IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
TANGA DISTRICT REGISTRY
AT TANGA

CIVIL REVISION NO. 6 OF 2021

(Arising from Misc. Application No.8/2021 of Muheza District Court at Muheza, originating from the judgment and Decree of Muheza District Court in Civil Case No.4/2020 delivered on 16/11/2020)

HASSAN AYUBU KHATIBU ..... APPLICANT

VERSUS

MBARAKA GEORGE MWALONGO .....RESPONDENT

JUDGMENT ON REVISION

Date of JUDGEMENT- 30TH September 2022

Mansoor, J:

The instant application for revision stems from the decision in Civil Case No.4 of 2020, held at Muheza District court where an exparte judgment judgement was entered in favour of the respondent. Dissatisfied with the judgment, the applicant filed civil revision No. 9 of 2020 seeking the indulgence of this court to revise the findings of the *ex parte* judgment desired to be impugned. However, the same was struck out for being incompetent and unmaintainable. It was ruled out that the

applicant was at first required to set aside the *ex parte* judgment before resorting into revision.

Following the ruling delivered by his Lordship Agatho, J, the applicant filed Misc. Application No. 8 of 2021 before Muheza District Court seeking for two prayers; first, for extension of time within which to file an application for setting aside the *ex parte* judgment and second the trial court to set aside the *ex parte* judgment and decree delivered on 16/11/2020. The application was similarly dismissed for lack of sufficient cause.

Aggrieved by the findings, the applicant lodged this instant revision beseeching this court for the following orders.

1. That this court to revise the proceedings of Misc. Application No. 8 of 2021, inspect and or correct the procedural irregularities and substantive material errors.

2. Costs and any other relief(s) that this court may deem fit and just to grant.

The application is made by way of Chamber Summons under section 79(1) (b) (c) and 95 of Civil Procedure Code (Cap 33 R.E 2019) supported with the affidavit dully sworn by the applicant. The respondent contested the application by filing a counter affidavit sworn by the respondent.

The matter was disposed of by written submissions and each party duly complied to the schedule of submissions set by the Court. Mr. Thomas Kitundu from Divine Chambers Advocates appeared for the applicant whereas the respondent was unrepresented.

The learned counsel for the applicant adopted the applicants' affidavit and submitted that his central arguments are errors on face of records, and he has stated the errors in paragraph 11-17 of the affidavit.

He says the trial magistrate failed to discover that there is illegality in the proceedings, judgment, and decree in civil case No. 4 of 2020 as the applicant was denied his constitutional right to be heard. The trial magistrate having ruled out that the applicant's advocate was unqualified for failure to renew his practicing certificate, he ought to have allowed the applicant to seek and engage another qualified advocate or rather defend himself instead of proceeding *ex parte.*

He argues that the act of striking out the Written Statement of Defence (WSD) prejudiced the applicant as he was condemned unheard. He contends that the *ex parte* order was wrongly invoked. He insists that the applicant's WSD was properly drawn by a qualified advocate one Hassan Omari Kiango and not Hassan Kilule as assumed by the trial magistrate. He therefore says the applicant was punished for a mistake not committed by him but by an advocate. He further submitted that had the applicant been afforded the right to be heard, the trial magistrate would have discovered that the applicant was a core shareholder with the respondent

in MWALOW COMPANY LIMITED and that there existed no principal- agent relationship between the parties and that there was undue influence, duress as the applicant was forced to sign the agreement. He therefore pleads that for the interest of justice the applicant be given a chance to defend his case.

To buttress his arguments, the applicant cited the case of **Amour Habib Salim V. Hussen Bafagi Civil Application No.52 of 2009 CAT at Dar es Salaam** to amplify that illegality constitutes sufficient cause for extension of time. He also cited the case of **Ausdrill Tanzania Limited Vs. Mussa Joseph Kumili and Another, Civil Appeal No.78 of 2014 CAT at Mwanza (all unreported)** to demonstrate that the right to be heard is a fundamental principle which court of laws must guard against.

As to the issue of sufficient cause, the learned counsel submitted that the trial magistrate ought to have found that

the applicant accounted for each day of the delay. The applicant took immediate actions to prosecute Civil Revision No. 9 of 2020 as well as Misc. Application No. 8 of 2021 and that throughout the other days the applicant had been in the High Court premises prosecuting his cases without negligence. He thus submitted that the trial magistrate should have considered the time spent by the applicant when he used a wrong approach for revision instead of first seeking the remedy of setting aside *ex parte* judgment.

To fortify his argument, he cited the cases of **Hamis Mohamed (as the administrator of the estate of the Late Risasi Ngawe) Vs. Mtumwa Moshi (as the administrator of the estate of the late Moshi Abdallah) Civil Application No. 407/17 of 2019 CAT (unreported)** and **Elibariki Asseri Nnko Vs. Shifaya Mushi and A Lewanga Kinando [1998] TLR No.81**

Lastly the counsel submitted that the trial magistrate exercised his jurisdiction with material irregularity by holding that the judgment and decree were signed on the same date and that no evidence was tendered by the applicant to prove that he wrote a letter requesting to be supplied with a copy of judgment. He argued that the applicant applied instantly for a copy of judgment on the same date the *ex parte* judgment was pronounced, and he was supplied the same on 24/11/2020 the day when the decree was extracted.

In reply, the respondent urged the court to disregard and not to accord weight the cited unreported cases not attached by the applicant. He says nonattachment of unreported cases denies the court and the adverse party an opportunity of applying and appreciating the said authority and verifying the same as was held in **Muro Investment Co. Limited Vs. Alice Andrew Mlela Civil Appeal No.72 Of 2015 (unreported)**

The respondent further submitted that the trial court was correct by not granting extension of time. The applicant failed to show good cause. He argues that the applicant was ignorant of Order VIII Rule 14 (3) of the CPC [CAP 33 R.E 2019]. He cited the case of **Ngao Godwin Losero Vs. Julius Mwarabu Civil Application No.10 of 2015 CAT at Arusha** to show that ignorance of law has never featured as a good cause for extension of time and that a diligent and prudent party who is not properly seized with of the applicable procedure will always ask to be appraised of it for otherwise, he/she will have nothing to offer as an excuse for sloppiness. He therefore submitted that since the applicant had representation by a professional legal expertise, he should have known the legal procedure following the pronouncement of a default judgment.

As to the issue of WSD, the respondent says the other qualified advocate one Hassan Omari Kiango was not known. The records of the court do not reveal whether he appeared

for the applicant. Courts' records only identified Hassan Kilule as his advocate.

He finally argues that since the applicant failed to show sufficient cause he cannot benefit from his ignorance of the law. He therefore pleads this Honourable court to dismiss this application with costs.

In rejoinder, the applicant reiterated what he submitted in chief and therefore prays for the application to be allowed with costs

I have considered, the affidavits on record, the contending submissions of the parties and the authorities cited.

Having a look at the Chamber Summons am called upon to revise the proceedings of Misc. Application No. 8 of 2021 delivered on 8th November 2021. I therefore find two issues to determine; whether the trial magistrate failed to exercise

jurisdiction so vested or whether he acted in the exercise of his jurisdiction illegally or with material irregularity.

The applicant has raised several errors that this court needs to determine however of all the errors I find only one pertinent issue touching the intended application to be revised while the rest are connected to the main suit of which I was not called upon to revise.

If at all I take time determining the other errors canvassed by the applicant counsel, then it will make no sense as my brother Agatho, J had already made a ruling of not revising the main suit unless first the *ex parte* judgment is set aside.

The pertinent issue has said is.

That the trial magistrate failed to appreciate that the applicant showed good cause for the extension of time.

It is essential to note that the Court's power for extending time is discretionary, but it is exercisable judiciously upon good cause being shown. In numerous case laws it has been held that it may not be possible to lay down an invariable or constant definition of the phrase "**good cause**", but the Court consistently looks at factors such as the length of the delay involved; the reasons for the delay; the degree of prejudice, if any, that each party stands to suffer depending on how the Court exercises its discretion; the conduct of the parties; and the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal: see, for instance, unreported decisions in **Dar es Salaam City Council v. Jayantilal P. Rajani, Civil Application No. 27 of 1987.**

Also, to be considered is whether there is a point of law of sufficient importance such as the illegality of the decision sought to be challenged as held in **Principal Secretary,**

Ministry of Defence and National Service v. Devram Valambhia [1992] TLR 185.

It is also settled that in an application for enlargement of time, the applicant must account for every day of delay involved and that failure to do so would result in the dismissal of the application as was decided in the unreported decisions in the cases of **Bushin Hassan v. Latifa Mashayo, Civil Application No. 2 of 2007.**

In the premises, I now turn and test whether the applicant furnished good cause.

Rule 15 of order VIII of the CPC provides limitation of time within which an aggrieved party may apply to set aside a default judgment. The time limit is 60 days from the date of judgment. The records show that the *ex parte* judgment was delivered on 16/11/2020 meaning that 60 days began to run from this date. The applicant applied for extension of time on

04/8/2021 about 201 days after a limitation period of 60 days had lapsed. The applicant was therefore duty bound to account for each day of the delay.

With due respect I find no error committed by the finding of the trial magistrate. He properly held that the applicant failed to account for each day of the delay. For instance, it was inordinate for a qualified advocate to prepare legal documents for revision for about 25 days without accounting other justifiable reasons. There is also no evidence to prove that the applicant requested for the copy of judgment and that he was supplied the same on 24/11/2020. The records reveal that the copy of judgment was ready the day it was pronounced on 18/11/2020. As the records speaks, the applicant was also present in person the day the *ex parte* judgment was pronounced. He had a chance to collect the same but never acted upon.

The trial magistrate was also correct to hold that the time used to pursue his case in the High Court cannot be a good

reason for extension of time. The respondent has demonstrated undoubtedly that the applicant was ignorant and not diligent. Several case laws have held that ignorance of law has never featured as a good cause for extension of time. See, for instance, **Bariki Israel Vs. The Republic Criminal Application No. 4 of 2011 (unreported).**

Being represented by a qualified legal practitioner he could not waste time in a wrong court premise. If he was not seized with proper procedure to take, he was duty bound to inquire rather than wasting time in an improper avenue. This was the position in **Ngao Godwin Losero (supra)** where the court held;

'A diligent and prudent party who is not properly seized of the applicable procedure will always ask to be apprised of it for otherwise he/she will have nothing to offer as an excuse for sloppiness'

I now turn to the applicants' argument that the application be granted on merit as the decision intended to be set aside is

tainted with illegality. Undoubtedly, as held by the Court in **Devram Valambhia (supra)** illegality is of sufficient importance to constitute 'sufficient reason' for extending time." The illegality raised by the applicant is that the applicant was not afforded a right to be heard. I am inclined to say that this issue was not raised at any point of the trial in Misc. Application No. 8 of 2021. Equally, my brother Agatho, J discussed this issue in length in Civil Revision No. 9 of 2020. I therefore have nothing to rule out.

To that end, I must conclude that the applicant has not demonstrated that the trial magistrate failed to exercise jurisdiction so vested or that he acted in the exercise of his jurisdiction illegally or with material irregularity. In the result, this application fails and is, accordingly, dismissed with costs.

DATED at Tanga this 30TH day of September 2022

MANSOOR
JUDGE
30TH September 2022