IN THE COURT OF APPEAL OF TANZANIA

AT IRINGA

(CORAM: LILA, J.A. KITUSI, J.A. And MWAMPASHI, J.A.)

CIVIL APPEAL NO. 27 OF 2020

STEPHEN NGALAMBE..... APPELLANT

VERSUS

ONESMO EZEKIA CHAULA..... 1ST RESPONDENT

SONGEA MUNICIPAL COUNCIL..... 2ND RESPONDENT

(Appeal from the Ruling of the High Court of Tanzania (Songea District Registry) at Songea)

(Moshi, J.)

dated the 1st day of October, 2019

in

Misc. Land Application No. 25 of 2019

JUDGMENT OF THE COURT

15th & 22nd March, 2022

MWAMPASHI, J.A.:

The appellant, Stephen Ngalambe, is appealing against the decision of the High Court of Tanzania at Songea (Moshi, J), dated 01.10.2019, in Miscellaneous Land Application No. 25 of 2019. In the said application, the appellant's application for extension of time within which to set aside the decision of the High Court (Moshi, J) dated 30.10.2018 in Land Case No. 6 of 2017 which was heard and determined in his absence, was dismissed with costs.

Briefly, the facts giving rise to the instant appeal are as follows: In the High Court at Songea (Land Case No. 06 of 2017), the present first respondent sued the second respondent and the appellant for trespass to land in respect of Plot No. 104 Industrial Area, Block Ruhuwiko, Songea Municipality in Ruvuma Region (the suit property). In that suit, the first respondent prayed, among others, for a declaration that he is the legal owner of the suit property or for payment of TZS. 190, 200,000/= by the second respondent, being the costs he had incurred in developing the suit property. On 21.09.2017 when the suit was called on for mention for the first time, the parties were all absent and the court ordered that the parties be served to appear on 12.10.2017. On 12.10.2017, the appellant was absent for not being served as it was on 19.10.2017 and on 16.11.2017 when an advocate for the first respondent, prayed to serve the appellant by substituted service. The prayer to serve the appellant in that manner, was granted by the court and on 16.02.201, after it had been reported that service by publication had been effected, an order was made for the hearing to proceed *ex parte* as against the appellant.

After the conclusion of the hearing of the suit in the absence of the appellant, the judgment was delivered on 30.10.2018 in the

absence of the appellant whereby the first respondent was declared the rightful owner of the suit property. In addition, the second respondent and the appellant were condemned to costs. Aggrieved, the appellant, who claimed to have had no notice of the suit, trial and the judgment till on 14.12.2018 when he was so informed by one of his relatives, filed a Misc. Land Application No. 01 of 2019 on 04.01.2019 for extension of time within which to apply for setting aside the said judgment, which as we have stated above, was delivered in his absence. Unfortunately, this application was withdrawn on 07.03.2019 by the appellant's advocate for being made under a wrong provision of law. Thereafter, on 08.03.2019, another similar application (Misc. Land Application No. 07 of 2019) was filed but again, it was struck out on 04.07.2019 following the concession by the appellant's advocate of a preliminary objection taken by the first respondent, that the application was supported by a defective affidavit. Still determined to pursue his right, the appellant did again on 15.07.2019 file Misc. Land Application No. 25 of 2019, the subject of this appeal, which as we have alluded to above was dismissed on 01.10.2019.

The learned High Court Judge dismissed the appellant's application mainly for two reasons; **One**, that the date the appellant became aware

of the impugned decision was uncertain as there was no affidavit of the appellant's relative through whom the appellant claimed to have known about the case and the judgment against him and **two,** that the appellant failed to account for the delay. Aggrieved, the appellant has preferred this appeal on the following four grounds:

1. *That the Honourable Judge erred in law and fact for not considering the fact that the appellant was not properly served with the summons to appear for hearing.*
2. *That the Honourable Judge erred in law and fact for not considering the fact that the appellant was not served with the summons notifying him the judgment date.*
3. *That the Honourable Judge erred in law and fact to hold that the appellant did not show sufficient reasons for each day he delayed for the court to extend time for him to file an application to set aside ex parte judgment.*
4. *That the Honourable Judge erred in law and fact [in basing] her decision [on] the fact that the appellant was supposed to include the affidavit of her relative who gave him the information concerning the ex parte judgment in Land Case No. 06 of 2017.*

At the hearing of the appeal, the appellant was represented by Mr. Symphorian Kitare, learned advocate, whereas Mr. Vincent P. Kassale, also learned advocate appeared for the first respondent. The second respondent had the services of Mr. David Kakwaya, Principal State Attorney and Messrs. Thomas Mahushi, Bryson Ngulo and Alto Liwolelu, learned State Attorneys.

Before proceeding any further, we find it apposite to point out at this very stage that having dispassionately and carefully examined the four grounds of appeal, we are of a considered view that this appeal can sufficiently be disposed of, on the last two grounds without venturing into the first two grounds. We are of a settled mind that from the nature of the matter and mainly basing on the fact that the appellant is still fighting for the judgment in Land Case No. 06 of 2017 that was delivered in his absence, to be set aside, it is better that we refrain from dealing with the said first two grounds. We have no grain of doubt in our mind that the justice of this appeal can be attained even without determining the first two grounds. It is for this reason and not out of disrespect that we will thus not consider the arguments made for and against the said first two grounds by the learned counsel for the parties.

In his submissions on the two last grounds, Mr. Kitare, began by adopting his written submissions he had earlier filed on 29.01.2020 as part of his oral submissions. As on the third ground that the learned High Court Judge erred in holding that the appellant failed to show sufficient cause by not accounting for each day of the delay, it was submitted by Mr. Kitare that the principle of accounting for each day of delay was not properly applied by the learned Judge in the case where the appellant was not notified of the judgment date. He argued that after becoming aware of the decision, the appellant promptly and diligently acted by applying for the relevant copies, engaging an advocate, perusing the relevant record and then filing applications for extension of time within which to apply for setting aside the relevant judgment. To buttress his argument, Mr. Kitare referred us to the case of **Cosmas Construction Co Ltd v. Arrow Garment** Ltd [1992] T.L.R. 127.

Regarding the fourth ground concerning the complaint that the High Court erred in holding that the appellant was supposed to include an affidavit of his relative from whom he became aware of the fact that there had been a judgment in Land Case No 06 of 2019 decided against him in his absence, it was argued by Mr. Kitare that the averment in

paragraphs 4 and 10 of the supporting affidavit to the effect that the appellant came to learn about the decision given *ex parte* against him through his relative on 14/12/2018, was sufficient. He contended that the failure to let his relative swear an affidavit in support of that fact did not lower the value and weight of the appellant's averment in those paragraphs of the supporting affidavit.

Mr. Kassale for the first respondent, opposed the appeal arguing, on the third ground, that for the application to be granted, the applicant ought to have accounted for every day of the delay. He contended that even if it is agreed that the appellant became aware of the decision on 14/12/2018, the appellant did not account for each day of the delay from that date to 04.01.2019 when the first application for extension of time was filed and also to 15.07.2019 when the application subject of this appeal was filed. It was further argued by Mr. Kassale that the act of the appellant filing incompetent applications suggests negligence on the part of the appellant.

In regard to the fourth ground of appeal it was submitted by Mr. Kassale that the affidavit of the appellant's relative was important to prove the date the appellant became aware of the relevant decision. For these reasons Mr. Kassale argued that the application was properly

dismissed by the High Court because no good cause was shown and that even this appeal should be dismissed with costs.

On his part, Mr. Kakwaya, learned Principal State Attorney, for the second respondent, intimated that he was also opposing the appeal. He adopted his written submissions filed on 27.02.2020 and submitted, on the third ground of appeal, that the appellant failed to account for each day of the delay and therefore that the learned High Court Judge did not err in dismissing the application. He pointed out that the appellant did not account for 16 days from 19.12.2018 when he engaged an advocate to represent him to 04.01.2019 when he filed his first application. It was further argued that 11 days were not accounted for from 04.07.2019 when the second application was dismissed to 15.07.2019 when the application which is the subject of this appeal was filed. He insisted that even a single day of the delay needed to be accounted for. To cement his arguments, Mr. Kakwaya referred us to the case of **Vedastus Raphael v. Mwanza City Council and 2 Others,** Civil Application No. 594/08 of 2021.

As for the fourth ground of appeal it was argued by Mr. Kakwaya that the learned High Court Judge did not err in demanding an affidavit of the appellant's relative because the said affidavit was crucial to

support the appellant's allegations that he became aware of the decision on 14.12.2018. He also contended that the appellant's averment to that effect could not be relied upon because he failed to disclose the name of his said relative. In support of his arguments Mr. Kakwaya cited the cases of **Heritage Insurance Company Ltd v. Sabians Mchau and 2 Others**, Civil Application No. 284/09 of 2019 and **Workers Development Corp Ltd v. Vocal Network Ltd,** Civil Application No. 28 of 2008 (both unreported). He therefore prayed for the appeal to be dismissed with costs.

Having heard the submissions made for and against the appeal by the counsel and also having considered the respective written submissions, the ball is now on our table. The question we are invited to determine is whether the appellant's application for extension of time within which to apply for setting aside the judgment given *ex parte* against him, was rightly refused by the learned High Court Judge or not.

We propose to begin our deliberation with the fourth ground on the complaint that the learned High Court Judge erred in concluding that an affidavit of the appellant's relative from whom he got to know the existence of the judgment against him, was material. In our

considered view, as it was also argued by Mr. Kitare, it was a misdirection for the learned High Court Judge to have disregarded the appellant's claim that he became aware of the judgment made against him, on 14.12.2018 merely because an affidavit of the appellant's relative had not been filed to support the application. The averment to that effect, in paragraphs 4 and 10 of the appellant's affidavit in support of the application, was never denied or controverted by the respondents through their respective counter affidavits. In the absence of any evidence from the counter affidavits contradicting the appellant's claim in the supporting affidavit that he became aware of the judgment on 14.12.2018 through his relative, there was no justification for the learned High Court Judge to demand an additional affidavit from the appellant's relative. We find that, under the circumstances of this case, where there were complaints that the appellant was not notified of the judgment date and where there was no any other evidence contradicting the claim that he became aware of the judgment given *ex parte* against him on 14.12.2018 through his relative, the appellant's affidavit to that effect, was sufficient and needed no further support by any other affidavit.

It is on the above observations that we also find the cases of **Cosmas Construction Co Ltd** (supra) and **Workers Development Corp. Ltd** (supra) cited by Messrs Kassale and Kakwaya to be distinguishable from the case at hand. While in the **Cosmas Construction Co Ltd** case, the applicant was silent on when he got to know that the judgment against him had been delivered, in our case the applicant disclosed that he became aware of the judgment on 14.12.2018. In the case of **Workers Development Corp. Ltd** (supra), the allegation that there was no service came from the oral submissions of an advocate and the desired missing affidavit was of a person whose evidence was material to the matter in dispute. In our case the issue of the appellant being aware of the judgment on 14.12.2018 was evidenced by the appellant in the supporting affidavit and since it was not contradicted, then the evidence from the appellant's relative was, under the circumstance, therefore not material. The fourth ground is therefore found meritorious.

Turning to the third ground of appeal in regard to whether the appellant managed to show good cause warranting grant of the extension of time, we should begin our determination of the ground by restating that in an application for extension of time, an applicant has

to show and the court has to be satisfied that there is good or sufficient cause warranting extension of time for doing an act authorised or required by the law. While there is no particular reason or reasons which are established as good or sufficient cause, the determination of what constitutes a good or sufficient cause involves an application of a judicial discretion and depends on the circumstances of each particular case. Each case has to be looked at its own circumstances. See- **Citibank (TZ) Ltd v. TTCL and Others,** Civil Application No. 97 of 2003 (unreported).

In determining what reason or reasons constitute a good or sufficient cause, courts are guided by certain principles which have been established for that purpose. The principles include, but are not limited to; the length of the delay, the reasons for the delay, the degree of prejudice to the respondent if the application is granted and whether it raises any point of public importance or illegality in the decision, that is to say, if there is an arguable case. See- **Lyamuya Construction Company Limited v. Board of Registered Trustees of Young Women's Christian Association of Tanzania,** Civil Application No. 2 of 2010 and **Khadija Rahire Said and 5 Others v. Mohamed Abdallah Said,** Civil Application No. 39 of 2014 (both unreported).

Guided by the above guidelines, we find that looking at the circumstances of this case, most importantly bearing in mind that the main reason for the delay was that the judgment was delivered in the absence of the appellant and there being allegations that the appellant was not notified of the judgment date, the refusal to grant the application by the learned High Court Judge was not justified. It is our finding that the appellant was prompt and diligent in pursuing his goal to have the judgment made *ex parte* against him set aside.

According to the affidavit filed in support of the application before the High Court, just after being informed by his relative of the existence of the judgment against him on 14.12.2018, he wrote a letter to the Registrar of the High Court requesting to be supplied with the copies of the relevant documents. Upon being supplied with the said copies on 19.12.2018, he had to look for an advocate who on the same date acted by applying for leave to peruse the relevant case file. Thereafter, on 04.01.2019, Misc. Application No. 01 of 2019 for extension of time within which to set aside the judgment was filed. This application was however withdrawn by the appellant's advocate on 07.03.2019 for being filed under a wrong provision of the law. On the following day (08.03.2019) the appellant filed another similar application (Misc.

Application No. 07 of 2019). Unfortunately, this application was struck out on 04.07.2019 following the concession by the appellant's advocate of a preliminary objection taken by the first respondent that the application was supported by a defective affidavit. Thereafter, on 15.07.2019 the appellant filed Misc. Application No. 25 of 2019, the subject of this instant appeal.

Looking at the above sequence of events, it cannot be said that the appellant was not diligent. The period between 07.03.2019 when the first application was withdrawn to 15.07.2019 when the application, the subject of this appeal, was filed, amount to a technical delay. That period was spent by the applicant in court corridors pursuing his rights. The delay was therefore excusable. See-**Fortunatus Masha v. William Shija and Another** [1997] T.L.R. 154, **Salvand K. A Rwegasira v. China Henan International Group Co. Ltd,** Civil Reference No 18 of 2006 **and Yara Tanzania Limited v. BD Sapriya and Co. Limited**, Civil Application No. 498/16 of 2016 (both unreported). With due respect, we do not agree with Mr. Kassale that the fact that two incompetent applications were filed by the appellant, suggested negligence on part of the appellant. It is our considered view that, in the circumstances of the instant case, filing incompetent

applications by itself cannot be said to have amounted to negligence. At most, that could have been attributed by wrong appreciation of the relevant law by the appellant's advocate, which we think cannot, under the circumstances of this case, be construed to the appellant's detriments. See- **Yusufu Same and Another v. Hadija Yusufu**, Civil Appeal No. 1 of 2002 and **Bahati Musa Hamis Mtopa v. Salum Rashid**, Civil Application No. 112/07 of 2018 (both unreported) Further, to our considered view that under the circumstances of this case, the delay of 11 days from 04.07.2019 when the second application was struck out to 15.03.2019, was not inordinate.

Lastly, we have noted that Mr. Kakwaya cited the case of **Vedastus Raphael** (supra), insisting that in an application for extension of time, every day of delay even a single day should be accounted. While we wholly subscribe to that principle and appreciate our decision in that case, we however find that under the circumstances of the instant case, as we have amply demonstrated above, it cannot be concluded that the appellant failed to account for the period of the delay. The third ground of appeal is therefore also found sound and it is accordingly sustained.

In the upshot and for the above given reasons we find that the appeal is meritorious. Under the circumstances of this case, the

appellant managed to show good cause for the delay and the learned High Court Judge ought to have granted the application before her. The appeal is therefore allowed and the appellant is given thirty (30) days from the date of delivery of this judgment, to file his application before the High Court for setting aside the High Court judgment dated 30.10.2018 (Moshi, J) in Land Case No. 06 of 2017. Costs in the cause.

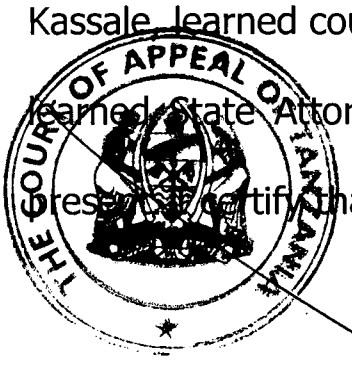
DATED at **IRINGA** this 21st day of March, 2022.

S. A. LILA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

This Judgment delivered this 22nd day of March, 2022 in the presence of Mr. Marco Kissakali, learned counsel who hold brief for Mr. Symphorian Kitare, learned counsel for the appellant and Vincent Kassale, learned counsel for the 1st respondent. Mr. Bryson Ngulo, the learned State Attorney for the 2nd respondent/Solicitor General also present.



I certify that this is a true copy of the original.

M. A. MALEWO
DEPUTY REGISTRAR
COURT OF APPEAL