IN THE COURT OF APPEAL OF TANZANIA
AT ZANZIBAR

(CORAM: LILA, J.A., MWANDAMBO, J.A. And MASHAKA, J.A.)

CIVIL APPEAL NO. 240 OF 2020

KIWENGWA LIMITED ..... APPELLANT

VERSUS

ALOPI TOUR WORLD HOTELS AND RESORT SPA ..... 1ST RESPONDENT
KIWENGWA STRAND HOTEL LIMITED ..... 2ND RESPONDENT
JUMBO TURISMO S.A. ..... 3RD RESPONDENT

(Appeal from the Ruling and Order of the High Court of Zanzibar at Vuga)

(Mwampashi, J.)

dated the 8th day of June, 2016
in
Civil Application No. 24 of 2016

JUDGMENT OF THE COURT

30th May & 14th June, 2022

MWANDAMBO, J.A.:

The High Court of Zanzibar sitting at Vuga dismissed an application by the appellant for setting aside an ex parte judgment entered against her on 18/07/2011 in Civil Case No. 16 of 2011 (the suit). The appellant has now appealed against the decision of the High Court upon a memorandum of appeal predicated on five grounds.

The tale behind this appeal runs thus: the appellant was a defendant in the suit instituted jointly by the respondents, each claiming a specific sum of money for goods and services supplied and/or

rendered to the appellant on diverse periods. In her written statement of defence, the appellant made several admissions whilst disputing the rest. After the conclusion of pleadings and disposal of interlocutory matters, the High Court set itself to frame issues in readiness for trial. Mr. Suleiman Said, learned advocate who was representing the appellant till that moment could not continue representing her anymore. He was thus allowed to withdraw from the conduct of the defence followed by an order for personal service on the appellant to appear for mention on 15/10/2014. However, none of the parties entered appearance on 15/10/2014 when the suit was called on for mention before Mr. Kayange Yesaya, Deputy Registrar, High Court (DRHC). That was followed by a series of mentions before the DRHC and subsequently, the suit was called on for mention on 04/02/2015 before the trial Judge on which date, the learned advocate for the respondents prayed to serve the appellant. Accordingly, the suit was adjourned to 17/03/2015.

Yet again, the appellant did not enter appearance on 17/03/2015 apparently, because she was not yet duly served. A fresh order for service was made and the High Court scheduled the suit for mention on 27/04/2015. Neither did the respondents nor appellant appear on 27/04/2015 before the DRHC who fixed the matter for mention on

16/06/2015. On 16/06/2015, the erstwhile advocate for the respondents moved the High Court to enter judgment on admission in respect of the admitted part of the amounts claimed by the first respondent amounting to Euro 62, 654.07 and USD 76,447 and to proceed with ex parte hearing in respect of the remaining undisputed claim due to the appellant's non-appearance despite being duly served. The learned Judge granted both prayers and adjourned the hearing ex parte to 12/08/2015 with an order for service on the appellant. However, the ex parte hearing could not proceed on the subsequent dates for one reason or the other all at the instance of the respondents until 08/10/2015. On that date, only one witness for the second respondent testified before the trial court granted the respondents leave to file two affidavits in proof of some of the disputed claims in the suit. The said affidavits were not filed until 04/03/2016 followed by the ex parte judgment on 18/07/2016 incorporating the claims subject of the ex parte hearing and the amounts granted on admission earlier on in favour of the first respondent.

Subsequently, the appellant applied to set aside the ex parte judgment under Order XI rule 14 of the Civil Procedure Decree [Cap. 8 of the Laws of Zanzibar], henceforth, the CPD. The appellant's main

contention in the supporting affidavit was that the trial court conducted the ex parte hearing without notice to her thereby denying her right to be heard. Nonetheless, the High Court found no sufficient cause to grant the application. It dismissed it hence the instant appeal.

Ground four on which the appeal will be determined states:

> *"The trial court erred in law and fact in holding that there was no sufficient reason to set aside its* ex parte *judgment in Civil Case No. 16 of 2011"*

At the hearing of the appeal, the appellant was represented by Mr. Reuben Robert, learned advocate from Nexlaw Advocates. The respondents for their part had the services of Messrs. Omar Idd Omar and Omary Habib Omary, learned advocates resisting the appeal. We heard oral submissions from the learned advocates for and against the appeal by way of emphasis in addition to their respective written submission in support and in reply filed earlier on in accordance with the relevant Rules of the Court.

Essentially, the learned advocate for the appellant submitted that the learned High Court Judge misdirected himself in refusing to set aside the ex parte judgment under Order XI rule 14 of the CPD by failing to

hold that the appellant was not aware of the date of hearing of the suit in the absence of proof of service of summons to appear on the date the High Court made an order for ex parte hearing. Neither was she aware of the withdrawal of her erstwhile advocate.

Secondly, the appellant contended that in any event, had there been any proof of service, the summons was not for hearing of the suit but for mention on which date the trial court could not have made such an order. The learned advocate sought reliance from two of the Court's decisions in **Shengena Limited v. National Insurance Corporation & Another**, Civil Appeal No. 9 of 2008 and **Mr. Lembrice Israel Kivuyo v. M/s. DHL Worldwide Express DHL Tanzania Limited**, Civil Appeal No. 83 of 2008 (both unreported) for the proposition that no substantive issues can be disposed on a date fixed for mention.

The learned advocate contended further that the learned Judge made an error in the exercise of his discretion against the appellant thereby refusing to set aside the ex parte judgment and prayed for an order allowing the appeal with costs.

The learned advocate for the respondents urged the Court to sustain the impugned decision. He argued that the High Court rightly refused to set aside the ex parte judgment upon being satisfied that the

appellant was aware of the case but wilfully defaulted appearance regardless of whether the summonses served on her were for mention or hearing. Mr. Omar contended that the refusal to set aside the ex parte judgment was a result of the appellant's own failure to exhibit sufficient cause as required by Order XI rule 14 of the CPD by her wilful default to appear before the trial court despite the warning at the foot of the summons upon non-appearance.

Mr. Reuben argued in rejoinder that notwithstanding the warning or the indication that the notice was for hearing of the suit, the summons was for mention on which date the High Court could not have made an order for ex parte hearing let alone the fact that there was no proof of service of such summonses.

As alluded to earlier on, the determination of this appeal resides in the issue whether, in refusing to set aside the ex parte judgment, the High Court exercised its discretion properly. Unlike in other appeals, this appeal involves the exercise of discretion by the High Court bestowed on it by Order IX rule 9 of the CPD which states: -

> *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:..."

In effect, the appellant is faulting the exercise of discretion by the trial court inviting the Court to interfere with it in this appeal. We must state at this juncture that it is settled law that superior courts are generally loathe to interfere with the exercise of discretion by the lower courts/tribunals except where it is plain that the decision arrived at was a result of erroneous exercise of discretion through; one, taking into consideration irrelevant extraneous matters; two, omitting to take into account relevant matters and three; misdirecting itself. See: **Mbogo & Another v. Shah [1968]** E.A. 93 and subsequent Court decisions amongst others, **Credo Siwale v. R.** Criminal Appeal No. 417 of 2013, **The Commissioner General, Tanzania Revenue Authority v. New Musoma Textile Limited**, Civil Appeal No. 119 of 2019 and **Nyabazere Gora v. Charles Buya**, Civil Appeal No. 164 of 2016 (all unreported).

The appellant's application before the High Court was predicated on want of service of the summons to appear when the suit was called on for hearing. She sought to persuade the trial court that summonses for hearing were not duly served on her but even if that was so, the order for ex parte hearing was erroneous because it was made on a day fixed for mention. It is plain that Order XI rule 6(a) of the CPD on whose basis the trial court made an order for ex parte hearing presupposes that the party (plaintiff) seeking ex parte hearing has proved that the summons was duly served on the defendant on a date the suit is called on for hearing.

The record shows that, on 16/06/2015, the appellant did not enter appearance but the advocate for the respondents moved the trial court for an order for ex parte hearing under Order XI rule 6 (1) (2) and (b) of the CPD because, despite the appellant being duly served, she defaulted appearance. However, the record does not indicate that there was any proof of service on the appellant. Indeed, as there was no order for service on the appellant on 27/04/2015 when the DR-HC scheduled the matter for mention on 16/06/2015, it could not have been practically possible for the appellant to enter appearance on that date. Yet, the trial

Judge readily granted the prayer for ex parte hearing which he adjourned to 12/08/2015 with an order for service on the appellant.

Apart from lack of proof of service, the learned Judge ordered service on the defendant (appellant). It is not clear on what basis the trial Judge directed service on the absent defendant (appellant) if there was proof of service on her. Needless to say, on 12/08/2015, the record reflects the following: -

> *"Coram: Mr. Abraham Mwampashi, J.*
>
> *Plaintiff: Absent*
>
> *Defendants: Absent*
>
> *Court Clerk: Mr. Juma Bakar*
>
> *Court Clerk: Mr. Mbwambo (Advocate) for the plaintiff has called me to notify that they won't make it today because he is bereaved. He askes for matter to [come] on 17/09/2015...."*

On the basis of that information, the learned Judge ordered the matter to "come" on 17/09/2015. The record does not show that there was any proof of service on the appellant consistent with the previous order made on 16/06/2015 neither did the trial court direct fresh service on the absent appellant. But that was not all. The ex parte hearing did

not take place on 17/09/2015 due to the absence of the respondents' witnesses which necessitated another adjournment to 08/10/2015. Only one witness testified for the respondents before the trial court granted leave to the filing of affidavits in proof of some of the claims in terms of Order XXII rule 1 of the CPD.

The nagging question still remains; was the order for service on the appellant made on 16/06/2015 complied with and if so, did the trial court satisfy itself that the appellant was duly served? These two questions take us to Order XI rule 8 of the CPD which provides: -

> *"Where the court has adjourned the hearing of the suit* ex parte *and the defendant, at or before such hearing, appears and assigns good cause for his non appearance he may, upon such terms as the court directs as to costs or otherwise be heard in answer to the suit as if he had appeared on the day fixed for his appearance."*

It is evident from the record that the ex parte hearing ordered on 16/06/2015 did not take place instantly. It was adjourned to 12/08/2015 with an order for service on the appellants. Had that order been complied with, the appellant would have seized the moment to satisfy

the trial court why she defaulted appearance earlier and be granted a hearing in terms of Order XI rule 8 of the CPD.

What happened in the instant appeal is somewhat analogous to the events in **Faizen Enterprises Limited v. Africariers Ltd** [1999] T.L.R 416. The respondent in that case had defaulted appearance when the suit was called for hearing on 15/04/1993. Instead, the High Court of Tanzania (Dar es Salaam Registry) proceeding with hearing ex parte by affidavit at the respondent's prayer to that effect, it ordered the filing of affidavit on a subsequent date and a mention the following day. Nevertheless, it dismissed the suit subsequently. One of the issues the Court was confronted with was the propriety of the order adjourning the ex parte hearing to a subsequent date. The Court found that to be irregular holding that that order had the effect of adjourning the hearing to the new returnable date which triggered in the provisions of Order IX rule 7 of the Tanzania Civil Procedure Code [Cap. 33 R.E 2019] (the CPC), the equivalent of Order XI rule 8 of the CPD. The Court had the following to say: -

> *"First, 15/04/93 was the date set for the hearing of the suit, presumably therefore counsel for the plaintiff had come to court with all his witnesses and exhibits ready to proceed with the hearing.*

> *If this is so, why then or what prevented him from proceeding with the hearing? Was counsel's application to proceed* ex parte *by affidavit meant to hide the fact that even the plaintiff was in no position to proceed with the hearing? If the court had not as it were automatically granted this strange application, it would have seen through the deception and discovered that even the plaintiff had no witnesses to proceed with the case..."* [at page 421].

By parity of reasoning, if 16/06/2015 was the date set for hearing then the assumption was that the respondents' advocate had all his witnesses and ready to proceed which did not happen. Even though the trial court adjourned the ex parte hearing to 12/08/2015, such hearing did not take place at the instance of the respondent's advocate reported to have been bereaved. We are not entirely certain whether the trial court was properly moved to grant the adjournment on the basis of the advocate's communication with the Court Clerk but what is obvious is that the respondents were, yet again, not ready to proceed with the ex parte hearing. Similarly, whereas the trial Judge had directed notice to be issued to the appellant for the new returnable date, he did not do alike when it became inevitable to adjourn the hearing to 17/09/2015 at the instance of the respondents' counsel the more so when there was no

indication that the appellant had been served with notice of hearing having regard to the provisions of Order XI rule 8 of the CPD.

What all the above show is that despite the appellant's absence for whatever reason, the respondents who had moved the trial court for an ex parte hearing were not ready for such hearing until 08/10/2015. All the same, only one witness testified followed by a request for filing affidavits on a subsequent date which were not filed until five months later on 04/03/2016.

In our view, whether or not the summons claimed to have been served on the appellant were for mention or hearing, the issue for our determination turns on whether the trial court acted properly within the law in refusing to set aside the hearing. It is clear from the record that the appellant's quest to have the *ex parte* judgment set aside by reason of her being unaware of the case did not find purchase with the learned trial Judge who downplayed it as a lie, so to speak.

Be that as it may, despite the High Court's finding, 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. Had the learned trial Judge critically examined the copies of summonses annexed to the respondents' counter- affidavit (annexures K-1 and K-2),

he would have exercised his discretion in the appellant's favour and set aside the ex parte judgment. We say so mindful that the record, particularly page 299, does not indicate that the summons issued on 17/03/2015 was duly served on the appellant; a corporation which ought to have been served on her in accordance with the provisions of Order XXXIII rule 2 of the CPD through her secretary, any director or other agent. There is no indication that the signature appearing on annexure K-2 is that of a secretary or director or any agent of the appellant in the absence of an official stamp or name and title of the person who is shown to have acknowledged service by appending a signature. To cap it all, the rubber stamp embossed on annexure K-2 is shown to be that of KIWI Resort Limited a distinct legal person from the appellant.

It is true that the appellant's averment that she was not aware of the case may not have been correct but in our view, the appellant must have meant that she was not aware of the progress of the case after the withdrawal of her erstwhile advocate on 10/09/2014. Viewed in that context, the finding that the appellant was negligent in following up her case was, with respect, not based on the evidence on record particularly what transpired on 17/03/2015. It is evident that the advocate for the

respondent informed the trial court that the appellant had not been duly served and hence adjournment to 27/04/2015 pending service. Under the circumstances, it is not clear to us how could have the appellant been negligent when it was obvious that by 17/03/2015 she had not been duly served with the summons to appear let alone the fact that at no material time did the respondents prove service of summons on her.

The foregoing glaring matters which were brought to the attention of the learned trial Judge were sufficient to prove that the appellant was not duly served warranting an order setting aside the ex parte judgment. The appellant had nothing more to satisfy the trial court that she was not duly served which should have triggered in the full application of the Court's decision in **Caritas Kigoma v. K. G. Dewsi Ltd**, Civil Appeal No. 47 of 2004 (unreported) cited to the learned trial Judge which he sought to distinguish as inapplicable. As shown at page 263 of the record, in **Caritas Kigoma** (supra) the Court emphatically stated that it was wrong for the trial Judge refusing to set aside an ex parte judgment in the absence of proof that the appellant had been duly served with the summons to appear. Unlike the learned trial Judge, that decision was relevant and applicable to the facts in the application before him.

It will be clear by now that apart from the arguments put forward by the appellant's counsel on the propriety of the nature of the summons on whose basis the trial court ordered ex parte hearing, that argument can only arise if there was proof of service and not otherwise.

Consequently, we are satisfied that the trial court failed to exercise its discretion properly by taking into account matters which it should not have taken into consideration and failing to take into consideration matters such as want of proof of summons on the appellant's company before making an order for ex parte hearing. Besides, the trial court failed to take into account the fact that the order for ex parte hearing was premature considering that the respondents were not ready for hearing for a period of four months from the date of that order. As a result, the trial court arrived at a wrong decision refusing to set aside the ex parte judgment warranting the Court's interference in this appeal.

In the light of the foregoing, we are constrained to allow the appeal in ground four and quash the decision of the High Court refusing to set aside the ex parte judgment in Civil Case No. 16 of 2011 and substitute it with an order granting Civil Application No. 24 of 2016 with a direction for the hearing of the suit *inter partes* on the remaining claims between the second and third respondents (plaintiff) and the

appellant (defendant) in accordance with the law. The appellant shall have her costs in this appeal against the 2nd and 3rd respondents considering that the first respondent has no interest in the ex parte judgment by reason of the judgment on admission entered on 16/06/2015.

DATED at **ZANZIBAR** this 14th day of June, 2022.

S. A. LILA
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Judgment delivered this 15TH day of June 2022 in the presence of Mr. Ruben Robert, counsel for the Appellant and Mr. Omary H. Omary, counsel for the Respondents, is hereby certified as a true copy of the original.

J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL