

IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

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

CIVIL APPEAL NO. 231 OF 2018

ABDALLAH JUMA KAMBALE APPELLANT

VERSUS

NORADI TILIKO MONGELWA RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Tabora)

(Mrango, J.)

Dated the 8th day of December, 2016

in

Misc. Land Case Application No. 91 of 2016

JUDGMENT OF THE COURT

2nd September & 5th October, 2023

MGEYEKWA, J.A.

The appellant, Abdallah Juma Kambale seeks to reverse the decision of the High Court of Tanzania at Tabora (Mrango J as he then was) dated 8th December, 2016 in Misc. Application No. 91 of 2016. In the said application, the appellant applied for extension of time within which to

restore Land Appeal No. 3 of 2015 which was dismissed for want of prosecution.

The background to the appeal may, in the interests of brevity, be stated as follows: The respondent, Noradi Tuliko Mongelwa, instituted Land Application No.37 of 2011 in the District Land and Housing Tribunal (DLHT) for Kigoma at Kigoma against the appellant. He claimed to be the lawful owner of the suit Plot No. 164 Block 'L' Ujiji at Mnazi Moja Street in Kigoma. The respondent prayed the DLHT to declare him the lawful owner of the suit premises, a permanent injunction restraining the appellant and his agent from interfering with his ownership of the suit plot and the estate thereon.

The DLHT (Vincent Lingw'entu – Chairman) determined the matter and decided in favour of the respondent. Aggrieved, the appellant decided to file an appeal at the High Court but he found himself out of time. He thus lodged Misc. Land Application No. 91 of 2016 which was determined by Mrango, J (as he then was). The High Court dismissed the application for want of prosecution mainly for two reasons; one, the affidavit of the appellant's advocate was missing and two, the negligence of the advocate was not a good cause for extension of time. Aggrieved, the appellant has preferred this appeal on a sole ground of grievance, namely:-

1. That, the learned Judge erred in law and fact that there is no sufficient cause advanced before the High Court to extend the time to apply for readmission of Land Appeal No. 3 of 2015 dismissed for want of prosecution by the High Court.

The case proceeded *ex parte* against the respondent who defaulted appearance despite being duly served with the notice of the hearing through substituted service by publication in one issue of Mwananchi Newspaper dated 11th September, 2023.

The learned advocate for the appellant had earlier filed written submissions in support of the appeal, and he urged the Court to adopt as part of his oral arguments. The learned advocate elucidated his respective written submissions.

In the written submissions in support of the appeal, the appellant, through Mr. Kelvin Kayaga, learned counsel submitted that the genesis of the saga arose on 19th December, 2014 when Mr. Kwikima, learned counsel for the appellant by then lodged an appeal at the High Court at Tabora. On 22nd October, 2015, he wrote a letter to the Deputy Registrar of the High Court requesting to be supplied with a copy of the proceedings of the trial

tribunal. The Deputy Registrar of the High Court refused to give him the documents and directed the appellant himself to write a letter requesting to be supplied with the said copies. It is not in record that the communication between Mr. Kwikima and the Deputy Registrar was brought to the attention of the appellant.

Expounding his submissions, he contended that the proceedings in Land Appeal No.3 of 2015 speak louder than at the time when the appellant lodged his appeal, there was no point in time the summons or notice from the court was ever issued to him. To exemplify his argument, Mr. Kayaga referred us to page 75 of the record of appeal. He asserted that on 3rd December, 2015, the matter was set for hearing but the appellant was absent and the court scheduled the appeal for hearing with an order that he be notified. Unfortunately, the summons to the appellant was not served, as a result, the court dismissed the appeal for want of prosecution.

Illustrating further, he asserted that the appellant lodged Misc. Land Application No.91 of 2016 which contained omnibus prayers; extension of time to lodge an application for re-admission of Land Appeal No. 3 of 2015 which was dismissed on 1st March, 2016 and to restore Land Appeal No. 3

of 2015. He added that the High Court in its ruling refused the applicant's prayers based on fact that the previous appellant's advocate was supposed to file an affidavit to support the appellant's allegations. The learned counsel asserted that Mr. Kwikima, learned counsel, being not a practicing advocate was not capable of lodging in court an affidavit implicating himself. Reliance was placed on the case of **Faraji Likenge v. Republic**, Criminal Appeal No.91 of 2015. Relying on the case of **Shaibu Salim Hoza v. Helena as legal representative of Amerina Mhacha**, Civil Appeal No.7 of 2012, he contended that the court denied the appellant's right to be heard. Mr. Kelvin Kayaga sought the court's indulgence to reverse the learned judge's holding that there was no sufficient cause advanced for extension of time and readmission of the Land Appeal No.3 of 2015.

Turning to the issue of negligence of an advocate, the thrust of Mr. Kayaga's contention was that he is aware that the parties are in most cases, punished for their advocates' conduct. However, in his view, in the case at hand, the appellant was wrongly penalized by the mistake of his advocate which was not a result of negligence or dilatoriness on his part but his counsel's conduct. The learned counsel thus beseeched us to find that in the

circumstances of the case at hand, the appellant cannot be punished for his advocate's misconduct.

On the strength of the above submission, Mr. Kayaga beckoned upon the Court to allow the appeal.

In determining the sole ground of appeal, there are three areas that we intend to examine closely. Firstly, the issuance and service of summons to the appellant when the Land Appeal No.3 of 2015 was called on for hearing. Secondly, the appellant's counsel affidavit whether or not it was necessary to support the appellant's allegations and thirdly, negligence on the part of an advocate whether it is not a good cause for extension of time, that being the bone of contention.

We shall resolve first whether or not the issuance and service of summons to the appellant was proper. We have perused the proceedings in Land Appeal No. 3 of 2015 which was dismissed for want of prosecution and noted that the appellant was absent from 5th March, 2015 when the matter was first called for hearing before Mrango, J (as he then was) to 1st March, 2016, when the appeal was dismissed. As rightly submitted by Mr. Kayaga, there is no point in time the summons was issued to the appellant, before

the court dismissing the appeal for want of prosecution. It was the appellant's contention in his affidavit that he believed his counsel one Kwikima was properly representing him in court. It came to his knowledge later that his advocate was barred from practicing as an advocate and he was not informed.

Going by the appellant's counsel contention, it is Mr. Kwikima, learned counsel who lodged the appeal at the High Court and the appellant never appeared in court to pursue his appeal. This implies that, Mr. Kwikima who was advocating for the appellant, lodged the appeal without informing the appellant herein as to the status of the appeal. In the case at hand, we must take each circumstance separately and give the appellant the benefit of doubt that his negligent advocate lodged the appeal without his knowledge so that he could closely make follow up.

Secondly, the averment of the appellant that he was not summoned to appear in court when Land Appeal No. 3 of 2015 was called for hearing was not controverted by the respondent's counsel. Instead, he took a swipe at the appellant's submission. He blamed the appellant for failure to obtain an affidavit of Mr. Kwikima, learned advocate to justify his absence on the

day when the appeal was called for hearing. This ground was brought to the attention of the learned judge at page 151 of the record of appeal. After due consideration, the judge subscribed to the respondent's counsel's submission and concluded that there was no good cause for extension of time. We firstly, agree that the advocate's affidavit would have added value to the application before the learned judge. However, we do not go along with the learned judge that the affidavit of Mr. Kwikima was necessary to support the appellant's allegations, the circumstance of the case implies that there is no way Mr. Kwikima who ceased from practicing as an advocate, could cooperate with the appellant herein. We are of the firm view that, in the circumstance of the case, the affidavit of Mr. Kwikima should not have been considered necessary.

The third issue for our determination is whether or not the learned counsel for the appellant was negligent for not showing appearance when the appeal was called for hearing, that being the bone of contention.

Before embarking on the determination of the said issue, we wish to note at the outset that, a party to a case who engages the services of an advocate is reasonably expected to closely follow up the progress and status

of his case. However, there are some exceptions to the rule which we will address last for reasons which will unfold in the course of this judgment.

To answer the third issue, we wish to start by reiterating that as a general rule inaction, negligence, or omission on the part of the advocate does not constitute sufficient cause for extension of time. This has been held in numerous decisions of the Court. However, this is not a foregone conclusion. It depends on the circumstances surrounding the case, an application for extension of time may be granted even where there are some elements of negligence by the applicant's advocate. In **Taukathodory Ferdinand v. Eva Zakayo Mwita (As administrator of the estate of the late Albanus Mwita (Deceased) & 3 Others**, Civil Reference No. 16 of 2017, the Court being faced with a similar situation, cited the decision of **Felix Tumbo Kisima v. TTCL Limited and Another**, Civil Application No. 1 of 1997 [1997] TZCA 58 (24 February 1997) TanzLII where the Court granted the applicant extension of time to lodge an application for leave to appeal notwithstanding the fact that, through negligence, the counsel for the applicant delayed to institute an appeal. The advocate who had been fully instructed by the applicant misled his client that he was dealing with the matter while in fact, he was not. It is a similar situation in the present

appeal where the appellant was punished for the conduct of his advocate who was entrusted to represent him in his case.

This ground was raised by the learned judge in his judgment. It is evident from the record of appeal at page 152, he discussed the negligence of the advocate and concluded that the negligence of an advocate does not constitute sufficient reason for extending time. As intimated above, generally, the negligence of an advocate is not a good ground for extension of time. However, we do not go along with the learned judge's holding, as alluded earlier, in the case at hand. In the peculiar circumstances of this case where the advocate was no longer practicing, negligence of advocate constituted sufficient reason.

The law is settled that parties have rights to legal representation, that is, a party can instruct an advocate to represent him in the proceedings in court. The engaged advocate is required to discharge his duties with integrity towards his client as stipulated under Regulation 5 of the Advocates (Professional Conduct & Etiquette) Regulation, 2015 (the Regulation). More so, the advocate has a duty to explain and advice his client and not to waive or abandon a client's legal rights, without the client's informed consent. See

Regulations 55 and 57 of the Regulation. This was also explained in the case of the High Court in **Dotto Dofu v. Kulwa Lufwega Kija** (Civil Appeal 37 of 2022) [2022] TZHC 14948 (5 December 2022) that: -

"A client instruction is a legal contract between (sic). When you accept the instruction/ nomination you are legally agreeing that all parts of that contract can be performed...Regulation 55 provides that; an advocate shall represent the client resolutely, honourably and within the limits of the law and make every reasonable effort consistent with the legitimate interests of the client to expedite litigation..."

In the light of the above cited law and authority, it is vivid that the law casts the duty upon the advocate to discharge his contractual obligation. This means Mr. Kwikima had a legal duty to inform the appellant that he intended to lodge an appeal at the High Court. Also, he was required to inform the appellant that he intended to withdraw himself from representing him. Failure to do so meant his conduct was deplorable and tarnishes the image of the legal profession.

On the other hand, as allude to above, the party to a case who engages the services of an advocate, has a reciprocal duty to closely follow up the

progress and status of his case. See **Lim Han Yung & Another v. Lucy Treseas Kristensen**, Civil Appeal No.219 of 2019, [2022] TZCA 400 (28 June 2022) TanzLII and **Elias Masija Nyang'oro & Others v. Mwanachi Insurance Company Limited**, Civil Appeal No.278 of 2019 [2022] TZCA 648 (24 October 2022) TanzLII. However, it is noteworthy that each case is decided on its own facts and circumstances. The case at hand is distinguishable from the cited cases in a sense that, in the instant appeal, the appellant was not aware of the existence of the Land Appeal No.3 of 2015 at the High Court. Therefore, we find considerable merit in Mr. Kayaga's submission because this is not among the cases where a party dumped his case to an advocate.

For the reasons we have endeavored to assign, we hold that in the circumstances of this case, the inaction and negligence of the applicant's previous advocate cannot be used to penalize the appellant. Had the learned judge exercised his discretion properly then he could have granted the appellant's application for extension of time instead of throwing the whole blame on the appellant.

In the upshot, we allow the appeal and order the appellant to lodge an application for restoration of Land Appeal No. 3 of 2015 before the High Court within thirty (30) days from the date of delivery of this judgment. No order as to costs.

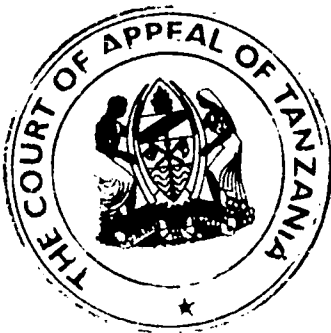
DATED at **TABORA** this 4th day of October, 2023.

S. A. LILA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

A. Z. MGEYEKWA
JUSTICE OF APPEAL

Judgment delivered this 5th day of October, 2023 in the presence of Mr. Kelvin Kayaga, the learned counsel for the Appellant and in the absence of the Respondent, is hereby certified as a true copy of the original.




G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL