

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF DAR ES SALAAM

AT DAR ES SALAAM

CIVIL APPEAL NO 241 OF 2021

(Arising from Ruling and Drawn Orders of the District Court of Kinondoni at Kinondoni in Miscellaneous Civil Application No 226 of 2020; and Original Civil Case No 287 of 2019 of the District Court of Kinondoni)

BETWEEN

GEORGE MINJA.....APPELLANT

Versus

ELIZABETH PRODENCIUS MWAREKE.....RESPONDENT

JUDGMENT

MRUMA, J

By a plaint dated 18th December 2019, the Respondent herein sought from the District Court of Kinondoni for a declaration that she was a lawful married wife to one Vincent George Minja now deceased and therefore she was entitled to 50% shares in the estate of the said late Vincent George Minja.

Efforts to serve the present Appellant who was the Defendant in that suit by ordinary method proved futile. Thus, following an application

for substituted service which was granted and published in Habari Leo Newspaper of 4th March 2020 and in default of appearance and defence, a request to proceed ex-parte was made by the Respondent against the Appellant and on 20th May, 2020 an ex-parte judgment was thereby entered.

The Appellant was aggrieved and he lodged an application to set aside the said ex-parte judgment so that he could enter appearance and be heard. His application met stiff resistance from the counsel for Respondent on the ground that it was filed out of time. The objection was sustained.

In what he called "Ruling of the Court" the learned presiding magistrate found that the application was filed six months out of time. The learned trial magistrate advised the Appellant to apply for extension of time within which he can file an application to set aside ex-parte judgment first and upon grant of the extension sought then he can apply to set aside the ex- parte judgment.

The Appellant was aggrieved and he has appealed to this court on seven grounds.

The appeal was argued by way of written submissions. I am grateful to the learned counsel for their brilliant submissions on the

matter. I have considered, the submissions filed on behalf of the parties herein and the authorities relied upon in support thereof.

In the first place the decision whether or not to set aside *ex parte* judgement is discretionary and there is no doubt that the discretion is intended so to be exercised to avoid injustice and hardship resulting from accident, inadvertence or excusable mistake or error on the part of the court. It is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice [See **Shah vs. Mbogo & Another [1967] EA 116**]. In this case the grounds upon which the application to set aside the judgement was made were twofold. First it was contended that the Appellant was never served with summons to file defence and secondly, and as a result, he was denied of an opportunity to be heard.

Admittedly, the Application was filed six months after the handing down of the impugned *ex-parte* judgment. The first question for determination is therefore whether the prescribed time to set aside *ex-parte* judgment starts to accrue from the date of that judgment or from the date the judgment debtor became aware of the judgment against him. Section 5 of the Law of Limitation Act [Cap 89 R.E. 2019] provides that:

"Subject to the provisions of this Act the right of action in respect of any proceeding, shall accrue on the date on which the cause action arises"

Under item 5 of the Schedule to the law of Limitation Act time limit for bringing an application to set aside an ex-parte decree is thirty days. This period of thirty days therefore accrues from the date the ex-parte decree was handed down and not from the date the judgment debtor became aware of the existence of the decree. The fact that the Appellant was not aware of the proceedings and subsequent decree could be a good ground in an application for extension of time within which one can make an application to the court to have the ex-parte decree or judgment set aside not in an application to set aside the decree itself. If the framers of the law had wanted time to accrue at the time when the judgment debtor become aware of the decree against him, they would have clearly said so and if such would have been the case then there could no need to have a provision to cater for extension of time within which to do any act which was not done within prescribed time.

For those reason I agree with the learned first instance magistrate that the appropriate remedy available to the Appellant

was to apply for extension of time within which he could file an application to set aside the ex-parte judgment. Accordingly I proceed to dismiss the appeal with costs to the Respondent.


A.R. Mruma

Judge.

Dated at Dar Es Salaam this...^{17th}...day of May, 2022.



A.R. Mruma,

Judge.