

TANZANIA / JUDGMENT

SHABANI IDD GANJA V

COURT
TANZLII

DECIDED
19 September 2024

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA IN THE SUB - REGISTRY OF SHINYANGA AT SHINYANGA CIVIL APPEAL REF. NO. 202407151000016901 (Arising from Shinyanga District Court through the Civil Appeal Case with Reference No. 3660/2024; Origin Probate and Administration Cause No. 91 of 2022 at Kizumbi Primary Court) SHABANI IDD GANJA APPLICANT VERSUS MAXIE SONDO 1 st RESPONDENT JOHN BUTONDO 2nd RESPONDENT BLANDINA GOGADI 3rd RESPONDENT

JUDGMENT

25th July & 19th September, 2024 S.M. KULITA, J. The Appellant herein, Shaban Idd Ganja, was the Respondent in the Application for Revocation of his administration for the estates of the late Luhende Shoka which was granted to him by that said court through the Probate and Administration Cause No. 91 of 2022 by Kizumbi Primary Court. 1 The said application by the Respondents herein was attacked with a Preliminary Objection from the Appellant herein. It happened that on 11/08/2023 the said Preliminary Objection proceeded ex-parte, that it was heard in the absence of the Appellant herein. The reason behind, according to the records, pleadings and submissions of the parties is that, by the time the trial Magistrate had arrived at the trial court on the date that was scheduled for hearing, the Appellant and his Advocate were both absent with no notice. As the objectors (Respondents) were there, the Magistrate conducted hearing of the said Preliminary Objection ex-parte. The records transpire that, after noticing that the Magistrate was not available by the time he had arrived there at Primary Court, the Advocate who was representing the Appellant, Mr. Ijani Augustino, left for High Court where he had a case before the Judge. That, it is upon his arrival back at the Primary Court when he found the said case already been heard ex-parte. That led the Appellant herein to seek for the trial court to set aside the ex- parte ruling in vein. Aggrieved with the said decision, the appellant lodged an appeal at Shinyanga District Court through the Civil Appeal Case with Reference No. 3660/2024 in which he also lost, hence this appeal with two grounds as follows; 2

1. That, the District Court erred in law and in fact to dismiss the appeal without taking into consideration that, it is his Advocate's personal negligence, not the Appellant's negligence that led the matter to be heard ex-parte. Thus, the Appellant should not be punished for the fault of his Advocate.
2. That, the District Court erred in law and in fact for failing to realize that the trial court infringed the Appellant's constitutional right of being heard. The appeal was argued by way of written submissions. While the Respondents had the service of Mr. Amri Linus, the Appellant was unrepresented, that he used to used appear in person. In his written submission in support of appeal the Appellant stated that, it is the fault of his advocate, Augustino Ijani, who, after noticing that the trial Magistrate was not there at the Primary Court, decided to leave the Primary Court premise for High Court where he had another case to attend. He further alleged that, the said Advocate, Mr. Ijani, did so without notifying the Primary Court's officials which was wrong. 3 The Appellant, whose residential premise is Dar es Salaam, averred that, that being the personal negligence of the Advocate whom he had engaged to represent him for that case, should not be used to punish him. The Appellant concluded by praying for the appeal to be allowed, decisions of the lower courts be quashed, and that hearing of the case at the trial court should start afresh by ordering both parties to be heard on merit. In the reply thereto, the Respondent through his Advocate, Mr. Amri Linus, submitted that the Appellant herein had no sufficient reason to influence the trial court to set aside the ex-parte ruling. He said that setting aside the ex- parte order is the discretion of the court, done upon establishment of reasonable causes. As for this matter, the Counsel stated that the Appellant and his Advocate were aware of the date that was scheduled for him/them to appear before the trial court, thus failing to comply with it implies that he negligently faulted to appear. Hence, there was no reasonable cause for the non-appearance of the Appellant and/or his Advocate. Further, the Respondent's Counsel alleged that, in his application to set aside the ex-parte ruling that had been conducted at the trial court, the Applicant's Counsel failed to produce any document like summons or cause list which 4 shows that on the material date and time he was actually attending the case at High Court. It is the submission of the Respondents' Counsel that, the legal effects of negligence of the Advocate in attending his client's case, including non- appearance before the court on the scheduled date and time, without reasonable cause, extends to his client. That, it makes his client to suffer the consequence. That was the end of the Respondent's submission. The Appellant had no rejoinder, hence submissions from both parties ended up there. From the above submissions, I find the issue to be determined is whether the appeal is meritorious. According to the law the trial court has powers to set aside the ex-parte decision, be it a ruling or judgment, upon the applicant advancing reasonable grounds for his non-attendance that led to the matter being heard and determined ex-parte. As it has been submitted before this court, as well as the submissions made at the 1st appellate court, the records transpire that, during the hearing of 5 his application to set aside the ex-parte ruling at the trial court, the Advocate, Mr. Ijani, gave the reasons that, after noticing that the presiding Magistrate at the trial court was not present, he left for the High Court where he

also had a case to attend. But, the fact that there was no certainty of time that the Magistrate would be available the Advocate was actually negligent for leaving the Primary Court premises without making a notice to that said court. It is undisputed that the Applicant herein was actually not there, but the fact that the Advocate ever reached at the Primary Court premises, he could at least leave a notice or ask any other Advocate to hold brief for him when the Magistrate comes, whereby the reasons for his absence could be addressed to the said Magistrate, that he had left for High Court. Had such a notice been there, the Magistrate could have not rejected the prayer for waiting, as the High Court is superior to the Primary Court, and that, the Advocate was actually thereat Primary Court before. From the above scenario and nature of complaint, the issue is whether the consequences of the Advocate's personal negligence in handling a case can extend to his client. There are two schools of thought on this. In some authorities it is said that, fault/negligence of the Advocate should not affect the rights of his client. See the Ugandan case, namely, KATEYO ELIEZER V. MAKERERE UNIVERSITY, LMCA 147/2021. As well, there is a principle from other precedents stating that, as long as the said Advocate has been engaged by the client himself, negligence of the Advocate has the direct effect to his client. See INDEPENDENT POWER TANZANIA LIMITED V. VENERABILLS JIGGE AND ANOTHER, Misc. Civil Application No. 206 of 2017, HC Labour Division at DSM. As for the matter at hand, The Advocate's fault/negligence does not directly touch the base of the case. It is just the Advocate's personal issue, which is out of litigation of the case in question, hence the same should not be used to make the applicant's case affected. Otherwise, it will be like punishing the Appellant for the personal fault of his Advocate. The record and submissions transpire that, by the time this fault/negligence happened the Appellant was in Dar es Salaam, a place where he resides. Hence, he could have not appeared to court in person to address the Magistrate on the whereabouts of his Advocate. I therefore find that, the said Probate and Administration Cause Case No. 91 of 2022, Kizumbi Primary Court, being heard and determined ex-parte for the personal negligence of the Appellant's Advocate, is the infringement of the said Appellant's right to be heard, hence collision of Article 13(6) of the Constitution of the United Republic of Tanzania, 1977, as amended from time to time. As narrated herein before that the Appellant herein has been punished for the personal fault of his Advocate, which is fatal. In that sense, the above cited case of Uganda, namely, KATEYO ELIEZER V. MAKERERE UNIVERSITY, LMCA 147/2021 (supra) applies. In the said case it was held that a mistake or error of an Advocate should not be visited on his client, though the same depends on the circumstances of a given case. Further to that, the law is settled that parties have rights to legal representation, that is, a party can instruct an advocate to represent him in the court's proceedings. The engaged advocate is required to discharge his duties with integrity towards his client as stipulated under Regulation 5 and 55 of the Advocates (Professional Conduct & Etiquette) Regulation, 2015 (the Regulation). More so, the advocate has a duty to explain and advice his client and not to waive or abandon a client's legal rights, without the client being informed and accordingly consent. See Regulations 55 and 57 of the Regulation. 8 This was also stated in Dotto Dofu v. Kulwa Lufwega Kija (Civil Appeal 37 of 2022) [2022] TZHC 14948 (5 December 2022), in which it was held; "A client

instruction is a legal contract between (sic). When you accept the instruction/nomination you are legally agreeing that all parts of that contract can be performed Regulation 55 provides that; an advocate shall represent the client resolutely, honorably and within the limits of the law and make every reasonable effort consistent with the legitimate interests of the client to expedite litigation " In the light of the above cited authorities, it is vivid that the law casts the duty upon the advocate to discharge his contractual obligation. Therefore, as the non-attendance before the court was the Advocate's personal wrong, for the interest of justice, and protecting the rights of the Appellant herein, this matter should be determined inter-parties. In upshot, I find this appeal meritorious, hence allowed. The ex-parte ruling of the trial court is hereby set aside. It is thus ordered that the original case, Probate and Administration Cause No. 91 of 2022, Kizumbi Primary 9 Court, should be retried by being heard inter-parties. That should be done by another Magistrate of competent jurisdiction. As the fault has been contributed by the court, and that the matter involves family members, I grant no order as to costs. S.M. KULITA JUDGE 19/09/2024 DATED at SHINYANGA this 19th day of September, 2024 S.M. KULITA JUDGE 19/09/2024 10

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