

**IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM
CIVIL REVISION NO. 34 OF 2019**

**FINCA TANZANIA LIMITED APPLICANT
VERSUS**

**JOHN JOSEPH LUHAZI 1ST RESPONDENT
MWAMVUA A. KIGULU t/a IGAGULA AUCTION
MART LIMITED & COURT BROKERS ... 2ND RESPONDENT**

Date of last order: 01/07/2020

Date of Ruling: 23/04/2021

R U L I N G

MGONYA, J.

Before this Honourable Court is an **Application for Revision** by the Applicant named above applying before this Court for the following orders:

- 1. That, this honourable Court be pleased to call and examine the records of the proceedings of the Resident Magistrate Court of Dar es Salaam at Kisutu. In respect of Miscellaneous Civil Application No. 83/2017 with the view of satisfying itself as to the correctness, legality, propriety and justice of the proceedings and orders therein made.***

2. That, the Honourable Court be pleased to grant costs of this Application.

3. That the Honourable Court be pleased to make such any other orders as it may deem fit.

This matter was heard by way of written submission where the parties had successfully filed the submissions in line with the schedule of the Court.

The Applicant in his submission was of the contention that they do not concur with the decision of the trial Court in holding not to have power to correct alleged illegality and so illegality cannot in the circumstance of the said matter constitute a sufficient cause for extension of time. Further the Magistrate did not state clearly the reasons and principles for such decision.

Moreover, it is said that, the trial Magistrate ought to have taken into consideration the ground of illegality that was pleaded so as to grant the Applicant extension of time to set aside the *Ex parte* judgement. Rather than denying to exercise its obligation by merely stating not to have powers.

It is averred in the Applicants submission that when applying for extension of time due to illegality as it happened in the time when judgement was procured and during adjudication of the proceedings, then accounting for each day of delay in this circumstance is not necessary. The issue was for the Applicant to prove the illegalities pointed out, and that

it is trite law that illegality has been accepted to be good cause for extension of time.

In reply to the Applicant's submission, the 1st Respondent submitted that, the Application before this Court is subjected into looking into it's competence. This is due to the fact that there is a restriction when one intends to invoke Revisionary powers, they ought to observe the principle that a revision is not an alternative way to appeal where the right of appeal exists. The provisions of **Order XL Rule 1 paragraphs a – v of the Civil Procedure Code, Cap. 33** and the case of **MWAKIBETE VS. THE EDITOR UHURU LTD [1995]** were cited to support the above contention by the 1st Respondent.

Further, the 1st Respondent also referred this Court to the provisions of **Order XL Rule 1 (d) of the Civil Procedure Code (supra)** that states as to what matters an appeal may lie upon. Stating further, the 1st Respondent submits that the Applicant learnt there was an ex parte judgement against him on 29th July 2016 when a summons was served upon him for execution. But still the Applicant was inactive until 24th May 2017 when he emerged with an Application to set aside the ex parte Judgment alleging an illegality. However, the contention that the Court stated not to have power over the Application is misleading this Court.

It is also the 1st Respondent's claim that the Applicant herein has filed this Application in lieu of an appeal a fact that is contrary to law and that the same should be dismissed.

Having gone through the records of this file and the file from which this Application for Revision originates from, I have taken into consideration that the Applicant seeks for revision of the matter at Kisumu Resident Magistrates Court on bases of illegalities as well stated in their submissions of which had occurred during hearing of the matter *Ex parte* against the Applicant.

It is also in my awareness that during an application for extension of time to set aside the *Ex parte* Judgement matters of illegality were still pleaded therein but the Court erred into not considering the illegalities that the Applicant had pleaded thereto.

From the proceedings of the trial Court during hearing of **Civil Case No. 164 of 2013**, on the **25/02/2016** when the matter was heard *Ex parte*, the Plaintiff testified for his case. It is nowhere in the records that the Plaintiff had tendered any exhibit to prove his case as stated by the Applicant. **The annexures in plaint were not tendered neither endorsed in Court to be part of evidence** and thus being contrary to **Order XIII Rule (4) of the Civil Procedure Code (Supra)**. Having seen this in the records, I am in support with the

Applicant's contention that this is an **illegality** that owed the Court to grant the extension of time so the same can be cured.

Moreover, the Applicant also stated that there was an existence of another illegality that, the Respondent who is the Applicant herein was not summoned to attend the hearing of an **Ex parte** judgement, as it a legal It is requirement that when a matter is heard **Ex parte**, at the time of judgement, the law requires the party whom the **Ex parte** order was against to be summoned for hearing of the **Ex parte** judgement.

Having visited the proceedings of the Court on the **25/2/2020** after the Plaintiff had testified an order for the **Ex parte**, Judgement was set to be on **17/03/2020** and there is nowhere that there was an order of service of summons to the party who the matter was heard **Ex parte** against. Again, I join hands with the Applicant on existence of such illegality.

Therefore, having said all of the above, I choose to celebrate the decision in the case of **THE PRINCIPAL SECRETARY OF DEFENCE AND NATIONAL SERVICE VS. DEVRAM VALAMBIA (1992) TLR 182**, where it was stated that:

"In our view when the point at issue is one alleging illegality of the decision being challenged, the Court has a duty, even if it means extending the time for the purpose to ascertain the point and if

the alleged illegality be established, to take appropriate measures to put the matter and the record right”.

It is from the above that I find the Court had the chance to exercise its discretionary power to extend time so as to put the matter and the record right. **This Application is hereby granted.**

Having said all of the above, the **Ruling** of Kisumu Resident Magistrates Court denying the Applicant an extension of time and the **Ex parte Judgement** are hereby set aside. **Further, the entire proceedings for the Ex parte proof are accordingly quashed. This matter is to be tried de novo before another Magistrate.**

It is so ordered.



**L. E. MGONYA
JUDGE
23/04/2021**



COURT: Ruling read before me in my chamber in the presence of Ms. Akwila Wilberd, Advocate for the Applicant and Ms. Msuya RMA on this 23rd day of April, 2021.



**L. E. MGONYA
JUDGE
23/04/2021**

