IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MKUYE, J.A, LEVIRA, J.A. AND MWAMPASHI, J.A.)

CIVIL APPEAL NO. 219 OF 2019

LIM HAN YUNG ..... 1ST APPELLANT

LIM TRADING COMPANY LTD ..... 2ND APPELLANT

VERSUS

LUCY TRESEAS KRISTENSEN ..... RESPONDENT

(Appeal from the Ruling and Drawn Order of the High Court of Tanzania (Land Division) at Dar es Salaam)

(Mzuna, J.)

dated 06th day of July, 2018

in

Misc. Land Application No. 762 of 2017

.....

JUDGMENT OF THE COURT.

7th & 28th June, 2022

MWAMPASHI, J.A.:

This is an appeal against the ruling and order of the High Court of Tanzania (Land Division) at Dar es Salaam (Mzuna, J.) in Miscellaneous Land Application No. 762 of 2017 wherein the appellants' application for setting aside an *ex parte* judgment rendered by the High Court in Land Case No. 45 of 2015 was dismissed with costs.

At the outset, we find it apposite to preface our judgment by giving, *albeit* in brief, the factual background from which the appeal

arises. The appellants herein, Lim Han Yung and Lim Trading Company Ltd (henceforth the first and second appellant respectively) were the defendants in Land Case No. 45 of 2015, instituted in the High Court of Tanzania at Dar es Salaam by the respondent, Lucy Traseas Kristensen. It was the respondent's case before the High Court that a lease agreement she had entered with the second appellant in respect of her property situated on Plot No. 2001 at Kawe Beach Area, Kinondoni District, held under Title No. 119505 (henceforth "the property"), had been breached by the second appellant who had allowed the first appellant to enter into the property and start some constructions on it hence turning the property into an unhabitable horrible condition. The respondent did therefore pray, *inter alia*, for a declaratory order that the second appellant is in breach of the lease agreement, an eviction order against the second appellant and for payment of Tshs. 185,000,000/= as special damages.

It is also apt to note, at this very stage, that after the suit had been instituted, the respondent applied and was granted leave to amend her plaint. According to the record of appeal, on 30.11.2016 while it was ordered by the High Court that the amended plaint be filed within seven (7) days, the written statement of defence was ordered to be filed in

accordance with the law, that is, within 21 days. On 13.03.2017 the appellants had not filed their written statement of defence as ordered by the High Court and when the appellant's counsel orally applied for extension of time within which to file the defence, the application was refused followed by an order for the suit to proceed *ex parte* as against the appellants under Order VIII rule 14 (1) of the Civil Procedure Code, [Cap 33, R.E. 2002, now R.E. 2019] (henceforth "the CPC"). Consequently, after hearing evidence for the respondent and visiting the locus in quo, the High Court did on 18.08.2017 render its *ex parte* judgment in favour of the respondent.

Aggrieved by the *ex parte* judgment, the appellants filed in the High Court, Miscellaneous Application No. 762 of 2017, praying for the *ex parte* judgment to be set aside. According to the affidavit in support of the application, and from the arguments made by the counsel for the appellants, the application was basically premised on three grounds. **Firstly,** it was argued that when ordering the suit to proceed *ex parte*, the High Court was not informed of the existence of another pending case, that is, Land Case No. 17 of 2015, instituted by one Cheyhan Lim Han Yung under the guardianship of the first appellant, against the respondent. The appellants contended that the fact on the existence of

that other case was material and was deliberately concealed by the respondent. It was insisted that there were triable issues arising from the two cases on the rights of the parties which could only be properly decided upon proof of the cases *inter partes*. **Secondly**, it was argued that the appellants were not summoned to appear on the date set for the delivery of the *ex parte* judgment and **three**, it was contended that the appellants did not know anything about the progress of the case. It was maintained that the appellants were never informed by Lloyd Advocates who were then representing them, about what was transpiring in court particularly about the orders for the appellants to file a written statement of defence to the amended plaint and for the hearing of the case to proceed *ex parte*.

In its reasoned ruling dated 06.07.2018, the High Court dismissed the application for being unmeritorious. It was held that the pendency of Land Case No. 17 of 2015 in court had nothing to do with the application before the court because while the said other case was on ownership, the case at hand was on lease agreement. The High Court did also observe that there was no concealment of any material fact amounting to good cause for setting aside the *ex parte* judgment. As on the second ground, the High Court firmly observed that the appellants

were present on the day the *ex parte* judgment was delivered through their advocate one Mr. John Mhozya. In regard to the third ground, it was found by the High Court that the appellants who were duly represented were aware of everything pertaining to the progress of the case through their counsel. It was further held that if there was any miscommunication or negligence on part of the appellants' counsel then the same did not amount to a good cause for setting aside the *ex parte* judgment.

As we have alluded to earlier on, the appellants were aggrieved by the above High Court decision and preferred the present appeal on the following nine (9) grounds:

1. *That the trial High Court Judge grossly erred in law and in fact in holding that in both cases (Land Case No. 45 of 2015 and Land Case No. 17 of 2015) the ownership of the suit land (Plot No. 2001 Kawe Beach Area, Dar es Salaam) was in question while the material facts of Land Case No. 17 of 2015 were not before the trial Court.*
2. *That the trial High Court Judge grossly erred in law and in fact in holding that the Applicants in Miscellaneous Land Application No.*

762 of 2017 (the present Appellants) were aware of the case and the existence of Miscellaneous Land Application No. 375 of 2016.

3. *That the trial High Court Judge grossly erred in law and in fact in holding that the Applicants (the present Appellants) failed to state that the two cases (Land Case No. 45 of 2015 and Land Case No. 17 of 2015) which were [both] before the registry of the High Court of Tanzania (Land Division) at Dar es Salaam were interrelated and that they should have so stated in the amended Written Statement of Defence.*
4. *That the trial High Court Judge erred in law and in fact in holding that the issue of ownership in Land Case No. 17 of 2015 and the validity of the Lease Agreement which was the subject of Land Case No. 45 of 2015 was not the concern of the application for setting aside the ex parte judgment which application was before him.*
5. *That the trial High Court Judge grossly erred in law and in fact in declining the application by holding that triable issues in Land Case No. 45 of 2015 which was decided ex parte can be determined in Land Case No. 17 of 2015 which was still pending before the registry of the Land Division of the High Court of Tanzania at Dar es Salaam.*

6. *That the trial High Court Judge erred in law and in fact in declining the application before him by holding and concluding that there was no concealment of necessary information which concealment led to the abrogation of justice.*
7. *That the trial High Court Judge erred in law and in fact in holding and finding that the Applicants (the present Appellants) were aware of the order for filing Written Statement of Defence to the amended plaint.*
8. *That the trial High Court Judge grossly erred in law and in fact in holding that the Applicants (the Appellants herein) did not state in their affidavit as to when they withdrew instructions from Lloyd Advocates.*
9. *That the trial High Court Judge grossly misapprehended the facts of the case and erred in law by misapplying the legal principle in* ***Shamshudin Mitha v. Abdul Aziz Ladak*** *where the judge assumed the conclusion that the Applicants (the Appellants herein) deliberately withdraw instructions from Lloyd Advocates and thereafter abdicated from their duty to take necessary actions to assert their rights before the court.*

We have keenly examined the grounds of appeal raised in support of the instant appeal and observed that the refusal to set aside the impugned *ex parte* judgment by the High Court is basically faulted on two limbs. The first limb is in relation to grounds 1 to 6 whereby the appellants' complaint is based on the argument that when allowing the respondent to prove her claims *ex parte,* the High Court was not informed by the respondent about the existence or pendency of Land Case No. 17 of 2015, in which the subject matter was the same property as it was in Land Case No. 45 of 2015. The second limb which is constituted by grounds 7, 8 and 9, is on the appellants' endeavour to justify their failure to file a written statement of defence. We propose to approach the appeal from the above two limbs.

At the hearing of the appeal before us, the appellants were represented by Mr. Novatus Michael Muhangwa, learned counsel, whereas the respondent had the services of Messrs. Richard Rweyongeza and Robert R. Rutaihwa, both learned counsel.

In his submissions in support of the appeal, Mr. Muhangwa began by abandoning the first and second grounds. He then adopted the written submissions he had earlier filed on 28.10.2019 in terms of rule 106 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules). In

regard to the first limb, Mr. Muhangwa submitted at lengthy on why he believed the High Court could not have allowed the respondent to prove her claims *ex parte* had it been informed of the pendency of Land Case No. 17 of 2015. He argued that the respondent who was aware of the pendency of Land Case No. 17 of 2015 was obliged to so inform the High Court in her amended plaint and that with that information the High Court could not have proceeded with hearing of the case *ex parte*. He contended that the respondent deliberately concealed the information hence causing the High Court to reach at an erroneous decision. On this Mr. Muhangwa placed reliance on the case of **Said Salim Bakheressa & Co. Limited v. VIP Engineering and Marketing Limited** [1996] T.L.R. 309 where the Court held among other things that the fraud, concealment and deception on the part of the respondent entailed that the judgment so obtained could not stand.

It was insisted by Mr. Muhangwa that the information concealed by the respondent was material because in both two cases the key issue was on the ownership of the property. He further argued that in both two cases there were triable issues that needed to be determined in an *inter partes* trial. He thus argued that the High Court erred in holding that the two cases were not interrelated. The High Court was also

faulted in holding that the issues of ownership and validity of the lease agreement in the two cases were irrelevant to the application for setting aside the *ex parte* judgment.

With regard to the second limb of the grounds in support of the appeal covering grounds 7, 8 and 9 in regard to the appellants' failure to file a written statement of defence, it was argued by Mr. Muhangwa that the High Court erred in holding that the appellants were aware of the order to file the written statement of defence and that the appellants did not tell when they withdrew instructions from Lloyd Advocates and engaged Fortis Attorneys. He submitted that the appellants debriefed Lloyd Advocates on 03.07.2017 following unwarranted conducts of advocate Lloyd Nchunga Biharagu and engaged Fortis Attorneys on 04.07.2017. Mr. Muhangwa insisted that the appellants did not know that there was an order for them to file written statement of defence to the amended plaint until when they were so informed by their new counsel Fortis Attorneys. He therefore prayed for the appeal to be allowed by upsetting the High Court decision in Misc. Land Application No. 762 of 2017 and consequently setting aside the *ex parte* judgment dated 18.08.2017 in Land Case No. 45 of 2015.

On his part, Mr. Rutaihwa, having adopted the written submissions he had filed on 04.12.2019, opposed the appeal arguing that it is baseless and that it should be dismissed. Responding to the arguments made by Mr. Muhangwa in respect of the first limb, Mr. Rutaihwa submitted that the most part of Mr. Muhangwa's arguments were not raised before the High Court. He, for instance, singled out the argument on triable issue, which he said, does not even feature in the affidavit filed in support of the application before the High Court. Mr. Rutaihwa further submitted that the High Court did not err in holding that there was no interrelation between the two cases. He also pointed out that the respondent had no duty to inform the High Court about Land Case No. 17 of 2015 which involved different parties and different causes of action. He insisted that there was no concealment of any material fact because in paragraphs 8 and 9 of the amended plaint the facts relating to the attempted sales of the property in dispute were pleaded.

In response to the submissions by Mr. Muhangwa on the second limb, Mr. Rutaihwa argued that the High Court did not err in holding that the appellants were aware of the proceedings in Land Case No. 45 of 2015. He contended that under paragraphs 11, 14 and 17 of the first appellant's affidavit filed in support of the application for setting aside

the *ex parte* judgment, it was averred by the first appellant that the appellants had instructed Lloyd Advocates who had full conduct of the matter and that they were being properly updated on the status of the case. He insisted that the argument that the appellants were not aware of the order to file written statement of defence to the amended plaint is baseless. He therefore, prayed for the appeal to be dismissed with costs.

Basing on the grounds of appeal and the submissions made for and against the appeal, the issue for our determination is simply whether the High Court was justified in refusing to set aside the *ex parte* judgment dated 18.08.2017 or not.

Before we venture into answering the above posed issue, we find it appropriate to premise our deliberations by making the following observations: **One,** it is not in dispute that the *ex parte* judgment sought to be set aside resulted from an *ex parte proof* of the respondent's claims in Land Case No. 45 of 2015 under Order VIII rule 14(1) of the CPC, following the appellant's failure to file a written statement of defence to the amended plaint. **Two**, just as it is in an application for setting aside an *ex parte* judgment resulting from the failure by the judgment debtor to appear when the suit is called on for hearing, the judgment debtor against whom an *ex parte* judgment is

passed for his failure to file a written statement of defence and who desired the said judgment to be set aside, must assign good reasons that prevented him from filing the written statement of defence within the prescribed or given period of time. **Three**, generally, the remedy for setting aside an *ex parte* judgment is available if the judgment debtor shows good cause to justify his failure to either appear on the date the suit is called on for hearing or file a written statement of defence. **Four**, In the instant case, for the *ex parte* decree to be set aside, essentially, the appellants had to satisfy the High Court that they were prevented by any sufficient cause from filing a written statement of defence when they were ordered by the High Court to do so on 30.11.2016.

It is also noteworthy to observe that the power to set aside an *ex parte* judgment, it be passed for a failure by a defendant to appear when the suit is called on for hearing or for failure to file a written statement of defence, is vested in the court by which the decree was passed. This is in accordance with Order IX rule 13 (1) and (2) of the CPC, under which it is provided that:

> *"13(1) 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 the summons was not duly served or 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:

Provided .....

(2)Where a judgment has been entered by a court pursuant to paragraph (ii) of sub-rule (1) of rule 6 of this Order or sub-rule (2) of rule 14 of Order VIII it shall be lawful for the court, upon application being made by an aggrieved party within twenty-one days from the date of the judgment, to set aside or vary such judgment upon such terms as may be considered by the court to be just".

Going by the wording of the above reproduced provisions, it is clear that the power given to the court in setting aside an *ex parte* judgment, is discretional. We are also mindful that generally the exercise of discretion by the lower court can rarely be interfered by a superior court. Such an exercise can only be interfered with where it is clear that the decision arrived at was a result of erroneous exercise of discretion

through either the omission to take into consideration relevant matters or taking into account irrelevant extraneous matters and misdirecting itself. See- **Mbogo and Another v. Shah** [1968] E.A. 93, **The Commissioner General Tanzania Revenue 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 Resort SPA and Others,** Civil Appeal No. 240 of 2020 (all unreported). Since in the instant appeal, the appellants are in essence faulting the exercise of discretion by the High Court, then, in the determination of the appeal we will cautiously be guided by the above position of the law.

We have duly considered the arguments for and against the appeal on the first limb. As we have earlier alluded to, it is being argued for the appellants that the order by the High Court for *ex parte* proof and ultimately the *ex parte* judgment in the respondent's favour was a result of the concealment of the fact that Land Case No. 17 of 2015 was pending in court. This argument has led us to ask ourselves a number of questions. **Firstly,** we have asked ourselves whether there was really such a concealment on the part of the respondent. **Secondly**, if the answer to the first question is in the affirmative then, whether the

concealment was on a vital and relevant fact, and **thirdly** whether the concealment had any effect to the application by the respondent to prove her suit *ex parte* and also to the High Court decision on the *ex parte* judgment. Most importantly is also a question whether, under the circumstances of this matter where the *ex parte judgment* sought to be set aside resulted from the appellants' failure to file a written statement of defence, concealment of such a fact, could properly be raised as a ground for setting aside the *ex parte* judgment.

Our answers to the questions posed above, are in the negative. Basing on the facts on the record, it is not only that there was no concealment of any vital and relevant fact, but it is also our considered view that the respondent had no obligation or duty to plead in her amended plaint or inform the High Court during the *ex parte* hearing, about the pendency of Land Case No, 17 of 2015 to which the appellants were not parties. The respondent's duty was to prove her claims in conformity to what she had pleaded in her amended plaint in Land Case No. 45 of 2015. As it was also rightly found by the High Court, although the two cases were in respect of the same property, the two cases were different and were based on two different causes of action. While Land Case No. 45 of 2015, subject of this appeal, was on

breach of lease agreement, Land Case No. 17 of 2015 was on breach of sale agreement. The two cases were therefore not interrelated and as was rightly held by the High Court, each case could have been appropriately tried separately. The issue of ownership in Land Case No. 45 of 2015 was not key to that case and the finding that the property belonged to the respondent was not against the whole world and in particular it was not against the plaintiff in Land Case No. 17 of 2015. Under the circumstances of Land Case No. 45 of 2015, the declaration by the High Court that the respondent was the rightful owner of the property was for the purposes of the case which was on breach of lease agreement and it had no effect to Land Case No. 17 of 2015 to which the appellants were not parties and which was on breach of sale agreement.

With regard to whether the pendency of Land Case No. 17 of 2015 was vital or relevant to the respondent's application for the *ex parte* proof or to the *ex parte* judgment, it is our considered view that since the appellants had failed to file their written statement of defence, the respondent had the right, regardless as to whether there was Land Case No. 17 of 2015 pending in court, to apply for leave to proceed *ex parte*

as against the appellants. This, was in line with Order VIII rule 14 (1) of the CPC which states that:

> *"Where any party required to file a written statement of defence fails to do so within the specified period or where such period has been extended in accordance with sub rule 3 of rule 1, within the period of such extension, the court shall, upon proof of service and on oral application by the plaintiff to proceed ex parte, fix the date for hearing of the plaintiff's evidence on the claim".*

The pendency of Land Case No. 17 of 2015 had therefore, no relevance to the oral application to proceed *ex parte* made by the respondent. In the same vein, the same was also irrelevant and could not have affected the reasoning of the High Court decision in passing the *ex parte* judgment in favour of the respondent. As we have amply alluded to above, the two cases were not interrelated.

It is also our considered view that because the *ex parte* judgment sought to be set aside had resulted from the appellant's failure to file a written statement of defence, then raising the argument that the High Court was not made aware of the pendency of Land Case No. 17 of 2015 as a ground for setting aside the ex parte judgment, was a

misconception. We think that such a ground would have been relevant if raised in an appeal against the *ex parte* judgment rather than being a ground for setting aside the *ex parte* judgment. In fact, even if we were to allow the appeal and set aside the *ex parte* judgment on this ground, its effect could not have gone to the extent of also setting aside the High Court order for the respondent to prove her claims *ex parte*. Such a decision could not have resulted into the suit being heard *inter partes* because the appellants' written statement of defence could have still remained missing. It should be borne in mind that the ground on the concealment of Land Case No. 17 of 2015 does not give explanations on what prevented the appellants from filing a written statement of defence within the prescribed time. The appellants' attempt for the *ex parte* judgment to be set aside on the first limb is therefore a barren exercise with no benefits to them.

We also note that in fortifying his arguments on the first limb, Mr. Muhangwa has referred us to a number of cases. In doing so he has, however heavily relied on our decision in **Saidi Salim Bakheressa & Co. Limited** (supra). With due respect, as also correctly argued by Mr. Rutaihwa, that case is not only irrelevant to the case at hand but it is also distinguishable. The former case was an appeal and the complaint

that there was fraud, deceit and concealment of facts on the part of the respondent, formed part of the first ground of appeal. The ground on concealment of fact was therefore raised in an appeal and not in an application for setting aside an *ex parte* judgment. It is on this account that we have pointed out above that the first limb could have been raised as a ground in an appeal against the *ex parte* judgment and not in an application for setting aside the *ex parte* judgment. In our case, the complaint that there was concealment of the pendency of Land Case No. 17 of 2015 was raised in an application to set aside the *ex parte* judgment in which the nature of the grounds suitable for such an application is generally confined to grounds that justify the failure to appear when the suit is called on for hearing or failure to file a written statement of defence. Further, unlike in our case, in the former case, the allegation on the judgment having been obtained by fraud, deceit and concealment of facts was, as also observed by the Court in that case, very serious.

The second limb should not detain us at all. We do not see any good reason of faulting the High Court which, in exercise of its discretion, found that the appellants failed to discharge their duty of giving sufficient reasons to justify their failure to file a written statement

of defence as ordered on 30.11.2017. The arguments that the appellants were misguided and let down by their erstwhile advocates and also that they were not being updated on the progress of the case, are not only baseless but they are also unfounded. We agree with Mr. Rutaihwa that the appellants were aware of what was going on in court including the fact that there were court orders for the appellants to file a written statement of defence and for *ex parte* proof of the claims by the respondent. Contrary to what is being argued for the appellants, the record of appeal at pages 113 and 114, bears the first appellant's testimony in his affidavit filed in support of the application for setting aside the *ex parte* judgment before the High Court. It was averred in paragraphs 11 and 14 of the said affidavit that:

> *"11. That upon being served with a copy of plaint in Land Case No. 45 of 2015, the 1st applicant on behalf of the 2nd applicant engaged and instructed Lloyd Advocates to defend the applicants' rights in Land Case No. 45 of 2015 wherein on 24th March, 2015 a Statement of Defence was filed in court.*
>
> *14. That at all times when the two suits were pending in Court, lawyers from Lloyd Advocates were updating the 1st applicant on the state of*

affairs regarding the pendency of the two cases involving the 1st applicant and the respondent".

The above extract from the first appellant's affidavit, clearly show that the appellants were duly represented, firstly, by Lloyd Advocates and then by Fortis Attorneys who, after being engaged to represent the appellants in place of Lloyd Advocates received the *ex parte* judgment on its delivery on 18.08.2017. The appellants were aware of what was going on in court through their advocates and the finding by the High Court to that effect cannot be faulted. It is also our considered view that even if the appellants were truthful in their allegations against their erstwhile advocates' inaction, negligence or omission, which generally, does not amount to good cause, they themselves share the blame. The appellants cannot throw the whole blame on their advocates. 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 view of the above discussion, we finally find no merit in the appeal. The appellants failed to show good cause for the *ex parte* judgment to be set aside and the High Court refusal to set aside the *ex parte* judgment cannot therefore be faulted. The appeal is, thus, hereby dismissed with costs.

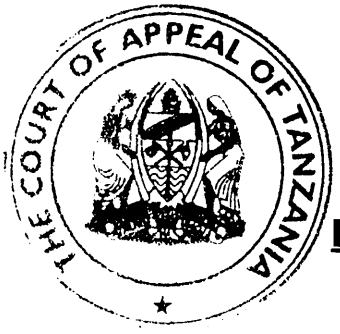
DATED at **DAR ES SALAAM** this 24th day of June, 2022

R. K. MKUYE
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

This Judgment delivered this 28th day of June, 2022 in the presence of Ms. Jackline Rweyongeza learned Advocate for the Respondent and also holding brief for Mr. Ndurumah Majembe learned Advocate for the Appellants, is hereby certified as a true copy of the original.



R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL