

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

AT DAR ES SALAAM

CIVIL APPEAL NO. 379 OF 2021

(Arising from Misc. Civil Application No. 103 of 2019 at Kinondoni District Court dated
14/05/2020 before Hon. Mwakalinga SRM)

ST. JOSEPH UNIVERSITY IN TANZANIA..... APPELLANT

VERSUS

SAFARI INDOOR DIGITAL.....RESPONDENT

EXPARTE JUDGMENT

Date of last Order: 10/08/2022

Date of Ruling: 09/09/2022

E.E. KAKOLAKI J.

Aggrieved by the decision of the District Court of Kinondoni, at Kinondoni in Civil Appeal No. 14 of 2021 handed down on 14th May 2022, the appellant has registered her grievances before this Court in two grounds of appeal. The first one, is that, *the honourable Magistrate erred in law when she decided to dismiss the application for extension of time to file appeal against the decision of primary court of Kimara before her without considering on merit the points of law raised in that application.* Secondly that, *the*

honourable magistrate erred in law when she delivered her ruling on 14th May, 2020 without any notice to the appellant.

Before venturing into determination of the two raised grounds of appeal, I find myself enjoined to explore first the factual settings giving rise to this appeal as recapitulated from both the trial court in Civil Case No. 229 of 2018 and District Court records. Before the Primary Court of Kimara in Civil Case No. 229 of 2018, the respondent successfully sued the appellant for breach of contract. Aggrieved by that decision but time barred to prefer an appeal, he filed Misc. Civil application No. 103 of 2019 before the District Court of Kinondoni, seeking among other things extension of time within which to file an appeal out of time against the decision of Primary Court of Kimara, relying on two grounds, the first one being illegality of the decision sought to be impugned. And secondly that, the decision was delivered in her absence and without notice, hence was supplied by the trial court with the proceedings and judgment for appeal purposes lately. After hearing both parties, the District Court on 14/05/2020, dismissed the application on the reasons that there was no good cause accounting for the delay as the copy of judgment was not one of requirement for one intending appeal against the Primary Court decision. Displeased with the District Court's decision but again being

out time to appeal against it, the appellant filed similar application to this Court but this time seeking for the extension of time within which to file an appeal against the ruling of the District Court of Kinondoni of 14/05/2020 dismissing her application for extension of time to file an appeal to the said Court against the decision of the Primary Court. The application was successful as on 19th November 2021, the appellant was given 14 days to file an appeal to this Court against the decision of the District Court in Misc. Civil Application No. 103 of 2019 dated 14/05/2020, hence the present appeal.

When the matter was called for hearing, the appellant appeared represented by Mr. Erasmus Buberwa who was also holding brief of Mr. Kennedy Lyimo for the respondent and leave of the Court was sought and granted for have the appeal disposed by way of written submission and filing schedule orders issued. On 10th August, 2022 when the matter came for mention to ascertain whether the submissions were complete, neither the respondent nor his advocate Mr. Kennedy Lyimo appeared to either seek extension or inform the court as to why he failed to file the submissions timely as ordered by the Court. Mr. Buberwa seized that opportunity to pray for the Judgment date which was granted as the appeal was to be decided ex-parte against the

respondent since failure of the party to file submission is tantamount to non-appearance on the date fixed for hearing. See the case of **P3525 LT Idahya Maganga Gregory v. The Judge Advocate General**, Court Martial, Criminal Appeal No. 2 of 2002 (unreported) where the Court held that:

*It is now settled in our jurisprudence that the **practice of filling written submissions is tantamount to a hearing and; therefore, failure to file the submission as ordered is equivalent to nonappearance at a hearing or want of prosecution.** The attendant consequences of failure to file written submissions are similar to those of failure to appear and prosecute or defend, as the case may be. Court decision on the subject matter is bound...Similarly, courts have not been soft with the litigants who fail to comply with court orders, including failure to file written submissions within the time frame ordered. Needless to state here that submissions filed out of time and without leave of the court are not legally placed on records and are to be disregarded."*

Now reverting to the merit of the present appeal, Mr. Buberwa opted to argue the first ground only while abandoning the second one. Submitting on the sole ground he argued that, in the impugned ruling particularly at page 3, the magistrate noted that, the appellant had raised a point of law that the appellant is not a legal entity capable of being sued in its own name, rather

in the name of owner who is ***the Registered Trustees of Mary Immaculate and Collaborators***. And that, at page 2 and 3 of the impugned ruling the said magistrate mentioned that the appellant/applicant in intended appeal raised a point of law as a ground for extension of time, but surprisingly in the ruling she omitted to discuss or consider that point of law or illegality. In view of Mr. Buberwa, since the question of illegality of the decision of the primary court of Kimara was pleaded and acknowledged by the District Court, the said court was duty bound to decide on it and either agree or disagree with that point of illegality of the decision which aspect is completely missing, hence constituting an irregularity of the ruling.

Mr. Buberwa further submitted that, had the court took note of the point of law raised, it would have arrived at the decision of granting the application instead of dismissing it as it did. Fortifying his argument on the said stance, he cited the case of **Stephen Mafimbo Madwary Vs. Udugu Hamidu Mgeni and Mwinyihamisi Hamidu Mgeni**, Civil Application No.123A of 2008 (CAT-Unreported) which quoted with approval the case of **Principal Secretary, Ministry of Defence and National Service Vs. Devram Valambia** [1992] TLR 185, where the Court of Appeal held that, where the point of law at issue is illegality or otherwise of the decision being challenged,

the same constitutes “sufficient reason” for extension of time as to hold otherwise would amount to permitting a decision which in law might not exist to stand. In view of the afore said, Mr. Buberwa prayed this Court to allow the appeal, set aside the ruling and orders of the District Court of Kinondoni in Misc. Civil Application No 103 of 2019, and order the file to be re-assigned to another magistrate for deciding the application on merit.

I have dispassionately considered and weighed the submission by the appellant’s counsel. I should state from the outset that, as a matter of general principle whether to grant or refuse an application for extension of time is the legal sphere entirely in the discretion of the Court though that discretion has to be judiciously exercised according to the rules of reasons and justice. **Lyamuya Construction Company Ltd Vs. Board of Registered Trustee of Young Women’s Christian Association of Tanzania**, Civil Application No. 2 of 2010 (Unreported – CAT). I am also alive of the fact that, where illegality is claimed as the ground for extension of time, the same is sufficient reason for extension regardless of whether or not reasonable explanation has been given by the applicant under the rule of accounting for the delay. See the case of **VIP Engineering and Marketing Limited and Three Others Vs. Citibank Tanzania Limited**,

Consolidated Civil Reference No. 6, 7 and 8 of 2006 CA (Unreported). The same principle was adumbrated in the case of **Devram Valambia (supra)** where it was held that:

In our view, when the point at issue is one alleging illegality of the decision being challenged, 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 records straight. (Emphasis added)

So when the point of illegality of the decision is pleaded and advanced by the party seeking an extension of time the trial court is enjoined to deliberate on and decide on it. In the present appeal the records reveal that, the issue of illegality was claimed as can be evidenced at page 3 of the impugned ruling of the District Court. However, the magistrate did not determine the same before concluding that the application was unmeritorious hence its dismissal. Indeed such court's act of dismissing the application without determining the issue at controversy as raised by the appellant was fatal and rendered the entire decision irregular as submitted by Mr. Buberwa since an omission to consider and determine parties' issue at dispute is tantamount to denial of his right to be heard. The Court of Appeal in the case **M/S Tanzania**

Wildlife Corporation Vs. Ms. Frida Mwijage, Civil Application No. 32 of 2014 (CAT-unreported) discussing on the importance of according the party of the right to be heard before his matter is dismissed had the following to say:

*"But what is of more importance to us, was the act by the court to give the order of dismissing the appeal summarily without the concerned parties being heard. **The right to be heard before any decision affecting his right is made is so fundamental.** It is from such importance that, the right has specifically been provided for in our constitution (the Constitution of United Republic of Tanzania, 1977) in Article 13(6)(a)." (Emphasis supplied)*

In light of the above position of the law and given the fact that in this matter the appellant's application was dismissed without considering the ground she had raised, I find her right to be heard was denied, hence the first ground has merit and the same is allowed.

Next question for determination is what the remedy for such omission by the District Court. As alluded to above the same renders the decision illegal. Mr Buberwa prayed the Court to set aside the decision and remit back the file to the district court for the same to be reheard before another competent

magistrate. I agree with the appellant's proposition as the law is settled that, when an issue which is relevant in resolving the parties' dispute is not decided on, an appellate Court cannot step into the shoes of the lower court and assume that duty. The remedy is to remit the case to that court for it to consider and determine the matter. This sound principle of law was expounded in the case of **Truck Freight (T) Ltd Vs. CRDB Ltd**; Civil Application No. 157 of 2007 (CAT-unreported) where the Court held that;

If the lower court did not resolve the controversy between the parties, rightly or wrongly, what can an appellate court do? We cannot step into its shoes. We therefore, allow the appeal and quash the decision.... We order that he (the trial Judge) either decides the issues which were framed and agreed upon by the parties or, if he is of the firm opinion that the issue of the governing law on execution of what is crucially important for the just determination of the suit, then he should re-open the hearing and let both learned counsell address him.

Guided by the principle in the above cited authority, in this matter having found that the omission vitiated the impugned decision, I hereby allow the appeal and proceed to set aside the ruling and orders of the District Court of Kinondoni in Misc. Civil Application No 103 of 2019 dated 20/05/2020. Consequently, I remit back the file to the Kinondoni District Court for it to

render a decision before another competent magistrate after considering the issue as to whether the claimed illegality could be a sufficient ground for extension of time to the appellant. Since the parties are not to blame on what transpired, I hereby order each party to bear its own costs.

It is so ordered.

DATED at DAR ES SALAAM this 09th day of September, 2022.



E. E. KAKOLAKI

JUDGE

09/09/2022.

This Judgment has been delivered at Dar es Salaam today this 09th day of September, 2022 in the presence of Mr. Paul Mtui, advocate holding brief for Mr. Erasmus Buberwa, advocate for the appellant and Ms. Asha Livanga, Court and in the absence of the Respondent.



E. E. KAKOLAKI

JUDGE

09/09/2022

