

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM SUB DISTRICT REGISTRY)

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 562 of 2021

(Arising from Civil Case No. 30 of 2019, Hon. L.M. Mongela J.)

JOFLO COMPANY LIMITED.....1ST APPLICANT

JOHN BONIFACE TULLA.....2ND APPLICANT

FIDELIS AUGUSTINE MGASHA.....3RD APPLICANT

FLORA E. MALYEKA.....4TH APPLICANT

VERSUS

BANK OF AFRICA TANZANIA LIMITED.....RESPONDENT

RULING

Date of last Order: 04/08/2022

Date of Ruling: 09/09/2022

E.E. KAKOLAKI J.

Pursuant to section 14 (1) of the law of limitation Act, applicants have brought this application for extension of time to file an application for setting aside ex-parte judgment and decree issued by this Court on 17th June, 2021 in Civil Case No. 30 of 2019. The application is supported by an affidavit deposed by applicants themselves. As per the affidavit, applicants were the defendants in Civil Case No. 30 of 2019, which proceeded ex-parte against them for failure to file their defence in which the ex-parte judgment was

handed down on 26th June, 2020, in their absence and without notice. It appears they remained unaware until on the 12th August, 2021, when their advocate through HAKI Associates Advocate, filed a letter requesting for the copies of Judgment and decree in Civil Case No. 30 of 2019. According to them no response was received from the Court until 24th September 2021, when their advocate wrote once again applying for copies of proceedings, judgment and decree which were availed to him on 27th October, 2021. Upon obtaining the copies of judgment, decree and the proceedings on 27th October, 2021, applicants discovered that before delivery of the ex-parte judgment on 17th June, 2021, this Court on 28th May, 2021, had issued an order to the effect that, applicants be notified of the judgment date but respondent failed to notify them.

Following the above mentioned developments, the applicants lodged this application for extension of time basing on the reason that, the delay to file the application to set aside the ex-parte judgment resulted from respondent's omission to notify them of the date of judgment as per the Court's order and the making of follow ups of the copies of judgment and decree which they obtained late. Upon being served, the respondent

vigorously resisted the application by instructing his advocate to file the counter affidavit dully sworn by advocate Peter Joseph Swai to that effect.

On 28 June, 2022 when the application was called on for hearing, the applicant was represented by Mr. Hashim Mziray, learned counsel while the respondent enjoyed the services of Ms. Irene P. Swai. By consensus of both parties leave of the Court was sought and granted to the effect that, the application be disposed by way of written submission.

Mr. Mziray commenced his submission by adopting the applicants' affidavit to form part of his submission. Submitting in support of the application, Mr. Mziray argued that, paragraph 3,5,6,7,8 and 9 support the applicants' contention that, it was not in their fault to delay in filing their application to challenge the ex-parte judgment and decree issued by this court on 17th June, 2021. According to him, this court on 28th May 2021 ordered the respondent to notify the applicants on the date for judgment but they failed to comply. In his view, respondent had to attach any proof of compliance of this court order in his counter affidavit as the omission to notify them of the date of judgment is a very serious one for denying them with the right to be heard. He argued, failure by the trial court to give parties the right to be heard is an illegality. He placed reliance on the case of **Gracious**

Mwanguya Vs. Treasury Registrar and Others, Misc. Civil Application No. 585 of 2020 which quoted with approval the case of **Andrew Athumani Ntandu and Another**, on the effect of denying a party with the right to be heard. He eventually requested the court to grant the prayers in the chamber summons to pave a way for the applicants to file the application to set aside the ex-parte judgment issued against them.

In rebuttal, Ms. Irene like Mr. Mziray prayed for leave of the Court to adopt respondent's counter affidavit to form part of her submission. She then argued that, applicants' arguments that the delay to file an application to set aside the ex-parte judgment was occasioned by failure by the respondent to notify them of the date of judgment has no basis since in their affidavit applicants deponed that, their advocate started following up the case since 12th August 2021, thus were aware of existence of the judgment and could file their application before expiry of 60 days. She argued further that, a copy of judgment and decree is not a prerequisite for the application to set aside ex-parte Judgment as the matter was finalized in the same court. She added that, applicants and their advocates are to blame for abandoning the matter, thus they cannot shift the whole burden to the respondent. To her, applicants contributed to the delay by failure to make follow up on the case

and take necessary steps within time as the ex-parte hearing order did not relieve them from attending since they still had an intention of challenging ex-parte judgment at the end. Concerning the allegations that applicants were denied of their right to be heard she submitted, the same is misplaced as illegality should be traced from the records and applicant are not party of the record since the case proceeded ex-parte against them.

With regard to the case of **Gracious Mwanguya** (supra) cited by the applicant's counsel, she countered, the same is distinguishable to the facts of the present case, as in the former case, parties were present while the Court deciding on suo moto raised matter without availing them a chance to be heard contrary to the present case, where applicants' room to be heard was closed by their failure to file written statement of defence and the counterclaim thus, the same cannot be referred as illegality.

Ms.Swai, submitted further that, applicants have failed to advance reasonable and sufficient cause to warrant this honorable court grant them an extension of time as provided for under section 14 (1) of the Law of Limitation Act, [Cap 89 R.E 2019]. She contended that, the reasons that they were not notified of the date of judgment cannot be a good cause for grant of extension of time. She fortified her stance by citing to the Court the case

of **Board of Trustees/Executive of CHAWATA Vs Banana Contractors Limited**, Civil Case No. 80 of 2021. Ms. Irene was of the view that, Applicants had knowledge since 12th August 2021, added that the contention that they collected the judgment and decree on 27th October 2021 was not proved by any attachment. She eventually prayed the Court to dismiss the applicants' prayer with costs.

In a short rejoinder Mr. Mziray attacked Ms. Swai's assertion that, applicants had knowledge of the date of judgment saying that is why he wrote the letter on 12th August, 2021 requesting for the copy of Judgment and Decree. He said, it is unfortunate that the respondent did not disclose the source of such knowledge to the applicants and when did they get such knowledge. He said, paragraph 5,6,7 and 8 of the affidavits shows that applicants took deliberate action to establish what was the Judgment about, which fact they obtained on 27th October, 2021 only to discover that the ex-parte Judgment was issued against them and hence this application is the initial process of challenging the said Judgment and decree. Concerning the submission that applicants lastly appeared in court on 16 April 2020, he said, that is immaterial since the matter was ordered to proceed ex-parte and applicants were released from appearance that is why in the annexure 4 to the affidavit

on 28 May, 2021 the court issued order that applicants be notified on the judgment day set on 17th June, 2021. In view of Mr. Mziray, the respondent had that duty to notify the applicants in which in their submission, conceded that they did not notify the applicant on the Judgment date. According to him, the applicant could not take action against unknown details of the Judgment as to who won the case.

Concerning the assertion that, the case of **Gracious Mwanguya** cited by Mr. Mziray is not applicable in this case, it was Mr. Mziray submission that, the right to be heard in ex-parte Judgment is weighed not on the date the matter was ordered to proceed ex-parte but, on the date fixed for Judgment. In his view, had the applicants been notified of the Judgment date, they would have challenged the said decision on time. He rested his submission by challenging the case of **The Board of Trustees/Executive of Chawata** cited by Ms. Swai contending that, the same supports applicants' position that they have established good cause warranting this Court grant them extension of time. He added that, there is no any evidence produced by the respondent to counter the evidence that applicants obtained the copies of Judgment, decree and proceedings on 27th October, 2021.

I have taken time to examine and consider the affidavit, counter affidavit and submissions for and against this application. As alluded to earlier, this application is brought under Section 14 (1) of the Law of Limitation Act, [Cap 89 R. E 2019]. The same states that:

*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.*

Guided by the above provision, it is apparent that, this court has discretion to extend time to the applicant, the discretion which must be exercised judiciously upon the applicant advancing reasonable or good cause. Now the issue is whether in the present application, applicants have advanced good or sufficient cause to warrant this court to grant them the prayer for extension of time.

Notably, what constitutes good cause is not defined, but it depends on the circumstances of each case. For instance, in the case of **The International**

Airline of the United Arab Emirates Vs. Nassorror, Civil Application No 263 of 2016, CAT at Dar es Salaam (Unreported) it was held:

"In order for the court to establish whether there was a good cause or sufficient reason, depends on whether the application for extension has been brought promptly as well as whether there was diligence on the part of the applicant."

Further it was stated in the case of **CRDB (1996) Limited Vs. George Kilindu**, Civil Appeal No 162 of 2006 CAT (Unreported) that:

"...sufficient cause may include, among others, bringing the application promptly, valid explanation for the delay and lack of negligence on the part of the applicant."

In general the applicant has to state reasonable reasons that prevented him from taking action within the prescribed time limit as it was stated by the Court of Appeal in the case of **Jumanne Hussein Bilingi Vs. Republic** (Criminal Application 2014 [2015]TZCA 65 (16 July 2015); www.tanzlii.org.tz stated as follows:

*"...what amounts to good cause is upon the discretion of the Court and it differs from case to case. But basically **various judicial pronouncements defined good cause to mean reasonable cause which prevented the applicant from***

pursuing his action within the prescribed time.”

(Emphasis added).

In the present application, gleaned from the contents of the affidavit and counter affidavit of the respective parties and counsel's submissions thereto; it is the common ground that, the impugned decision was delivered on 17th June, 2021. And that, the application to set aside ex-parte decree ought to be filed within 30 days from the date of judgement, meaning not later than 16th July 2021. However this application was filed on 3rd November 2021, more than 107 days out of time in which the applicant have to account for. Advancing the reasons for his failure to file the application timely applicants faults the respondent for his failure to notify them of the judgment date as well as being availed with copies of the said judgment, decree and proceedings lately.

Starting with the first reason of notification of the date of judgment, as the law stands, parties must be notified of the date of the decision regardless of whether the case is heard ex-parte or not. Failure to so do, contravenes the mandatory provisions of order XX Rule 1 of the CPC, which provides that, that a judgment when prepared should be pronounced in open court, in the

presence of the parties and parties must be notified. For clarity the said provision is quoted here under:

*The court, after the case has been heard, shall pronounce judgment in open court, either at once or on some future day, of which **due notice shall be given to the parties or their advocates.***

In the present matter, much as there is no evidence as to whether the applicants were notified of the date of judgment regardless of the court's orders that the same should be notified, I hold that, applicants were deprived of their right, and that, in my view, it sufficient reason for the court to extend time for them to file the application to set aside ex-parte Judgment.

As regard to the second ground on the time spent by them to make follow up of the copies of judgment and decree, it was Mr. Mziray's contention that, he applied for the said document for the first time on, 12th August and later on re-applied on 23rd September, before the same were availed to him on 27th October 2021, thus delayed to file the application for setting aside the sought to be impugned ex-parte judgment. On her side Ms. Swai submitted that, applicants do share the blame for wasting their time chasing for copies of judgment, decree and proceedings since the copy of judgment is not a

prerequisite document in the application for setting aside ex-parte judgment.

Firstly, I should say from the outset that, I distance myself from Ms. Swai's submission that, a copy of judgment is not a prerequisite document in the application for setting aside ex-parte Judgment. I am in the same line with Mr. Mziray's proposition that, applicants could not take action against unknown details of the judgment.

Gleaned from the records, applicants advocate requested for the copies of Judgment on 12th August, 2021 and later on 23rd September 2021 meaning until 23rd September, 2021, though aware of existence of ex-parte judgment applicants were not availed with the same. It is unfortunate that, the applicants did not attach in their affidavit any proof as to when they obtained the copies of Judgment apart from asserting that it was on 27th October 2021. In absence of such evidence an inference is drawn against them that, the said documents were made available to them on presentation of the second letter on 23rd September 2021, hence 30 days is reckoned from that date meaning the application was to be filed by 22nd October, 2021. Garnered from the chamber summons and court fees receipt this application was filed on 3rd November, 2021, meaning 11 days out of time. There is no explanation

forwarded by the applicants accounting for those days, as the law requires that each and every day delayed must be accounted for. See the cases of of **Bushiri Hassan Vs. Latina Lukio, Mashayo**, Civil Application No. 3 of 2007 and **Mohamed Athuman Vs. R**, Criminal Application No.13 of 2015 (All CAT-unreported). In absence of any reasons to account for the said 11 days this ground of delay in collection of the necessary documents for appeal purposes fails.

I have however already held that the first ground of failure to notify the applicants of the date of ex-parte judgment constitutes good cause warranting this court to grant the prayer sought in his chamber summons. Consequently, I find the applicants' application for extension of time to be meritorious and proceed to allow the same. Time is therefore extended to the applicants for fourteen (14) days from the date of this ruling, for them to file the application for setting aside ex-parte judgement in Civil Case No. 30 of 2019 before this Court.

Each part to bear its own cost.

Order accordingly.

Dated at Dar es Salaam this 9th September, 2022.



E. E. KAKOLAKI

JUDGE

09/09/2022.

The ruling has been delivered at Dar es Salaam today 09th day of September, 2022 in the presence of Mr. Benard maguha holding brief for advocate Hashim Mziray for the applicants, Mr. Mwang'enza Mapembe, advocate for the respondent and Ms. Asha Livanga, Court clerk.

Right of Appeal explained.



E. E. KAKOLAKI

JUDGE

09/09/2022.