

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA**

AT SHINYANGA

DC CIVIL Appeal NO 18 OF 2021

(Arising from Land Application No. 1 of 2020 before Kishapu District Court)

JAMES DUTTU.....APPELLANT

VERSUS

ELAXI'S TEXTILE INDUSTRIAL CO LTD..... RESPONDENT

JUDGMENT

3^d & 4th February 2021

MKWIZU, J.

This appeal emanates from a ruling on an application for extension of appeal, in Civil Application No 1 of 2020 handled down by Hon. A.K. Ismail of Kishapu District Court. The Background of the matter is as follows: Appellant had in 2017 filed against the respondent a civil case No 3 of 2017 before Kishapu District Court seeking among other things for a return of a confiscated tractor with Reg. No. T.972 CXH-TT-45 make New Holland , blue in colour, interest and costs of the suit . His suit was dismissed for plaintiff's counsel nonappearance, he appealed to this court but later went back to the same court with an application for extension of time to file Review after he had withdrawn his appeal. The application was at the end dismissed for want of sufficient reason for the delay.

Still on his toes to pursue his rights, appellant is now before this court with four grounds of appeal to wit,

1. That the Honourable learned trial Magistrate erred in law and fact by dismissing the appellant's application for extension of time within to file an application for Review against the decision in Kishapu District Court Civil Case No. 03 of 2017 (Hon. W.S. LUHWAGO) (RM) dated 8th day of November 2018. Whereas he had shown cause for the delay.
2. That the Honourable learned trial Magistrate erred in law and fact by dismissing the appellant's application for extension of time within to file an application for Review as stated in ground no. 1 (supra) without due regard to the fact that the appellant had sufficiently explained away the delay.
3. That taking into account of the glaring errors appellant on the record of the impugned decision of the Trial Court to wit in Civil Case No. 3 of 2017 among them illegalities, the trial court ought to exercise its discretion judiciously and in the favour of the appellant.

At the hearing, appellant had the services of Mr Joseph Sang'udi advocate. Respondent could not enter appearance without reason and therefore this appeal proceeded ex parte against him.

Arguing grounds 1,2 and 4 together, Mr. Sang'udi blames the magistrate for dismissing the application on account of the degree of the delay without regard to the appellants time spent in pursuing his appeal in this court which came to an end on 1/4/2020 the period of which according to the said counsel, ought to have been excluded in reckoning the requisite time.

While appreciating that the application for extension of time must be with sufficient reason, Appellant counsel argued that the delay was not inordinate as appellant had been all along diligent making follows up of Civil Appeal No 11 of 2020 before the high Court. He referred the court to the decisions in **Lyamuya Construction Ltd V Board of Trustees of Young Women Chistian Association of Tanzania**, Civil Application No 2 of 2010 and **TANESCO Mfungo Leonard Majura and 15 Others**, Civil Application No 94 of 2016.

Submitting on the 3rd ground counsel Sang'udi said, Civil Case No. 3/2018 was wrongly dismissed in the presence of the appellant in person and after wo witnesses had already testified. Pointing this as an illegality on the face of the record justifying the granting of the application for extension of time, appellant counsel stated that the proper course for the magistrate was to allow the appellant to proceed with the hearing or else close the plaintiff's case and proceed with the defence case. He on this cited to the court the case of **TanESCO Vs. Mfungo Leonard and 15 others** (supra) this claim of illegality constitutes a sufficient reason for extension of time. He lastly prayed. for the court to allow the Appeal with costs.

Admittedly, an application for extension of time succeeds only with sufficient causes. The appellant, original applicant had advanced two reasons for the delay, that the delay was reasonable and illegality. On reasonability of the delay, appellant explained before the court that he was not sited idle, but he was in the High court pursuing his appeal no 11

of 2020 which he himself withdrew on 4/5/2020 before filing of the application for extension of time to file Review on 7th October 2020. This was in support of paragraph 5 of his affidavit in support of the application.

The second reason is illegality which he expressly demonstrated in paragraph 6 of the affidavit in support of the application as one of the grounds for extension of time. The trite law is, where an illegality of the decision is raised, time must be extended to give an opportunity to the party making such allegation to have the issue considered. In **The Principal Secretary Ministry of Defence and National service Vs Duram Valambhia** (1992) TLR 185 Court of appeal had this to say: -

"In our view when the point at issue is one alleging illegality of the decision being challenge 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."

As illustrated above, the point of illegality was one of the grounds relied upon by the appellant. Paragraph 6 of the applicant's affidavit in support of the application reads:

"6. THAT, in the said Dismissal order of the District Court of Kishapu there is accountable mistakes and an error desire to obtain a review of this court on account of illegality and illegality to wit:

i. That the Court misdirected in dismissing the Suit while the plaintiff was present

ii. That while the plaintiff party had already testified in Court, The Court ought not to dismiss the suit rather than proceedings by requiring the plaintiff to close the case and the defendant proceed with the defense."

According to the authority cited above, the district court was bound to determine whether there was an illegality and if yes, allow the application even where the delay is not accounted for to allow rectification of the said error by the court. The test for a valid point of illegality as a ground for extending time was elaborated by Musa JA (As he then was) in **Ngao Godwin Losera V, Julius Mwarabu**, Civil application No. 10 of 2015 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 rule 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 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. "*

This takes me to the proceedings in Civil Case No 3 of 2018. The hearing of the suit in Civil Case No 3/2017 began on 28/3/2018 where evidence of two witnesses for the plaintiff were recorded and the matter went on

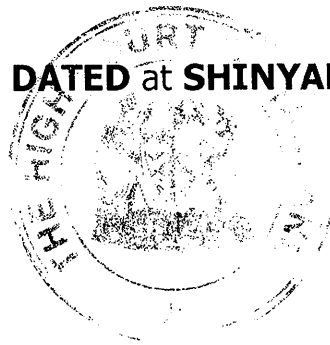
adjourned on several reason including the transfer of the trial magistrate. It is from the records that on 8/11/2018, both parties were present in court in person. On this date, plaintiff (now appellant) arose to inform the court that his advocate was appearing before the High Court Tabora. When given time to respondent, respondent is recorded to have stated that ***"I object that this case has been here for so long and with endless excuses"***. This reply was followed by an order of the court dismissing the suit for unfounded plaintiff's advocate absence.

Certainly, the appellant suit was dismissed in his presence, after he had paraded two witnesses as stated by his counsel and if I may add, without a prayer for adjournment. This is an error apparent on the face of the record which is by itself a good cause for extension of time. In **Omary Ally Nyamalenge & Others Vs Mwanza Engineering Works**, Civil Application No 94/08 of 2017 (CAT unreported) it was held:

"I wish to remark, at this point, that it is settled jurisprudence of the Court that where a point of law involved in the intended appeal is a claim of the illegality of the impugned decision, that in and of itself constitutes a good cause for the Court to extend the limitation period involved"

Consequently, the dismissal of the application for extension of time to file review, as rightly submitted by the appellant's counsel was without justification as appellant had demonstrated a good cause entitling him the sought extension of time . The uncontested appeal is for that reason allowed. Since the error was committed by the court, each party should bare owns costs.

Order accordingly.



DATED at **SHINYANGA** this 4th day of **February**, 2022.


E.Y MKWIZU
JUDGE
4/2/2022