IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MKUYE, J.A., KENTE, J.A. And KIHWELO, J.A.)

CIVIL APPEAL No. 278 OF 2019

ELIAS MASIJA NYANG'ORO.....1st APPELLANT

EDNA ELIAS NYANG'ORO.....2ND APPELLANT

RODRICK ELIAS NYANG'ORO.....3RD APPELLANT

VERSUS

MWANANCHI INSURANCE COMPANY LIMITED .....RESPONDENT

(Appeal from the decision of the High Court of Tanzania, Commercial Division at Dar es Salaam)

(Sehel, J.)

dated the 23rd day of October, 2017
in
Misc. Commercial Application No. 192 OF 2017

.....

JUDGMENT OF THE COURT

28th September & 24th October, 2022

KIHWELO, J.A.:

The appellants, Elias Masija Nyang'oro, Edna Elias Nyang'oro and Rodrick Elias Nyang'oro seek to reverse the decision of the High Court of Tanzania, Commercial Division (Sehel, J. as she then was) dated 23rd October, 2017 which dismissed the appellants' application for setting aside the dismissal order in Commercial Case No. 135 of 2015. Aggrieved by the impugned decision, the appellants have come before this Court by way of appeal.

We find imperative to briefly give a historical account of this matter, which is, ostensibly, not very difficult to comprehend despite its protracted history. The respondent, Mwananchi Insurance Company Limited, following the investigation conducted by M/S Deloitte Consulting Limited, instituted Commercial Case No. 135 of 2015 in the High Court of Tanzania, Commercial Division at Dar es Salaam (the High Court) suing the appellants for fraudulently taking its money, negligently settling insurance claims without adhering to the proper insurance practice and procedures, willful misappropriation and conversion of the respondent's assets, negligently authorizing payments for legal fees on matters that did not involve the respondent and without the necessary Board resolution and general damages among other claims. The case proceeded *ex parte* on account that the counsel for the appellants was absent on the hearing date, despite the fact that, he was present on the date when the hearing was fixed. After hearing the respondent's case, on 12th June, 2017 an *ex-parte* judgment was delivered in favour of the respondent. Subsequently, the appellants lodged Miscellaneous Commercial Application No. 192 of 2017 before the High Court seeking to set aside the *ex parte* Judgment. The matter was assigned to Hon. Sehel, J (as she then was) who upon hearing the parties was satisfied that the appellants deliberately decided

not to turn up on the date fixed for hearing for reasons better known to themselves. The application was therefore dismissed with costs.

The appellants presently seek to overturn the decision of the High Court through a memorandum which is comprised of three points of grievance, namely:

1. *That the learned trial Judge erred in law and fact when she found and held that the absence of the appellants at the hearing of Commercial Case No. 135 of 2015 was deliberately made.*

2. *That the learned trial Judge erred in law and fact for failure to determine the sufficient causes advanced to justify setting aside the ex parte judgment.*

3. *The appellants were denied the right to be heard and to a fair trial.*

When, eventually, the matter was placed before us for hearing on 28th September, 2022 the appellants had the services of Mr. Daimu Halfani, learned counsel whereas the respondent was represented by Mr. Hussein Kitta Mlinga, learned counsel who teamed up with Ms. Neema Mbotto and Mr. Theophil Kimaro, learned counsel. Both learned counsel lodged written submissions either in support or in opposition to the appeal which they, respectively, fully adopted during the hearing. However, we hasten to remark that, it will not be possible to recite each and every fact

comprised in the submissions but we can only allude to those which are conveniently relevant to the determination of the matter before us. In the upshot, Mr. Daimu invited us to allow the appeal with costs, whereas Mr. Kitta urged us to dismiss the appeal with costs.

Arguing in support of the appeal Mr. Daimu contended that the learned trial Judge was wrong to hold and find that the absence of the appellants at the hearing was deliberately made in that the appellants elected not to turn up on the date fixed for hearing for reasons better known to themselves. Elaborating further, he submitted that, the learned trial Judge took into-account matters which ought not to be taken into-account to deny the appellants an order to set aside the *ex parte* judgment. He particularly faulted the trial Judge's reasoning that the appellants deliberately did not appear on the date fixed for hearing while there was no order requiring them to make personal appearance before the court. In his view, he argued that the reasoning by the learned trial Judge was erroneous and cited Order III rule 1 of the Civil Procedure Code, Cap 33 R.E. 2022 (CPC) to facilitate his proposition.

Mr. Daimu went on to argue that, the affidavits by the appellants in support of the application do not show and cannot be implied that the appellants had personal knowledge of the date of hearing to be

condemned for deliberately absenting themselves on the date of hearing. He further submitted that, the appellants were not aware of the dates on which the matter was fixed for consecutive hearing owing to the withdrawal of the instructions by the former counsel who was representing them which information was relayed to them through email on 8th June, 2017 well beyond the dates when the matter was fixed for consecutive hearing on 9th and 10th May, 2017. In his view, there was no sufficient information before the trial Court to know that the appellants were aware of the date on which the matter was fixed for consecutive hearing nor the date for delivery of the *ex parte* judgment.

Illustrating further, Mr. Daimu contended that, the promptness and diligence upon which the subsequent learned counsel for the appellants engaged on 8th June, 2017 demonstrated, deserved due consideration by the learned trial Judge and that, it was erroneous for the learned trial Judge to consider that failure to bring documentary evidence to prove withdrawal of the previous learned counsel justified the dismissal of the application for setting aside the *ex parte* order. In his view, the learned trial Judge ought to have been persuaded with reasons for non-appearance of the appellants and not any other factors she mentioned in her ruling. To facilitate the appreciation of the proposition put forward by

the learned counsel, he referred us to the case of **Rafiq & Another v. Munshilal & Another,** 1981 AIR 1400, 1981 SCR (3) 509 as well as the case of **Felix Tumbo Kisima v. Tanzania Telecommunication Co. Ltd and Another** [1997] TLR 57 and submitted that, in the instant case there is no indication that the appellants were evading justice, intended to obstruct or delay the course of justice but in the contrary, the learned trial Judge ought to have taken into account the conduct of the erstwhile learned counsel as well as the promptness and diligence of the appellants in engaging another learned counsel.

Arguing in support of the second ground of appeal, Mr. Daimu contended that, the learned trial Judge in her ruling admittedly and correctly stated that, the breath of power to set aside *ex parte* judgment under rule 43 (2) of the High Court (Commercial Division) Procedure Rules, 2012 GN. No. 250 of 2012 (the Rules) is extensive with need to exercise such power on the facts and circumstances of each case and argued that there are reasons which the High Court ought to but did not take into account in determining the application to set aside the *ex parte* judgment. Mr. Daimu went further to discuss at considerable lengthy the facts, legal issues and circumstances which in his opinion were supposed to be taken into-account by the High Court including the existence of the

notice of appeal against the ruling of Hon. Nchimbi, J, dated 30th September, 2014, the investigation report by Deloitte Consulting Limited which in his opinion was conducted and prepared by inspectors not appointed and approved by the court, Commercial Case No. 135 of 2015 which in his view was instituted in contravention of section 222 (3) of the Companies Act, 2002 (Act No. 13 of 2002) and absence of proper Board resolution authorizing the institution of the Commercial Case No. 135 of 2015.

We should interpose here and observe that, the submission by the appellants' counsel on the above issues which was done at considerable lengthy is misconceived. We think, with respect, that, the argument by the appellants' counsel on the said facts, legal issues and circumstances are not relevant to the instant appeal which seeks to challenge the refusal to set aside the *ex parte* judgment.

In support of the third ground of appeal, Mr. Daimu was fairly brief and submitted that, in the impugned decision the appellants relied on three grounds namely, the appellants were not aware of the hearing date, existence of notice of appeal and that the appellants had prima facie good defence, both in matters of facts and law. Elaborating further, Mr. Daimu argued that the above grounds were adequately argued by the appellants, however, the High Court disposed the application on the basis of one

ground only leaving the other two grounds unresolved. In his opinion, one or more grounds were sufficient to grant the application but rejection of one of the grounds without considering others was sufficient to dismiss the application, Mr. Daimu argued.

In further arguing the appeal Mr. Daimu submitted that, the High Court did not consider the joint written statement of defence and the witness statements of the appellants which were not expunged from the record which was a fatal irregularity that denied the appellants the right to be heard and fair trial. The appellants were entitled in law to have their joint written statement of defence and their respective witness statements considered in the *ex parte* judgment, Mr. Daimu argued. He referred us to rule 49 and 56 of the Rules and contended that as the witness statements were still on record the learned trial Judge was duty bound to consider the appellant's witness statements and accord lesser weight and therefore argued that the appellants were not accorded a fair hearing and right to be heard. Mr. Daimu urged us to allow the appeal.

On the adversary, Mr. Mlinga, learned counsel for the respondent was very adamant and clearly commenced with a brief and focused reply supporting the decision of the High Court. Mr. Mlinga, contended that the impugned decision which the appellants are challenging arose from

Miscellaneous Commercial Application No.192 of 2017 which was an application to set aside the *ex parte* judgment in Commercial Case No. 135 of 2015. He argued further that, surprisingly and for an obscure cause the appellants' submission attempt to bring matters of substance in relation to Commercial Case No. 20 of 2013 as well as Commercial Case No. 135 of 2015 as if these cases are subject of the instant appeal. In any case matters relating to Commercial Case No. 20 of 2013 were earlier on raised as preliminary points of objection in Commercial Case No. 135 of 2015 and the same were overruled on the basis that they were devoid of merit.

In response to the first and the third grounds of appeal, Mr. Mlinga elected to argue them conjointly. He contended that, record of proceedings bears out that throughout the proceedings at the High Court, the appellants never appeared in court and instead they were represented by Royal Attorneys and Apex Attorneys, despite several demands to require their personal appearance. He referred us to pages 721 and 722 and the warrant of arrest issued in Commercial Case No. 135 of 2015. Mr. Mlinga, further contended that on 21st March, 2017 the matter was scheduled for Final Pre-trial Conference and issues were framed and agreed by the parties and the appellants were fully represented. He referred us to pages 726 and 727 and submitted further that the High

Court ordered that all witnesses who had filed witness statements be present for cross examination but quite unfortunate, neither the appellants nor their advocates appeared and it was under those circumstances that, the counsel for the respondent applied and was granted leave to proceed *ex parte* and the High Court ultimately entered an *ex parte* judgment on 12th June, 2017.

In further elaboration, Mr. Mlinga, argued that, it is erroneous and incorrect to argue that there was no order for the appellants to appear in person before the court on 9th and 10th June, 2017, because when the matter was called for Final Pre-trial Conference the appellants' advocates were present in court which is as a good as the appearance of the appellants themselves and the court ordered that all witnesses who filed witness statements should be available for cross examination and the appellants filed witness statements. He referred us to pages 367 to 456 of the record of proceedings and argued that it is inconceivable to argue that there was no order requiring the appellants to appear in person in court.

Illustrating further, Mr. Mlinga argued that, it is also inconceivable to argue that the appellants had no knowledge of the hearing date and that they became aware of the withdraw of their advocate on 8th June,

2017 after the matter had already been heard *ex parte* on 9th and 10th May, 2017. In his considered opinion, Mr. Mlinga argued, and correctly so in our view, that, since the counsel for the appellants appeared when the matter was fixed for consecutive hearing, the appellants were not diligent and vigilant enough to wait for more than three months to inquire about the status of their pending case. Reliance was placed in the case of **Lim Han Yung and Another v. Lucy Treseas Kristensen**, Civil Appeal No. 219 of 2019 (unreported). He contended that, the appellants cannot come now and allege that they have been denied their right to be heard while they had every opportunity to exercise that right. He distinguished the cited cases of **Rafiq and Another** (supra) and **Felix Tumbo Kisima** (supra) as being in applicable in the circumstances of the instant appeal as circumstances are not the same. Mr. Mlinga submitted that the appellants deliberately opted not to appear in order to delay justice and prolong the case. There is a considerable body of case law, see, for example, **Shah v. Mbogo and Another** (1967) EA 116 and **Haji Shamte and Another v. Republic** [1987] TLR 70 just to mention a few.

In response to the second ground of appeal, Mr. Mlinga argued that, in determining to set aside an *ex parte* judgment the court has discretion upon consideration that there was triable issues and sufficient reason as

rightly argued by the counsel for the appellants. However, in the instant appeal the records of appeal bear out that, the appellants were represented by Apex and Royal Attorneys but it is not clear which among the two law firms withdrew their instructions and what happened with the other law firm and this was not clearly articulated by the appellants while pursuing the impugned application.

In further response to the second ground, Mr. Mlinga submitted that, the existence of notice of appeal in Commercial Case No. 20 of 2013 without any bearing to the instant application under scrutiny does not warrant any sufficient reason for the failure by the appellants to appear on the date when the matter was fixed for consecutive hearing. The learned counsel distinguished all the cited cases by the appellants' counsel on account that they were not relevant to the appeal before us and that reference to the notice of appeal filed on 5th November, 2015 was ineffectual since to date, there is no any appeal filed and therefore in terms of rule 91 (a) of the Tanzania Court of Appeal Rules, 2009, the notice is deemed to be withdrawn.

In rejoinder submission Mr. Daimu was fairly brief. He essentially, reiterated his earlier submission and urged us to allow the appeal.

After a careful consideration of the entire record and the rival submissions by the parties there remains only one contentious aspect that needs to be resolved and that is whether or not the appeal is meritorious.

Our starting point will involve a reflection of the law that provides for discretion of the High Court to set aside an *ex parte* judgment. For the sake of clarity, we wish to excerpt the provision of rule 43 (2) of the Rules which provides thus:

> *"Where the Court has* ***entered an ex-parte judgment*** *or passed a dismissal order or any other order in accordance with Order IX of the Code,* ***it shall be lawful for the Court, upon application being made by an aggrieved party*** *within fourteen days from the date of the judgment or order,* ***to set aside or vary such judgment*** *or order* ***upon such terms as may be considered by the Court to be just****".*

Clearly, going by the wording of the provision above, the power to set aside an *ex parte* judgment passed by the High Court in this case for failure by the appellants to appear when the suit was called for hearing is vested in the High Court and this power has to be exercised judiciously and not arbitrarily or capriciously, nor should it be exercised on the basis of sentiments or sympathy. Fundamentally, the said discretion must aim at avoiding injustice or hardships resulting from accidental inadvertence

or excusable mistake or error, but should not be designed at assisting a person who may have deliberately sought it in order to evade or otherwise to obstruct the cause of justice – See **Shah v. Mbogo and another** (supra).

We have emboldened the text in the above excerpt to show the relevant parts of the provision in the circumstances of the instant appeal.

Speaking of the above provision, it is, perhaps, pertinent to observe that, the law in this country, like the laws of other jurisdictions, recognizes that, generally the High Court may set aside an *ex parte* judgment upon an application being made by an aggrieved party and upon the applicant assigning good reasons that prevented him from appearing when the matter was fixed for hearing. Therefore, the underlying factor in granting or not granting the application is for the applicant to demonstrate that they were prevented by good or sufficient cause to do what they were required to do by law or order of the court. The object of rule 43 (2) of the Rules which is more or less similar to Order IX rule 13 (1) and (2) of the CPC is to ensure that parties to the suit do not sleep on their rights but rather responsibly pursue their rights in the spirit of effective case management. It is on that basis the exercise of discretion by the lower court can rarely be interfered with where it is clear that the decision

arrived at was a result of erroneous exercise of discretion through either omission to take into consideration relevant matters or taking into-account irrelevant extraneous matters and misdirecting itself. See, for instance, **Mbogo and Another v. Shah** [1968] EA 93.

Corresponding observations were made in the case of **The Commissioner General Tanzania Revenue Authority v. New Musoma Textile Limited**, Civil Appeal No. 119 of 2019, **Nyabazere Gora v. Charles Buya**, Civil Appeal No. 164 of 2016 and **Kiwengwa Limited v. Alopi Tour World Hotels and Resorts SPA and Others**, Civil Appeal No. 240 of 2020 (all unreported).

The gravamen in this appeal seems to lie on the issue whether or not the appellants demonstrated good or sufficient cause for their failure to appear on the date when the matter was fixed for consecutive hearing on 9th and 10th May, 2017.

Looking at the averments deposed to by the appellants, we think, the Appellants are mainly trying to attribute their failure to appear on the date fixed for consecutive hearing to reasons furnished in paragraphs 7 and 8 of the affidavit of which we wish to quote as follows:

7. *". That, from then our lawyer from Apex Attorneys was attending the case and would have informed us of the status.*
8. *That, on 8th June, 2017 we asked for the status of the case from Apex Attorneys and we were informed that they had sent us an email that they had withdrawn from representing us in the case which email we did not receive".*

The above excerpt clearly, indicates that the appellants were duly represented throughout the proceedings and as rightly argued by Mr. Mlinga, the appellants were represented by a consortium of law firms as evidently seen in the records of proceedings at page 837 where the appellants averred in paragraph 2 of the affidavit that they jointly instructed Apex Attorneys and Royal Attorneys to represent them in Commercial Case No. 135 of 2015. Surprisingly, and for an obscure cause, the appellants remain silent on the fate of Royal Attorneys. So, even if we assume for the sake of arguments, that Apex Attorneys withdrew their instructions as Mr. Daimu sought to convince us, still there is no explanation leave alone plausible explanation as to what happened with Royal Attorneys.

We find considerable merit in Mr. Mlinga's submission that since the counsel for the appellants appeared on 21st March, 2017, when the matter was fixed for consecutive hearing on 9th and 10th May, 2017, the appellants were not diligent and vigilant enough to wait for more than three months up to 8th June, 2017 to inquire about the status of their pending case. The appellants were aware of what was going on in court through their advocates who even acknowledged receipt of the summons for *ex parte* judgment which is a clear manifestation that until the time of pronouncement of judgment the appellants were represented by their erstwhile advocates which is largely in stark contrast to what the appellants counsel allege. We are also of the considered opinion that, even if there was inaction, negligence or omission on the part of the erstwhile advocates as averred by the appellants, which generally, does not amount to good cause, the appellants deserve an amount of share of blame. Time without number we have held that in the circumstances like this, a party cannot throw the whole blame on their advocates. In **Lim Han Yung and Another** (supra) we observed that:

> *"We think that a party to a case who engages the services of an advocate, has a duty to closely follow up the progress and status of his case. A party who dumps his case to an advocate and does not make any follow ups of his case, cannot be heard*

complaining that he did not know and was not informed by his advocate the progress and status of his case. Such a party cannot raise such complaints as a ground for setting aside an ex parte judgment passed against him."

In our considered opinion the trial Judge was undeniably right to arrive to the conclusion she arrived at, considering the reasons we have explained above. In view of the foregoing position, the first and third grounds of grievances are misconceived and therefore we dismiss them.

We will now turn to the second ground of appeal which in our respectful opinion, it should not detain us. We do not see any grain of merit in the learned counsel for the appellants submission that there are reasons which the High Court ought to, but did not take into-account in determining the application to set aside the *ex parte* judgment. We think, with respect, issues like, the existence of the notice of appeal against the ruling of Hon. Nchimbi, J, the investigation report by Deloitte Consulting Limited, Commercial Case No. 135 of 2015 which is alleged to have been instituted in contravention of the law and absence of proper Board resolution authorizing the institution of the Commercial Case No. 135 of 2015, are arguments which would have been properly advanced in an appeal against the *ex parte* judgment in Commercial Case No. 135 of 2015

rather than being a ground of appeal in the instant appeal that seeks to challenge the refusal to set aside an *ex parte* judgment.

Indeed, all the issues that the appellants outline as matters that ought to, but were not considered by the High Court in determining them application, do not provide the explanation as to what prevented the from appearing on the date when the matter was fixed for consecutive hearing to warrant the Court find that they had good or sufficient cause for not appearing and therefore reverse the High Court by setting aside the *ex parte* judgment. None of the issues outlined under the second ground demonstrate that the appellants were diligent enough to pursue or follow up their case before the High Court. In the circumstances, it cannot be doubted that the second ground of complaint is misconceived and it equally fails.

We think it is momentous that we should remark in passing before we take leave of the matter that, the overarching policy objective behind effective case management is to ensure timely dispensation of justice which requires judicial officers to manage important steps and events in the case without occasioning injustice. To achieve this, judicial officers are duty bound to ensure that cases are determined expediently, fairly and dutifuly without allowing litigants who in one way or the other deliberately

seek to obstruct or delay the cause of justice. To allow that will amount to abdicating our constitutional mandate of timely dispensation of justice. It will also amount to paving way to a sure road to a grave miscarriage of justice. Fortunately, we are not ready to allow that. However, we are mindful that, every case must be decided according to its peculiar circumstances.

In view of the foregoing position, we find no merit in the appeal. Consequently, we dismiss it in its entirety with costs.

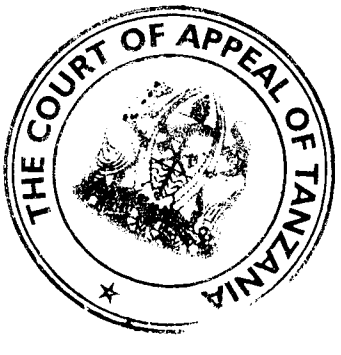
DATED at **DAR ES SALAAM** this 19th day of October, 2022.

R.K. MKUYE
JUSTICE OF APPEAL

P.M. KENTE
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The judgment delivered this 24th day of October, 2022 in the presence of the Mr. Daimu Halfani, learned counsel for the Appellants and Ms. Agness Dominick learned counsel for the respondent, is hereby certified as a true copy of the original.



S. P. MWAISEJE
DEPUTY REGISTRAR
COURT OF APPEAL