

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO. 221 OF 2019

*(Originating from the Ruling of the Resident Magistrate's Court of Dar es Salaam at
Kisutu in Misc. Civil Application No. 96 of 2019)*

AFRICAN BANKING CORPORATION

(TANZANIA) LIMITEDAPPELLANT

VERSUS

BETTY KAHUMBARESPONDENT

JUDGMENT

12th March & 12th May, 2021

BANZI, J.:

Sometimes in October, 2016, the Appellant sued the Respondent before the Resident Magistrate's Court of Dar es Salaam at Kisutu claiming among other things payment of Tshs.16,200,000/= as an indemnity following her resignation from employment. The Respondent, on the other hand, apart from denying the claim, raised preliminary point of objection on jurisdiction issue. On 28th June, 2017, the trial court, after hearing both

parties, delivered its ruling by sustaining the preliminary objection and dismissed the suit with costs.

Almost two years later, the Appellant resurfaced with an application for extension of time to file a review basing on the ground of illegality. However, the application was dismissed for want of merit. Aggrieved with that decision, the Appellant knocked the doors of this Court with this appeal on two grounds, thus;

- 1. That the first trial senior Resident Magistrate erred in law in not holding that once illegality is proved as ground for extension of time that alone constitutes sufficient grounds for the court to extend time without consideration of other factors.*
- 2. That, the trial senior Resident Magistrate erred both in law and fact in failing to hold that the Appellant ably demonstrated illegality as ground for extension of time and was thus legible to be granted the extension of time required.*

At the hearing the Appellant had the services of Mr. Elisa Abel Msuya, learned counsel, while the Respondent enjoyed the services of Ms. Anna Stephen Assey, learned counsel. By consent, the appeal was argued by way of written submissions.

Addressing the grounds of appeal, it was the contention of Mr. Msuya, for the Appellant that, the trial court erred in law by holding that the Appellant had a duty of accounting for every day of the delay without considering the ground of illegality which constituted sufficient cause to grant extension of time. Expounding further, he submitted that, since the suit was not determined on merit, the same ought to be struck out instead of being dismissed which precludes them to refile another suit on the same cause of action until the dismissal order is vacated. He added that, without vacating the dismissal order, the Appellant will be denied the right to be heard before the competent court vested with jurisdiction on labour matters. According to him, that alone constitutes illegality which is a ground for granting extension of time. He cited unreported decisions of the Court of Appeal of Tanzania in the cases of **East Africa Development Bank v. Blueline Enterprises Limited**, Civil Appeal No.101 of 2009 and **Tanzania Telecommunications Co. Ltd and three Others v. TRI Telecommunications Tanzania Ltd**, Civil Revision No. 62 of 2006 which emphasised on the effect of dismissal order. He also cited the case of **Principal Secretary, Ministry of Defence and National Service v. Devram Valambhia** [1992] TLR 185, and unreported decisions in the cases

of **Omary Shabani Nyambu v. Dodoma Water and Sewerage Authority**, Civil Application No. 146 of 2016, **Mary Rwabizi T/a Amuga Enterprises v. National Microfinance PLC**, Civil Application No. 378 of 2019 and **Ngao Godwin Losero v. Julius Mwarabu**, Civil Application No. 10 of 2015 to support his submission on illegality as a ground for extension of time. In that regard, he prayed for the appeal to be allowed with costs by setting aside the ruling and order of the trial court dated 15th November, 2019.

Ms. Assey on the other hand, strongly resisted the appeal. Basically, she argued that, granting extension of time is a discretion of the court which has to be exercised judicially. She invited the court to look at factors to be considered in granting extension of time which were discussed in the case of **Lyamuya Construction Company Ltd v. Board of the Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 CAT (unreported). She further argued that, in the matter at hand, there was no sufficient ground to warrant extension of time due to unaccounted delay. Moreover, the said illegality ought to be apparent on the face of record which was not the case in the matter at hand. She therefore prayed for the appeal to be dismissed with costs.

Having thoroughly considered the record of the trial court and the submissions by counsel for both sides, the main issue for determination is whether the appeal is meritorious.

It is worthwhile noting here that, an application for extension of time is entirely in the discretion of the Court to grant or refuse it, and that extension of time may only be granted where it has been sufficiently established that the delay was with sufficient cause. See the case of **Benedict Mumello v. Bank of Tanzania** [2006] 1 EA 227. It is also vital to underscore that, there is no hard and fast rule on what constitute sufficient cause. In **Lyamuya Construction Company Ltd v. Board of the Registered Trustees of Young Women's Christian Association of Tanzania** (supra), the Court of Appeal of Tanzania highlighted the following guidelines for grant of extension of time; (a) the applicant must account for period of delay; (b) the delay should not be inordinate; (c) applicant must show diligence; (d) existence of point of law such as illegality of the decision sought to be challenged.

In the matter at hand, it was contended that, the Appellant ably demonstrated illegality as a ground for extension of time. According to them, there is illegality in the impugned decision sought to be challenged because

after being found incompetent, the suit in question ought to be struck out rather than dismissed. As stated herein above, there are various factors to be considered in granting extension of time. Nevertheless, since the discretion is vested on Court, those factors are not meant to be used cumulatively.

It is undisputed and as the trial court rightly decided that, the Appellant in his application has failed to account for the delay. Nonetheless, failure to account for the delay is not the only factor to be considered in granting or refusing extension of time. Equally, other factors such as existence of illegality should also be taken into consideration. In **Principal Secretary, Ministry of Defence and National Service v. Devram Valambhia** (supra), the Court of Appeal had the following to say;

"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."

In the case of **Lyamuya** (supra) it was emphasised that, the point of law in the decision subject to be challenged must be that of sufficient

importance and apparent on the face of the record; and not one that would be discovered by a long-drawn argument or process. It is a common knowledge that, dismissal and striking out are two distinct orders whereby the former implies that a competent suit, appeal or application has been disposed of and the latter implies there was no proper suit, appeal or application capable of being disposed of. See the cases of **Ngoni Matengo Co-operative Marketing Union Ltd v. Alimahomed Osman** [1959] 1 EA 577 and **Cyprian Mamboleo Hizza v. Eva Kioso and Another**, Civil Application No. 3 of 2010 CAT (unreported). In the matter at hand, it is apparent that, the suit in question was dismissed in answer to a preliminary objection. Thus, it was not determined on merit. This in itself is not only important point of law but also sufficient to grant extension of time for purpose of ascertaining such point. In that regard, I am inclined to agree with counsel for the Appellant that, had the trial court properly considered the issue of illegality, it would have reached into different decision.

That being said, I find the appeal with merit and I hereby allow it. Consequently, I quash the ruling and set aside the drawn order in Misc. Civil Application Number 96 of 2019 before the Resident Magistrate's Court of Dar es Salaam at Kisutu. The Appellant is hereby ordered to file application for

review before the Resident Magistrate's Court of Dar es Salaam at Kisutu within thirty (30) days from the date of delivery of this judgment. Each party to shoulder its own costs.

It is so ordered.



A handwritten signature in blue ink, appearing to be "I. K. Banzi".

I. K. BANZI
JUDGE
12/05/2021

Delivered this 12th May, 2021 in the presence of Ms. Irene Mchau, learned counsel for the Appellant who is also holding brief of Mr. Roman Lamwai learned counsel for the Respondent.



A handwritten signature in blue ink, identical to the one above.

I. K. BANZI
JUDGE
12/05/2021