

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

PC. CIVIL APPEAL NO 8 OF 2020

*(Originating from Civil Case No. 13 of 2019 at Tandahimba Urban Primary Court and
Appealed to the District Court of Tandahimba registered as Misc. Application
No. 7 of 2019)*

MOHAMEDI SIMBA MOHAMEDI..... APPELLANT

VERSUS

HAMISI ISMAIL LISUMA.....RESPONDENT

JUDGMENT

Hearing date on: 13/04/2021

Judgment date on: 23/04/2021

NGWEMBE, J:

This is a second appeal arising from Misc. Application No. 07 of 2019 of Tandahimba District Court, which originated from Civil Case No. 13 of 2019 tried by Tandahimba Urban Primary Court. The background of the matter traces back to July 2019 when the respondent filed a Civil Case No. 13 of 2019 at Tandahimba Urban Primary Court against the appellant claiming among others payment of TZS. 13,000,000/=being the outstanding balance emanated from the original debt of TZS. 27,000,000/=. The

alleged debt accrued from the business relationship between the disputants. The trial court heard the said case ex parte due to the absence and failure of the appellant to file defense.

On 7th July 2019 the trial court entered judgment in favour of the respondent and the appellant was ordered to pay TZS. 13,000,000/= to the respondent.

In turn, the appellant was dissatisfied with that ex parte judgment, thus preferred an appeal to the District Court of Tandahimba. However, his attempt to appeal was caught in the web of time limitation. Instead, he made another attempt to file Misc. Application No. 07 of 2019 for extension of time before the District Court of Tandahimba, yet his application was dismissed for lack of good and sufficient cause for delay.

Being dissatisfied with the dismissal of his application for extension of time, he preferred this appeal intending to challenge that decision. The appeal is clothed with two (2) grounds as follows:-

- (a) That, the trial magistrate erred in law and facts by holding that the applicant did not adduce sufficient grounds for extension of time.
- (b) That the trial magistrate erred in law and facts by holding that the applicant did not adduced sufficient grounds for extension of time while the applicant proved that there is a point of law on illegalities which is enough to accord extension of time.



On the hearing of this appeal, the appellant appeared in person, while the respondent was represented by learned advocate Songea.

The appellant submitted that he was not invited or summoned to appear and defend on the main case. Although he was not denying the respondent claim to settle his amount of money, but he wants the court to give him time so that the dispute can be heard inter parties.

He submitted further that, even the claimed amount is different from the actual amount due to the respondent. Added that the actual claimed amount by the respondent is TZS. 4,000,000/= (four million only) as opposed to TZS. 13, 000,000/= (thirteen million shillings). The reason advanced for his failure to appear on the hearing date at trial court is the fact that he travelled to Mozambique and remained in that country all the time when the trial court proceeded with his case. To justify his assertion, he produced passport indicating that he travelled to Mozambique.

He rested his submission by urging this court to allow extension of time so that he can be afforded an opportunity to appear in the trial court and defend his case.

In turn, the respondent submitted that, this appeal lacks merits because there is no valid reason to make this court to decide against the decision of the District Court. All grounds raised by the appellant were argued and decided by the District Court. Argued that the case at the trial court was filed on 1/4/2019 and the appellant was served with Plaint. The Village



Executive Officer made an affidavit confirming service of the plaint to the appellant. Thus, the allegations of absence are afterthought. Further submitted that, the appellant was absent from Tanzania from July, 2019, while the Plaint was served to him on April, 2019. Therefore, his allegations of absence are purely an afterthought, same be dismissed.

Submitted further that, extension of time is only granted when the appellant has sufficient cause, the appellant has no reason, leave alone, good cause for his failure to appear in court during trial. Again Mr. Songea attacked strongly on the actual amount of money. That such claim ought to be raised at the executing court not at this stage of appeal.

Having summarized the arguments of both parties together with the evidence on record, I find the issue which triggered the appellant to institute this appeal is failure of the 1st appellate court to grant him extension of time. It is, I think, now settled in our jurisdiction that, Appeal from one court to another is a Constitution right. So any person who is aggrieved by the decision of the lower court may appeal to a superior court as a matter of right not privilege or favour. However, such right is accompanied with a duty to act diligently and timeously otherwise, limitation may vitiate such right.

Moreover, even if the aggrieved party may apply and obtain extension of time upon which he can exercise his right to appeal, yet before obtaining such extension, of time he must dutifully satisfy the court with sufficient



reasons for delay. I am well aware on the contents of Article 13 (6) of the Constitution of Republic of Tanzania, as quoted hereunder in its original language:-

"Wakati haki na wajibu wa mtu yeyote vinahitaji kufanyiwa uamuzi wa mahakama au chombo kinginecho kinacho husika, basi mtu huyo atakuwa na haki ya kupewa fursa ya kusikilizwa kwa ukamilifu, na pia haki ya kukata rufaa au kupata nafuu nyingine ya kisheria kutokana na maamuzi ya mahakama au chombo hicho kinginecho kinachohusika".

The plain meaning of this Article is that, the right to be heard by a competent court or tribunal and the right to appeal to whoever aggrieved is guaranteed.

In respect to this appeal, the appellant is complaining against the 1st appellate court that it failed to consider his reasons for extension of time. In other words the reasons advanced by the appellant as for the delay to appeal, were not sufficient to convince the trial court and the 1st appellate court to grant him extension of time.

It is, I think, settled in our jurisdiction that extension of time is always court's discretion and that discretion is exercised judicially. Such position has attracted many precedents therein including in the case of **Shant Vs Shi Ndocha and Others [1973] E.A 207**, where the court held:-

"The application for extension of time is concerned with showing sufficient reasons why he should be given more time and the most persuasive reason that he can show the delay has



not been caused or contributed by dilatory conduct on his part”.

In regard to this appeal, I have keenly visited the whole evidences recorded by the trial court as well as of the 1st appellate court with a view to see if there were any error in terms of law or factual. It is clear that among the reasons advanced by the appellant for extension of time is that, he was not aware about the existence of the case during trial as he was not served with any summons until the case was decided ex parte.

The 1st appellate court found this reason insufficient to satisfy the court to grant extension of time, hence dismissed the appeal forthwith. It is also in record that; this case was filed for the first time on 1/4/2019 at Tandahimba Urban Primary Court. On 8/4/2019 the matter came for mention before the trial magistrate whereby, according to the proceedings, the appellant was absent. So the case was adjourned to 15/4/ 2019 when the court ordered the appellant to be served with summons.

On 15/4/2019 when the case came before trial magistrate, the appellant was also absent, again the trial was adjourned to 17/4/2019. Also on that date the appellant was absent and the case was adjourned to 30/4/2019 and the court also ordered the appellant be served with summons to appear for hearing.

On 30/4/2019 when the matter came for hearing before the trial magistrate the appellant was also absent. Therefore, due to several non



appearance of the appellant the trial magistrate proceeded to hear the matter ex parte, consequently judgement was entered in favour of the respondent.

The question is whether the appellant was duly served with a plaint and summons as required by law? To answer this question, I need to peruse again the trial court's records. In essence the record speaks lauder; that the appellant through Hamlet chairman on 15th April, 2019 was served with summons to appear in court, but it is in record that he refused to accept summons from Hamlet leader. The Hamlet leader returned summons with an affidavit confirming that the appellant refused to accept summons. Such affidavit of Omary B. Ching'anganya affirmed before M. H. Jumaa, Resident Magistrate, confirmed that the appellant refused court summons.

Another summons dated 30/4/2019 which also was accompanied with an affidavit affirmed by Omary B. Ching'anganya testified that he went to serve the appellant, although he did not meet himself, but he met the appellant's wife who accepted the summons on behalf of the appellant. It is clear that the court record indicates that the appellant was served with summons and was well aware of the suit filed in court against him.

In turn, the appellant came up with a defence that he was outside the country. To justify his assertion, he tendered a copy of a passport to prove that during trial of his case he was in Mozambique. Copy of the passport was admitted by trial court as "**Annexure A-1**". However, the said passport clearly indicates that the appellant was outside the country



between May and June, while the suit was filed in court on 1/4/2019 and Judgment was delivered on 10/7/2019. So, it is clear that when the matter was filed in court and on the hearing of that case, the appellant was at Tandahimba. This fact is supported by the two affidavits of Omary B. Ching'anganya (Hamlet Chairman), who served the appellant with a copy of summon, but the appellant refused to except it.

In the circumstances of this appeal, I am asking what else does this court need to conclude this appeal? I have stated prior that appeal is a constitutional right, but that right is subject to compliance to other applicable laws, including time limitation and adherence to the court orders. Failure to heed to the court orders, including acceptance of summons to appear in court on a date and time specified in the summons and file necessary defences against the claims filed by the plaintiff is fatal. Moreover, extension of time is not an automatic right, rather is a discretionary powers of the court upon sufficient cause. Above all, court orders are meant to be complied with, failure to heed to court orders, always there are punitive consequences. Failure to accept service of summons issued by the court is equal to failure to heed to any other court orders. Thus, immediate consequences must be felt.

In respect to extension of time, I would buy a leaf from the case of **Dr. Ally Shabhay Vs. Tanga Bohora Jamaat [1997] T.L.R 305 at 306**, where the court held:-

“Those who come to court of law must show unnecessary delay in doing so; they must show great diligence”



In any event the best reason is for the appellant to advance reasons that he is not the brain behind that delay. In the contrary, it is clear that the appellant in this appeal proved that he was inactive to follow up what was happening in court against him. It is evident that the appellant when was served with court summons, he refused to accept. Such situation is similar to what happened in year 1979, which I intend to borrow a leaf therein. Justice of Appeal Law J.A in the case of **Francis Kimani Mwaura Vs. Attorney General of Kenya, Civil Application No 22 of 1979** at page 25 when held:-

"A litigant cannot plead ignorance of his own cause. It is up to a litigant to keep himself informed as to what happened to his case"

As said earlier, time limitation is always an essential element for the ends of justice. Once time is gone, good cause must be produced otherwise, one may lose his rights forever. This appeal has reminded me the wisdom of justice Kalegeya J, (As he then was) in the case of **Mathew Martin Vs. Kahama Mining Corporation, Civil Case No 79 of 2006** when held:-

"However, unfortunate it may be for the plaintiff, the Law of Limitation on actions knows no sympathy or equity. It is a merciless sword that cuts across and deep into all those who get caught in its web".

In the absence of sufficient reasons, the applicant is only interpreted to mean he is playing with delaying tactics, for whose benefits? is better



known to himself. Usually, disputes of any nature, must be decided as early as possible not only for the interest of the parties, but also for the interest of the general public. The Latin Maxim on public interest is called "*rei publicae ut sit finis litium*" meaning the interest of the public is to find conflicts comes to an end as soon as practicable. In the contrary, endless litigation is not only against the public interest, but also against the purpose of having judiciary in place. When the appellant decided to sleep on his rights for whatever time, beyond the time limitation prescribed by the law of Limitation, he may be allowed to continue sleeping on it forever.

For the reasons so stated, this appeal in any standard, lacks merits and is intended to delay the ends of justice to the respondent contrary to the public policy and to the parties' interest. In totality, I find no reason to depart from the decision of the 1st appellate court, accordingly this appeal is dismissed with costs payable to the respondent.

I accordingly order.

Dated at Mtwara in chambers this 23rd day of April, 2021



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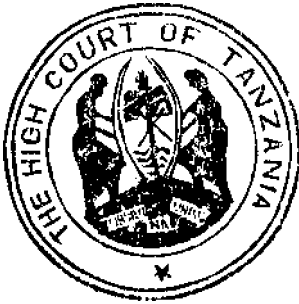
P.J. NGWEMBE

JUDGE

23/04/2021

Court: Ruling delivered at Mtwara on this 23rd day of April, 2021 in the presence of the appellant and Ms. Anisa Mzira, advocate for the respondent.

Right to Appeal to the Court of Appeal explained.



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P.J. NGWEMBE

JUDGE

23/4/2021