

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM
CIVIL APPEAL NO. 80 OF 2021

(Appeal from the ruling of the District Court of Ilala at Kinyerezi in
Miscellaneous Civil Application No. 176 of 2020 before Hon. K.C. Mshomba,
RM dated 25/02/2021)

THE BOARD OF TRUSTEES/EXECUTIVE OF CHAWATA...APPELLANT

VERSUS

BANANA CONTRACTORS LIMITED..... RESPONDENT

JUDGMENT

25th Aug, 2021 & 17th Sept, 2021.

E. E. KAKOLAKI J

This judgment is in respect of the appeal preferred by the appellant from the decision of the District Court of Ilala at Kinyerezi in Misc. Civil Appeal No. 176 of 2020 handed down on 25/02/2021. Before the District Court of Ilala the appellant unsuccessfully filed omnibus application seeking for extension of time to file an application for setting aside ex-parte judgment in the first set and the application for setting aside ex-parte judgment of the District Court of Ilala in Civil Case No. 98 of 2014 dated 29/01/2015 as second set. The trial court dismissed both applications on the ground that the appellant

failed materially to assign good cause to account for the delay of more than three years before the filing of the said application for extension of time within which to file an application for setting aside the said ex-parte judgment, after becoming aware of its existence. In paragraph 9 of her affidavit in support of the application, the appellant had deposed that she was not served with the notice of judgment of the said ex-parte judgment, thus was not aware of its existence until November 2019 when she became aware of it. That appellant's assertion was vehemently contested by the respondent who proved to the contrary through its counter affidavit that, the appellant became aware of the said ex-parte judgment since 2016 when she was involved in two applications filed in the same District Court of Ilala arising from the same Civil Case No. 98 of 2014, the subject of the decision in the present matter. The two referred applications were mentioned by the respondent to be Misc. Civil Application No. 228 of 2016 for execution filed by the respondent and Misc. Civil Application No. 408 of 2016 filed by the appellant herself seeking to stay execution order issued in Misc. Civil Application No. 228 of 2016. It is from that evidence the trial court was satisfied that the appellant became aware of the complained of ex-parte judgment in 2016 and therefore found she had failed miserably to account for the delay in filing the said application for extension of time hence its dismissal. As the consideration and grant of the application for setting aside ex-parte judgment depended on the grant of the application for extension of time the same automatically was found to have not been proved hence dismissal as well. It is from that decision the appellant is aggrieved hence the present appeal equipped with nine (9) ground of appeal which I see no

need of reproducing them all as during the hearing she abandoned eight (8) of them and decided to pursue only one ground going thus:

1. That trial Magistrate erred in law and fact by denying the Appellant a opportunity to have heard inter-parties of the dispute with the Respondent while knowing ex-parte judgment and decree as issued by the District Court of Ilala on 29/01/2015 in relation to Civil Case No. 98 of 2014 should not have the effect of finally disposing of the case.

At the hearing of the appeal appellant traded under legal aid of the Legal and Human Right Centre while the respondent hired the services of Mr. Andrew O. Malesi learned advocate and both parties chose to have their matter disposed of by way of written submissions. They were therefore subjected to the filing schedule orders which they religiously adhered to save for the appellant's who opted not to file a rejoinder submission hence this judgment. In her submission in support of the sole ground of appeal the appellant argued that, failure of the District court to grant her applications denied her the right to access justice and that technicalities were applied to deny her of that right to have the suit heard inter-parte which act is in contravention of the provisions of Article 13(1) and Article 107(2) of the Constitution of the United Republic of Tanzania, 1977 herein referred to as Constitution. She said the Constitution under the two cited articles guarantees the right to access to justice and prohibits the court from being tied up with technicalities something which may obstruct justice when dispensing justice as in the instant matter the application for extension of time was not supposed to be subjected to procedural law.

The appellant went on to submit that, extension of time can be granted for the interest of justice regardless whether the reason advanced by the applicant is reasonable or not or whether the intended proceedings will succeed or not as to do otherwise amounts to stifling of the case. In that stance the appellant relied on the cases of **Mabrama Gold Corporation Ltd Vs. Minister for Energy and Minerals and the Attorney General and The East African Gold Mines Ltd** (1998) TLR 425 as cited in the case of **John Dongo and 3 Other Vs. Lepasi Mbikoso**, Civil Application No. 14/01 of 2018 (CAT-unreported) and **Mawji Vs. Amola General Stores** (1971) EA 137. She therefore invited this court to allow the appeal by setting aside the decision of the District Court and grant the applications by extending time and as well as setting aside the ex-parte judgment.

Retorting the appellant's submission Mr. Malesi for the respondent informed the court that, the submission by the appellant that she was denied of her right to access justice is unfounded aiming to mislead this court. He echoed before the District court both parties were given equal right of hearing on the filed applications but the appellant completely failed to assign good reasons to warrant the trial court grant the applications as she failed to account for the delay of three (3) years before filing the said applications. He argued, before the law there is no right without duty as the applicant was duty bound to account for every single day of delay for her application to be granted as it was held in the case of **Dar es salaam City Council Vs. S. Group Security Company Limited**, Civil Application No. 234 of 2015 (CAT-unreported). As to the complaint that the application was subjected to technical rules of procedural he countered, the argument sounded strange

to him arguing that, if the courts are to act to the contrary by not subjecting the application for extension of time under procedural rules then the rules prescribing for time limitation will be rendered meaningless as it was held in the case of **Zitto Zuberi Kabwe and 2 Others Vs. The Attorney General**, Civil Application No. 365 of 2019 (CAT-unreported) that ***“delay of even a single day has to be accounted for otherwise there would be no point of having rules prescribing periods within which certain steps have to be taken.”*** He was therefore of the submission that, regulations enacted setting parameters and limits of time on certain actions must be observed otherwise there would be no meaning of having them.

As regard to the submission on the application of the law without being tied up with technicalities as provided under Article 107A(2) of the Constitution he said, the same cannot be used as an excuse or shed to cover someone’s negligence and failure to comply with the law such as to account for the delayed days to warrant the court grant the application for extension of time as such behaviour is discouraged by the Court. On that argument he referred this court to the decision of **John Dongo and Three Other Vs. Lepasi Mbikoso**, Civil Application No. 14/01 of 2018 (CAT-unreported). It was his submission therefore that, the refusal by the District Court to grant the application on account of the appellant’s negligence and failure to account for the delay of three years cannot fall with the meaning of technicalities as mentioned at Article 107A(2) of the Constitution. As the appellant failed to assign good cause for the delay in filing the application to warrant the court grant her extension of time, this appeal has no merit as the District Court

was justified to dismiss it, Mr. Malesi submitted and implored this court to dismiss it with costs.

I have dispassionately considered the conflicting arguments from both parties as well as passing through the pleadings, proceedings and the impugned ruling of the District Court of Ilala. What is discerned from the record is that, the applicant preferred her application under section 14(1) of the Law of Limitation Act, [Cap. 89 R.E 2019] (LLA), section 93 and Order IX rule 13(1) of the Civil Procedure Code, [Cap. 33 R.E 2019]. The law under section 14(1) of the LLA the applicant has a duty to supply to the court reasonable or sufficient cause for the same to grant him/her an extension of time. The provision of section 14(1) of LLA provides:

*14.-(1) Notwithstanding the provisions of this Act, **the court may, for any reasonable or sufficient cause, extend the period of limitation for the institution of an appeal or an application, other than an application for the execution of a decree, and an application for such extension may be made either before or after the expiry of the period of limitation prescribed for such appeal or application.***
(Emphasis supplied)

As the appellant preferred her application under section 14(1) of LLA she was duty bound to advance reasonable or sufficient cause to warrant the trial court grant her extension of time. Reasonable cause as described in a number of cases includes but not limited to accounting for each and every day of delay as right spelt out in the cases of **Dar es salaam City Council**

(supra) and **Zuberi Zitto Kabwe and 2 Others** (supra) and I would add **Bushiri Hassan Vs. Latifa Lukio, Mashayo**, Civil Application No. 3 of 2007(CAT-unreported) and **Alman Investment Ltd Vs Printpack Tanzania and Others**; Civil Application No. 3 of 2003 (Unreported).

Now the issue for determination before this court is whether the appellant supplied good cause to account for the delay in filing the application warranting the District Court grant her extension of time. The appellant relying on the cases of **Mabrama Gold Corporation Ltd** (supra) and **Mawji** (supra) submitted the District Court should have granted the application regardless whether she accounted for the delay or not as doing otherwise amounted to stifling of her case. As such she said dismissal of her application basing on technicalities denied her of the right to access justice and be accorded with the right to be heard in contravention of Articles 13(1) and 107A (2) of the Constitution. Conversely Mr. Malesi argues the appellant's negligence and failure to discharge her duty of accounting for the delayed days in filing the application cannot be termed as technicalities within the meaning of Article 107A(2) of the Constitution and therefore deny the appellant right to access to justice as asserted by the appellant. I am in agreement with Mr. Malesi and therefore not prepared to purchase the appellant's contention that the District Court should have granted the application regardless whether she had accounted for the delay or not as denial of grant amounted to stifle of the case he wanted to have its ex-parte judgment set aside. Under section 14(1) of the LLA the appellant knew was duty bound to assign good cause accounting for the delayed days being one of reasonable causes warranting the court to grant the application but failed

to discharge it. The appellant would also have relied on the illegality of the decision as one of the ground for extension of time without accounting for the delayed days as stated in the case of **Transport Equipment Vs. Valambia and Attorney General** (1993) TLR 91 (CAT) and **VIP Engineering and Marketing Limited and Two Others Vs. Citibank Tanzania Limited**, Consolidated Civil Reference No. 6,7 and 8 of 2006 (CAT-unreported) but she failed to successfully advance it as a ground for extension of time. The Court of Appeal **VIP Engineering and Marketing Limited and Two Others** (supra) on the issue of illegality as a ground for extension of time without accounting for the delayed days held thus:

“It is settled law that a claim of illegality of the challenged decision constitutes sufficient reason for extension of time under Rule 8 (Now Rule 10) of the Court of Appeal Rules regardless of whether or not a reasonable explanation has been given by the applicant under the Rules to account for the delay.”
(Emphasis supplied).

As to the contention that the denial to grant the application by the District Court amounted to stifle of the case which the appellant was seeking to set aside so as to proceed inter-parties, I also distance myself from that assertion as the term **“stifle”** as interpreted in the case of **John Dongo and 3 Others** (supra) did not intend to relieve the applicant seeking an extension of time from the obligation of furnishing good cause to the court as the appellant would want this court to believe. The Court of Appeal was of the following observation:

"I wish to state that, I do not think that the above quoted decision and the defined word (stifle) in particular intended to discharge the applicant from the obligation of furnishing good cause to the Court to extend time."

As the applicant is not relieved from discharging his duty of furnishing good cause to warrant the court grant her extension of time, I hold the denial did not amount to stifle of the case as she was duty bound to furnish good cause for the trial court to grant her extension of time, but she totally failed to so do. Since the appellant failed to discharge that duty I further hold, that obligation cannot be termed as technicality intended to be addressed under Article 107A (2) of the Constitution, 1977, meant to deny her access justice as asserted. My finding finds refuge in the decision of the Court of Appeal in the case of **John Dongo and 3 Others** (supra) where it was stated:

"...the refusal of the application for extension of time under the circumstances of this matter, is not and cannot fall under the technicalities intended to be addressed by Article 107A(2) of the Constitution of the United Republic of Tanzania."

In light of the above observation I am in agreement with Mr. Malesi's submission that, the District Court was justified in holding the appellant had failed totally to account for the days of three years hence her application deserved nothing than dismissal. It is for those reasons I am inclined to conclude this appeal is devoid of merits and hereby dismiss it.

I order each party to bear its own costs.

It is so ordered.

DATED at DAR ES SALAAM this 17th day of September, 2021.



E. E. KAKOLAKI

JUDGE

17/09/2021

The ruling has been delivered at Dar es Salaam today on 17th day of September, 2021 in the presence of the Mr. Josephat Panga the National representative of CHAWATA for the Appellant, Mr. **Benson Florence** advocate holding brief for Mr. Andrew Malesi, the respondent in person and Ms. **Asha Livanga**, Court clerk.



E. E. Kakolaki

JUDGE

17/09/2021