

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN THE DISTRICT REGISTRY OF MUSOMA**

**AT MUSOMA**

**CIVIL APPEAL NO 40 PF 2020**

*(Arising from Misc. Civil Case No. 8/2019 of the Musoma Resident Magistrate's Court)*

**MUSOMA DISTRICT COUNCIL.....APPELLANT**

**VERSUS**

**MRAGA MUKAMA SELEMANI .....RESPONDENT**

**JUDGMENT**

*6<sup>th</sup> May & 2<sup>nd</sup> July, 2021*

**Kahyoza, J**

This is an appeal against the ruling of the trial court rejecting an application for extension of time to file an application to set aside the *ex parte* judgment.

The issue is whether the trial court erred to reject the application to set aside the *ex parte* judgment.

A brief back ground is that the **Mraga Mkama** sued the **Musoma District Council** before the Resident Magistrate's Court of Musoma claiming for specific and general damages. Mraga Mkama served the Council with a summons to file the written statement of Defence. Although, there is no proof of service, the Council filed the written statement of Defence and defaulted to

appear on several mention dates. The trial court granted Mraga leave to proceed *ex parte* and later entered an *ex parte* judgment.

Aggrieved by the *ex parte* judgment, the Council applied for extension of time to file an application to set it aside the *ex parte* judgment. The trial court found that the Council did not adduce sufficient reason for extension of time. It rejected the application.

Dissatisfied, the Council instituted the current appeal, contending that-

1. That, the honourable Magistrate erred in law and facts by not considering properly the evidence adduced by the Appellant regarding non-appearance.
2. That, there is serious illegality on the face of Civil Case No. 8 of 2019 to the extent that the whole case is void before the door of this honourable court.

At the hearing Mr. Mude, State Attorney represented the Council and the respondent appeared in person. Mr. Mude submitted that on the material date the city solicitor, Mr. Mwita was unable to attend the Court as he was transferred. The Council had no one to represent her. He added that Mr. Mraga's contention that the Council had many lawyers was not true.

As to the second ground Mr. Mude, submitted that the Resident Magistrate's court had no jurisdiction to hear the matter. To support his contention, he cited section 24(1) (e) of Cap. 208, the **Business Lincence Act**, which he argued that it provides

what should a person denied a licence do. He contended that Mr. Mraga was not required to go to court but to appeal to the Minister. He concluded that the court entertained the matter without jurisdiction. He indicated in the plaint that the court had no jurisdiction but it did not determine issue as it proceeded to give the respondent leave to prove his case *ex-parte* and later delivered the *ex-parte* judgment in favour of the respondent.

Mr. Mude argued further that the trial court's judgments offended the provisions of S. 110 of the **Evidence Act**, [Cap. 6 RE 2019] in that Mraga did not adduce evidence to prove that he suffered damage.

In reply, Mr. Mraga opposed the appeal and prayed for its dismissal. He argued that transfer of the city Solicitor was not a good cause as the Council had many other employees. Any employee would have appeared and informed the Court that the City Solicitor was transferred.

He concluded that the Council was ordered to appeal, instead of appealing the council applied for extension of time.

In his rejoinder, Mr. Mude insisted that the suit was properly filed in the Resident Magistrates Court.

It is settled that in an application for extension of time, the applicant must exhibit sufficient reason(s) for delay. In **Mumello v. Bank of Tanzania** [2006] E.A. 227 the Court of Appeal stated that:

*"... an application for extension of time is entirely in the discretion of court to grant or refuse and that extension of time may only be granted where it has been sufficiently established that the delay was due to sufficient cause"*

The trial court refused to extend time on the ground that the Council did not account for all period of delay. It also found that the Council was not diligent. The applicant seeks to challenge the decision of the trial court because the trial court did not consider properly the evidence adduced by the appellant for non-appearance. He also raised the issue of illegality of the decision in **Civ. Case No. 08/2019.**

I passionately considered the first ground of appeal, that the trial court did not consider properly the evidence adduced for non-appearance. The appellant's representative submitted that the Council did not enter appearance as its City Solicitor, one Mwita was transferred. The respondent replied that the applicant had other employees who would have appeared on her behalf. I will not dwell on this ground of appeal. This ground was misconceived. Before the trial court was an application for extension of time to apply to set aside an *ex parte* judgment. It was therefore, irrelevant to submit evidence to show that the applicant had good ground not to attend. Grounds for non-appearance support an application for setting aside *ex-parte* hearing or judgment and not

an application for extension of time. I therefore, do not find merit in the first ground of appeal.

I now, move to consider the second ground of appeal that the impugned decision was tainted with illegality. It is trite law that illegality of the impugned decision is a sufficient cause for extension of time. See the case of **Principal Secretary Ministry of Defence and National Service Vs. Devram Valambia** [1991] TLR 387, where the Court of Appeal held thus:-

*"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 straight. "*

However, the alleged illegality to amount to a sufficient cause, it must be on the face of record. This position was expressed by the Court of Appeal in **Ngolo Godwin Losero v Julius Mwarabu** Civil Application No. 10/2015 CAT at Arusha (unreported), where the Court of Appeal reiterated its decision in **Lyamuya Construction Company Ltd Vs. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application 2/2010 that-

*"Since every party intending to appeal seeks to challenge a decision either on points of law or facts, it cannot in my view, be said that in Valambia 's case, the court meant to*

*draw a general principle that every applicant who demonstrates that his intended appeal raises points of law should, as of right, be granted extension of time if he applies for one. The Court there emphasized that **such point of law must be that of sufficient importance and I, would add that it must be apparent on the face of the record**, such as the question of jurisdiction; not one that would be discovered by a long-drawn argument or process.*

The applicant raised two points of the alleged illegality as follows. **One**, that the trial court had no jurisdiction to hear the matter. He contended that the Council raised the issue of jurisdiction in the Written Statement of Defence but the trial court did not determine it.

The respondent a lay person had nothing to reply to this.

Indeed, the Council stated in its Written Statement of Defence that the trial court had no jurisdiction. Paragraph 2 of the Written Statement of Defence states that;

*"This honourable Court has no jurisdiction on the business licencing matters".*

The question of court's jurisdiction is fundamental. Jurisdiction is a creature of the law, courts are bound to determine whether it is clothed with jurisdiction before it sets to determine a civil suit or any criminal matter. Courts ought not forge ahead and

determine any matter without establishing that it is closed with jurisdiction. The Court of Appeal in **Fanuel Mantiri Ng'unda v. Herman M. Ng'unda & Others [CAT] Civil Appeal No. 8 of 1995**, stated that-

*"The question of jurisdiction for any court is basic, it goes to the very root of the authority of the court to adjudicate upon cases of different nature... (T)he question of jurisdiction is so fundamental that courts must as matter of practice on the face of it be certain and assured of their jurisdictional position at the commencement of the trial... **It is risky and unsafe for the court to proceed on the assumption that the court has jurisdiction to adjudicate upon the case.**"* (emphasis added)

Also in another case of **Richard Julius Rukambura v. Issack N. Mwakajila & Another [CAT] Civil Appeal No. 3 of 2004**, the Court of Appeal had the following to say-

*"...the question of jurisdiction is fundamental in court proceedings and can be raised at any stage, even at the appeal stage. The court, **suo motu** can raise it. In **Baigand Batt Construction Ltd v. Hasmati Ali Baig, [CAT] Civil Appeal No. 9 of 1992** this Court .....raised suo motu in an appeal to it, the question of the High Court not having jurisdiction to hear a review case regarding an*

*order made by the District Registrar. It said the judge of the High Court had no jurisdiction as only the District Registrar could review the order he had made earlier.... [T]here is authority, therefore, that on a fundamental issue like that of jurisdiction a court can **suo motu**, raise it and decide the case on the ground of jurisdiction without hearing the parties."*

In the current case, the trial court's jurisdiction was questioned, it was bound to make a determination. The fact that the matter proceeded *ex parte* was not a waiver for the trial court to consider whether it had jurisdiction or not. It is trite law that courts would not normally entertain a matter for which a special forum has been established unless the aggrieved party can satisfy the court that no appropriate remedy is available in the special forum. (see **Attorney General v. Lohay Akonaay & Another** [1995] T.L.R. 80)

I agree that failure to make a determination of the issue whether the trial court had jurisdiction or otherwise is an illegality, which once established, time has to be extended so that, that issue may be addressed. It should be clear that I am not saying that the trial court lacked jurisdiction, rather I am saying that it did not consider and determine whether it had jurisdiction or not.

It should be borne in mind that, it is the position of law that once preliminary point of law is raised it must first be resolved before the appeal or suit is decided on merit. See the cases of



**Shahida Abdul Hassanali v. Mahed M.G. Karji**, Civil Application No. 42 of 1999 (CAT), **Thabit Ramadhani Maziku & Another v. Amina Khamisi Tyela & Another**, Civil Appeal No. 98 of 2011 (CAT) and many others. In **Shahida Abdul Hassanali's** case (supra) the Court of Appeal held that-

*"The law is well established that a court seized with a preliminary objection is first required to determine that objection before going into the merits or the substance of the case or application before it. In **Bank of Tanzania Ltd V. Devran P. Valambia** Civil Application No. 15 of 2002 (CAT) (unreported) the Court observed: 'The aim of a preliminary objection is to save the time of the court and of the parties by not going into the merits of the application because there is a point of law that will dispose of the matter summarily.'*

The Court of Appeal further observed that -

*Furthermore, given that one of the points raised in the preliminary objection concerned the court's jurisdiction, it was therefore even more imperative for it not only to be heard but also to be determined fully by the trial court before the continuation of the main suit... With respect, therefore, the failure by the learned Resident Magistrate with extended jurisdiction to deliver the ruling on the preliminary objection... constituted a colossal procedural*

*flaw that went to the root of the trial. It matters not, whether it was inadvertent or not. The trial court was duty bound to dispose of it fully, by pronouncement of the ruling before dealing with the merits of the suit. This it did not do. The result is to render all subsequent proceedings a nullity."*

I cannot agree more with the decision of our highest Court and hold that the trial court seriously erred and not to determine the issue whether it had jurisdiction or otherwise. It further, restate the apposition that such an illegality is on clearly on the face of record and is a sufficient cause to support an application for extension of time.

**Two**, the Council submitted that the judgment was illegal as the trial court did not receive credible evidence. It awarded damages on the bases of insufficient evidence, thus contradicting Section 110 of Evidence Act.

The respondent did not specifically reply to this.

I must say from at the very outset that the appellant's argument that the judgment was illegal as it was given in the want evidence did not convince me. The Council's argument did not raise and establish an error on face of record, which can be established without long arguments to prove it. There is evidence or not is matter of combined legal and facts, the person alleging must prove it.

In end, I find that the applicant did establish sufficient cause for extension of time on account of illegality in the impugned decision. Consequently, I set aside the ruling of the trial court dismissing the application for extension of time. I grant the application for extension of time to file an application to set aside the *ex parte* judgment. The Council is required to file the application within 21 days from the date of this ruling. Costs shall be in due course.

It is ordered accordingly.



**J. R. Kahyoza**

**JUDGE**

**2/7/2021**

**Court:** Judgment delivered in the presence virtually of Mr. Matheniel Mude S/A for the applicant and Mraga Mkama Seleman the respondent. Mr. Mofuga the Judges assistant present.



**J. R. Kahyoza**

**JUDGE**

**2/7/2021**