

IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

(DAR ES SALAAM REGISTRY)

CIVIL APPEAL NO 236 OF 2016

**(ORIGINATING FROM RULING OF THE DISTRICT COURT OF ILALA AT SAMORA IN
MISC.CIVIL APPLICATION NO 242 OF 2016 BY HON. HASSAN, SRM)**

GEORGE GRATIAN NSEKANABO APPELLANT

VERSUS

EDWIN PASCAL RESPONDENT

Date of last order: 13/06/2018

Date of the judgment: 26/06/2018

JUDGMENT.

MAGOIGA, J.

This judgment is on appeal by the appellant emanating from the ruling of the district court of Ilala at Samora dated 3/10/2016, in which the appellant's application for extension of time to file an application to set aside an ex-parte judgment and decree of district court in civil case number 150 of 2013 was dismissed for want of good reason. Aggrieved, the appellant has preferred this appeal challenging the ruling of the lower court, hence this appeal.

The appellant has filed two grounds of appeal couched thus: -

1. That the honorable court erred in law and facts by failing to analyze, assess and consider properly grounds of delay as sworn by the appellant for which extension of time was sought for the honorable court to grant leave for the applicant to file an application out of time to set aside an ex-parte judgment and decree.

2. That the honorable court erred in law and facts by dismissing the application on the ground that the appellant and his advocate faulted to appear while same was not sworn by the appellant as one of the grounds of delay for which extension of time was sought for the honorable court to grant leave for the applicant to file an application out of time to set aside an ex-parte judgment and decree.

When this appeal was called for hearing, the appellant appeared in person and was enjoying the legal services of Mr. Oswald Mpangala, learned Advocate. The respondent appeared in person and unrepresented. Both parties were ready for hearing.

Submitting on this appeal, Mr. Mpangala started by giving a history of the appeal that it arises from the ruling of Ilala District Court dated 3/10/2016 in Misc. Civil Application no 242 of 2016. The said application was for the leave to file an application to set aside the ex-parte judgment of the civil case no 150 of 2013 out of time, delivered on 25/05/2016. According to him the application for leave was filed on 11/07/2016, which was only 17 days after the elapse of statutory period. The application was filed with the support of an affidavit which explained at paragraphs 5-15 explaining why he was late. He submitted that despite that elaborative explanation the trial court did not say anything to those reasons. Mr. Mpangala faulted the trial court for its failure to analyze and assess properly the grounds for delay as deposed in paragraphs 5-6 of the affidavit. Further submitting, he said according to paragraph 7 of the affidavit the applicant became aware of the judgment on 28/06/2016. The application was filed on 11/07/2016. From the date of being aware to when he filed is only 11 days as explained in paragraph 10. He lamented that had the trial magistrate analyzed and assess the reasons for delay this was a fit case for grant of extension for time to file an application to set aside the ex-parte judgment.

On the second ground the learned counsel submitted it was wrong for the court to decide its decision based on advocate's failure to attend the case at that stage. This point he insisted could be valid during the application to set aside if at all was to be considered. It is on this he invited this court to find merits in this appeal.

On the other hand, the respondent was brief and opposed this application. According to him the decision of the trial court was proper. He concludes that he leaves for the court to decide on the matter.

In rejoinder, Mr. Mpangala insists on his earlier submission and cited the case of Caritas Kigoma v. K.G. Deus Ltd [2003] TLR 420 to be of the help of the court in this appeal. That marked the end of hearing of this appeal.

I will consider the raised grounds of appeal jointly in my judgment. Therefore, let me point out that the application before the lower court was an application for extension of time to make an application to set aside ex-parte judgment delivered on 25th day of May 2016. According to the affidavit of the appellant he became aware of the ex-parte decision on 28th day of June 2016, definitely more than 30 days in which one has to make an application to set aside ex-parte judgment. This is as per First Schedule to Law of Limitation Act [Cap 89, R.E. 2002] part III paragraph 5. In the instant appeal it is crystal clear the appellant became aware of the ex-parte judgment after the expiry of the thirty days. So the proper recourse was for him to make an application for leave to make an application out of time to set aside an ex-parte judgment and in that application what was required of him was to show **"good cause"** and/or **"sufficient cause"** for failure to take action within prescribed time.

The phrase **"good cause"** was discussed in the case of AIDAN CHALE V. REPUBLIC, CRIMINAL APPEAL NO 130 OF 2003, (Unreported) Mbeya (CAT). Quoting with approval and accepting as correct in law an English case of R. Governor of Winchester Prison, ex P. Roddie [1991] 2 ALL E.R 931 in which it was held and said **"good cause" will usually consist of some good reason why that which is sought should be granted. It does not have to be something exceptional. To amount a good cause there must be some good reason for what is sought. It was considered that it was undesirable to define good cause and it should be left to the good sense of the tribunal which has to decide whether a good case has been disclosed."**

In the instant appeal the lower court, as correctly argued by learned counsel Mpangala, considered the reasons that were to be considered at the stage

of an application to set aside the ex-parte judgment. In this appeal there is no dispute that the impugned judgment was delivered ex-parte and in the absence of prove that the appellant was served with the notice of judgment, then this amount to good cause in the circumstances. In the case of FELIX TUMBO KISIMA AN ANOTHER V. TTCL [1997] TLR 57 (CAT) a good cause was found where the advocate who was fully paid did not take up the matter at the detriment of the applicant.

Guided by the above reasoning and holding of the Court of Appeal of Tanzania in the above cited cases I am constrained to hold that the learned trial magistrate erred as correctly submitted by the Mr. Mpangala to look into matters that were to be considered at the next stage of the proceedings. The arguments by the respondent that the decision of the lower court is proper is denied as the same was based on wrong factors at that stage of the proceedings.

Therefore, I find merits in the instant appeal and proceed to set aside the trial court's ruling and drawn order and hold that in the circumstances of this appeal, the appellant demonstrated a good cause worth to be granted leave as sought. The counsel for the appellant has asked me to revise the ruling and the drawn order of the lower court and proceed to order for trial de novo of the hearing of the application. I decline to take this approach because what is before me is an appeal and not an application for revision. In the event I allow this appeal to the extent I have explained above and order that appellant is given 30 days within which to make an application to set aside the ex-parte judgment in the lower court before another magistrate with competent jurisdiction to try the matter. No order as to costs.

It is so ordered.

Date at Dar es salaam this 26th day of June 2018.

S.M. MAGOIGA.

JUDGE.

26/06/2018