

**IN THE HIGH COURT OF TANZANIA
(IN THE DISTRICT REGISTRY)**

**AT MWANZA
HC. CIVIL APPEAL NO. 48 OF 2020**

(Arising from the Ruling and Drawn Order of the Resident Magistrates' Court
of Mwanza at Mwanza in Misc. Civil Application No. 43 of 2020)

FG FLINT GRAPHS LIMITED APPELLANT

VERSUS

GODFREY MICHAEL RESPONDENT

JUDGMENT

Date of last Order: 27.10.2020

Date of Judgment: 10.11.2020

A.Z.MGEYEKWA, J

This is the first appeal. It stems from the decision of the Resident Magistrates' Court of Mwanza in Misc. Application No. 43 of 2020. Brief facts relevant to the case at hand is that FG Flint Graphs Ltd, the appellant filed an application to set aside an *ex parte* Judgment and Decree dated 27th February, 2020 before the Resident Magistrates' Court for Mwanza. The Resident Magistrates' Court dismissed the said application for the

reasons that the appellant's Advocate was required to renew his practicing certificate and attend the matter in court but instead, he vanished for the lame excuse of having a return ticket to Dar es Salaam and alleged subsequent sickness. The appellant was not pleased with the decision of the Tribunal. He, therefore, preferred an appeal to this court.

Believing the decision of the Resident Magistrates' Court was not correct, the appellant lodged this appeal on four grounds of appeal and while the matter was still pending in Court. The grounds of appeal are as follows:-

- 1. That, the trial Resident Magistrate erred in both fact and law by failing to consider sickness of the Applicant's counsel as a sufficient reason for non-appearance.*
- 2. That, the Honourable Magistrate erred in fact and law by finding that the Applicant did not show sufficient cause for his non-appearance.*
- 3. The Honourable trial Magistrate erred in both fact and law in failing to analyse the legal aspects raised by the Applicant in his submissions.*
- 4. That, the trial Magistrate erred in both facts and law by making findings and conclusions not based on the facts and evidence available but it was based on speculations and assumptions.*

When the appeal was called for hearing before this court on 27th October, 2020. Mr. Edwin Webiro, learned counsel, represented the

appellant while Mr. Linus Munusi, learned counsel, appeared for the respondent.

Mr. Edwin, learned counsel started to kick the ball rolling. He abandoned the fourth ground of appeal and opted to consolidate the second and third grounds of appeal. The first ground to be argued separately.

Submitting on the first ground of appeal, Mr. Edwin argued that the Magistrate scheduled the hearing date on 11th February, 2020 unfortunately, the counsel for the applicant failed to appear due to sickness as a result the application was dismissed. Mr. Edwin went on to argue that the applicant filed an application to set aside the Misc. Application No. 43 of 2020, the reason for nonappearance was sickness.

He added that the appellant's Advocate was sick and appended a medical report. He went on to state that the Magistrate erred in law for failure to consider sickness as a sufficient reason to set aside the *ex parte* judgment. Mr. Edwin fortified his submission by referring this court to the case of **Sadru Mangalji v Abdul Aziz Lalani and 2 others**, Misc. Commercial Application No. 126 of 2006 (unreported).

As to the second and third grounds, he argued that it is trite law that the party against whom the matter proceeded *ex parte* deserved a right

to be notified of the date when the *ex parte* judgment will be delivered. Mr. Edwin lamented that the matter proceeded *ex parte* against the appellant however, the appellant was not notified of the date when the *ex parte* judgment will be delivered. To bolster his submission he cited the cases of **Cosmas Construction Company Ltd v Arrow Garments Ltd** (1992) TLR and **Chausiku Athuman v Atuganile Mwaitege**, Civil Appeal No. 122 of 2007 (unreported).

The learned counsel for the appellant continued to argue that the appellant raised the same concern before the Resident Magistrates' Court but the Magistrate did not take into account the appellant's concern. He added that it is their submission that the court erred in law by not considering this ground in setting aside the *ex parte* judgment.

On the strength of the above argumentation, the learned counsel for the appellant beckoned this court to allow the appeal with costs and remit back the file to the subordinate court to proceed with hearing interparties.

Responding thereto, Mr. Linus also consolidated the second and third grounds of appeal and opted to argue the first ground separately.

On the first ground, he asserted that the Magistrate was not able to proceed with hearing due to the inactive status of the appellant's Advocate

practicing licence. He added that the Magistrate ordered the Advocate to active his status and he scheduled the matter to proceed on the following day. Mr. Linus stated that the appellant's Advocate opted to return to Dar es Salaam. He added that the circumstance created confusion thus the Magistrate ruled out that the appellant's Advocate ground was an afterthought.

Mr. Linus went on to state that it was not the first time for the court to dismiss the appellant's application. He added that the applicant filed several applications; Misc. Application No.58 of 2017, Misc. Application No. 57 of 2018 and Misc. Application No. 43 of 2020 with the same prayers and the same were dismissed.

On the second and third grounds of appeal, Mr. Linus argued that the appellant's Advocate did not state how he was affected for not being notified of the date of delivering the judgment.

On the basis of the above, the learned counsel for the appellant submitted that the application was without merit and prayed to have it dismissed with costs.

Rejoining, Mr. Edwin reiterated his submission in chief and insisted that the main cause of his absence was because he falls sick. He added

that the appellant's advocate had a duty to prove his whereabouts at the time when the matter was called for hearing. Mr. Edwin went on to state that the law does not require one to show how he was affected by an *ex parte* judgment instead the court is obliged to inform the party of the consequences of *ex parte* judgment. He concluded by requesting this court to allow his appeal.

After a careful perusal of the submissions made for and against the appeal by both learned Advocates and after having gone through the court records, I have come to the following firm conclusions. In determining this application the main issue calling for determination is *whether or not the appellant has shown good cause to warrant this court to grant his appeal.*

After taking into consideration what has been stated by both learned counsels. I would like to make an observation that the appellant's grounds for setting aside the *ex parte* judgment in Civil Case No.114 of 2016 was due to the appellant's sickness and that the appellant was not notified of the date of delivering the judgment. It is no gainsaying that the appellant neither the appellant's Advocate appeared before the Resident Magistrates' Court on the day when the matter was called for hearing. As a result, the application was dismissed for non-appearance.

The record reveals that the appellant's Advocate filed a Misc. Application No. 43 of 2020 praying for the District land and Housing Tribunal to restore the appellant's application and his reason was based on sickness. I am in accord with both learned counsels that sickness is a sufficient reason for setting aside an *ex parte* judgment if the party has proved that on the day of hearing he was undergoing treatments.

The court in a number of authorities explained what amount to sufficient cause whereas in determining good cause, circumstances of each case have to be taken into consideration as there is no single definition of what amounts to good cause. In the case of **Mr. Kamiz Abdullah M.D Kermal v The Registrar or Buildings and Misc. Hawa Bayona** (1998), TLR 199, The Court of Appeal of Tanzania held that:-

"... where delay is caused by good reason, a prudent party may safeguard his interests by applying for extension of time."

Based on the above authority, the terms 'good cause' may include but not limited to, whether the application has been brought promptly, absence of any invalid explanation for delay, diligence on the part of the applicant, and claim of the illegality of the impugned decision. Examining,

the reasons given by the learned counsel that on the hearing day he fall sick and was kept under strict observation and he appended a medical report to support his submission.

In my respectful opinion, I find that the appellant's counsel has sufficiently stated the reasons for his non-appearance when the court proceeded with hearing the case *ex parte*. Reading closely the decision of the Hon. Ruboroga, SRM he did not consider the ground of sickness instead he based his decision on finding that the appellant's Advocate did not obey the court order to activate his practicing certificate.

The appellant's Advocate has also stated that the appellant had a right to know the date of delivering the *ex parte* judgment. The law requires that in an *ex parte* hearing the party against whom the hearing proceeded *ex parte* has a right to know the date of delivering the *ex parte* judgment. The main purpose of notifying the appellant is to know his right to take necessary steps to protect his or her rights where the judgment is prejudicial to his or her interest. The same was held in the case of **Chausiku Athumani** (supra). The Court of Appeal of Tanzania held that:-

"...in ex parte proceedings, failure to notify the defendant when the ex parte judgment will be delivered renders such proceedings

null because it denies the defendant the right to take necessary steps to protect his or her rights where the judgment is prejudicial to his or her interest."

Similarly, in the case of **Cosmas Construction Company** (supra) the Court of Appeal of Tanzania held that:-

"...a party who fails to enter an appearance disables himself from participating when the proceedings are consequently esparto, but that the furthers extent he suffer. Although the matter is therefore considered without any input by him he is entitled to know the final outcome. He has to be told when the judgment is delivered so that he may if he wishes, attend to take it as certain consequences may follow.

I have also considered the fact that it is in the interest of justice and the practice of this court that unless there are special reasons to the contrary, suits or matters are determined on merits as it was held in the case of **Sadru Mangalji** (supra). I have also considered the fact that the respondent would neither be prejudiced nor suffer any irreparable injury by the grant of this appeal.

In view of the above, I am satisfied that the appellant's Advocate had provided sufficient reasons why he did not show appearance when the matter was called for hearing.

In the upshot, the Orders of the Resident Magistrate's Court of Mwanza dated 11th June, 2020 in Misc. Civil Application No. 43 of 2020 and the *ex parte* Judgment in Civil Case No.114 of 2016 are hereby quashed and set aside. In the interest of justice, I order the matter be remitted back to the Resident Magistrate's Court of Mwanza to be determined on merits inter parties. Appeal is allowed without costs. Order accordingly.

DATED at MWANZA this 10th November, 2020.




A.Z.MGEYEKWA

JUDGE

10.11.2020

Judgment delivered in Chamber on 10th November, 2020 in the presence of both parties.


A.Z.MGEYEKWA

JUDGE

10.11.2020