IN THE HIGH COURT OF TANZANIA

(DARE S SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM.

CIVIL APPEAL NO. 86 OF 2012

(Originating from Civil Case No. 50 of 2011, in the

District Court of Temeke District, at Temeke)

TANZANIA INTERNATIONAL CONTAINER

SERVICES LIMITED.....APPELLANT

VERSUS

ABDULLAHI HASSAN WARDERE..... RESPONDENT

JUDGMENT

16/04/2014 & 05/09/2014.

This is a first appeal against the ruling made by the District Court of Temeke District, at Temeke (lower court) dated 3rd July, 2011 in Civil Case No. 50 of 2011. The brief facts of this appeal can be recounted thus; the respondent, ABDULLAHI HASSAN WARDERE filed a suit against the appellant, TANZANIA INTERNATIONAL CONTAINER SERVICES LIMITED before the lower court. The lower court pronounced a judgment against the appellant exparte on the ground that it had not filed any written statement of defence despite due service. The appellant filed before the lower court, a chamber summons supported with an affidavit seeking, *inter alia,* for an extension of time to file the application for setting aside the exparte decree, and for actual setting aside of the exparte decree upon the extention of time been granted. The application was made under Order IX rule 13 (1) and s. 93 of the Civil Procedure Code, Cap. 33 R. E. 2002 and s. 14 (1) of the Law of Limitation Act, Cap. 89 R. E. 2002. The lower court however, dismissed the application by its ruling dated 3rd July, 2011, which is the subject matter of this appeal. The appellant preferred the following four grounds of appeal which I reproduced for ease of reference;

1) The Honourable Resident Magistrate erred in law and in fact in rejecting the Appellant's application for extension of

time within which to apply to set aside an ex parte decree, which was delivered without notes of judgment date to the Appellant, on the basis that the Appellant did not file written statement of defence;

2) The Honourable Resident Magistrate erred in law and in fact by ruling that only a party who defaulted to enter appearance, and not a party who did not file a defence, is entitled to extension of time within which to apply to set aside ex parte decree;

3) The Honourable Resident Magistrate erred in law and in fact by ruling that if the application for extension of time is granted the court would be relying on wrong provision of the law;

4) The Honourable Resident Magistrate erred in law and fact by ruling on the reasons/ grounds for setting aside the ex parte decree since the reasons/grounds were not at issue in the extension of time application;

For these grounds the appellant prays for the following reliefs;

i. That the decision of the lower court be reversed and the appellant be granted an extension of time within which to apply to set aside the exparte judgement and decree issued on the 23rd November, 2011.
ii. That the application to set aside the exparte judgment and decree be heard before a different magistrate at the District Court of Temeke, at Temeke.
iii. That the appellant be awarded costs of this appeal.

The respondent objected the appeal. It was directed that the same be argued by way of written submissions and the parties accordingly filed their respective submissions. In this appeal, the appellant was advocated for by Mkono and Company Advocates while the respondent used the services of Mr. Domitian Rwegoshora, learned counsel.

In my adjudication scheme, I opt to combine all the four grounds of appeal into one ground that, The Honourable Resident Magistrate erred in law and fact in rejecting the Appellant's application for extension of time within which to apply to set aside an ex parte decree. The reason for this course is that, all the four grounds of appeal are revolving around the first ground of appeal which essentially complains that it was wrong for the lower court to dismiss the application for extension of time.

The appellant made lengthy submissions in support of grounds of appeal. The respondent did the same in his replying submissions objecting the appeal. But

following what transpired before the lower court according to the record, I will consider only few pertinent arguments that will be capable to dispose of this appeal. In its submissions, the appellant argued, *inter alia*, to the effect that though the lower court found in its ruling that the application for extension of time was rightly made under s. 14 (1) of the Law of Limitation Act, Cap. 89 R. E. 2002, it erred in deciding that it could not grant the application for extension of time because, the appellant had cited Order X rule 13 (1) of the Civil Procedure Code, Cap. 33 R. E. 2002, as the basis for the application for setting aside the exported decree, which said provisions did not apply to the circumstances of the case. The appellant thus argued that, as long as the application heard by the lower court was only for extension of time, that court could not consider matters related to the actual application for setting aside the exparte decree in its ruling. The appellant further submitted that, the lower court could also not find that, granting the extension of time would, under the circumstances of the case, amount to applying a wrong provision of law, especially considering the fact that there was no any preliminary objection raised against the application before the hearing of the application for extension of time.

In his replying submissions, the respondent supports the ruling by the lower court arguing inter alia that, Order X rule 13 (1) of Cap. 33 was inapplicable in the matter and the lower court did not mix matters related to the setting aside of the exparte decree with those of extension of time.

The issue before me is therefore, whether or not under the circumstances of this matter the, impugned ruling of the lower court was justified. Before I decide on this issue, it is inevitable for me to narrate some facts of this matter according to the record. In the first place, it is clear that both the application for extension of time and for setting aside the exparte decree were combined into a single chamber summons filed before the lower court on the 27th day of April, 2012. It is apparent also that on the 30th of April, 2012 the respondent lodged a notice of preliminary objection against the application on a single ground that the application was mercilessly and incurably overtaken by event. However, on the 7th day of May, 2012 the counsel for the respondent (Mr. Rwegoshora) withdrew the notice of preliminary object so that the application could proceed to an oral hearing. The application was accordingly heard on the 5th of June, 2012.

It is however, apparent that on the said 5th of June, 2012 the parties opted, and the lower court approved, that the oral hearing could proceed in respect of the prayed extension of time only before the application for setting aside the exparte decree could be heard. The appellant's counsel accordingly made his submissions on the merits of the prayer for extension of time. In his reply the respondent's counsel opted to argue on the competence of the application submitting, amongh other things, that that it had been wrongly made under Order X rule 13 (1) of Cap.

33 instead of Order X rule 13 (2) of Cap. 33 which would entitle the appellant to an order for setting aside the exparte decree, he then prayed for the lower court to dismiss the application. In his rejoinder, the counsel for the appellant complained that the application before the lower court was at that time for extension of time and it had been made under s.14 (1) of Cap. 89. He further complained that arguments on the incompetence of the application was ambushing the appellant because it was not raised as a preliminary objection, instead it was raised during the hearing of the application. He argued that the respondent was estopped from raising such argument at that stage.

By reading the impugned ruling of the lower court, it is clear that it actually echoed the arguments raised by the respondent's counsel on the incompetence of the application. The ruling is to the effect that, though the appellant rightly applied for the extension of time under s.14 (1) of Cap. 89, the cited Order X rule 13 (1) of Cap. 33 in his chamber application was an incorrect law that did not apply to the circumstances of the case. It also found that, the court could not thus grant the extension of time since that would amount to doing so under wrong provisions. The lower court thus dismissed the application.

In my view, there were some serious confusions before the lower court that led to a grave miscarriage of justice. In the first place, as long as the prayers for extension of time and for setting aside the exparte decree were consolidated in one chamber application, the lower court was enjoined to hear them cumulatively and make an omnibus ruling. In that ruling, the lower court could first determine the issue of extension of time and if it granted it, it could proceed to the issue of extension of time. But, in case it refused it, that could be the end of the matter for, the prayer for setting aside the decree depended much on the granting of the prayer for extension of time. It was thus improper for the lower court to allow the application to he heard in piecemeal as it did, for that course was likely to cause confusion as it happened.

Again, it was improper for the lower court to entertain the arguments by the respondent related to the incompetence of the application based on wrong citation of the law and amid the hearing of the application. Such arguments could properly be made before the hearing commenced by way of preliminary objection as the appellant counsel suggested before the lower court and before this court. The course opted by the lower court in entertaining such arguments thus ambushed the appellant, it is more so considering the fact that, the respondent had previously raised a preliminary objection on a different ground, and later withdrew it before hearing commenced. It was also wrong for the lower court to base its ruling on matters related to the said incompetence of the application for wrong citation of the law guiding on setting aside the exparte decree, after all at the time the lower court recorded and pronounced the impugned ruling, the prayer for setting aside the

exparte decree was still pending and unheard. This follows the fact that what had been heard before the lower court at that time was only the prayer for extension of time, which I have observed, was wrongly heard in isolation from the prayer for setting aside the exparte decree.

I am settled in mind that, the above pointed out course adopted by the lower court breached the Principles of Natural Justice and amounted to an unfair trial/hearing to the appellant. The course was thus against article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977, Cap. 2 R. E. 2002 (the Constitution) which instructs that any person whose rights or duties are being determined by the court or any other organ, is entitled to the right to fair hearing. It follows thus that, the lower court grossly misdirected itself for not affording the appellant the right to fair trial.

Neither the Constitution nor any other written law in our jurisdiction defines what is a fair trial. But the Constitutional Court of Uganda once defined the phrase "fair trail" as giving a party to court proceedings the necessary opportunity to canvass all such facts as are necessary to establish his case, in accordance with the law, see in the case of **Major General David Tinyefunza v. Attorney General, Constitutional Petition No. 1 of 1996, in the Constitutional Court of Uganda, at Kampala.** I appreciate this definition and approve it accordingly. The circumstances of the case at hand as demonstrated herein above do not fit into this definition as far as the issue of the competence of the appellant's application before the lower court was concerned.

The effect of breaching the Principles of Natural Justice and the denial of one's right to fair trial is fatal. It vitiates the proceedings and the decision resulting from that omission, see the decisions in **Ndesamburo v. Attorney General [1997] TLR 137** and **Agro Industries Ltd v. Attorney General [1994] TLR 43** and **Raza Somji v. Amina Salum [1993] TLR 208.** The law further provides that it is immaterial whether the same decision would have been arrived at in the absence of the omission, that decision must be declared to be no decision, see **General Medical Council v. Spackman [1943] AC 627** quoted with approval in the case of **De Souza v. Tanga Town Council [1961] EA. 377** (at page 388) which is binding to this court. See also the Court of Appeal decision in the case of **Abbas Sherally and another v. Abdul Sultan Haji Mohamed Fazalboy, civil application No. 133 of 2002, at Dar es salaam** (unreported).

For the afore going reasons, I determine the issue posed above negatively to the effect that under the circumstances of this matter the impugned ruling of the lower court was unjustified. I therefore uphold the single consolidated ground of

appeal and I consequently allow the entire appeal. I will however, not grant all the reliefs prayed by the appellant. Instead I make the following orders; I set aside the impugned ruling made by the lower court dated 3rd July, 2011 in Civil Case No. 50 of 2011. I also nullify the proceedings of the lower court from the 5th day of June, 2012 (inclusive) when the application was heard to the last date when the ruling was pronounced. I further order that, in case the parties still wishes, the application be heard by lower court afresh by another magistrate of competent jurisdiction.

However, in case the lower court finds it necessary for testing the competence of the application, then it shall invite the parties to address it on that issue and make a ruling before the hearing denovo proceeds. I also direct that, in case the lower court finds that the application is properly before the court upon testing its competence, then the hearing of both prayers, for extension of time and for setting aside the decree exparte shall be heard cumulatively as I envisaged herein above. I make these particular directions under s. 44 (1) (a) of the Magistrates Court Act, Cap. 11, R. E. 2002, as interpreted by the Court of Appeal's decision in the case of **Director of Public Prosecution v. Elizabeth Michael Kimemeta @ Lulu, Criminal Application No. 6 of 2012, at Dar es salaam** (unreported) which held that the provisions give this court mandate to make directions to the magistrates' courts in form of guidance.

I will not however, condemn any party to pay costs since the lower court also contributed to the circumstances that led to this appeal by allowing the serious irregularities pointed herein above. It is accordingly ordered.

JHK. UTAMWA

JUDGE

29/08/2014