

**IN THE HIGH COURT OF TANZANIA**

**(IN THE DISTRICT REGISTRY)**

**AT MWANZA**

**CIVIL APPEAL No. 57 OF 2020**

*(Arising from the Ruling of at Nyamagana District Court Misc. Civil Application No. 39 of 2019 originated from Civil Case No. 173 at Mwanza Urban Primary Court)*

**SYLVESTER SHINGO ..... APPELLANT**

**VERSUS**

**HEMED OMARY ..... RESPONDENT**

**JUDGMENT**

*Last Order: 26.10. 2020*

*Ruling Date: 02.11.2020*

**A.Z.MGEYEKWA, J**

The appellant SYLVESTER SHINGO filed an appeal against the Ruling of the District Court of Nyamagana in Misc. Civil Application No. 39 of 2019, which decided in favour of the respondent. The background to this appeal is briefly as follows. The respondent in this instant appeal filed a Civil Case No.

173 of 2019 at Mwanza Urban Primary Court claiming from the appellant Tshs 3,750,000/= being outstanding amount arising from the business of sale of books between the parties. The trial court decided in favour of the respondent. The appellant did not file his appeal within time before the District Court for the reasons known to himself, he, therefore, filed a Misc. Application No. 39 of 2019 for extension of time before the District Court of Nyamagana which was not granted.

Perusing justice, the appellant approached this court at late hours, applying for extension of time to file his appeal out of time before this court. On 14<sup>th</sup> August, 2020 the appellant managed to move this court and the appellant filed this instant appeal on 07<sup>th</sup> September, 2020 against the decision of Nyamagana District Court in Misc. Application No. 39 of 2019. The appellant raised three grounds of appeal as follows:-

- 1. That the trial court erred in law and fact by refusing to grant extension of time to appeal out of time to the appellants above without considering that there are irregularities made by the lower court which was Mwanza urban court.*

- 2. That the trial magistrate erred in law and in fact by refusing the applicant's application without considering all circumstances which hindered the appellant above to appeal out of time.*
- 3. That the trial magistrate erred I law and in fact by refusing the appellant's application without fair and just reasoning.*

In prosecuting this appeal, the appellant enjoyed the legal service of Mr. Steven Mhoja, learned counsel assisted by Paschal Joseph, learned counsels whereas the respondent afforded the legal service of Mr. Akram learned Advocate.

Mr. Steven was the first one to kick the ball rolling. On the first ground, he faulted the District Court for not extending time to the appellant to file his appeal while the trial court judgment was tainted with irregularities and the appellant challenged the same in the application before the District Court. He went on to avers that, parties have a contractual relationship and entered into a sale of books business. Later, it came to the appellant's knowledge that the books belonged to a 3<sup>rd</sup> party and therefore the respondent lacks a good title. To bolster his argumentation he cited section 22 of the Sales of Goods Act, which states that goods sold must bear a good title.



He enlightens that, the books which he bought from the respondent bear a school stamp the fact which the appellant was not aware and they could not be sold. Insisting, he cited section 10 of the Law of Contract Act and argued that there was a lack of a lawful object.

Submitting on the 2<sup>nd</sup> ground, the appellant avers that the court refused to extend time to the appellant without considering the fact that the appellant was sick and he tendered a sick sheet as evidence. Mr. Steven fortified his submission by referring this court to the case of **Kaluya & Company Advocates v the NBC Ltd**, Civil Appeal No. 124 of 2015 and stated the court has the discretion to extend time however, the applicant must have good reasons. He insisted that the appellant had good reasons and he accounted for each day of delay.

On the 3<sup>rd</sup> ground, Mr. Steven was very brief, he argued that the District Court was not fair in its decision and had no justifiable reasons to dismiss the appellant's application.

On the strength of the above argumentations, the learned counsel for the appellant beckoned this court to allow the appeal with costs.

Responding, on the 1<sup>st</sup> ground, the learned Advocate for the respondent submitted that this court is in a position to decide on matters determined by the District Court. He avers that the issue of irregularity was not determined by the District Court as it was not moved to determine the issue of irregularity. He insisted that the learned counsel only mentioned the issue of illegality without specifying what kind of illegality was involved. He argued that this court lacks jurisdiction to determine whether the contract was valid.

Mr. Akram went on that to state that illegality must be apparent on the face of records and the same is not. To support his submission he referred this court to page 8 of the District Court ruling. In supporting his position, Mr. Akram cited the case of **Tanzania Cigarette Company (TCC) v Hassan Marua**, Civil Appeal No. 49/01 of 2018. He urged this court to dismiss this ground of appeal.

On the second ground, he submitted that the District Court was able to analyse all circumstances of the appellant application. He went on to state that the District Court decided that the appellant was duty-bound to account for 27 days of delay. He insisted that the appellant's bed rest ended on 27<sup>th</sup> August, 2019 and he filed his application on 11<sup>th</sup> September, 2019 without

accounting for the 12 days of delay. He insisted that the District Court was right to dismiss the application. He urged this court to disregard this ground.

On the third ground, he insisted that the Magistrate was fair and just and he considered the evidence on record. To support his submission he referred this court on pages 7 to 9 of the District Court Ruling and insisted that the application failed because the appellant did not state good reasons.

In conclusion, Mr. Akram urged this court to find that the District Court was right thus its decision be upheld.

In his brief rejoinder, Mr. Steven avers that they delayed filing the appeal within time because they were waiting for copies of judgment, the same was to assist the appellant to prepare grounds of appeal though it is was not a must to attach them. He went on to state that the appellant accounted for days of delay.

Mr. Paschal submitted that it is not disputed that the contract is the base of the complaints and he wanted to challenge it. The respondent advocate argued that the issue of irregularity was raised and the respondent advocate did not say anything. He insisted that the appellant has a chance of success.



On the 3<sup>rd</sup> ground, he avers that the court failed to consider the issue of irregularity. Mr. Paschal argued that the cited case of **Tanzania Cigarette Company (TCC) v Hassan Marua** (Supra) is distinguishable from the instant case. He, therefore, prays the court to allow the appeal.

Having summarized the facts of the case and submissions of the appellant, I now turn to confront the grounds of appeal in determination of the appeal before me and I will tackle the grounds of appeal one by one. On the first ground, the appellant is complaining that the trial court erred in law and fact by refusing to grant extension of time to appeal out of time to the appellants without considering that there are irregularities made by the lower court which was Mwanza urban court.

The trial court record shows that the appellant in his affidavit before the District Court did not raise the issue of illegality rather he mentioned it during his submission. The trial court on page 8 of its ruling noted the defect that the applicant failed to display the said illegality on his affidavit. In the cited case of **Tanzania Cigarette Company (TCC) v Hassan Marua** (supra), the Court of Appeal of Tanzania held that:-

*" It is not every claim of illegality that be found to be a good cause, the illegality must be apparent."*

Applying the above principle to the instant case, it is clear that the claimed illegality was apparent not shown by the applicant in the trial court records. In the case of **The Registered Trustee of Dar es Salam v The Chairman Bunju Village Government and Eleven Others**, Civil Appeal No. 147 Of 2006, the Court of Appeal of Tanzania stated that:-

*"... reasons for the extension of time must be given on the affidavit and not on submissions because submissions are not evidence."*

Applying the above position to this appeal, the contention by the appellant that there was illegality to be determined by this court is not substantiated by any averment in the affidavital evidence before the trial court. To this end, I find this ground with no merit.

On the second ground, the District Court did not consider the applicant's application without considering all circumstances which hindered the appellant above to appeal out of time. I have revisited the trial court record and found that the decision of the Primary Court was delivered on 10<sup>th</sup>



October, 2019 and the appellant was served with a copy on 05<sup>th</sup> August, 2019 and he alleged to have fallen sick until he recovered on 27<sup>th</sup> August, 2019.

It is a trite law that the court can only grant extension of time after the applicant showing good cause which includes the reasons for the delay and to account for each day of delay. As it was held in the case of **FINCA (T) Ltd and Another v Boniface Mwalukisa**, Civil Application No. 589/12 of 2018 Court of Appeal of Tanzania at Iringa, (unreported) which was delivered in May, 2019 and the case of **Bushiri Hassan v Latifa Lukio Mashayo**, Civil Application No. 3 of 2007 (unreported) which had held that:-

*"Dismissal of an application is the consequence befalling an applicant seeking an extension of time who fails to account for every day of delay."*

Applying the above authority, I find that the appellant failed to account for each day of delay. He was required to account for days of delay showing the reasons for his delay. For this reason, I see no reason to fault the decision of the trial court.

On the third ground, it is clear that the trial court analysed the evidence on record, the raised issues, and the law and finally reached its decision.

For the aforesaid, I proceed to dismiss the appeal and sustain the decision of the District Court in Misc. Civil Application No. 39 of 2019.

Order accordingly.

DATED at Mwanza this 02<sup>nd</sup> November, 2020.



  
A.Z.MGEYEKWA

**JUDGE**

02.11.2020

Judgment delivered on 02<sup>nd</sup> November, 2020 in the presence of both parties.

  
A.Z.MGEYEKWA

**JUDGE**

02.11.2020

Right to Appeal fully explained.