

TANZANIA / JUDGMENT

Land Appeal No

COURT
TANZLII

DECIDED
29 October 2024

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IN THE HIGH COURT OF TANZANIA (LAND DIVISION) AT PAR ES SALAAM LAND APPEAL NO. 22659 OF 2024 (Originating From Application No. 26/2024, Kinondoni District Land and Housing Tribunal) ENTERPRISING ALLIANCE LTD..... APPELLANT
VERSUS SYONE SIMON KIONGOSYA.....1st RESPONDENT FOCUS MALIBATE LUGOYE..... 2nd RESPONDENT

JUDGMENT

16th to 29th October, 2024 E.B. LU VAN DA, J The Appellant above mentioned is appealing against the ruling of the Tribunal where it refused to extend time for filing an application to set aside the ex-parte judgment in Application No. 433 of 2020. In the memorandum of appeal, the Appellant raised twelve grounds of appeal. However, in the arguments, Mr. Boniphace E. Meli learned Counsel for Appellant consolidated grounds number 1, 6 and 7 into a single ground also consolidated grounds number 4, 5, and 11 into a single ground, thus: One, the Honorable Chairperson erred in law and fact for failure to properly analyze and evaluate the evidence in record as a result reached at a wrong decision; Two, the Honorable Chairperson erred in law and fact by misinterpreting the decision of the case of Cosmas Construction Co. Limited vs Arrow Germents Ltd i

[1992] TLR 127; Three, the Honorable Chairperson erred in law and fact by ignoring the principle established in the case of Shaban Khalfan Kondo vs Tajiri Abdi Barua, Civil Appeal No. 232 of 2021, CAT DSM; Four, the Honorable Chairperson erred in law and fact to base its decision on extraneous matters/un-pleaded evidence; Five, the Honorable Chairperson erred in law and fact by holding that the Appellant failed to show sufficient cause while in his ruling he admits that the Appellant was not served with summons to appear on the date when the ex-parte judgment was to be delivered; Six, the Honorable Chairperson erred in law and fact for failure to interpret the principle enunciated in Tanzania Breweries Limited vs Herman Bildad Minja, Civil Application No. 11/18 of 2019, CAT; Seven, the Honorable Chairperson erred in law and fact by going into substantive matters of the case which was supposed to be discussed in the application for setting aside ex-parte judgment and not in application for extension of time; Eight, the Honorable Chairperson erred in law and fact by relying his decision on the fact the Respondent was aware of the presence of the main case in the Tribunal while they were in discussion at

Kisutu while the said fact was not proved by the Respondent in their counter affidavit; Nine, the Honorable Chairperson erred in law and fact by holding that failure to issue summons to appear on the date on pronouncement of ex-parte judgment 2 to the party against whom ex-parte judgment was to be delivered in his or her absence alone does not suffice to grant application for extension of time. Ground number one that the Honorable Chairperson erred in law and fact for failure to properly analyze and evaluate the evidence in record as a result reached at a wrong decision, the learned Counsel for Appellant prefaced his argument by citing Registered Trustees of Joy in the Harvest vs Hamza K. Sungura, Civil Appeal No. 149 of 2017, CAT, for a proposition that the first appellate court has duty to evaluate the evidence of the trial court and come up with its own independent finding. He cited Leonard Mwanashoka vs The Republic, Criminal Appeal No. 226 of 2014, CAT Bukoba. He submitted that the Tribunal failed to evaluate the evidence tendered by the parties especially the Appellant, he faulted the Tribunal for being biased and based his decision on the First Respondent averments while ignoring that of the Appellant. He cited Shaban Khalfan Kondo vs Tajiri Abdi Barua, Civil Appeal No. 232 of 2021, CAT DSM; Arcopar (O.M.) S.A vs Harbert Marwa and Family Investments Co. Ltd & Three Others, Civil Application No. 94 of 2013; Abubakari I.H. Kilongo and Another vs Republic, Criminal Appeal No. 230 of 2021, CAT. He submitted that in the affidavit the Appellant averred that there was illegality on that she was not served with summons to file written statement of defence or summons to attend during the pronouncement of ex-parte 3 judgment. He cited Elia Mwamafupa and Eleven Others vs The Board of the Registered Trustees of Baptist Church of Tanzania, Civil Application No. 526/06 of 2014, CAT. He submitted that the Tribunal failed to evaluate evidence on record, on that there was no proof of report of Tribunal process server to prove that the Appellant was served as per the requirement of the law, argued there is no any evidence to show that the person purport to have received the said summons was a director, secretary of the company and showing that he was receiving the said summons on behalf of the company. He cited Pathec Limited vs Juma Lukinda Majengelo, Civil Appeal No. 42 of 202 (sic) HC Morogoro; Leonard Mwanashoka vs Republic, Criminal Appeal No. 226 of 2014 CAT Bukoba. In response, Ms. Jane Goodluck Mseja learned Counsel for First Respondent submitted that what the Appellant is addressing is clearly stipulated in the record that the Appellant herself appeared and was under representation of advocate Hadija Tati who appeared thrice and was given a chance to present her written statement of defence, but defaulted to do so despite being give extension of time thereafter. She distinguished Shabani Khalfani Kondo (supra) for explanation that therein the Appellant passed away, argued it was necessary after his death the court to issue summons to the administrator to be notified on the ongoing case. She cited Hyasintha Malisa vs John Malisa, 4 Mies. Civil Appeal No. 167/01 of 2021, for a proposition that it is a recent position on whether illegality can be drawn to the case where there is a failure to issue summons at the time of pronouncement of judgment. The Second Respondent submitted in replica to the argument of the First Respondent regarding representation of the Appellant by advocate Hadija Tati and allowance of extension of time file a written statement of defence. He

submitted that the service was sufficiently made to the Appellant, arguing that is why on 7/10/2020 and 30/10/2020 the Appellant appeared at the Tribunal through an advocate. He distinguished Elia Mwamfupa (supra) and Pathec Limited (supra) for explanation that therein the Defendant did not appear in court at all. He submitted that the matter before the Tribunal was for extension of time to file an application to set aside the ex-parte judgment, he therefore argued that the Tribunal was not under duty to examine the evidence submitted by the Appellant. He submitted that the Appellant's duty is to show that sufficient reason has been advanced to warrant the Tribunal to extend time. On rejoinder, the learned Counsel for Appellant dispelled a fact that she appeared in person at the Tribunal and disowned to have engaged any advocate to represent her at the Tribunal. He submitted that the First Respondent had not disputed a fact that there was no proper service of the summons to the Appellant and that the said summons was tainted with illegality for explanation 5 that it was attested by the person who sworn. He submitted that the Respondent did not dispute a fact that the Appellant was not served with summons to file written statement of defence. On my part, ground number one is unmerited. In the impugned ruling from page one to page seven the learned Chairperson prefaced it with the reliefs sought in the chamber summons, recapitulated averments in the affidavit and captured arguments by both parties. Thereafter the learned Chairperson embarked in critical evaluation and deliberation on each pleaded fact and argument made, as it can be reflected from page eight going to page thirteen of the impugned ruling. The argument that the learned Chairperson was biased for basing his decision on the First Respondent averments while ignoring that of the Appellant, apart from being a new ground which was not pleaded, also is misleading. In the impugned ruling, the learned Chairperson considered the ground of illegality pleaded by the Appellant, considered the case of Cosmas Construction (supra). When the learned Chairperson was considering the decision of Cosmas Construction (supra) regarding non-service of summons on the date of delivery of ex-parte judgment, for which the learned Counsel for Appellant banked on it to persuade the Tribunal that it amounted to the illegality. In rebuttal, the learned Chairperson cited a recent decision of Hyasintha Malisa (supra), where the apex Court ruled, 6 7 do agree and it is on record that the parties were not informed on the date of delivery of the ruling. Nonetheless, I am not persuaded by the submission of Mr. Shayo that it goes to the root of jurisdiction of the High Court because from the submission, the counsel for the Appellant failed to show how failure to notify parties on the date of delivery of ruling goes to the root of the jurisdiction of the trial court' When arguing on ground number two, the learned Counsel for Appellant was of the view that the holding in Cosmas Construction (supra) connote that failure to issue summons to appear on the date ex-parte judgment is delivered against the party whom ex-parte judgment is to be delivered is fatal and renders that decision to be nullity. With due respect, the position of non-service of summons on the date of delivery of ex-parte judgment is as stated in the recent decision of Hyasintha Malisa (supra), that it does go to the root of the jurisdiction of the court/tribunal, therefore no illegality can be traced from that angle. To my view, non service of summons on the date of delivery of judgment (ex-patef) it is worthy for

consideration when one takes the root of challenging the ex-parte judgment vide section 70(2) of the Civil Procedure Code, Cap 33 R.E. 2019, or extension of time thereof. On ground number seven, the Appellant faulted the learned Chairperson for going into substantive matters of the case which was supposed to be discussed in the application for setting aside ex-parte judgment and not in application for 7 extension of time. Surprisingly on this appeal, the learned Counsel for Appellant was bringing arguments for a fact that there was no proper service of the summons to the Appellant, the Appellant was not served with summons to file written statement of defence, there was no proof of report of Tribunal process server to prove that the Appellant was served as per the requirement of the law, argued there is no any evidence to show that the person purport to have received the said summons was a director, secretary of the company and showing that he was receiving the said summons on behalf of the company. As alluded by the Second Respondent that the matter before the Tribunal was for extension of time to file an application to set aside the ex-parte judgment, and the Appellant's duty was/is to show that sufficient reason has been advanced to warrant the Tribunal/this Court to extend time. Therefore the arguments which were hinged on the merit of the intended application for extension of time, are misplaced. The adumbration above, takes into board a complaint in ground number two as well as number three and six. Ground number four, that the Honorable Chairperson erred in law and fact to base its decision on extraneous matters/un-pleaded evidence. The learned Counsel for Appellant cited page six of the impugned ruling that where the learned Chairperson discussed on issues of filing the application on 29/09/2020 vide exchequer receipt No. 920273011169434; summons being issued to parties where the Appellants summons was received by Geogratus M. Kajola on 01/10/2020 and on 7/10/2020 the Appellant was represented by advocate Hadija Tati, later on the First Respondent prayed to the Tribunal to make amendment to the application where the defence was filed within time and on 30/10/2020 advocate Msengezi hold brief for advocate Hadija and prayed for condonation for extension of time to file defence out of time and the Tribunal accorded him seven days to file defence. He submitted that nowhere in the parties' affidavits and counter affidavits all these statements were jotted down. In reply, the learned Counsel for First Respondent submitted that those facts were pleaded into paragraph seven of the counter affidavit. The Second Respondent submitted that it is the duty of the Tribunal to check the whole record to satisfy whether a particular action was taken or not, or what transpired in the proceedings of a particular case. He submitted that Tribunal did not act on extraneous statements. To my view, this ground is without substance. What was ruled by the learned Chairperson was born from the averments in the pleadings, specifically contents of paragraph seven of the First Respondent's counter affidavit, where stated that, 'That the contents of paragraph 7, 8 and 9 to the applicant's affidavit is strongly disputed as the applicant was well aware of 9 the ongoing application No. 433 of 2020 and he appeared while represented by advocate Hadija Tatu who represented the applicant where on the second day of his appearance she prayed to be given a chance to file his reply to the said application and at the same time did not appear despite several summons issued an act which triggered the tribunal to order an ex-parte

hearing' Unfortunately, the Appellant did not file a reply to the counter affidavit to controvert or dispel these facts. In law it amounted to concession. Therefore, the Appellant cannot take an advantage of her own default. Above all, as alluded by the Second Respondent, the Appellant having pleaded on facts regarding to propriety or illegality on service of summons, the learned Chairperson was under obligation to check from the Tribunal records for purpose of achieving justice to both parties. Ground number five, was abandoned. Ground number seven, that, the Honorable Chairperson erred in law and fact by going into substantive matters of the case which was supposed to be discussed in the application for setting aside ex-parte judgment and not in application for extension of time. The learned Counsel for Appellant submitted that the learned Chairperson went beyond his jurisdiction by discussing on matters which was to be discussed in the application to set aside ex-parte judgment. He submitted that the learned Chairperson was supposed to see on 10 whether the Appellant has established sufficient cause to warrant him to exercise his discretion to either grant or refuse to grant the prayers sought. Neither the learned Counsel for First Respondent nor the Second Respondent made reply to this ground. This might be for obvious reason that the learned Counsel for Appellant was arguing on abstract, in a sense that the learned Counsel for Appellant made no mention of any of the so called substantive matters of the case which was supposed to be discussed in the application for setting aside ex-parte judgment which alleged the learned Chairperson discussed during adjudication of the application for extension of time. To my view, even if it can be traced from the impugned ruling still the confusion was attributed by the learned Counsel for Appellant himself. Example in his argument which was submitted by the learned Counsel for Appellant before the Tribunal regarding issues of non-service of summons on the date of delivery of ex-parte judgment, an affidavit of the process server did not show if summons were received. Therefore, it is unfair to heap all the blame to the learned Chairperson on the mistakes and confusion committed by the litigants themselves. Ground number eight, that the Honorable Chairperson erred in law and fact by relying his decision on the fact that the Respondent was aware of the presence of the main case in the Tribunal which were in discussion at Kisutu while the 11 said fact was not proved by the Respondent in their counter affidavit. The learned Counsel for Appellant submitted that there was no any evidence in the Tribunal record from the First Respondent's counter affidavit showing that there was discussion in the Resident Magistrates Court between the Counsel for the Appellant and that of the First Respondent, pertaining to the application No. 433 of 2020, rather the learned Chairperson decided to rely on the averments from the First Respondent's counsel that the Appellant was represented by Mary Solomon, arguing was a submission from the bar, not substantiated in any counter affidavit and faulted the Tribunal for ignoring the arguments of the Appellant. He cited Mediterranean Shipping Company Ltd vs Emmanuel Agreyson Daud t/a Ishey's General Enterprises and Another, Civil Appeal No. 342 of 2021, CAT; Registered Trustees of the Archdiocese of Dar es Salaam vs The Chairman, Bunju Village Government and Eleven Others, Civil Appeal No. 147 of 2006. In reply, the learned Counsel for First Respondent submitted that since the two cases are interchangeably, the parties used to

discuss the proceedings of each case in every degree of the court. Going by the impugned ruling, at page thirteen first paragraph, the learned Chairperson ruled that the Appellant participated on the discussion of Shauri Na. 15 of 2020 at the Resident Magistrates Court of Dar es Salaam at Kisutu. 12 However, this fact was born from the pleadings, specifically paragraph nine of the First Respondent's counter affidavit, where he averred that, 'That, the content of paragraph 13 of the applicant affidavit is strongly disputed as the applicant was well aware of the delivered judgment since the year 2020. Soon after delivery of judgment there was a discussion before the Kisutu District Court on whether the judgment of the tribunal issued on the application No. 433 of 2020 be considered in execution No. 15 of 2020 where the applicant herein was the one praying to the district court not to consider the said judgment as it was from the tribunal. For that reason we are truly sure that the applicant was reluctant not to challenge the judgment of this tribunal until the time when realized that the same is binding and execution could proceed' As I have said the Appellant neglected to file a reply to the counter affidavit to controverts this fact, which in law amount to concession. Therefore, the argument of the Appellant is unmerited. In totality the appeal is without substance. The decision of the Tribunal is upheld. Judgment delivered in the presence of the Second Respondent, Manase Malagila who introduced as one of the Director for Appellant and in the absence of the First Respondent. 14

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