules and not to set aside *ex parte* judgments and decrees. The Counsel stressed that the correct provision for moving the Court to set aside an *ex parte* judgment was Rule 43 (2).

Supporting his position Mr. Ngogo cited the case of **Elly Peter Sanya v Ester Nelso, Civil Application No. 3 of 2015, CAT, Mbeya (unreported)** (copy annexed) which cited with approval the decision in **Hussein Mgonja v the Trustees of the Tanzania Episcopal Conference, Civil Reision No. 2 of 2002,** where the Court had this to say:

"If a party cites a wrong provision of the law the matter becomes incompetent as the Court will not have been properly moved"

It was thus his conclusion that since the applicant preferred the application under Rule 31 (2) instead on 43 (2) of the Rules, the Court has not been properly moved and hence the application before this Court is incompetent.

Countering the objection, Mr. Sifaeli Tuluwene Kulanga counsel for the applicant, contended that this Court has been properly moved by taking out the chamber summons under Rule 31 (2) of the Rules for the reasons that Rule 31 (1) of the Rules was used by the Court to struck out the defence to the counter-claim and vide the same provision the Court entered *ex parte* judgment. To buttress his position Mr. Kulanga reproduced contents of Rule 31 (1) of the Rules. The remedy for the order made under Rule 31 (1) of the Rules, is to resort to Rule 31 (2) of the Rules, submitted Mr. Kulanga quoting the provision verbatim.

Expounding on Rule 43 (2) suggested by Mr. Ngogo as to be the correct provision of the law to properly move the Court to grant the relief sought, Mr. Kulanga contended that both rules closely examined allow to set aside an *ex parte* order upon application by an aggrieved party so long as it is within 14 (fourteen) days from the day of judgment. Fortifying his position he referred this Court to the case

of **Advatech Office Supplies Limited v Ms Farha Abdullah Noor and Bolsto Solutions Limited, Civil Application No. 353/17 of 2017 (unreported) p. 6-7** (copy supplied) On the basis of his submission Mr. Kulanga urged the Court to dismiss the preliminary point of objection raised, and consider the Court has been properly moved by the citation of one of the enabling provisions of the law.

In rejoinder, Mr. Ngogo essentially maintained his position, but went further clarifying the distinction between application of Rule 31 (2) and 43 (2) of the Rules. He clarified the use of Rule 31 (2) to be for requesting the setting aside of the order for *ex parte* proof and the striking out of the applicant's defence whereas with Rule 43 (2) such request has to be after the case has already been heard *ex parte* and an *ex parte* judgment delivered. It was his argument that since this application was for setting aside an *ex parte* judgment then it should be vide Rule 43 (2) of the Rules.

Enlightening the applicant's counsel on the new development regarding Rule 31 (1) (c), it was Mr. Ngogo's submission that under Rule 17 of the Amendment of the High Court (Commercial Division) Procedure (Amendment) Rules, 2019 the said provision allowing the Court to enter judgment no longer exist. In its place after striking out defence what follows is an order for an *ex parte* proof, which was what this Court ordered for an *ex parte* proof. This was then followed by an *ex parte* judgment.

Expressing his position on the cited case of **Advatech Office Supplies** (supra), he contended that the applicant in the cited case had both correct and wrong provisions of the law and what infuriated the Court was this guess work mode of operation opted by the counsel involved, the situation which is completely different with the present application whereby a wrong provision of law has been cited. The Court cannot condone the application with a wrong provision and it's on this footing he urged the Court to dismiss the application with costs.

The Court before which the application is placed must have powers to grant the relief sought in the chamber summons. Proper citation of the enabling provision of the law is the only way the Court is allowed or vested with powers to grant the relief sought. Short of that any chamber summons improperly filed or filed citing wrong or non-existing or failing to cite any provision at all, is rendered incompetent. And the remedy is none other than striking the chamber summons out, with or without costs.

The question for determination is which rule among the two Rules would properly move the Court to deal with the application to set aside the *ex parte* judgment as sought; is it Rule 31 (2) as argued by Mr. Kulanga or Rule 43(2) as suggested by Mr. Ngogo.

Close scrutiny of the two cited rules although the applicant considered both to be valid for the application and hence can be applied interchangeably, but the two provisions are quite distinct and cater for separate situations. Rule 31 is usually applicable during the pre-trial stage of the case while rule 43 applies after that stage has been passed.

On the other hand prior to amendment of the High Court (Commercial Division) Procedure Rules, (Amendment) Rules 2019, GN. No. 107 of 2019, the provision of Rule 31 (1) and 31 (2) of the Rules could have echoed the applicant's stance, and she would have been correct, had Rule 31 (1) (c) been applied. However in the advent of the GN No. 107 of 2019, which seemed to have escaped the applicant's counsel's attention, the law has evolved. Pursuant to rule 17 of the GN No. 107 of 2019, Rule 31 (1) (c) referred and relied on by the applicant's counsel is no longer in existence. Currently after the striking out of the defence instead of entering judgment which would have essentially been an *ex parte* judgment, now the Court is mandated to order for an *ex parte* proof which will lead to an *ex parte* judgment or dismissal order.

The implication of this development (the amendment) is that, by requiring a party to prove her case *ex parte,* it means the matter has moved from the pre-trial stage as provided under Part IV to Part VI covering appearance, hearing and examination of parties.

It is at this juncture where the application of Rule 43 (2) of the Rules kicks in. Citing of Rule 31 (2) of the Rules is by and large incorrect. While indeed, as argued by Kulanga, both Rules, Rule 31 (2) and Rule 43 (2) of the Rules can be implored to set aside an order, however, it is only Rule 43 (2) which can be applied in setting aside an *ex parte* judgment. Thus in the instant application the proper and enabling provision of the law as argued by Mr. Ngogo ought to have been Rule 43 (2) and not 31 (2) of the Rules as reflected in the present application.

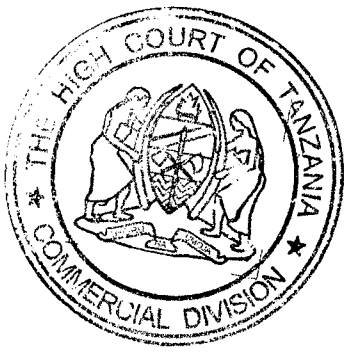
The applicant's submission that if one cites a wrong provision while trying to move the Court does not mean that the Court cannot determine the matter, since the Court is there to provide justice to the people seeking it, taking refuge in the case of **Advatech Office Supplies** (supra), is in my view flawed. *One,* the Court has to be properly moved by citing the provision of the law which vests the Court with powers to grant the relief sought and nothing else. Rule 31 (2) cited can only grant relief of setting aside an order made by the Court, at the pre-conference stage, in the absence of the party. What the applicant is seeking in the present application is the setting aside of an *ex parte* judgment and decree, which is passed the pre-conference stage. The two reliefs are in my view completely different and can only be obtained at different phases of the proceedings and through different enabling provisions of the law, for this reason it was therefore important to cite the proper enabling provision of the law.

Two, the position in the **Advatech Office Supplies** (supra) is dissimilar to the one in the instant case. In **Advatech Office Supplies** the applicant cited both a wrong and proper enabling provision. Though the practice was highly discouraged, but the Court had guess work placed before it to work on, which in the present case is lacking. The Court in the present application is left with only the wrong enabling provision cited to deal with.

Three, while I agree that parties come to Court to have their issues resolved and not to basically be punished, but that does not mean rules and procedures in place be ignored. The rules and procedures in place are not for embroidery, they are there to assist and guide the Court in the administration and dispensation of justice. Admittedly, without such arrangement dispensation of justice will be chaotic on one hand and can lead to more perilous injustice on the other.

I thus completely agree to the respondent's counsel that this Court has not been properly moved. Citing of Rule 31 (2) of the Rules is incorrect and rendered the application before the Court incompetent. The remedy for such irregularity is striking out the application, which I proceed to do by sustaining the preliminary point of objection raised.

The application is struck out with costs. It is so ordered.



P.S.FIKIRINI

JUDGE

12th FEBRUARY, 2020