

**IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY
AT MWANZA**

MISC CIVIL APPLICATION NO. 108 OF 2020

*(Arising from the decision of RM Civil Case No. 66 of 2017 dated 3^d
September 2018 before Hon. Y. Ruboroga- SRM)*

GOODLUCK MOSES NZWALLA APPLICANT

VERSUS

THE REGISTERED TRUSTEE OF MAVUMO VILLAGE RESPONDENT

RULING

10/9/2021 & 10/9/2021

W. R. MASHAURI, J;

This application is made under S. 44(I)(b) of the MCA Cap. II R.E. 2019 section 95 of the CPC Cap. 33 R.E. 2019 and S. 14(I) of the Law of Limitation Act Cap. 89 R.E. 2019. It is emanating from the decision of the Resident Magistrates' court of Mwanza at Mwanza in Civil Case No. 66 of 2017 Y. Ruboroga – SRM.

According to the chamber summons filed by the applicant Goodluck Moses Nzwalla, the relieves sought from this court are: -

(a) that, this court be pleased to extend time within which to file an application to revise the exparte judgment and decree in RM Civil Case No. 66 of 2017 delivered on 3rd September, 2018.

The applicant has also contended in his affidavit that, he was defendant in Civil Case No. 66 of 2017 of which its decision was given exparte on 3rd September, 2018.

That, the said case was decided exparte without his knowledge as he was outside the country pursuing Theological studies, the respondent initiated claims against him in his absence and proceeded to prosecute the same as per the copy of a letter from the college (annexture GMZ) which he clave (sic) to form party of his affidavit.

He was not served despite the respondent knowledge that he was outside the country but the respondent misled, the court as a result, the court proceeded exparte and ordered the applicant to pay Shs. 51,000,000/= and interest of decretal amount at the court rate of 7% from the date of judgment till payment in full without proof.

As per attached to the affidavit a copy of judgment and decree of the court.

That, by delivering the judgment *exparte* means that he was denied of his right to defend his case which is contrary to the principle of natural justice (*audi alteram partem*). Hear the other side. No one shall be condemned unheard. Which also is a constitutional right.

That, when he returned back in Tanzania from his studies in 2019 he found the case being already heard and worse enough he fell sick and attended medical diagnosis which was revealed to have renal problem as shown in a medical chart annexure GMZ2 which also he clave (*sic*) to form part of his affidavit.

That, the *exparte* judgment and decree has an error material to the merits in that it was decreed that the applicant should pay Tshs. 51,000,000/= instead of Shs. 36,000,000/= as per agreement and as of now the respondent has instituted a criminal case against the applicant for a charge of stealing by agent. The respondent has also lodged in the RM's court for Mwanza an application to confine the respondent in prison as civil prisoner and the application has been granted with an order to pay the respondent Shs. 116,877,466/= as indicated in a copy of charge sheet (annexture GMZ3), and on 18/06/2020, the applicant was ordered to pay Tshs. 116,877,465 instead of contract as per the ruling and agreement marked

annexture GMZ4 the said irregularities to be addressed before this court and it would be in the interest of justice if this application is granted and the proceedings before the RM's court be revised.

The applicant in this application is represented by Mr. Mtete learned counsel and the respondent by Mr. Silas learned counsel.

When this application was called in court for hearing on 9/08/2021, Mr. Mtete counsel for the applicant addressed the court in support of the application that, this application has been filed in this court under section 44(I)(b) of the MCA Cap. II R.E. 2019, section 95 of the CPC Cap. 33 R.E. 2019 and section 14(I) of the Law of Limitation Act Cap. 89 R.E. 2019. It is an application for extension of time within which to file an application to file Revision of an exparte judgment of the RMs' court of Mwanza in Civil Appeal No. 16 of 2017 the judgment of which contains an illegality as it is contended by the applicant in his sworn affidavit.

And in reply to the submission by counsel for the applicant, Mr. Silas counsel for the respondent objected the applicant's application and he stated four reasons as follows: -

1. There is no sufficient reasons for delay given by counsel for the applicant.
2. The applicant has failed to account for each day of delay.
3. The application is an abuse of the court process; and
4. The application is omnibus.

He also prayed the court to adopt his counter affidavit to be part of his submission.

Starting with the 1st reason, the learned counsel for the respondent referred this court to the case of the **Regional Manager Tan Roads Kagera v/s. Ruaha Concrete Co. Ltd.** Civil Application No. 96 of 2007 CAT Dar es Salaam Registry (unreported) in which the CAT held at page 3 of its typed judgment that: -

"Sufficient reason cannot be laid down by any hard and fast rules. This must be determined by references to all the circumstances of each particular case. This means that the applicant must place before the court material which will move the court to exercise its judicial discretion in order to extend the time limited by the rules."

That, under paragraph 4 of the affidavit, the applicant deposed to have never been served with any summons in respect of this matter. However, it

is clear and not disputed that, from the inception of the matter the applicant was being represented by Mr. Venance Kibiliga learned counsel who one time did abandon the case, and the applicant attempted to engage another advocate but he failed the outcome of which the trial court proceeded hearing the case exparte.

That, he said so because, it is not known how the applicant got an advocate to appear in court on his behalf. His allegation that he was not served with summons to appear in court is a broad-sun-light-lie. Such allegation ought to be discarded.

Counsel for the respondent further submitted that, in his sworn affidavit, the applicant deposed was outside the country attending further studies. Such allegation is baseless for want of attaching relevant documents for example a passport he used to travel to attend studies, failure to name the country and school he was studying and the time he was outside the country pursuing his further studies.

That, the annexure marked GS-1 is not believable because in the current world of computers and internet, such document may be a mere print out from a computer. That, the applicant did not say how he got the

document. On that regard, under section 58 of the electronic Transaction Act 2013, the same cannot be accepted in so far as the applicant has failed to given sufficient reasons for the delay, his application therefore ought to be dismissed, with costs.

In respect of the issue of illegality in the judgment of the trial court, Mr. Silas counsel for the respondent failed to establish in his submission nor counter-affidavit how omnibus the application is. And by so doing, this application is not omnibus, and since the application is not omnibus, even the allegation of failure to account for the delay of each day is therefore immaterial. Mr. Mtete therefore prayed the court to allow this application, for extension of time to file revision so that the decision of the trial court can be reviewed.

The issue is whether, the applicant has advanced sufficient reasons to this court which can move the court to grant his application for revision against the exparte judgment given by the Resident Magistrates court.

I have carefully followed the submission by the applicant that, he failed to attend his case in the trial court because he was outside the country attending further studies, that exparte decision was illegal and omnibus, I

have gathered that, the allegation by applicant that he was outside the country pursuing further studies is questionable for want of supporting documents, for example a passport and air ticket used to travel to the alleged country and/or viza which enabled him to live in that country and which country he was undertaking further studied at what college or institute and for how long. He did not also produce any leaving corticated for his studies.

He did not also mention what kind of illegalities are available in the judgment of the RM's court. A mere allegation that the judgment of the trial court contains illegalities is not a sufficient cause to render his application granted. His allegation that he was not served is baseless because, as indicated in the Mwananchi. Local Newspaper with publication ISSN 0856-7573 of Thursday April 2019, the applicant was served by publication in the said Mwananchi Newspaper dated 4th April, 2019. A substuted service by way of publication in a common Newspaper is allowed at law.

He cannot therefore be heard saying that he was not served. that is a lie on oath.

The applicant has further contended that, when here returned back in Tanzania from his studies abroad, he found the case being already heard

and decided exparte and worse enough he also fell sick and attended medical diagnosis which was revealed to have renal problem as shown in a medical chit annexure GMZ2.

In law, sickness cause of delay is permissible when the applicant was sick. It was held by the Court of Appeal in the case of **Regional Manager TANROADS KAGERA v/s Ruaha Concrete Co. Ltd** Civil Application No. 96 of 2007 Cat DSM Registry (unreported) that: -

"What constitutes sufficient reasons cannot be laid down by any hard and fast rule. This must be determined by reference to all the circumstances of each particular case. This means that, the applicant must place before the court materials which move the court to exercise its judicial discretion in order to extend the time limited by the rules."

The Court of Appeal has also held in the case of **John David Kashenya v/s The Attorney General** Civil Application No. 107 of 2012 (unreported) that: -

"Sickness is a condition which is experienced by the person who is sick. It is not a shared experience, except for children which are yet in a position to express their feelings. It is the sick person who can express his/her condition whether he/she has strength to move, work and do whatever kind of work he/she is required to do. In this matter, it is the applicant who says was sick and he produced medical chits to show that, he reported to the Doctor for checkup

for sometimes. There is no evidence from the respondent to show that after that period, his condition immediately became better and he was able to go to court to pursue his case."

Under such circumstances, I do not see any reason for doubting his health.

On my part, and upon looking from the events as stated by the Court of Appeal in the above two cited cases, I find the reason of sickness given by the applicant to be sufficient reason for granting the application for extension of time to revise the exparte judgment and decree in RM Civil Case No. 66 of 2017 delivered on 03/09/2018. This application is granted. No order as to costs in made. Right of appeal explained.




W. R. MASHAURI

JUDGE

10/09/2021

Date: 10/09/2021

Coram: Hon. W. R. Mashauri, J


Applicant:

Respondent:

B/c: Elizabeth

Court: Ruling delivered in court in presence of Mr. Mtete Advocate for applicant and Mr. Silas for respondent this 10/9/2021. Right of appeal explained.




W. R. MASHAURI
JUDGE
10/09/2021