IN THE HIGH COURT OF TANZANIA

(MWANZA DISTRICT REGISTRY)

AT MWANZA

CIVIL APPEAL NO. 45 OF 2015

(Arising from the exparte judgment of the District Court of Musoma as per R.B. Maganga, SDM dated 21.5.2015 and as order refusing to set aside the exparte judgment dated 17.8.2015)

THE REGISTRED TRUSTEES OF PENTECOSTAL CHURCH IN TANZANIA ..... **APPELLANT**

VERSUS

MAGRETH MUKAMA (A minor by Her Next friend, EDWARD MUKAMA ..... **RESPONDENT**

RULING

MAIGE, J

On 21st May 2015, the trial court pronounced an *ex parte* judgment awarding the respondent **TZS 147,000,000/=** as damages for negligence. Aggrieved by the decision, the appellant filed an application for setting aside the *ex parte* judgment, the application which was dismissed on 17th August, 2015. Once again aggrieved, the appellant has jointly appealed against both

the *ex parte* decree and the order refusing to set it aside. The appeal is premised on the following six grounds of appeal:-

1. That the trial Court erred on point of law when it proceeded with a matter without framing issues for determination.

2. That the trial Court misdirected itself on point of law to consider and act on secondary evidence without good cause.

3. That since no Doctor was called upon to prove medically the health of the minor, the trial Court misdirected itself to asses and award damages on hearsay evidence that was incredible and unreliable.

4. That the trial Court erred on point of law to act upon evidence that was received without payment for exhibits according to the law.

5. That the trial Court misdirected itself on facts to deny the appellant the right to be heard despite the Respondent's Counsel Admission.

6. That since there was no proof of service to the Respondent the trial Magistrate erred on point of law to disregard the

requirements of law and procedure thus seriously faulting the appellant fundamental right to defend her case.

The first four grounds of appeal, it would appear to me, seek to challenge the *ex parte* judgment on merit whereas the last two grounds of appeal fault the order refusing to set the *ex parte* judgment aside. It is common ground that both the *ex parte* judgment and the order refusing to set aside the same are appealable. Nevertheless, the counsel for the appellant contends that an appeal against an e*x parte* judgment is conditional upon there being an attempt to have it set aside. It is perhaps because of that reason that the appellant had first attempted to set aside the *ex parte* judgment before preferring this joint appeal.

Admittedly, my attempt to have this appeal disposed of on merit has been as tough as sacking blood from a stone. Ordinarily, the advocates' written submissions would have simplified my business. Conversely, the vice versa has turned out to be the truth. No sooner did I go through the written submissions than I realized that this appeal could not be determined on its merit without first satisfying my self on its maintainability. It was not positively clicking in my mind that, an

ex parte judgment and a decision refusing to set it aside would be jointly preferred without offending the law. I therefore, instead of proceeding with the composition of the judgment, invited the counsel to address me orally on that issue, which they did considerably well in my view.

It would appear to be the view of Mr. Makowe, learned advocate for the appellant; that an appeal against an *ex-parte* judgment does not arise unless the appellant has first attempted to have the same set aside in terms of order 9 rule 13 (1) of the Civil Procedure Code Act, Cap. 33 RE 2002 ("the CPC"). His submission was not unsubstantiated. It was premised on the authorities of this Court in **Mtondoo vs. Janmohamed**, (1970) HCD 325 and **Sosthenes Kagyabukama vs. Theobald Kayungulima**, 1968 HCD.

On his part, Mr. Chama Matata, learned advocate for the respondent contends that the approach taken by the appellant in dealing with the *ex-parte* judgment is tantamount to riding two horses at the same time which is logically impossible. In his view, once the appellant opted to make use of order 9 rule 13 (1) of the CPC, he ought to have continued with the same avenue up

to the level of the Court of Appeal. Mr. Matata placed heavy reliance on the authority of my brother judge Mjemas in the **Managing Director, Precession Air Service Ltd. Leonard F. Kachebonaho**, Civil Appeal No. 18 of 2008, HC (Bukoba)Unreported.

Before addressing this pertinent issue, it may be valuable to make a brief elucidation of the law relating to *ex-parte* determination of a suit. It is a clear position of law, under order 9 of the CPC that, where the defendant does not appear on the date of hearing, the trial Court may allow the plaintiff to proceed *ex-parte* and upon *ex- parte* hearing, it may pronounce an *ex-parte* judgment. Under order 9 rule 13 (1) of the CPC, an *ex-parte* judgment may be set aside if the judgment debtor assigns good cause that prevented him to appear on the date when the Court allowed the decree holder to proceed *ex-parte*. It has to be noted that the remedy for setting aside an *ex-parte* judgement is only available if the judgment debtor has good cause to justify his non-appearance. In the event that the trial court refuses to set aside the *ex-parte* judgment, the judgment debtor can appeal under order XL rule 1 (d) of the CPC.

On the other hand, an *ex-parte* judgment is appealable under section 70 (2) of the CPC which provides that " *an appeal may lie from an original decree passed ex-parte*". Section 70 (2) of the CPC unambiguous as it is, does not impose any condition for appealing against an *ex-parte* judgment. Its wordings as I read it is identical with that of section 70 (1) of the CPC which provides for an automatic right of appeal against an original decree of a subordinate court. Mr. Makowe has referred me to the authorities in **Mtondoo vs. JanMohamed** and **Sosthenes Kagyabukama vs. Theobald Kayunguluma** to support the view that an appeal against an *ex-parte* judgment presupposes an attempt to have the same set aside. I have examined the authorities and found nowhere the provision of section 70 (2) of the CPC is being considered. It is only the provision of order 9 rule 13 (1) of the CPC which has been taken into account in the respective authorities. There being no discussion of the provision of section 70 (2) of the CPC, it cannot be said that the same has been interpreted as to impose restrictions in an appeal therein envisaged.

It is worthy of note that, unlike the old authorities just referred, in **Managing Director Air Service Ltd vs. Leonard F.**

Kachebonaho, both the provisions of section 70(2) and order 9 rule 13 (1) of the CPC were given due consideration before the Court had come to a conclusion that the merit of an *ex-parte* decree could be directly appealed from without a prior attempt to have it set aside. The opinion of my Lord Mjemas which I fully support was to the effect that; since an *ex-parte* decree can be challenged on appeal or by way of an application to have it set aside, the aggrieved party may appeal without a prior attempt to have it set aside provided that the appeal does not seek to challenge the order allowing the decree holder to proceed *ex-parte*. In his judgment, his Lordship sought an inspiration from the learned author Mullar in his **Mulla on Code of Civil Procedure, 16th Edition,** in his commentary on the provision of section 96 (2) of the India Code of Civil Procedure which is in *peri -materia* with our section 70(2) of the CPC. In his own words, His Lordship has the following to say at page 9 -10 of the judgment;-

> *What I can gather from the above quoted comments by Muller on section 96(2) of the Code of Civil Procedure of India which is in pari materia with our Section 70 (2) of the Civil Procedure Code is that an appeal against a decree passed ex-parte is possible*

under that section even if the appellant did not exhaust or exercise the remedy provided under O IX rule 13 and O XL rule 1 (d) of the Civil Procedure Code, Cap. 33 R.E. 2002. The only limitation is that appellant will not be allowed on appeal to challenge the order posting the suit for ex-parte hearing by the trial court and or existence of sufficient cause for non appearance of the defendant before it. He could only challenge the merit of the suit so as to enable him to contend that the materials brought on the record of the plaintiff were not sufficient for passing a decree in favour or the suit was otherwise not maintainable.

It is cardinal principle of statutory interpretation that where the wording of a statue is clear and unambiguous, it does not need interpretation. Maxwell on **the Interpretation of Statues**, 10th Edition, at page 4 makes the following persuasive statement on the rules of interpretation.

"When the language is not only plain but admits of but one meaning, the task of interpretation can hardly be said to arise. It is not allowable...to interpret what has no need of interpretation....."

The above statement was given judicial recognition by the Court of Appeal of Tanzania in the case of **the Board of Trustees of the National Social Security Funds vs the New Kilimanjaro Bazaar Limited**, Civil Appeal No. 16 of 2004, (Unreported), where the Court of Appeal stated that "***It occurs to us that where the provisions of a statute are plain and unambiguous, there is no need to resort to rules of construction***"

In my opinion therefore, since the provision of section 70 (2) of the CPC clearly and unambiguously provides for an automatic right of appeal against an *ex-parte* judgment, it is not for the court to, by way of interpretation, cut down its scope by speculating that the legislature intended to impose such a precondition. I have therefore no doubt from the foregoing authorities; that a right to appeal against an *ex-parte* decree on its merit is automatic and does not depend upon there being a prior attempt to have it set aside.

If, however, contrary to the opinion I have articulated, an appeal against an *ex-parte* judgment was conditional upon the appellant exhausting all the available remedies, an appeal against an *ex parte* judgment would not arise until the appellant had

exhausted the available remedies, namely appealing against an order refusing to set aside the *ex-parte* judgment in terms of order XL rule 1 (d) of the CPC and in the event of failure, a second appeal to the Court of Appeal.

The next issue which I have to resolve is whether it is appropriate to fault an *ex parte* judgment and an order refusing to set aside an *ex parte* judgment in one appeal. In the opinion of Mr. Makowa, learned advocate for the appellant, it is possible. It is his contention that where the appellant appeals against an *ex parte* judgment, the time in which he was prosecuting an application for setting aside the *ex parte* judgment will be suspended for the purpose of the law of limitation. He has not cited any authority. On his part, Mr. Matata was of the contention that it was not possible as that would be equivalent to riding two horses at the same time.

My quick research could not come out with any case law discussing similar issue. The instructive comment of the learned author Mullar on this aspect however may be useful. At page 1055 and 1056 of his **Mullar on the Code of Civil Procedure**(*supra*), he makes the following remark on the application of section 96 (2) and order 43 rule 1 (d) of the India

Code of Civil Procedure Code which are materially similar with our section 70(2) and XL rule 1 (d) of our CPC, respectively:-

> *Where no application under order 9 rules 13 was moved for setting aside the ex parte decree in an appeal against such decree under s. 96(2), an error, defect or irregularity which has affected the decision of the case, can be challenged. Such an appeal cannot be converted into proceedings for setting aside an ex-parte decree. The Code prescribes the remedy for setting aside ex parte decree under order 9 rule 13 and when a plea under such provision fails, an appeal is specifically provided under cl (d) of r 1 of Order 43 of the Code against an order of the trial court refusing to set aside ex-parte decree. When particular remedy is provided for setting aside an ex-parte decree and there is, by way of appeal, another special remedy against an order refusing to set aside a decree, these remedies alone, and none other, can be taken to resort. Therefore, where these remedies have not been availed of in an appeal under s.96(2)*

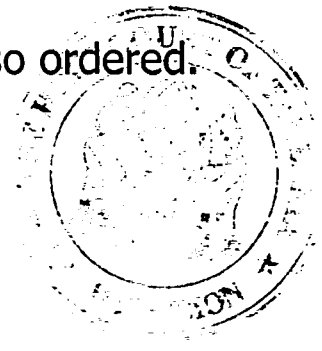
or in the second appeal under s 100 of the Code, no ground can be entertained that the ex-parte proceedings were wrongly taken against the appellant which resulted in passing of the ex-parte decree. The application under O 9, r 13 is a statutory remedy which is available to the defendant. In pursuance to this remedy, it could not be said that other remedy available under s 96 of the Code of Civil Procedure was suspended, or that the same could be exercised at some later point of time, in case the proceedings under O 9, r 13 failed.

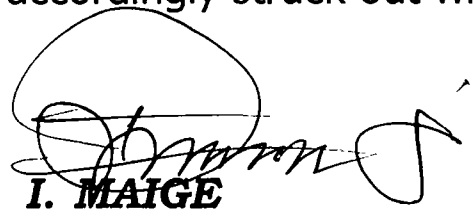
From the commentary above extracted, which I absolutely subscribe to, I think the two actions cannot be preferred together. As correctly observed by the learned author Mullar, the right to appeal against the two decisions are separate and distinct. They are two different and independent statutory remedies established by different provisions of law. An appeal against a decision refusing to set aside an *ex parte* judgment if successful has the effect of maintaining the s*tatus quo* by restoring the suit. It would thus follow that once the suit is

restored, there remains nothing to be appealed against. Contrariwise, an appeal against an *ex-parte* decree if successful will have the effect of finally and conclusively disposing of the dispute. There is therefore, no way the two causes of action can be preferred together. Conceivably, that would be possible if our law allowed omnibus appeals in the same way as it is for *omnibus* applications. As much as I know our law does not allow one appeal against two appealable decisions.

For the foregoing reasons therefore, this appeal is incompetent in law and it is accordingly struck out with costs.

It is so ordered.





I. MAIGE

JUDGE

Date: 15.12.2016

Coram: Hon. F. Kabwe – DR

Appellant: Mr. Mwita Musibo Church elder

Respondent: Present

B/C: M. Said

Court: Ruling delivered before parties R/A explained.

F.J. KABWE
DEPUTY REGISTRAR