IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY KIGOMA)

AT KIGOMA

APPELLATE JURISDICTION

(PC) CIVIL APPEAL NO. 08 OF 2021

(Arising from Kigoma District Court Misc. Civil Application No. 40 of 2020 Before K.V. Mwakitalu – RM, and Original Civil Case No. 135 of 2020, Ujiji Primary Court Before M.J. Luchunga - RM)

GOMBE HIGH SCHOOL (MKURUGENZI WA SHULE YA SEKONDARI GOMBE SCHOOL - YARED FUBUSA -PHD)..... APPELLANT

VERSUS

RUHWANYA KILANGI.....RESPONDENT

J U D G M E N T

12th & 13 April, 2021

MATUMA, J.

At Ujiji Primary Court, the respondent sued the appellant for recovery of debt amounting at the tune of **Tshs 15,000,000/=.** It is on record that the Appellant under a written authority sent one Maombi Pius Kishamba as a representative in the suit.

The claims having read over to the appellant through his representative, it is on record that she admitted the claims;

'Madai hayo ni ya kweli'

After the admission as herein, the trial court required the respondent to state briefly his claims. The respondent under oath stated that he was a food supplier to the appellant's school which accumulated the claim herein above but the appellant did not pay as agreed. That necessitated the two to execute a written agreement for the payment of the sum but again the contract period expired in vain. That he sent a demand note to the appellant but the same was not heeded hence the instant suit to have legal enforcement.

Thereafter, the appellant through such representative is recorded to have admitted the contents of the brief statement of the claim by the respondent;

> *'Maelezo ya mdai ni ya kweli tunadaiwa Tshs 15,000,000/='*

In that respect, the trial court, Ujiji Primary Court (Hon. M.J. Luchunga – RM) entered judgment on admission;

> *'Mdaiwa anakabiliwa na madai ya Tshs 15,000,000/= mbele ya mahakama hii. Na pale aliposomewa madai hayo hakukataa na kukubali kuwa ni kweli anadaiwa Tshs 15,000,000/=. Hivyo basi kwa kuwa amekubali madai yake mahakama hii inakosa pingamizi na kuona kuwa mdai ameshinda madai yake Tshs 15,000,000/='.*

The trial court then decreed;

'Mdai ameshinda madai yake Tshs 15,000,000/=. Hivyo mdaiwa alipe Tshs 15,000,000/= pamoja na gharama za shauri hili'.

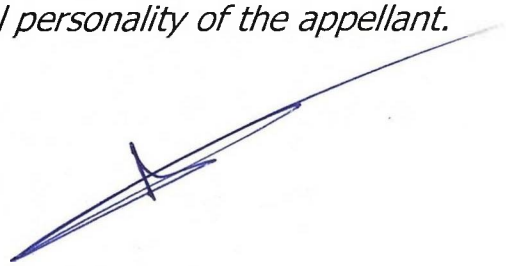
The decision of the trial court was delivered on 11/08/2020 and when it got on 11/09/2020, the appellant Lodged Civil appeal No. 13 of 2020 in the District Court of Kigoma which was however struck out on 02/11/2020 for having wrongly filed under wrong names of the parties.

It is from such decision on the 23/11/2020, the appellant filed application for extension of time so that he could refile afresh the appeal.

On 08/01/2021 Hon. K.V. Mwakitalu learned Resident Magistrate dismissed the application for want of sufficient cause. It is from such background; the appellant is now before me on appeal challenging the decision of the District Court which refused to grant the extension of time. The appellant has advanced five grounds of appeal whose gist of complaints are; -

i. That the learned Resident Magistrate erred in law and fact to dismiss the application as having no good cause; -

a. without due regards to the apparent errors on the face of record on the legal personality of the appellant.



b. without due regard to the fact that the appellant had prior lodged her appeal within time hence was not reluctant or negligent.

c. by misapplication of the case law authorities.

d. by exercising discretional powers injudiciously.

At the hearing of this appeal Mr. Ignatus Kagashe learned advocate represented the Appellant while Mr. Damas Sogomba learned advocate represented the Respondent who was also present in person.

Mr. Kagashe learned advocate submitted generally on the grounds of appeal stating that the Appellant having been aggrieved by the impugned judgment of the trial court appealed timely vide Civil Appeal no. 13 of 2020 which was however struck out merely because she was alleged to have wrongly cited the name of the Respondent.

The learned advocate further stated that the appeal having been struck out, they lodged application for extension of time so that they could re-appeal but the application was wrongly dismissed on the ground that there was no sufficient cause while the appellant at all times had shown due diligence when she appealed in time and again made such application for extension of time soon after the appeal was struck out.

Mr. Kagashe further argued that principally extension of time is granted by considering some other principles such as illegalities. That in the instant matter there was illegality on the face of record as the appellant was sued in the wrong name to the extent that on the face of record the appellant is neither a natural person nor artificial person hence extension of time was called for to have things rectified on appeal since the decree thereof would be inexecutable. The learned advocate finally submitted that the District Court wrongly applied the principle in the case of ***Lyamuya Construction Company Limited v. Board of Trustees of Young Women Christian Association of Tanzania, Civil Application no. 2 of 2000***.

Mr. Damas Sogomba learned advocate on his party responding on the submission of the Appellant submitted that this appeal has been brought without any merit. He submitted that the appellant was sued on the names appearing on the contract and thus the decree is executable and that Civil Appeal no. 13 supra was wrongly filed due to negligence of the appellant because she had the contract at hand which bear the correct names of the parties. The learned advocate further argued that since the impugned judgment was reached on admission, principally no appeal can be allowed thereof. He was of the further argument that even the alleged

Civil Appeal no. 13 was not filed in time as submitted by Mr. Kagashe and that even after the appeal was struck out the application for extension of time was filed on 23/11/2020 which was 21 days after the struck out which was not accounted for. The learned advocate further stated that there is no illegality on the face of record as what is alleged requires arguments from the parties.

Having heard the parties for and against the appeal, I find this appeal can justifiably be determined by answering one major issue; whether the appellant had advanced sufficient cause for her delay to appeal which were wrongly rejected by the Resident Magistrate of the District Court.

I will start with the complaint that there was apparent error on the face of records of the trial court which alone as a point of irregularity sufficed to warrant the application being granted.

It is my firm finding that the defendant is a private entity whose legal existence is not a question that can be determined on the face of record. It requires some facts and arguments from both parties as rightly submitted by Mr. Sogomba learned advocate. The respondent would be entitled to be accorded opportunity to state why he chose such a name of the Appellant in his suit and the Appellant to reply thereof.

In that respect I find the learned magistrate to have properly ruled on the complaint in that; for irregularity to be a ground for extension of time, the same should be apparent on the face of the trial court's records and should not be traced after a long-drawn argument of the parties. The rationale behind is very clear, allowing the parties to extensively argue the alleged irregularities in an application for extension of time would mean allowing arguments on appeal itself in disguised manner. If that is done then the intended appeal would be pre-empted as the ground thereof would have been determined conclusively by the higher court in which the intended appeal is to be filed.

In the case of **EDM Network Limited versus Clay Canute**, Civil Review No. 1 of 2020, High Court at Kigoma I had time to rule out how can it be properly argued that the irregularity is apparent on the face of record. I referred to Mulla on the Code of Civil Procedure Act 1903 3rd Edition which is in par material to the Civil Procedure Code of Tanzania which defined;

> *'An error is apparent on face of record when it is obvious and self-evident and does not require an elaborate argument to be established'.*

It is my finding that the learned magistrate properly dismissed this complaint as it amounted to nothing but an appeal in disguise.

On the complaint that the appellant had acted promptly to appeal against the impugned judgment of the trial court vide Civil Appeal No. 13 supra, hence diligence in pursuing his complaints serve for human error that she wrongly cited the names of the parties, I agree with Mr. Sogomba learned advocate and find this as a misconceived fact which escaped the minds of both parties and even the District Court as Civil Appeal No. 13 of 2020 was not within time at all.

This is because in accordance to section 20 (3) of the Magistrate Courts Act, Cap. 11 R.E. 2019, an appeal to the District Court against the judgment of the primary court should be lodged within thirty (30) days after the date of the decision impugned.

In the instant matter the impugned decision was entered on 11/08/2020 and the appeal therefrom was lodged on 11/09/2020 which is clearly 32 days after the date of the decision as here under;

11th **(1),** 12th **(2),** 13th **(3),** 14th **(4),** 15th **(5),** 16th **(6),** 17th **(7),** 18th **(8),** 19th **(9),** 20th **(10),** 21st **(11),** 22nd **(12),** 23rd **(13),** 24th **(14),** 25th **(15),** 26th **(16),** 27th **(17),** 28th **(18),** 29th **(19),** 30th **(20),** 31st **(21),** 1st **(22),** 2nd **(23),** 3rd **(24),** 4th **(25),** 5th **(26)** 6th **(27),** 7th **(28),** 8th **(29),** 9th **(30),** 10th **(31),** 11th **(32).**

It is thus not true that Civil Appeal No. 13/2020 was filed within time. It was out of time.

Mr. Kagashe tried to argue that the payment for lodging the appeal was on 10/11/2020 which was the last day of the thirty days after exclusion of the date of judgment. But the record is very clear that the Petition of Appeal was lodged on 11th and not on 10th. Even if I have to agree that the day of judgment must be excluded then on 11th when the Petition was lodged it was a thirty-one day which is no doubt out of the prescribed time under the law.

In the case of ***Nyamunini Ntarambingwa versus Simoni Kikoti, Misc. Land Appeal no. 19 of 2020,*** High Court of Kigoma, I had time to please advocates who does not act promptly until deadline hours. I said;

> *"I appeal to all advocates and other court stake holders not to await deadlines in taking actions which are timely limited. Courts' time is so precious, we are jealous of it when one wants to consume the same with irrelevant arguments to camouflage his mistakes, wrongs, mischiefs or to please his client who by the time of such arguments is looking at him with a speaking eye*

that; ***"but I was making follow ups to you and you always told me to be patient, now look, what have you done!"***

I reiterate the same in this judgment and add that a committed lawyer and or a Party to the suit is not expected to act in the manner that calls for arguments against his or her suit such as filing documents on the days and or date that would call queries as to time limitation. The appellant thus ought to have accounted for the delay not only from the date the appeal was struck out but from the date of the impugned decision.

In both her affidavit at the District Court in support of the Application, her written submission thereof and her advocate's arguments before me, the appellant laments that despite her earlier request of the impugned judgment, the same was not supplied to her in time and that is why she was necessitated to lodge the appeal without having the judgment at hand hence wrongly cited the name of parties contrary to the way they are appearing on the impugned judgment. That she had sent one of her employees to collect the said judgment but the same was not timely supplied.

The respondent disputed such submission and stated that the impugned judgment was ready for collection just in two weeks after its delivery, and that the appellant had in fact collected it within the time for appeal. The

learned magistrate found that the impugned decision and its proceedings were certified on 04/09/2020 and thus ready for collection from such date. It thus ruled;

> *'The applicant was not vigilant in making follow up at the trial court in order to be supplied with the copies of the proceedings and the trial court decision...which was already available for collection before the expiration of the time to appeal to this court'.*

As it is undisputed fact that such impugned decision and its proceedings were ready for collection since the 4th day of September when they it was certified by the trial court, the appellant was duty bound to prove that;

i. *She really asked for the copy of the said decision be it orally or by Letter.*

ii. *That she made follow ups of the same but in vain until when time of appeal expired.*

In the instant matter the appellant averred in her affidavit deposed by her advocate Mr. Ignatius R. Kagashe at paragraph 4 that;

> *'Unfortunately, the trial court entered judgment on admission in favour of the Respondent on 11th august, 2020 thereby aggrieving the applicant's director who immediately, sent* ***one of the employees*** *to collect the judgment in order to seek legal advice'.*

The affidavit further avers that despite of such earlier and soon follow up, the impugned judgment was not timely supplied.

Is that a sufficient proof that the appellant applied for the impugned judgment and made follow up of it without any inordinate delay? I find not as rightly found by the district Court. It is my firm finding that the contents of such affidavit amounted to depositions of hearsays. That means, the learned advocate deposed what was informed to him by the Managing Director of the appellant without even disclosing the name of the employee who was sent as alleged to have his or her own depositions on the fact.

In the case of ***Shukrani Ramadhani versus Mohamed Hassan***, *Misc. Juvenile Application No. 1 of 2020,* High Court at Kigoma, I had time to rule out that an affidavit of a person so material has to be filed whenever a certain fact has to be proved by his knowledge. In fact, that is what was held by the Court of Appeal of Tanzania in the case of **John Chuwa v. Anthony Ciza** [1992] TLR 233.

Therefore, it was important and necessary for a person sent to collect the impugned judgment to be disclosed and have his/her affidavit filed in support of the applicant's affidavit.

In the absence of the affidavit of such material person in the circumstances of this matter all what Mr. Kagashe deposed lacked authenticity and it was equally a submission made at the hearing without oath or affirmation and he was not subject to cross examination by the opponent party. I therefore reject this complaint.

About misapplication of case laws by the learned magistrate of the District Court, I find the complaint misconceived. The learned magistrate in the District Court properly applied the principle in Lyamuya Constructi's case.

The last complaint is that the learned Resident Magistrate erred to have exercised his discretional powers injudiciously when he refused to grant her extension of time. Without much ado, this complaint is unfounded. Extension of time is granted only when sufficient cause for the delay is established. The learned Magistrate did not see such sufficient cause and as such he was right to refuse granting such extension. In the case of ***The Attorney General vs. Abdallah Mabenga,*** Misc. Labour application No. 7 of 2019, High Court at Kigoma, and ***Fabian Victor Mhamilawa and 3 others Vs. Naftari Mathayo,*** Misc. Civil Application No. 11 of 2020, High Court at Kigoma, I had time to rule out that discretional powers such as to set aside the decree passed ex-parte and to issue an order restoring the suit dismissed for want of prosecution, are

not exercised as a game of funny to the wishes of the parties. Rather a party seeking such an order would be required to show sufficient grounds why should such powers be exercised.

In the like manner, I ruled in the case of ***Paison Matende vs. Josofina Erasto*** Misc. Land Application No. 18 of 2020, High Court at Kigoma that;

> *'Courts of law are not there to entertain applications for extension of time just as a game of funny at the wish of the Applicant. The law requires him to account the delay for each day of the delay. This task should therefore, not be taken lightly'.*

I reiterate such holding in the instant application and further join hands with the learned Magistrate that the appellant did not account for each day of the delay and thus rightly dismissed the application.

In her submission the appellant lamented that her representative was not authorized to admit the claim but rather to seek for adjournment. This is not a ground for extension of time but rather a complaint against such representative which should not be taken to the detriment of the respondent. The appellant has not even filed affidavit of such representative admitting to have exercised beyond authority.

Even if such affidavit would be there, still the person to be liable would be the said representative and not the respondent.

With the herein observations, I find this appeal to have been brought without any sufficient cause. The same is hereby dismissed in its entirety with costs.

It is so ordered.

A. Matuma

Judge

13/04/2021

Court: Judgment delivered in the presence of Advocate Joseph Mathias holding brief of Advocate Kagashe for the Appellant, and in the presence of the respondent in person.

Sgd: A. Matuma

Judge

13/04/2021