

TANZANIA / JUDGMENT

20171124 TZHC Dar es Salaam 1

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TZHCDECIDED
24 November 2017

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f IN THE UNITED REPUBLIC OF TANZANIA \. IN THE HIGH COURT OF TANZANIA AT DAR ES SALAAM CIVIL REVISION NO 18 OF 2017 (Originating from the Resident Magistrates' Court of Morogoro in Misc. OWi Application No 14 of 2017)

- a) call for recor~ examine and revise the proceeding~ ruling and order of the Resident Magistrate Court of Morogoro issued by Hon. I.A Msacky (RM) dated Z'd June 2017 in res ect of Misc. Civil Revision No.18/2017 1 R. Sameji, J Civil Application No. 14 of 2017 arising from Civil Case No. 27 of 2016 as there exist serious irregularities, illegalities, impropriety and incorrectness which call for immediate intervention of this Court, before Justice is irretrievably hijacked;
- b) quash the said ruling and order anc! njake. ;~u;h q_rde[si 'as it deems fit; and ' . . .
- c) costs of this Application to be borne- by the respondent , ∴ o· C'. The Application is support~c::h' by affidavits duJJy sworn by ELIZABETH. MURO, a Head of L.egal· Department and Company Secretary of the applicant and NORBERT MLWALE ~ounsel for the applicant. A brief background 6n the facts of the case as obtained from the record indic~tes that,, on 0?/6/2017 the trial court entered exparte Judgment again st the applicant. Prior to the said Judgement, on 21 st August 2016 the applicant was served with a plaint in respect of Civil Case No. 27 of 2016, whereby on 1st September 2016, the applicant filed a Written Statement of Defence accompanied by a Notice of Preliminary Objection that, the plaintiff/respondent has no cause of action against the Civil Reivision No.18/2017 2 ; . , ~ ? . - R Somejl,J
- -- ~ ~~~ ,_'. --- - ~ ~. ----- ---- defendant/applicant. It is on record that, after filling the said preliminary objection, the defendant/applicant did not enter appearance to defend the same hence the trial court proceeded to hear and determine the matter ex parte and issued an exparte Judgement in the favour of the respondent. Subsequently, the applicant filed a Misc. Civil Application IVCJ~ 14 o(,?017 seeking for an extension of time within which to file an applic:atibn to set aside the exparte Judgement and decree. However, the said Application was dismissed on 2nd June 2017 forbeing com;mehced by an incompetent principal officer and supportediby an inturabli.defective affidavit, hence, this Application. At the hearing of this Application the applicant is under the services of Mr. Norbet Mlwale, the learned Counsel, while the respondent is represented by Mr. P~inias . Damas Majura, the learned Counsel. By consent the ''' application was argu'ed by way of written submission.

Submitting in support of the Application, Mr. Mlwale argued that the subordinate court exercised its jurisdiction illegally by dismissing the application. He was of the view that, the proper remedy was to strike out the application and not to dismiss it, as the remedy for striking out the Civil Revision No.18/2017 3 4..R.SameJ;.J application would give a room to the applicant to re-file the same and if the application will be dismissed the court denied the applicant the legal right to re-file it. He cited the case of MIC Tanzania Ltd Vs. Minister for Labour and Youth Development and Another, Civil Appeal No. 103/2004 (unreported) where the Court of Appeal stated that; "after all, it is now trite law that, once an appeal or an application is Found to be incompetent, the only option is to strike out it out". Mr. Mlwale added that, the trial court ruled out that the affidavit in support of Misc. Civil Application No. 20 of 2012 contains two paragraphs, four (4) and five (5), which were on hearsay evidence. While Mlwale admitted that the said two paragraphs were supposed to be declared defective, but he said, the same cannot render the entire Affidavit defective. It was the view of Mr. Mlwale that, since the said Affidavit contained seventeen (17) paragraphs, the proper remedy was for the trial court to expunge the said two paragraphs with hearsay evidence and proceeded to determine the application on the basis of the remaining fifteen 15 paragraphs. He referred to Samwel Kimaro Vs. Hidaya Didas, Civil Application No. 20 of 2012 and Phantom Modern Transport (1985) Ltd Vs. D.T Dobie. In the said cases, the court held that defects in an affidavit are inconsequential those defective paragraphs can be expunged or overlooked leaving the substantive parts of it intact so that the court can proceed to act on it. It may be signed and verified on behalf of the corporation by a secretary or by any director or other principal officer of the corporation who is able to depose to the facts of the case'. [Emphasis supplied]. Civil Revision No.18/2017 5

- The court found that the trial court was wrong in striking out the application.
- The court found that the trial court was wrong in striking out the application.
- The court found that the trial court was wrong in striking out the application. It was the view of Mlwale that, it was wrong for the trial Magistrate to act as if the provision was couched in a mandatory terms. Elaborating further on this matter the learned Counsel argued that the court to rule out that the officer is vested with the authority and was supposed to embark on close scrutiny of facts by calling witnesses, the stage which was not yet arrived at. He thus noted that, it was wrong for the trial court to conclude that, the deponent was not a competent principle officer through a preliminary objection raised in the respondent's reply submissions without venturing into the merit of the application. He argued further that, the preliminary objection raised does not fall in the ambit of preliminary objection as per the test and standard set out in Mukisa Biscuits Manufacturing Co. Ltd Vs. West End Distributors Ltd (1968). As regards the issue of jurisdiction he said, the trial court did not have pecuniary and territorial jurisdiction

as the specific damages claimed by the applicant. He argued that, specific damages are the ones used to ascertain pecuniary jurisdiction of the court and not general damages. He referred to the case of China Friendship Textile Company Ltd Vs. Our Lady of Usambara Sisters (2006) TLR 70, where the court of appeal stated that; "it is the substantive claim and not the general damages which determine the pecuniary jurisdiction of the court". He finally prayed, the Application to be granted. In response Mr. Majura started by noting that the applicant's written submission in support of the Application has not been signed by Mr. Mlwale. He then argued for the first issue on whether the deponent in the supporting affidavit is duly authorized principal officer of the applicant by referring to section XXVIII Rule -1 (1) of the Civil Procedure Code and said all pleadings are required to be signed and verified by the secretary or any director or other principal officer and that the word used is "is" to connote only a single officer out of the referred officers of the company who will be authorized by the Board of Directors through a Board Resolution. He said in the case at hand, the deponent was not duly authorized principal officer of the applicant by virtue of the above provision of the law. Civil Revision No.18/2017. On the issue of whether the law authorizes the deponent to commence legal proceedings on behalf of the applicant, Mr. Majura submitted that, the subordinate court maintained the Board Resolution as legal requirement and according to him it was essential for the applicant to produce it before the subordinate court to ascertain whether the person commenced the legal proceedings was duly authorized to do so. He elaborated that, in the main suit, the Written Statement of Defence was deposed by one Elizabeth Muro who was from the applicant's legal department and the application was filed by the advocate one Norbert Mlwale from Epic Law Partners. Mr. Majura wondered as to whether the law (above) allows anyone to commence a legal action on behalf of the company? He cited the case of Resolute Tanzania Ltd Vs. LTA Construction (T) Ltd & Others, Commercial Case No. 39 of 2010 (unreported) and National Oil (T) Ltd and Another Vs. Standard Chartered Bank (T) Ltd Commercial case No. 97 of 2005 (All unreported). Regarding the issue of an incurably defective affidavit, Mr. Majura started by defining the term 'affidavit' that it means a written document that purports to be voluntary and contain truthful statement(s) of the deponent.

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Magistrate Courts' Act, (supra), this Court has power of supervision over all District Courts and may at any time call for and inspect the records of such courts and give directions, as it considers necessary in the interests of justice, if it appears that, there has been an error material to the merits of the case involving injustice, the High Court may revise the proceedings and make such decision as it may think fit. See the case of *Lakshmi Dyeing & V. Liwangaswamy*.

(1980) 4 L.J. - sec 259: AIR 1980 SC 1253, where it was held that: - "In revisional jurisdiction, the High Court is to satisfy itself in three matters, namely: - (a) that the order of subordinate court is within Jurisdiction;

(b) that the case is one in which the court ought to exercise its jurisdiction; and

(c) that in exercising its jurisdiction the court has acted illegally that is, in breach of some provision of law or with material irregularity. Civil Revision No.18/2017 10

----- That, being said, it suffices to add on this point that, the power of the High Court to hear a revision Application is generally given to superior court to satisfy itself with the correctness, legality or propriety of any finding or order or any decision and the regularity of the proceedings of the subordinate court. See the decision of the Court of Appeal in *SJ Lariff v. i e r*,

• , : t ' " \ , , . Abdallah Salim and Another Vs Mahsen Abdalla C s ~ nm, Civil Revision No. 11 of 2016 and Joseph Wasonga Otieno Vs Assumpter Nshunju Mshama, Civil Appeal No. 97 of 20,16, CAT (All unreported). Having perused the record herein, I will direct my mind to the Ruling and Order of the trial court issued on 2nd June 2017 in respect of the Civil Application No~ 14 of 2017 which is the subject matter of this Application. In the said Ruling the trial Magistrate clearly indicated that the reason of dismissing the Application was due to the fact that it is supported by an incurably defective Affidavit. For the sake of clarity, I have endeavored to reproduce the last paragraph of the Ruling delivered by Hon. I. A. Msacky (RM) at page c26 where he indicated the reason for the dismissal that: - Civil Revision No.18/2017 11 ' I f " The application is hereby dismissed with costs for being commenced by an incompetent principal officer and for being supported by an incurably defective affidavit". From the above paragraph it is clear that, the trial Magistrate dismissed the application for being supported by an incurable defective affidavit. f\Jow, : : . ' : the following question is whether it was proper for the trial Magistrate to dismiss the said Application. It is a position of the law that the remedy for an application supported by an incurably defective affidavit is to be struck off Affidavit is termed to contain defects, it is out and not dismissal. Once renders the entire Application incompetent, as it has no legs to stand on. In some cases when there are only few paragraphs which are defective, the trial Magistrate or a Judge, particularly when the remaining paragraphs can still support the prayer made in the Chamber summons, may decide to only expunge the offensive paragraphs and continue to consider the application on the basis of the remaining

(1) of the Civil Procedure Act (supra) and the case of Tanzania Electric . Supply Company Ltd v. Dowans Tanzania Ltd, Miscellaneous Commercial Application No. 19 of 2008. In the matter at hand and as it was submitted by Mr. Mlwale that, after the trial court noted t t, the two Civil Revision No.18/2017 12 paragraphs in the Affidavit were defective and offensive, the proper remedy was to expunge them or struck out the entire Application, but not to dismiss it. It is also a common ground that in some other cases where the errors noted in the affidavit are not fatal and does not render the entire af,nqavit fatally defective, the court has discretion to permit the applicant tB rectify the error. See for instance the decision of the Court of Appeal in the Hon Attorney General and 2 Others Vs V.G. Chavda, Civil Application No. 122 of 2004, (Unreported) qubtlng with c:lpproval the passage by Bowen . . L.J. in Cropper V Smith[1884] XXV Ch.D. 700 at p. 710:- 11 1 know pf no kind of error or mistake which if not fraudulent or intended to overreach/ the Court ought not to correcl if it can be done without injustice to the other party. Courts do not exist for the sake of discipline but for the sake of deciding matters in controversy. .. " The position of the law is clear and settled that defective applications are always struck out to allow time for the concerned party to rectify the said defects and allow the matter to be determined on merit. There are Civil Revision No.18/2017 13 S - ~ R. Sameji,J . ~ -- -----. .. ~-- ~---- . -

- ~- --- ~--- . - ---- . -----~ numerous authorities to this effect. See for instance the cases of Edward Bachwa and 3 Others. V Attorney General and Others, Civil Application No.128 OF 2008; Chama Cha Walimu Tanzania V The " We are of the view that upon being satisfied that the appeal was incompetent for reasons it assigned, it ought to have struck out the . - - - - ----
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- • .. - - - - u --~. :::_ _ ~:,~~-i~* :;,f\:. ~:- -. ~ -- ~~~~ - ~,~~ .., . - - - - . __,,__, -_- .:~ the appeal it implied that there was a competent appeal before it which was heard and determined on merit which is not the case' In the circumstance and based on the above authority and taking into account that the applicant's case is yet to be determined on merit, I hereby quash the impugned Ruling and Order made by the trial court in respect of the Civil Application No. 14 of 2017 dated Z'd June 2017. Furth~rmore and in the lens and interest of justice, I remit the matter back to the trial court to correct the defects. I make no order asta,costs.- It is so ordered. R. KEREFU SAMEJI JUDGE 24/11/2017 COURT_-. Ruling to be delivered by the Deputy Registrar on 24th November 2017. R. KEREFU SAMEJI JUDGE 24/11/2017 Civil Revfsion No.18/2017 15

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Prepared on 14 October 2026 · Esheria