

IN THE HIGH COURT OF TANZANIA
(IN THE DISTRICT REGISTRY OF MWANZA)

AT MWANZA
(PC) CIVIL APPEAL NO. 17 OF 2019

*(Appeal from the Judgment of the District Court of Nyamagana at Mwanza
(Sumaye, SRM dated 26th of September, 2018 in Misc. Application No. 27 of
2018)*

ROBERT MAZIBA SENGHEREMA APPELLANT

VERSUS

ERASTO MAZIBA..... RESPONDENT

JUDGMENT

2nd September, & 15th October, 2020

ISMAIL, J.

This appeal arises from the ruling of the District Court of Nyamagana at Mwanza, in respect of an application in which the appellant, then the applicant, prayed for leave of the court out time, to institute an appeal out of time, against the decision of Urban Primary Court. The impugned decision, which was delivered on 26th September, 2018, dismissed the application on the ground that the same was not meritorious. The appellant's contention in the dismissed application was

that the trial court's decision was shrouded in illegality when the trial court based its decision on exhibit 5, a reply to the Demand Letter, in which the appellant's advocate made a commitment to the settlement of the sum due to the respondent.

The petition of appeal has two grounds of appeal, reproduced as follows:

- 1. That the District Court abdicated its duty by failing to consider the issue of illegality as a ground for extension of time.*
- 2. That the trial magistrate failed to exercise his discretion judiciously.*

As stated earlier on, the trial court found merit in the respondent's claim for refund of the sum of TZS. 19,000,000/-, which was transferred to him by the respondent, for acquisition of a semi-finished building and a surveyed piece of land at Buhongwa and Buswelu, within the City of Mwanza. The appellant allegedly acquired plots elsewhere and they were not to the respondent's liking, hence the demand for a refund. The respondent proved that the said sum was remitted to the appellant through a bank transfer. He also tendered exhibit P5 which is a reply to the respondent's demand letter in which the appellant's counsel allegedly

admitted the appellant's indebtedness and his readiness to effect a refund of the said sum. The appellant did not dispute that he received the said sum or his readiness to refund. His only dispute was in respect of the respondent's demand that the sum be paid with interest that swelled the obligation to TZS. 25,000,000/-.

While the appellant appeared to be less amused by the trial court's decision, he dawdled along until time caught up with him. The argument raised by him is that he was following up on the copies of the proceedings and decision of the trial court to enable him to institute an appeal. This necessitated preferring an application for extension of time in which illegality was cited as a ground for extension, contending that reliance on the "Without Prejudice" reply to the Demand Notice as the basis for deciding the case against him was an act of illegality. This is the application which was dismissed by the District Court and from which the instant appeal lies. The District Court was not convinced that any of that existed. It maintained its stance that no sufficient cause had been established to warrant the extension.

Hearing of the appeal took the form of written submissions, preferred consistent with the schedule drawn by the Court.

Submitting in support of the first ground of appeal, Mr. Masoud Mwanaupanga, learned counsel, argued that the trial court's decision was based on exhibit P5 and he holds the view that this was quite erroneous, and that in so doing, the trial court had acted illegally. He based his view on section 25 (1) of the Evidence Act, Cap. 6 R.E. 2019, which bars use of admission as evidence in civil cases where such admission is subject to an express condition that such evidence is not to be used in proceedings. The learned counsel argued that since the trial court's indulgence was an act of illegality then the District Court was erroneous when it failed to allow extension of time based on the illegality apparent on the trial court's decision. To this effect, the learned counsel cited the Court of Appeal's decision in the ***Principal Secretary Ministry of Defence v. Devram Valambhia*** [1992] TLR 185; and ***Mohamed Salum Nahdi v. Elizabeth Jeremiah***, CAT-Civil Case No. 14 of 2017 (DSM-unreported).

With respect to the second ground of appeal, Mr. Mwanaupanga's terse contention is that, while the courts enjoy the discretion to grant or not to grant the extension of time, such discretion ought to be exercised judiciously. In this case, the counsel's contention is that the court's discretion was injudiciously exercised, and that there was no justification

for dismissing the application. To buttress his view, he referred me to the decision in ***Tropical Air (TZ) Limited v. Godson Eliona Moshi***, CAT-Civil Application No. 9 of 2017 (ARS-unreported).

In his rebuttal submission, Mr. Mnyiwala Mapembe, the respondent's counsel, began by quoting the holdings in ***Lyamuya Construction Company Ltd v. Board of Registered Trustees of Young Women's Christian Association of Tanzania***, CAT-Civil Application No. 2 of 2010; and ***Ngao Godwin Losero v. Julius Mwarabu***, CAT-Civil Application No. 10 of 2015 (both ARS-unreported). He submitted that illegality can qualify as the basis for extension of time if the said illegality is apparently visible on the face of the record; and, if the illegality is of sufficient importance to warrant the extension.

The learned counsel took the view that consideration of exhibit P5 was not an error which is apparent on the face of record as it would take a long drawn process to be able to decipher it, arguing further that this is not in the mould of illegalities that can deny a party the right to be heard, as was the case in ***Valambhia's case*** (supra). Mr. Mapembe contended that, in this case, the District Court had to peruse the exhibit in order to discover the illegality. This means that the alleged illegality was not of the

magnitude required by law. The learned counsel argued that in the affidavit which was filed in support of the application for extension of time, the alleged illegality was not pleaded, contending further that the same was raised for the first time in the rejoinder submission to Misc. Civil Application No. 27 of 2018. He took the view that this ground was raised belatedly to win the Court's sympathy.

On the importance of the illegality, the respondent's counsel contended that the decision of the trial court was based on the respondent's ability to prove that the sum constituting the subject matter of the claim was transferred to the appellant; the appellant's own admission that he received the said sum; and that the minutes of the clan meeting quoted the appellant promising to reimburse the sum due to the respondent. With respect to exhibit P5, the respondent fronted the argument that the alleged illegality did not amount to a serious violation of the law which would occasion any injustice or prejudice to the appellant. On this, he cited the decision of ***Petro Myavilwa v. Zera Myavilwa & Another***, HC-Probate Appeal No. 1 of 2019 (MBY-unreported).

The respondent's counsel held the view that the illegality, if it exists, is of minor effect and unable to vitiate the proceedings of the trial court.

To fortify his view, he cited the decision of the Court of Appeal in ***Tanzania Harbours Authority v. Mohamed R. Mohamed*** [2003] TLR

76 in which it was held as follows:

"Admittedly, this Court has said in a number of decisions that time would be extended if there is an illegality to be rectified. However, this Court has not said that time must be extended in every situation. Each situation has to be looked at on its own merits. In this case the defence has been grossly negligent and surely cannot be heard now to claim that there is a point of law at stake...."

The respondent's counsel held the view that the first ground of appeal is devoid of any merit. He called for its dismissal.

Submitting on the second ground of appeal, the respondent's counsel began by defining the word discretion to mean prudence or wise conduct. He held the view that the District Court conducted itself in a judicious manner when it refused to grant leave. Finding no blemishes in the said decision, the learned counsel prayed for dismissal of this ground and the entirety of the appeal.

In his rejoinder, the appellant's counsel reiterated what he submitted in chief and played down the respondent's contention that the illegality was of minor effect. Taking exception to the reasoning of the Court in the

Myavilwa, he contended that he does not think that it was intended that a minor irregularity should include minor illegality. He argued that the illegality in this case is not minor. He maintained that admission of exhibit P5 was contrary to section 25 (1) of Cap 6, and that this was an illegality of a serious nature.

With respect to the exercise of the court's discretion, the learned counsel maintained that the district court would have exercised its discretion judiciously if it allowed the application.

From the parties' rival arguments, one issue is due for resolution, and this is whether the district magistrate was erroneous in his decision to refuse to grant extension of time to appeal.

The law is settled in this country, that extension of time is an equitable discretion, exercised judiciously and on a proper analysis of the facts, and application of law to facts. Its grant is done upon the applicant satisfying the court by presenting a credible case upon which such discretion may be exercised.

This requirement stems from the half a century's reasoning of the East African Court of Appeal in **Mbogo v. Shah** [1968] EA in which factors

for consideration in deciding whether to grant or refuse extension of time.

The Court held thus:

"All relevant factors must be taken into account in deciding how to exercise the discretion to extend time. These factors include the length of the delay, the reason for the delay, whether there is an arguable case on the appeal and the degree of prejudice to the defendant if time is extended."

Grant of extension of time also requires a party (the applicant) acting equitably, consistent with the persuasive position in ***Nicholas Kiptoo Arap Korir Salat v. IEBC & 7 Others***, Sup. Ct. Application 16 of 2014, wherein the Supreme Court of Kenya held as follows:

"Extension of time being a creature of equity, one can only enjoy it if [one] acts equitably: he who seeks equity must do equity. Hence, one has to lay a basis that [one] was not at fault so as to let time lapse. Extension of time is not a right of a litigant against a Court, but a discretionary power of courts which litigants have to lay a basis [for], where they seek [grant of it]."

The Court of Appeal of Tanzania encapsulated the compelling position in ***Nicholas Kiptoo Arap Korir Salat*** by holding, in ***Ngao Godwin Losero v. Julius Mwarabu*** (supra) as follows:

"To begin with, I feel it is instructive to reiterate, as a matter of general principle that whether to grant or refuse an application like the one at hand is entirely in the discretion of the Court. But, that discretion is judicial and so it must be exercised according to the rules of reason and justice."

See also: ***Aviation & Allied Workers Union of Kenya v. Kenya Airways Ltd, Minister for Transport, Minister for Labour & Human Resource Development, Attorney General***, Application No. 50 of 2014.

Whilst the principles enunciated in the cited decisions are intended to ensure grant of extension of time is not a mere formality or a remedy that can be dished out indiscriminately and subjectively, there is an implicit obligation of ensuring that the applicant of the enlargement of time should not be denied the right of appeal, unless circumstances of his delay in taking action are inexcusable and his or her opponent was prejudiced by it (see ***Isadru v. Aroma & Others***, Civil Appeal No. 0033 of 2014 [2018] UGHCLD 3.

The appellant's gravamen of complaint is that the decision of the District Court cast a blind eye on the trial court's decision which was a product of an illegality. The illegality resides exhibit P5 whose admissibility and reliance contravened section 25 (1) of Cap. 6. This view is strenuously

opposed by the respondent. He sees no illegality in the trial court's decision. Before I delve into the propriety or otherwise of the district court's decision to refuse to grant leave, it behooves me to register my concurrence with the learned counsel's views that, the legal position, as it currently obtains, is to the effect that an illegality constitutes the basis for extension of time. This extended scope of the grant of extension of time was laid down in the ***Valambhia case*** (supra), and the position has gained fame and applied widely in a multitude of subsequent decisions. In ***Citibank (Tanzania) Limited v. T.C.C.L. & Others***, Civil Application No. 97 of 2003, the appellate Court took the view that ***"a claim of illegality or otherwise of the challenged decision or order or in the proceedings leading to the decision"*** constitutes sufficient cause for extension of time.


The most captivating position was stated in ***Lyamuya Construction Company Limited*** (supra) in which the Court of Appeal laid the following key conditions for grant of enlargement of time, factoring in the question of illegality:

- "(a) *The applicant must account for all the period of delay.*
- (b) *The delay should not be inordinate.*

- (c) *The applicant must show diligence and not apathy, negligence or sloppiness in the prosecution of the action he intends to take.*
- (d) ***If the Court feels that there are other sufficient reasons, such as the existence of a point of law of sufficient importance; such as illegality of the decision sought to be challenged."***

*"Since every party intending to appeal seeks to challenge a decision either on points of law or facts, it cannot in my view, be said that in Valambia's case, the Court meant to draw a general rule that every applicant who demonstrates that his intended appeal raises points of law should, as of right, be granted extension of time if he applies for one. **The Court there emphasized that such point of law must be that of sufficient importance and, I would add that it must also be apparent on the face of record, such as the question of jurisdiction; not one that would be discovered by a long drawn argument or process."***

The contention by the appellant is that exhibit P5 which shouldn't have been admitted, swayed the trial court's decision. I have scrupulously gone through the judgment and the proceedings of the trial court. As rightly contended by the counsel for the respondent, the trial court's



decision was based on the respondent's testimony which included his oral account and exhibits P1 to P6; and the appellant's own testimony in which he acknowledged his indebtedness. This is found at page 2 of the said judgment. The much talked about exhibit P5 is basically an undertaking to pay which undertaking was reneged on by the appellant. This means that issues which were framed during trial would and were resolved without resort to the said undertaking. It is a serious misconception to contend, as did the appellant, that the trial court's decision was solely based on exhibit P5.

The appellant has raised yet another contention which touches on exhibit P5, as well. This relates to its admissibility, arguing that it offended the provisions of section 25 (1) of Cap. 6. It is worth of a note that exhibit P5 was tendered alongside other exhibits in the proceedings held on 19th December, 2017 (see page 6 of the trial court's proceedings). This document was tendered and admitted without any objection from the appellant. It is quite disingenuous that the appellant would subsequently raise an uproar on a document whose admission was acceded to by him. I would not be prepared to be placated by the appellant's contention that section 25 (1) of Cap. 6 was flouted.

Having held that the decision of the trial court was based on the totality of the evidence which was adduced in court and the appellant's own admission to the indebtedness, the question of illegality in the conduct of the trial proceedings does not arise. The same cannot, as a matter of law, be the ground for applying for extension of time. This means that the decision of the District Court to dismiss the application owing to the fact that illegality had not been established was sound and vindicated. I hold that the court's application of its discretion was judicious and took into consideration the fact that "*extension of time is not a right of a litigant against a Court, but a discretionary power of courts which litigants have to lay a basis [for], where they seek [grant of it]*", as held in **Nicholas Kiptoo Arap Korir Salat** (supra).

In the upshot, I find the appeal misconceived and lacking in merit. Accordingly, I dismiss it with costs.

It is so ordered.

DATED at **MWANZA** this 15th day of October, 2020.




M.K. ISMAIL

JUDGE