

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR-ES-SALAAM**

CIVIL REVISION NO. 48 OF 2018

(Arising from Misc. Civil Application No. 49 of 2018 before the Court of the Resident Magistrate for Dar es Salaam at Kisutu)

MILEMBE INSURANCE COMPANYAPPLICANT
versus
FESTO CAROL TARIMO.....RESPONDENT

RULING

Last Order:30/8/2021

Date of Ruling: 21/9/2021

MASABO, J

The applicant was a judgment debtor in Civil Case No. 102 of 2016 which proceeded *ex parte* her in the Court of the Resident Magistrate for Dar es Salaam at Kisutu. Disgruntled by the *ex parte* order, she sought to have it set aside but the time had already lapsed. She thus applied for extension of time vide Misc. Civil Application No. 49 of 2018 before the same court. By an order dated 1st November 2018, her application was dismissed for want of merit. Disgruntled, she has moved this court by way of a chamber summons praying that the dismissal order be revised, quashed and set aside as it was marred by material irregularities.

In the affidavit filed in support of the application, it was deponed that having discovered the existence of the *ex parte* decree against her, the applicant

applied to be furnished with a copy of the *ex parte* judgment and decree which were furnished on her on 21st February 2018. As the time within which to apply to have the *ex parte* judgment set aside had lapsed she applied for an extension of time in Misc. Civil Application No. 49 of 2018 and that, in the said application she complained that the *ex parte* decree was marred by irregularities as she was neither served with the plaint nor notified of the hearing date and date of judgment.

According to paragraph 10 of the affidavit, revision is sought as the applicant verily believes that there are material irregularities in the ruling as the court based its determination on only one ground of delay and left the other grounds unattended and in so doing, it did not address the issue of illegality of the *ex parte* order, which does in itself, suffice as a good cause for extension of time. It was also deponed that, instead of focusing on the application for extension of time, the court surpassed its jurisdiction as it focused on the merit of the *ex parte order* which was not yet placed before it. The application was contested through a counter affidavit deponed by Festo Caroli Tarimo, the respondent herein.

During the *viva voce* hearing, the applicant represented by Ms. Prisca Nchimbi, learned counsel, reiterated the content of the affidavit and proceeded to submit that, it is in the interest of justice that the ruling be revised, quashed and set aside as the applicant herein was judged unheard in the Civil Case No. 102 of 2016. She argued that, denial of the right to be heard is a fatal irregularity which suffices as a good cause for the trial court

to exercise its discretionary powers for extension of time but it was ignored all together.

On his part, Mr. Living Raphael, learned counsel for the respondent submitted that, the applicant's points are without merit as in the impugned ruling, the court determined whether there existed a good cause upon which to exercise its discretionary powers for extension of time and upon finding that it had not been demonstrated, it dismissed the application. Thus, there is no reason for revision as the trial court exercised its discretion judiciously as it holistically considered all the materials before it and made a finding.

I have carefully considered the materials placed before me and I am now ready to determine the application. Section 79(1) of the Civil Procedure Code [Cap 33 R.E. 2019] and section 44(1) of the Magistrates' Court Act [Cap11 R.E. 2019] under which this application is filed, vests this court with revisionary powers over subordinate courts. These powers are excised where it appears that a subordinate has exercised jurisdiction not vested in it; has failed to exercise the jurisdiction so vested; or has acted with illegally or with material irregularity. Since the applicant's major complaint in this case is that the subordinate court acted with illegality/material irregularities in exercising its powers, the only question for determined is *whether the in dismissing the application for extension of time, the court acted with illegality or material irregularities* as claimed by the applicant.

As the ruling contested is in respect of extension of time, I will pose to reflect on the principles guiding applications for extension of time. As a trite law, extension of time within which to take a certain legal action is a judicial discretion exercised upon the court being satisfied that a good cause for delay has been demonstrated. Articulating this principle in ***Benedict Mumello v Bank of Tanzania***, Civil Appeal No 12 of 2012 (unreported), the Court of Appeal of Tanzania stated that:

“It is trite law 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.”

As there is no universal definition of what constitutes a good cause, principally, a good cause is established by considering several factors dependent upon the prevailing circumstances of each case (see ***Mang'ehe t/a Bukine Traders v Bajuta***, Civil Application No. 8 of 2016, Court of Appeal of Tanzania (unreported). Such factors include; whether the applicant has accounted for all the period of delay, whether the delay is inordinate; whether the applicant has demonstrated diligence and not apathy, negligence or sloppiness in prosecution of the action; and existence of a point of law of sufficient importance such as illegality of the decision sought to be challenged (See ***Ngao Godwin Losero v Julius Mwarabu***, Civil Application No. 10 of 2015, Court of Appeal of Tanzania at Arusha (unreported) and ***Zahara Kavindi and Another v Juma Swalehe & Others***, Civil Application NO. 4/5 of 2017, Court of Appeal of Tanzania at Mwanza (unreported).

Where an application for extension of time is premised a point of illegality of the impugned decision/proceedings, it is now a cardinal law in our jurisdiction that, such a point when raised, it suffices as a good cause for the court to exercise the discretion for extension of time. In the case of **The Principal Secretary, Ministry of Defence and National Service v. Devram Valambia** (1992) TLR 182 it was stated 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 right”

It is however worth noting that, for this principle to apply, it is trite that: *such point of law must be of sufficient importance and, must also 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”* (see **Lyamuya Construction Company Ltd v Board of Registered Trustees of Young Women’s Christian Association of Tanzania**, Civil Application No. 2 of 2010 (CAT) (unreported) **Ngao Godwin Losero Vs Julius Mwarabu** (supra), and **Samwel Munsiro v Chacha Mwikwabe**, Civil Application No. 359/08 of 2019 CAT(unreported)).

Reverting to the application, the court is invited to consider whether the point of illegality was raised in Misc. Civil Application No. 49 of 2018 and if so, whether it was ignored as argued by the applicant. In my scrutiny of the

record, I have observed that, illegality of the proceedings leading to the ex parte judgment was among the grounds advanced by the applicant in support of his application. In paragraph 4 of the affidavit deposed by Norbert Brown on 1st March 2018, it was averred that, there was an illegality as the applicant was not served with the summons to appear or to file written statement of defence. This ground was further exemplified in paragraph 6 of the affidavit where it was asserted that the applicant was not notified of the date of the judgment.

The impugned ruling shows that, in determining the application, the point of illegality was not totally ignored as asserted. It was partially considered. As I have already demonstrated, the point of illegality had two limbs the first being that the applicant was not served with the WSD and the second being that she was not notified of the date of judgment. At page 6 of the ruling, the presiding magistrate discussed the first limb of illegality while he left the second limb unattended. I have observed further that, apart from leaving the second limb unattended, in determining the first limb, the presiding magistrate prematurely dealt with the merit of the alleged illegality a point which ought to have been reserved for determination in the application for setting aside of the ex parte judgment. It need not be overemphasized here that, when determining a point of illegality as a ground for extension of time, the court is exclusively mandated to consider whether such point is of sufficient importance and whether, it is apparent on the face of the record and leave the merit of the alleged illegality to be determined in the course of determination of the application for setting aside the ex parte order. Under

the premise, I am constrained to hold that by examining the merit, the presiding magistrate erred by usurping the powers not vested in him. He further erred in ignoring the lamentation that the applicant was not notified of the date of judgment which does, in itself, suffice as a good ground for extension of time.

In the upshot, the application passes. The ruling of the trial court is set aside. It is further ordered that the file be remitted to the trial court for it to be placed before another magistrate with jurisdiction for expeditious determination.

DATED at **DAR ES SALAAM** this 21st day of September 2021.

24/09/2021

X 

Signed by: J.L.MASABO

J.L. MASABO

JUDGE