

TANZANIA / JUDGMENT

neema buzo machenja vs robert manyanya kitalala 2024 tzhc 335 31 january 2024

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TZHCDECIDED
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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA TEMEKE SUB-REGISTRY (ONE-STOP JUDICIAL CENTRE) AT TEMEKE CIVIL APPEAL No. 50 OF 2023 (Arising from Wise. Civil Application No. 148 of 2022 from the District Court of Temeke at Temeke One-Stop Judicial Centre) NEEMA BUZO MACHENJA..... APPELLANT VERSUS ROBERT MANYANYA KITALALA..... RESPONDENT

JUDGMENT

25th January & 31st January, 2024: BARTHY, J.: In the matter before this court, the appellant, Fred Matula John Assenga, has appealed against the decision of the trial court, seeking to quash and set aside the ex-parte judgment in Matrimonial Cause No. 52 of 2021. The appellant being aggrieved with the decision of the District Court of Temeke at Temeke One Stop Judicial Centre (the trial court) i appealed to this court advancing 10 grounds of appeal, which were later reduced to the following three grounds;

1. That the trial court erred both in law and fact In his failure to set aside the ex-parte Judgment and decree by finding that the sickness is not sufficient cause for the appellant non-appearance when the suit was called on for hearing.
2. That the trial court erred both in iaw and fact in refusing to set aside the ex-parte judgment and decree on reason that the court was fanctus officio basing on the ruling of Hon. Mpressa A. E. SRM dated 11th of July, 2022.
3. That the trial court erred both in iaw and fact in refusing to set aside ex-parte Judgment on ground that the appellant was represented by Francis Munuo, advocate on 26P January, 2022. The appellant therefore prayed to this court to find this appeal has the merit, quash and set aside the decision of the trial court and afford the appellant the right to be heard, the costs of the suit and any other reliefs this court may deem just to grant. The brief background of this matter is crucial in order to appreciate the appeal at hand. The genesis of this matter is traced back 2 to Matrimonial Cause No. 52 of 2021, which was initially heard and determined ex-parte in the absence of the appellant. Subsequently, the appellant filed

an application, denoted as Misc. Civil Application No. 148 of 2022, to set aside the ex-parte judgment. However, the trial court dismissed this application, leading to the present appeal. During the hearing of this appeal, Mr. Mluge Kalori represented the appellant, while Mr. Mohamed Tibanyandera appeared for the respondent. By consensus, the hearing proceeded through written submissions, with both parties presenting their arguments in a timely manner. Mr. Kalori argued that, under Order IX, rule 9 of the Civil Procedure Code Cap 33 R.E. 2019 (CPC), an ex-parte order may be set aside if the judgment debtor assigns good cause that prevented them from appearing on the scheduled date. He cited the case of Dave Imoex Limited v. Hellaman Worldwide Logistics CD, Civil Appeal No. 320 of 2021, High Court at Dar es Salaam to support this argument. Mr. Kalori emphasized on the need for applicant to show sufficient reasons as to why the appellant did not enter an appearance. 3 He went further to state that, in the event where the trial court refuses to set aside the ex-parte judgment, the party has the right to appeal under Order XL, rule 1(d) of the CPC. Regarding the appellant's claim of sickness preventing her 'i appearance, Mr. Kaiori referred to the case of Yusuoh Same and ' r another v. Hadija Yusuoh, Civil Application No. 1 of 2001, asserting that "sufficient cause" is not explicitly defined and should be interpreted based on the facts and circumstances of each case. He contested the trial court's decision to refuse to set aside the ex-parte judgment on the grounds of functus officio, citing legal precedents and Black's dictionary ! definition of the term. Also, in the case of Kamundu v. Republic (1073) EA 540 the court held that when the case has been heard to finality it becomes functus officio. See also the case of Bibi Kisoko Medard v. Minister I rf for Lands Housing and Urban Development and another [1983] TLR250. Mr. Kaiori therefore was firm that the trial magistrate only "t refrained to exercise his jurisdiction to determine Misc. Civil Application No. 148 of 2022 on the ground that he was functus officio with the ex- parte decision of the trial court on Matrimonial Cause No. 52 of 2022. He 4 ■/ thus urged this court to restore the Matrimonial Cause No. 52 of 2022 by allowing the appeal. Submitting on the third ground of appeal faulting the decision of the trial court which refused to set aside ex-parte judgment on the reason that the appellant was dully represented by Francis Munuo learned advocate. It was his argument that at all the time the appellant was enjoying the representation from WLAC. As no advocate appeared to represent her before the court as the records reveal. Mr. Tibanyandera, representing the respondent, contended that the appellant failed to advance sufficient reasons for non-appearance, particularly challenging the claimed sickness. He argued that the documents presented by the appellant were insufficient and irrefevant to the case. Mr. Tibanyandera further stated that the trial court correctly refused to set aside the judgment based on the appellant's alleged representation by an advocate. He added that, the appellant on her counter affidavit in that application to set aside the ex-parte judgment, she deposed in detail on the days she went to court for several days for follow ups and lodging her complaints. Indicating she was able to appear in court by herself. 5 He therefore contended that the document that were tendered by the appellant were not sufficient and not relevant to the case before the court. He cemented further stating that, the appellant never missed the day of her application matter. Thus, it was said the sickness was just used to delay the matter, therefore the ground is devoid of merit and ought to be dismissed. Mr.

Tibanyendera contended that the appellant's failure to expressly withdraw instructions from her advocate and the advocate's negligence to inform the court on withdraw of instruction do not constitute sufficient reasons. He cited the case of Omari Shamba and others (supra) which expounded the principle stated in the case of Calico Textile Industries Ltd (supra) where it was held that failure of the advocate to act within the dictates of the law does not constitute a good cause. In addition to that, it was stated that this is the new ground that was not raised during the application. Thus, he prayed the appeal be dismissed with costs. Reiterating his earlier arguments, Mr. Tibanyendera challenged the appellant's reasons for non-appearance and maintained that the court was functus officio in this context. He emphasized the importance of medical proof for sickness claims and refuted the appellant's submission regarding the alleged representation by an advocate. Both parties maintained their respective positions, and Mr. Tibanyendera prayed for the dismissal of the appeal with costs. In rejoinder response, Mr. Kalori maintained that the trial court did not become functus officio, emphasizing that the appellant's inability to appear was due to an order of adjournment and not the original suit. He refuted the claim that the sickness was used to delay the matter. The court has carefully considered the submissions made by both parties and the evidence presented, this court is now tasked with determining whether this appeal has the merit. The appellant has raised concerns regarding the refusal of the trial court to set aside the ex-parte judgment, citing reasons of sickness, the court being functus officio and the alleged lack of proper representation. The court will now carefully consider the submissions and evidence presented by both parties before reaching a decision. Starting with the second ground of appeal which challenges the court's decision that it was functus officio. The appellant argues that the trial court, in entertaining Misc. Civil Application No. 148 of 2022, erroneously concluded that it was functus officio based on the earlier determination of Matrimonial Cause No. 52 of 2022. J ; The position which was supported by the respondent stating that the court was functus officio to determine the application sought to set aside the ex-parte decision. Generally, for the court to become functus officio when has made some orders finally disposing of the case, as it was so stated in the case of Elly Peter Sanva v. Ester Nelson (Civil Appeal 151 of 2018)

[2020] TZCA 157 (27 March 2020) acknowledging the decision in the case of Kamundu v. R (1973) EA 540 the E.A. However, the provisions of order IX, Rule 9 of the CPC provides that; In any case in which a decree is passed ex parte against a defendant, he may apply to the court by which the decree was passed for an order to set it aside; and if he satisfies the court that he was prevented by any sufficient cause from appearing when the suit was called on 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. The court acknowledges the general principle that a court becomes functus officio upon disposing of a case by making final orders. However, Order IX, Rule 9 of the Civil Procedure Code provides an avenue for a defendant against whom an ex-parte decree is passed to apply to set it aside. The law explicitly states that if the party satisfies the court that they were prevented by any

sufficient cause from appearing, the court shall set aside the decree. See the case of Lim Han Yung & Another v. Lucy Treseas Kristensen (Civil Appeal 219 of 2019) [2022] TZCA 400. The trial court that entertained the application to set aside the ex- parte judgment made the findings that the reason of sickness was already addressed by the trial court and denied. However, the finding of the trial court was made in the absence of the appellant who lodged the said notice of absence. Hence, her application to set aside ex-parte decree would have afforded the appellant the right to establish if her absence was caused by any sufficient cause as the law provides. It has also been determined by court that the party has to exhaust available remedy before exercising his right to appeal from the ex-parte 9 judgment. That is, seeking to set aside the ex-parte decree should be the first recourse. This point was stressed in the case of Danaote Industries Limited Tanzania v. Warnercom T. Limited (Civil Appeal 13 of 2021) [2022] TZCA 34. Therefore, the presiding magistrate had the mandate and the duty to hear and determine the application on merit as the trial court was not I rendered functus officio. This ground therefore has the merit. I will now turn to the first ground where the appellant has faulted I the trial court to have failed to consider sickness being sufficient reason to grant the application to set aside the ex-parte judgment. Having the court dismissed the application, this court will step into the shoes of the trial court to determine if the reason advanced by the applicant was sufficient to have the court set aside the ex-parte decree of the trial court. The appellant had stated that she had informed the trial court about her sickness and had attached all her medical records, only later to be informed that there was the ex-parte decree passed by the trial court. The respondent was of the view that the reason of sickness was⁷ not accepted by the trial court on Matrimonial Cause No. 52 of 2022. He ' 1 -^{*} 10 therefore sought same reason should be considered by this court to be sufficient. Adding that the appellant was able to appear in court for other follow up but not before the date scheduled for hearing. The records clearly show that the appellant had sent various letters with medical records to the court, notifying of her absence due to sickness. The appellant's assertion that she was unaware of the ex-parte hearing and decision is supported by the records, which implies he was not summoned or notified. In this circumstance, the court finds that the appellant has demonstrated sufficient reason for the court to set aside the ex-parte decree. The reason of sickness, coupled with the lack of notification, supports the appellant's case. This ground has merit. The last issue pertains to the trial court's finding that the appellant was duly represented on the date fixed for the hearing. The appellant denies any representation, stating that she was relying on the services of WLAC. The respondent argues that the appellant was represented and that there was no notice to withdraw instructions and his negligent act should not act as the excuse. 11 On the records of the ex-parte judgment of the trial court it reads that the appellant during the trial was represented by Mr. Tibanyendera, who in actual sense was appearing for the respondent herein. With respect to the record of this matter, it is clear that the appellant was not notified on the order of the court scheduling to proceed with the case ex-parte and pronounce ex-parte judgment. As the appellant stated she became aware of the decision on later stage and there was no rebuttal to her argument that she was informed of ex-

parte order. It is therefore clear that the notice of ex-parte judgment was not communicated to the appellant or her purported advocate. The notice or summons would have informed the party the intention of the court to proceed with the hearing of the case ex-parte and allow the party to appear and give reason before the court for default appearance. This was stated in the case of Kiwenqwa Limited v, Alop Tour World Hotels & Resort Spa & Others (Civil Appeal 240 of 2020) [2022] TZCA 366 where the court observed that, it is now obvious that it was not proved that the appellant was duly served on the date the order for ex parte hearing was made or any other date. Upon careful examination of the grounds of appeal, the court finds merit in all grounds. The trial court's ex-parte decision is set aside, and 12 Matrimonial Cause No. 52 of 2022 is restored for a fair hearing enter- partes, effective from the date the ex-parte hearing was ordered by the trial court. It is so ordered. r es Salaam this 31th of January, 2024. G. N. BARTHY JUDGE Delivered in the presence of the applicant in person and Ms. Bernadina Court Clerk, in the absence of the respondent without notice. Delivered in the presence of Mr. Tibanyera learned advocate for the respondent also holding brief of Mr. Kalori learned advocate for the appellant in the absence of both sides. 13

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