

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(ARUSHA DISTRICT REGISTRY)
AT ARUSHA**

PC CIVIL APPEAL NO. 2 OF 2020

*(C/f the District Court of Arumeru Misc. Civil Application No. 15 of 2018, Originating
from Maji ya Chai Primary Court, Civil Case No. 24 of 2013)*

EVA IBRAHIM APPELLANT

Versus

GLORIA GADY NDOSSY RESPONDENT

JUDGMENT

23^d September & 13th November, 2020

Masara, J

Eva Ibrahim, the Appellant herein, has preferred this appeal seeking to challenge the decision of the District Court of Arumeru (A. L. Mushi RM) delivered on 26/11/2019. In that decision, the Appellant filed an application seeking extension of time to file her appeal out of time against the judgment of Maji ya Chai Primary Court (the trial Court) in Civil Case No. 24 of 2013, which was delivered on 2/5/2013. The first Appellate Magistrate rejected the Application before her due to the fact that the Appellant did not adduce sufficient cause for the Court to grant the extension of time sought. The Appellant preferred this appeal on the following grounds:

- a) That, the District Court Magistrate erred in law and fact when refused to grant an order for extension of time to file appeal out of time while the decision sought to be challenged is an illegal decision; and*
- b) That, the District Court Magistrate erred in law and fact when refused to grant an order for extension of time for the Appellant to file appeal out of time while the intended appeal has overwhelming chances of success.*

Before determination of the appeal, I feel obliged to give out the factual setting leading to this appeal, albeit briefly. On 9/11/2012 the Appellant is said to have borrowed Tshs. 1,000,000/= from the Respondent with an interest of Tshs 200,000/= per month for a period of six months. Again, on 16/11/2012, the Appellant borrowed Tshs 300,000/= from the Respondent, which she was to refund on 8/12/2012 with an interest of Tshs 60,000/=. The total loan was therefore Tshs. 1,300,000/=. It appears from the record that the Appellant only paid Tshs. 60,000/= out of the total amount she was owed by the Respondent.

Following the default, the Respondent sued the Appellant in the trial Court claiming for a total of Tshs 2,280,000/=: being the principal amount and the interest thereon. At the trial Court, the Appellant admitted the claim of Tshs. 1,300,000/= and prayed for some time to repay the same for the reasons that her business was making a loss. The trial magistrate found the Respondent's claim genuine, and awarded her Tshs 2,020,000/=. According to the record, the Appellant could not pay as ordered. Her plot was subjected to attachment. The Appellant did not file an appeal against that decision until when she preferred the aforementioned application in the District Court of Arumeru (the first appellate Court) on 1/6/2018. As stated above, the application was dismissed. It is against that ruling the applicant has preferred this appeal

The Respondent did not enter appearance before this Court despite being duly served. The Appellant informed the Court that the Respondent refused

service and even when she was served with the Appellant's written submissions, she did not file a reply. On that account, the appeal proceeded in her absence. At the hearing of the appeal, the Appellant was represented by Mr. Hamis Mkindi, learned advocate from the Legal and Human Rights Centre. The appeal was heard by way of written submissions.

Before delving into the submissions made by the Appellant and the merits of the appeal, I feel obliged to make a comment on the attitude exhibited by the Respondent. There was proof that she was served but she deliberately refused to enter appearance and defend the appeal. That attitude cannot be condoned. Even if the Respondent had good grounds for not appearing, she ought to have put those grounds before the Court by a letter or an agent. It is well settled that failure of the Respondent to enter appearance or file reply submission as ordered by the court is tantamount to failure to defend the case. In ***National Insurance Corporation of (T) Ltd & another Vs. Shengena Limited***, Civil Application No. 20 of 2007 (unreported), the court made the following observation;

"In the circumstances, we are constrained to decide the preliminary objection without the advantage of the arguments of the applicant. We are taking this course because failure to lodge written submissions after being so ordered by the Court, is tantamount to failure to prosecute or defend one's case"

Therefore, the Respondent's failure to appear in Court and file reply submissions amounted to failure to defend the appeal in which case the Court is enjoined to proceed in her absence. I will therefore proceed to determine the Appeal ex-parte.

Submitting in support of the appeal, Mr. Mkindi argued the two grounds simultaneously contending that the decision of the trial Court was tainted with illegalities because the Respondent lent money to the Appellant with interest while she is not a bank or financial institution with mandate to lend money with interest. This, he contended, contravenes part II of the Banking and Financial Institutions Act, Cap 342. He cited the case of ***David Charles Vs. Seni Manumbu***, (HC) Civil Appeal No. 31 of 2006 (unreported) in which the court remarked that private persons who are not registered by the Bank of Tanzania are prohibited from lending money with interest as they are not registered by the Bank of Tanzania.

According to Mr. Mkindi, the Court is required to extend time for the Appellant to file her appeal out of time without considering the time that lapsed where there exists a point of sufficient importance such as illegality of the decision sought to be challenged. To support his argument, the learned advocate cited the decisions in ***Lyamuya Construction Company Limited Vs. The Registered Trustees of Young Women Christian of Tanzania***, Civil Application No. 2 of 2010 and ***Etiennes Hotel Vs. National Housing Corporation***, Civil Appeal No. 32 of 2005 (both unreported).

On the delay to file the appeal, it was Mr. Mkindi's submission that the Appellant delayed because her husband chased her out of their matrimonial home after discovering that their matrimonial house had been attached following the Appellant's failure to execute the court decree. Thereafter the

Appellant was forced to return to her parents' home in Singida. He added that if the application is granted it will not prejudice the Respondent. To bolster his argument, Mr. Mkindi cited the case of ***Mobrama Gold Corporation Vs. Minister of Energy and Minerals and 2 Others*** [1998] TLR 425.

Mr. Mkindi substantiated further that every aggrieved person has the right to appeal especially where chances of success in that appeal are high. Therefore, in case the Appellant is given the right to appeal, the chances of succeed in her appeal are promising. To support his argument, he cited the case of ***Samson Kishosha Vs. Charles Kingongo Gabba*** [1990] TLR 133. It is for those reasons that the Appellant prays that the decision of the District Court be quashed and set aside, time be extended for the Appellant to file her appeal out of time.

I have given deserving weight to the grounds of appeal as well as the submissions made by the Appellant's advocate, the main issue for determination is whether the Appellant's delay was necessitated by sufficient cause to warrant the grant of the prayer of extension of time.

In applications for extension of time, the applicant has to adduce sufficient cause for the delay. The mandate whether to grant the application or deny it is discretionary and courts are urged to exercise that discretion judiciously. Sufficient cause has not been statutorily defined. Resort is given to judicial pronouncements. In ***Manager, Tanroads Kagera Vs. Ruaha Concrete***

Company Limited, Civil Application No. 96 of 2007 (Unreported), it was held:

"What constitutes 'sufficient reason' cannot be laid down by any hard and fast rules. This must be determined by reference to all the circumstances of each particular case. This means that the applicant must place before the Court material which will move the Court to exercise its judicial discretion in order to extend the time limited by the rules."

In applications for extension of time, delay of even a single day has to be accounted for. See ***Bushiri Hassan Vs. Latifa Mashayo***, Civil Application No. 3 of 2007 (unreported). The record shows that the trial Court judgment was delivered on 2/5/2013, and the application for extension of time was preferred before the District Court on 1/6/2018. That is almost five years delay.

In the submissions, the Applicant grounds her delay on two points; delay to get copy of proceedings and judgment and illegality of decision. In paragraph 4 of the affidavit in support of the application in the District Court, the Appellant stated that she was chased out of their matrimonial house by her husband, necessitating her to return back to her parents' home in Singida. However, the Appellant did not state when she travelled to and from Singida so as to determine whether she acted promptly. It is therefore the finding of this Court that the Appellant did not account for the delay of all the five years. This alone would suffice to dispose the appeal. However, there is another concern raised by the Appellant that the decision sought to be challenged is tainted with illegalities.

Generally, illegality in the decision sought to be challenged constitutes sufficient cause for application of extension of time to be granted. However, such illegality has to be apparent on the record. In ***The Principal Secretary, Ministry of Defence and National Service Vs. Devram P. Valambhia*** [1992] TLR 387; the Court held;

"Where the point of law at issue is the illegality or otherwise of the decision being challenged, that is a point of law of sufficient importance to constitute a sufficient reason within rule 8 of the Court of Appeal Rules to overlook non-compliance with the requirements of the Rules and to enlarge time for such compliance."

See also ***Lyamuya Construction Company Limited Vs. Board of Registered Trustees of Young Women Christian Association of Tanzania***, Civil Application No. 2 of 2010; ***Bharya Engineering & Contracting Co. Ltd Vs. Hamoud Ahmed Nassor***, Civil Application No. 342/01 of 2017; ***Tumsifu Kimaro (The Administrator of the Estate of the Late Eliamini Kimaro) Vs. Mohamed Mshindo***, Civil Application No. 28/17 of 2017 (all unreported) and ***Kaiunga and Company Advocates Vs. National Bank of Commerce Ltd*** [2006] TLR 235

In ***Samwel Munsiro Vs. Chacha Mwikabe***, Civil Application No. 539/08 of 2019 (unreported), the Court of Appeal made the following remark:

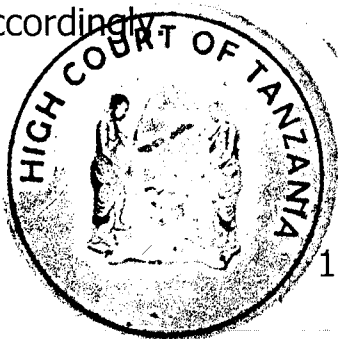
"As often stressed by the Court, for this ground to stand, the illegality subject of challenge must clearly be visible on the face of the record, and the illegality in focus must be that of sufficient importance"

In the instant appeal, the Appellant complained that the trial Court decision was tainted with illegality as the Respondent does the business of lending

money with interest in contravention of the law. It is on record at page 3 of the trial court proceedings, when cross examined by the court assessor, Mr. Mohamed, the Respondent replied that she frequently lends money with interest to different people. That is also shown clearly in exhibit A, which is the agreement between the two. As rightly stated by Mr. Mkindi, lending money with interest is subject to law, which according to the record the Respondent did not adhere. That amounts to illegality, which cannot be left to stand in the court records. Its rectification would best be done through an appeal. Thus, it is apparent that there is a point of law of sufficient importance that calls the attention of the court to address worth granting an extension of time.

For the reasons above stated and authorities cited, I am convinced that they have constituted sufficient cause for the delay, in which I grant the extension of time as prayed. Consequently, I find merits in the appeal. I allow it in its entirety. The decision of the District Court is hereby quashed and set aside. The Appellant is granted 14 days from the day of delivery of this judgment to file her appeal before the District Court. Considering the circumstances of this case and considering that the Respondent did not oppose the Application, I direct that each party bears their own costs for this appeal.

Order accordingly



Y. B. Masara

JUDGE

13th November, 2020