IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA

AT SHINYANGA

CIVIL APPEAL NO. 17 OF 2019

(Arising from the Ruling of Misc Civil Application No. 5 of 2018 of the District Court of Kahama)

CLEMENT GEORGE MWAKIBINGA..... APPELLANT

VERSUS

CRDB BRANCH MANAGER -KAHAMA ..... 1st RESPONDENT

GENERAL MANAGER PANGAEA

MINERALS LTD BUZWAGI GOLD MINE.....2nd RESPONDENT

JUDGMENT

Date of Last Order: 24/07/2020

Date of Judgment: 28/8/2020

MKWIZU, J.:

This appeal arises from the decision of the District Court of Kahama in Misc. Civil Application No. 5 of 2018 where the District Court dismissed Application for restoration of Civil Case No. 15 of 2018 for non-appearance. The Appellant came to this court with two grounds as follows:

In an attempt to clear the amount, on 28/11/2017, 2nd respondent credited the appellant's account with the full amount totalling at 28,408,374.62 which were thereafter withdrawn by the 1st respondent (an employee of the 2nd respondent) without any reasonable ground. Unhappy with the respondent's actions, appellant filed Civil Case No.15 of 2018 at Kahama District Court for a claim of 10,556,142.55/= being an outstanding balance of the compensations and unpaid entitlements plus general damages to the tune of 5,000,000/=.

The District Court heard the plaintiff's case to its completion and fixed the date for the defence case. The appellant defaulted appearance. The trial court dismissed the suit on 18/1/2018 for non-appearance under Order IX rule 8 of the Civil Procedure Code Cap 33 R:E 2002.Appellant's application No. 5 of 2018 before the same District Court for restoration was also dismissed for lacking in merit. He has now come to this court to challenge that decision.

The appeal was argued by way of written submissions. The appellant filed his written submissions drawn by advocate Mr. Audax T. Constantine on

20/5/2020. Mr. Rwiza W. M and Silwani Galati Mwantembe advocates for 1st and 2nd respondents filed their respective written submissions on 4/6/2020, and rejoinder submissions were filed on 15/6/2020 well within the fixed schedule.

In his submissions, appellant faulted the District Court for not taking into account the principles of overriding objective on the ground that it failed to consider that his non-appearance in court was not intentional but due to human mistake and that it only happened once. He said, he had mistaken the date believing that the matter was fixed for hearing on 23rd January, 2019 instead of 18/1/2019. He referred this Court to the principle stated by the Court of Appeal in case of **Yakobo Magoiga Gichere Vs Penina Yusuph**, Civil Appeal No 55 of 2017 (unreported) that,

> *"with the advent of the principle of overriding objective brought by Written Laws (Miscellaneous Amendments) (No. 3) Act, 2018 (Act No. 8 of 2018) which now requires the courts now to deal with cases justly and to have regard to substantive justice, section 45 of Land Disputes Court Act shall be given more*

prominence to cut back on over reliance on procedural technicalities"

He also cited the case of **Alliance One Taboco And Another Vs Mwajuma Hamis And Another, H.C (Unreported).**

On the second ground of appeal appellant's counsel submitted that, the trial Magistrate was biased in the sense that, the appellant was not accorded equal opportunity of being heard because when the respondents failed to attend the hearing, the trial court adjourned the suit. Elaborating on the incidents favouring his line of argument, appellant said, on 28/02/2018 the trial court granted the 1st respondent the extension of time to file counter affidavit. On 20/03/2018 the counsel for the 1st respondent was absent while on 15/04/2018 when the case was scheduled for hearing, the counsel for the 2nd Respondent was absent and on 13/05/2018 the 1st Respondent did not appear but in all occasions, the matter was adjourned. He prayed the court to allow the appeal

Mr. Rwiza W.M. Advocate for the 1st Respondent submitted that, the 1st ground of appeal is not justifiable warranting this court to allow this appeal. He argued that the Appellant was aware of the hearing date as it was fixed in his presence but for reasons known to himself failed to appear in court. He said, the court was justified to apply the provisions of Order IX rule 9 (1) of the Cap 33.

Mr. Rwiza stated further that, trial Magistrate heard the application for setting aside the dismissal order and restoration of the case but the appellant gave baseless reasons and therefore the application was rejected. He cited the case **Abogast C. Warioba Vs National Insurance Corparation (Ltd),** Commerce Case No. 86 of 2003 (unreported) where the court held that,

> *"Once an event is scheduled to proceed on certain date, it cannot be departed from, unless from exceptional reasons and that should be placed before the scheduled date"*

On the appellant's claim that the trial Magistrate was supposed to uphold overriding Objective Principle and disregard minor irregularities, Mr. Rwiza was of the view that , non-appearance of the plaintiff in court when the case is called on for hearing is a fundamental issue .He made reference to the case of **Puma Energy Tanzania Limited Vs Ruby Roadways (T) Limited,** Civil appeal No. 3 of 2018 (CAT unreported) to bolster his argument.

Mr. Rwiza opposed the appellant's complaint that the trial magistrate decision was biased. He said, the court can only allow adjournment on sufficient and reasonable reasons and that respondent's absence were justified with reasons which convinced the trial Magistrate to adjourn the matter. He prayed this court to dismiss the appeal with costs.

On his part, Mr. Silwani Galati Mwantembe, counsel for the 2nd respondent was of the view that, the trial court rightly dismissed Civil case No. 15 of 2018 when it came for defence on 18th January, 2019 in the absence of the appellant without any notice under **Order 1X of the Civil Procedure Code Cap 33.** Mr. Galati explained that, appellant failed to give genuine reason

for his absence leading to again rejection of his prayer for restoration of the case in Misc. civil application No. 5 of 2019.

Submitting on the second ground, Mr. Galati stated that, the issue to be considered is whether the Plaintiff had appeared in court or not and whether there is a good reason for his non- appearance on the particular date. He lastly prayed the appeal to be dismissed with costs.

In rejoinder, Counsel for the appellant insisted that the non-appearance was not intentional. He said, cases cited by the counsels for the 1st and 2nd respondents are distinguishable. He reiterated his prayer that his appeal be allowed with costs.

I have considered the grounds of appeal, the submission advanced by both parties and the records subject of the present appeal. The central issue is whether the appellant managed to justify his non-appearance to warrant the trial court restore the dismissed suit- civil case No 15 of 2018. It is a trite law that for the court to set aside a dismissal order, the applicant must

advance sufficient reason. The main reason stated by the appellant in Misc. Civil application No 5 of 2019 is that the appellant confused the date.

I have perused the applicant's affidavit in support of application mentioned above, in paragraphs 2 to 6 of the supporting affidavit, the appellant explained that he had never missed a date be it mention or hearing and that he confused the date instead of 18/1/2019, he thought the ,matter was fixed for hearing on 23/1/2019 and that on the 23/1/2019 he appeared in court to be informed of the dismissal order. Appellant maintained his position during the hearing of the said application in court. He prayed that the dismissal order be vacated, the matter be restored.

Undeniably, under **Order 1X rule 8 of the CPC Cap 33** courts are vested with power to dismiss the case if the Plaintiff does not appear However, ***Rule 9*** of the same order gives the Plaintiff a leeway that:

> *"...where the a suit is wholly or partly dismissed...the plaintiff shall be procured from bringing a fresh suit in respect of the same cause of action, but* ***he may apply for an order to set***

aside the dismissal aside and, if he satisfies the court that there was sufficient cause for his non-appearance when the suit was called on for hearing, the court shall make an order setting aside the dismissal order ... "

(bold is mine).

The reason advanced by the Appellant that he mistakenly confused the date fixed for hearing was not accepted by the trial court. In rejecting appellant's reason the Court was of the view that parties are not expected to confused the hearing date as they receive notification of the date through Judicial statistical dash board System (JSDS). Th court said:

"*The applicant said he confused the dates. The reason does not sound genuine at all. The judiciary has a system called Judical statistical dashboard System which was meant to expedite timely dispensation of justice. Through this system parties did not say if he did not receive any notification or that he received a notification for 23/1/2019. Confusion of dates cannot be a genuine reason for non-appearance with this technology*"

Very unfortunately, the issue of the Judicia Statistical Dashboard System was never at issue at the hearing of the application. It was neither brought by the parties nor the court itself. It just emerged in the ruling from the trial magistrates' own mind and understanding. What was submitted by the appellant was that he confused the date.

Again, Respondents contention all along, at the district court as well as in this appeal., is that the appellant failed to justify as to why he was un able to appear in court when the matter was scheduled for defence. Nothing was said on whether the respondents will be prejudiced if the application will be allowed. The Court, in the case of **SERIKALI YA KIJIJI CHA MALANGALI VS KASIM R. KEREN HC Misc. Land Application No. 233 of 2019** (Unreported) had considered the degree of prejudice to the respondent and said:

> *"...even if the said case will be re-admitted, the respondent will not suffer irreparable loss or be prejudiced by allowing this application. The applicant is the one with a likelihood to suffer irreparable injuries considering the nature of dispute, ..for interest of justice, it is just and fair not to punish the applicant for a mistake done."*

In the case of **Jesse Kimani V. McCornnell and Another** (1966) EA 547 at page 556 it was decided that the application should be granted if the respondent would neither be prejudiced nor suffer any irreparable injury. Court of appeal in **Bahati Musa hamisi Mtopa V. Salum Rashid**, Civil Application No 112 of 07 of 2018 quoted with approval the decision in Kenyan case of **Githere v, Kimunqu** [1976-· 1985] 1 EA 101 (CAK) which stated that:

> *"That where there has been a bona fide mistake. and no damage has been done to the other side which cannot be sufficiently compensated by costs, the court should learn towards exercising its discretion in such a way that no party is shut out from being heard, accordingly a procedural error or even a blunder on a point of law, ... should be taken with a humane approach and not without sympathy for the parties and, in a proper case, such mistake may be a ground to justify the court in exercising its discretion to rectify the mistakes if the interests of justice so dictate, because, the door of justice is not closed merely because a mistake has been made by a person of experience who ought to have known better, and there is nothing in the nature of such a mistake to exclude it from being a proper ground for putting things right in the interests of justice and without damage to the*

other side. But whether the matter shall be so treated must depend upon the facts of each individual case.

That the relation of rules of practice to the administration of justice is intended to be that of a handmaiden rather than a mistress, and that the court should not be so bound and tied by rules, which are intended as general rules of procedure, as to be compelled to do that which will cause injuries in particular case, and this is a principle which w a court must remember when judicially exercising its discretionary powers"

I am aware that applicant in an application for setting aside dismissal order must give sufficient reasons. What amounts to sufficient reasons depends on the circumstances of each case. See the case of **Yusufu Same and Another Vs Hadija Yusufu,** Civil Appeal No. 1 of 2002 (unreported)

Guided by the above authorities, I am satisfied that appellant committed a human error of such a nature that it is hard to explain and that given the general circumstances of this case, rejection of the application is more of prejudice to the appellant rather than the respondents. I find the reason adduced by the appellant in Misc. application No. 5 of 2019 justifiable. I allow

the appeal, set aside the dismissal order in Civil Case No. 15 of 2018. The file is remitted back to the trial court to proceed with the hearing of the defence from where it ended before dismissal on 18/1/2019 .This ground alone is sufficient enough to dispose of the appeal, I will for that reason not determine the second ground.

Appellant to have his costs.

It is so ordered.

DATE at **SHINYANGA** this 28th day of **AUGUST**, 2020

E.Y. MKWIZU
JUDGE
28/8/2020

Court: Right of appeal explained to the parties.

THE HIGH COURT OF TANZANIA

E.Y. MKWIZU
JUDGE
28/8/2020