IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

MISCELLANEOUS CIVIL APPEAL NO. 76 OF 1994

JOSEPH T LUCHAGULU ..... APPELLANT

VERSUS

SOKOINE UNIVERSITY OF AGRICULTURE ..... RESPONDENT

RULING

MREMA, J.:

The applicant FREDERICK O.K. MGONGO filed this application Under Section 14 of the Laws of Limitation Act,No.10 1971 and Section 95 of the C.P.C, 1966. He is praying for extension of time to institute an appeal against the judgement and decree in Civil Case No.4 of 1993 of the District Court of Morogoro. He is also praying for costs of the application. The application is supported with Mgongo's affidavit.

The facts as disclosed by the affidavit is that the Respondent - plaintiff filed an amended plaint on the 4th August, 1993 and the case was fixed for mention on the 19th August, 1993. On this latter date (19/8/93) the respondent successfully obtained leave to prove the case ex-parte by affidavit due to absence of a representative of the applicant - defendant. Ex-parte judgement was entered on the 2nd September, 1993 against the applicant. It is also the applicant's averment that he was not aware that the case was set down for mention on the 19th August, 1993 nor was he aware that ex-parte judgement had been entered against the applicant. The applicant's main complaint is on the award of shs.5,000,000/= as general damages based on tortious claim plus another award of shs.25,000/= as special damages allegedly arising from injury of character assassination on the part of the respondent - applicant. That such award could not be just granted on a mere swearing or affirming an affidavit. Proof of evidence is necessary. Highlighting the applicant's application, Mr. Kapinga, Learned counsel for the applicant, stated that it is strange on their part to observe at para 6 of the amended plaint of the respondent to contain a defamatory claim on the account that the applicant refused to pay money in connexion with the estate of the deceased

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Anna Joyce Rutabanzibwa who died intestate in a car accident on the 10th of August, 1991 to the respondent - plaintiff. That the refusal was justified because the estate - money was paid to the true and actual administrator of the deceased s estate. It is further submitted that the so called "judgement" at page 7 of the proceedings is not judgement at all as it offends rule 4 of Order 20 of the C.P.C, 1966 which very clearly prescribes that a judgement must not only be consise but also that the statement therein must show the points of determination, the decision thereon and the reason for such decision. On the strength of the above reasons, the applicant is praying for extension of time for leave to file appeal out of time to enable him contest against the said judgement.

At the hearing of this application Mr. Kapinga claimed that the respondent Josephat Rugaimkamu was properly served but was not present in court. Admittedly I over looked on this aspect and I tended to agree with the Learned Counsel on what he submitted with the result that I allowed him to prosecute the application ex-parte. With respect, however, after a thorough perusal of the Chamber Summons and the forwarding notice while writing ruling of the application I have noted with regret that Mr. Kapinga was not correct when he informed me that the respondent was served. There is no evidence to that effect. Nevertheless, I think it is also my duty to examine as whether the application is sustainable in the circumstances as revealed by the applicant's affidavit and the submission made by Mr. Kapinga, counsel for the Sokoine University of Agriculture.

The central issue here is whether from the revelation of facts from the proceedings of the district court there is reasonable or sufficient cause to extend the period of limitation for the applicant to institute an appeal out of time, notwithstanding that the period of limitation has expired as prescribed under section 14 - (1) of Act No. 10 of 1971 (Limitation Act). It is common ground that ex-parte judgement was obtained on the 2nd day of September, 1993 against the applicant Sokoine University of Agriculture (hereinafter referred as SUA). Then on the 17th day of September, 1993 the applicant filed a chamber application (supported with an affidavit) seeking an order to set aside the ex-parte judgement

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given on 2/9/1993. The application was resisted by the respondent through his advocate, Mr. Massati. One Nyabingili had appeared for the applicant. That application was eventually dismissed on being found to be defective in law, and that was on 11/1/1994. The respondent - plaintiff presented application for the execution of the judgement and decree. Mr. Nyabingili put up an application for stay of execution pending a purported fresh application for an order setting aside the ex-parte judgement. From the record this application appears to have been on the 18th of April, 1994. This was more than 90 days from the date of the ruling dated 11/1/1994. Despite the application for stay of execution it would appear that execution for attachment of the vehicles were carried out as per the court's order dated 11/4/1994. The attached motor-vehicles were released after the applicant deposited shs.1,000,000/= as security in terms of Order 21 r.24 (3) of the C.P.C., 1966. It would appear that the second application for setting aside the exparte judgement was to be heard on the 29th April, 1994 but was adjourned to 3/5/94 because the applicant - judgement debtor was not present. Still on that date the applicant was not present and the matter was pushed to 4/5/94 for mention. On this latter date the Court's record reveals that the applicant had written a letter to the court praying for two weeks adjournment so as to enable their lawyer from Dar es Salaam to appear. On 13/5/94 the present applicant's advocate, Mr. Kapinga, appeared before the District Court and made the following application verbally:

> " The first application was dismissed and no appeal was preferred against it. The right cause is to appeal. I therefore pray for leave to withdraw this application with leave to file the same before the High Court".

The District Court granted the application and made an order for the withdrawl of that application. The Learned trial Magistrate also directed that the applicant was at liberty to file his appeal before the High Court.

Mr. Kapinga then reacted on the 30th of August, 1994 when he filed the present chamber application for extension of time to file appeal out of time. Putting aside all of what really had happened in the district court concerning the miserable and inexplicable delays to file proper application for the setting aside of the ex-parte judgement, the applicant's affidavit

before this court does not say when copies of proceedings and judgement of the District Court were supplied to him after the Magistrate's order dated 13/5/94. There is no evidence to show why the application was filed after 105 days after the Magistrate's final order of 13/5/1994. It is also curious as to why the affidavit is silent as to what steps the applicant undertook after he learnt of the ex-parte judgement on the 2nd of September, 1993. The affidavit of the applicant seems to avail nothing to explain why the intended appeal has been preferred to the alternative remedy available under Rule 13 -(1) of Order IX of the Civil Procedure Code which entitles the defendant to apply before the trial court for an order setting aside the ex-parte judgement passed against him. The sub-rule provides:

" 13-(1) In any case in which a decree is passed ex-parte against a defendant, he may apply to the court by which the degree was passed for an order to set aside; and if he satisfies the court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called for hearing, the court shall make an order setting aside the decree as against him upon such terms as to costs, payment into court or otherwise as it thinks fit and shall appoint a day for proceeding with the suit:

Provided ..... (not relevant)".

It is in the evident record that the applicant attempted to move the court to set aside ex-parte judgement against him but his efforts bore no fruit as the court hold that the affidavit filed in support of the application was bad in law. A second attempt also failed. But the position in the matter still remained unchanged in that the applicant - judgment debtor's legal right to apply to vacate the ex-parte judgement had not been declared stale by the court. I would therefore take the view that while that legal right accorded to the applicant - defendant through which he could cause the subordinate court to vacate the ex-parte decree passed it, it is not legitimate and proper to circumvent that procedural rule and go to the higher court to challenge the ex-parte judgement which the trial court had jurisdiction to set it aside upon sufficient cause or reason being shown.

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While I am fortified by a number of authorities insisting that sufficient reason has to be the deciding factor in an application for an enlargement of time, and also taking into view the fact that this court has unfettered discretion to extend time for leave to appeal out of time, however, regard must also be had to the manner and way the proceedings were handed by the trial court. If I understand the applicant's affidavit correctly, coupled with the submission made before me by Mr. Kapinga, counsel for the applicant, the main complaint is that grave injustice was occassioned by the trial court when it awarded to the plaintiff - decree holder (respondent) Shs.5,000,000/= as general damages, and Shs.25,000/= as special damages based on a simple averment of the respondent's affidavit without proving the alleged complaint by oral evidence. That an affidavit could not on the (balance of) preponderance of evidence prove the alleged defamatory character assassion of the plaintiff without having recourse to real evidence by the plaintiff's witnesses. It is also questionable as how the plaintiff's character could have been injured on the account of the fact that the applicant-defendant refused to make payment out of the estate of the deceased Anna Joyce Rutabanzibwa to the respondent for reason that the money was actually paid to the administrator of the deceased's estate one Wilson Samson. Whether this statement is correct or not, the point that outs right accross my mind is whether the trial Magistrate was right in passing the Judgement on facts based on a sworn affidavit and not on evidence proving the extect of damage or injury to the plaintiff's character and exposition, the principle used in determing the quantum of damages awarded, et ce tera. It is also the rule of law that special damages are not generally assessed but must strictly be proved by concrete evidence, and in most cases by documentary evidence. I have painstakingly delved into the entire record of the lower court ith a view to ascertaining as what were the actual averments stated in the affidavit filed to prove the plaintiff's case ex-parte. It was not without difficulty, I dare say, to perceive from all the affidavits found in the court record that only one affidavit tends to show that it could be the one purporting to be one as such filed in proof of the plaintiff's case. If then I am right that the every affidavit I am referring to is the one filed in support of the plaintiff's claim, with greatest respect, one deserves to be perplexed because the affidavit itself does unequivocally state as for what it seeks to support. For the sake of this ruling and benefit of the parties, it is worthwhile to show what the affidavit avers, starting from para 2 thereof:

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2. That I am the holder of a power of attorney by one Wilson Nyitwa who was duly appointed Administrator of the estate of one Anna Joyce Rutabanzibwa now deceased.

3. That as a holder of such power attorney I presented all claims due to the estate to the defendant.

4. That initially the defendant paid all the presented dues to me and I eventually remitted the same to the administrator of the estate.

5. That when I presented the deceased's insurance claims, and after I had incurred same expenses following the claims up and down to Dar es salaam, I handed over the cheque to the defendant.

6. That instead of issuing me with the cheque as they had done before the defendant flatly refused to do so, implicitly casting doubt over my credibility and honesty.

7. That as a result of such action I felt greatly humbled down and instituted the present suit to restore my dignity and to recover damages for the wrong inflicted upon me by the defendant.

8. That I verily and strongly believe I am entitled to the reliefs claimed in the plaint.

Wherefore I pray for judgment and decree against the defendant as shown in the plaint.

From such affidavit, in the first place it was not exhaustively proved that the applicant-defendant was obliged to pay the money from the deceased's estate to the respondent - plaintiff. In otherwords no evidence called from the administrator of the estate, or even the beneficiary to positively confirm that the alleged power of attorney had exclusively and absolutely required that the deceased's property should be handed over to the plaintiff (respondent). Secondly, it was not shown in evidence what wrong the applicant - defendant had committed by sending the money in the deceased's estate directly to the primary court of the area in which the administrator of property is or was residing? Thirdly, it is not explained in evidence, as to what was the stumbling block preventing the respondent - plaintiff to collect the said money from the primary court to which the money was sent for collection as long as he was holding the power of attorney so to do? All these questions, in my considered view, remain unanswered and in effect it cannot, without reasonable criticism, be said that the judgment was judicially, let alone judiciously, made

under such circumstances. I am tempted to believe, and also hold as intimated by the applicant's counsel, Mr. Kapinga, that reading from the affidavit and judgement, what the plaintiff holds as a judgement, is not a judgment within the meaning of sub-rule 4 of Order 20 which provides:

> "Judgment shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision".

What has been described as judgment is found at page 5 of the typed proceedings, and is dated 2/9/93, and it reads:

> "Court: Having gone through the affidavit let the judgment entered as prayed".

As I have attempted to show above, the affidavit (herein above recited) itself is insufficient to concisely and conclusively proved the facts for consideration and determination, nor does the said "judgment" shows the points for determination, and on what reasons on which the decision was founded.

Although the application before me is to seek extension of time for leave to file an intended appeal outside the prescribed limitation period, in my inclined view, it will not serve the interest of justice whether to grant or refuse the application because the judgment or decree sought to be appealed from was neither judgement nor proper decision founded on the correct principles of law. In this regard, I have no alternative but to invoke the additional powers of revision conferred upon this court interms of section 44 - (2) of the Magistrates' Courts Act, 1984 which says:

> " 44-(2) In addition to any other powers in that behalf conferred upon the High Court, the High Court - may, in any proceeding of a Civil nature determined in a district court or a court of a resident magistrate, on application being made in that behalf by any party or of its own motion, if it appears that there has been an error material to the merits of the case involving justice, revise the proceedings and make such decision or order therein as it seems fit: Provided ....."

I am mindful of the saving provision under the sub-section that unless the effect of such revision is to increase any sum awarded or altering the rights of any party to his detriment, it is not necessary that the parties, or one of them, must be present at the time for revision is made, or that must first be

given an apportunity to be heard. In the present case the situation is that the proceedings in the district court are such that they be revised, and are accordingly revised, and with a direction that the suit be heard de novo before another Magistrate of competent jurisdiction. It follows therefore that all the orders made consequent upon that judgement are invalidated, and accordingly are set aside I make no order as to costs.

A.C. MRUMA
JUDGE

Delivered on 15th November, 1994 at Dar es Salaam.

A.C. MRUMA
JUDGE

Applicant - Absent
Respondent - Absent

A.C. MRUMA
JUDGE

ORDER: The Order for revision be supplied to the parties upon payment of fees, according to law.

A.C. MRUMA
JUDGE

Certified true copy of the Original.

A.R. MANENTO
SENIOR DEPUTY REGISTRAR