IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[ARUSHA DISTRICT REGISTRY]

AT ARUSHA

HC. CIVIL APPEAL NO. 35 OF 2022

GA INSUARANCE TANZANIA LIMITED.....APPELLANT

VERSUS

CECILIA ANTHONY.....1ST RESPONDENT

PHILEMON JOSEPH MOLLEL.....2ND RESPONDENT

RULING

22nd August & 2nd September, 2022

TIGANGA, J

Before me is an application for extension of time filed by way of chamber summons made under section 14(1) of the Law of Limitations Act [Cap 89 R.E 2019] and section 95 of the Civil Procedure Code [Cap. 33 R.E 2019] it was supported by affidavit and supplementary affidavit sworn by one Yusuph Sheikh for and on behalf of the applicant. As earlier on pointed out, the applicant seeks for an order for extension of time within which they can file an appeal against the judgment passed by the Resident Magistrate Court of Arusha at Arusha, in Civil Case No. 61 of 2019. The grounds of the application as reflected in the affidavit sworn and filed in support of the application is mainly one which is irregularity on the process of serving the summons in Civil Case No. 61 of 2019.

The application was opposed by the respondents who filed counter affidavits sworn by the respondents countering both, the affidavit and supplementary affidavit sworn and filed for and on behalf of the applicant. The counter affidavits disputed and the application by asking the court to find that the applicant has failed to show good cause for delay as they have not accounted the number of days delayed, and that there is no apparent illegality proved by the applicant in the decision sought to be challenged before this court.

To understand the gist of the application, the historical background of the disputed between the parties is very important. Gathered from the affidavits and counter affidavits, the background of the application is as follow; the 1st respondent was the plaintiff in Civil Case No. 61 of 2019 which she instituted against the current applicant and the second respondent. She was claiming amount other reliefs payment of damage to the tune of a total sum of Tanzania Shillings Forty-Five Million, two hundred Twenty-Four Thousands (Tshs. 45,224,000/=) but after full trial, she was awarded Tanzania Shillings Twenty-Two Million, and Sixty-Four Thousands (Tsh. 22, 064,000/=)

The applicant did no immediately appeal against that decree, when she decided to appeal, she was already out of time, she decided to file this application for extension of time.

At the hearing of the application which was conducted orally, the applicant was represented by Mr. Denis Mworia, learned Advocate while the respondents were represented by Mr. Shedrack Mofulu and Mr. Hamis Mkindi both are learned Advocates.

In his submission in support of the application, the applicant's counsel, Mr. Mworia, Advocate submitted, regarding the first prayer of extension of time that, the applicant failed to appeal within time due to the facts that he was making follow up of the copies of the impugned judgment and decree which were supplied to him late, after a number early some accounted days after it was pronounced.

He reminded the court that, the principle governing the grant of extension of time are provided in the case of **Lyamuya Construction Company Ltd vrs. Board of Registered Trustees of Young Women's Christian Association of Tanzania,** Civil Application No. 2 of 2010 which are four namely **one,** the need of the applicant to account all days of delay, **two,** the delay should not be inordinate, **three,** the diligence of the applicant in taking action intended to prosecute and **four**

the illegality of the decision to be challenged. Of these four principles, he relied on the fourth that the impugned decision is tainted with illegality which attracts the attention sufficient to warrant extension of time. He submitted further that, the said Illegality has been stated out in paragraph 5 of the affidavit filed in support of the application.

He referred this court to the case of **Lyamuya Construction Company Ltd Vs. Board of Registered Trustees of Young Women's Christian Association of Tanzania (supra)** in which it was held that once illegality of the decision is raised, it suffices to be a good ground for extension of time.

Further to that, the learned Advocate argued that, the process involves the service of summons. He submitted further that, the affidavit of the process server indicates that, the summons was issued on 28/01/2020 by the Resident Magistrates' Court of Arusha, but did not indicate on the nature of that the affidavit of the process sever it was sworn by one Zakarai Maleiya, who alleged to be a court process sever while he was not and has never been a court process sever as he was not in a list of the court process server. The other illegality is that the summons did not indicate to whom the same was supposed to be served as it was left blank by the process server.

Further to that, the prosess server said the applicant was not personally known to him, but was identified to him by the said Askari Getini but there was no mention of the names of that Askari getini. He submitted that, since the said applicant is a corporation then the summons was supposed to be served through its agent.

The other illegality cited is that reading the said affidavit of the court process server, he served the number in the affidavit does not correlate with the case umber of the case which was before the court. while the affidavit read 01 of 2019 the case number was 61 of 2019. He submitted that since the court based on the strength of the affidavit of the Court Process server to order an exparte proof then the order was illegal. He submitted that the trial court ought to have questioned the anomalis in the affidavit of the process server before denying the applicant her constitutional right under article 13 of the Constitution of he United Republic of Tanzania.

Regarding the pitfall in the affidavit of the process server, he cited and relied on the case of Muro Investment Co. Ltd vs Alice Andrew Mlela, Civil Appeal No. 72 of 2015 in which the court nullified the proceeding basing on the defective affidavit of the process server.

He also cited the case of **Principal Secretary Ministry of Defence and National Service vs Devram Valambhia** [1991] TLR 387 CAT where it was held that where illegality is established then the court's duty is to allow the extension of time. So is the case of **Mohamed Salum Nalidi Vrs Elizabeth Jeremiah,** Civil Reference No. 14 of 2017 CAT-DSM that once illegality has bee been raised, the court is to grant application for extension of time. He then prayed for the application to be granted as prayed.

Replying to the applicant's submission the counsel for the 1st and 2nd respondent submitted that, learned Advocate for the applicant misdirected himself as under Order IX rule 9 of the CPC [Cap 33 R.E 2019] is clear that, the defendant was supposed to file an application to set aside the exparte judgment which he has not done. The counsel submitted that in some circumstances the law allows an appeal in cases like this however, the appeal must be on purely point of law. Not on the right to be heard as the right to be heard is always exercised before the trial Court not the appellate court. to support this contention, he cited the case of the Registered of **Trustee of Pentecost vrs Magreth Mukama (suing as a minor by her next friend),** Civil Appeal No. 45 of 2015 High Court Mwanza where my Senior Brother Maige J, (as he then was) held that,

the remedy for setting aside must be exhausted. Basing on that authority they asked the court to dismiss that application for failure to exhaust remedies.

Reverting to the merit of the application, the counsel submitted that, extension of time is an order given at the discretion of the Court however, in exercising such discretion, the court must be guided by the principle propunded in the case of **Lyamuya Construction Ltd vrs the YWCA of Tanzania** (supra). They joined hand of the four principles and instead that, the applicant is supposed to account all delayed days which she has not done by accounting the four months she delayed.

Regarding the point of illegality as paged on the affidavit of the process server. He said that is not correct because under Order V Rule 12 of the CPC (Supra), the provision states what is to be done where the court process server fail to deliver the summons. In the said situation the summons was received by Harold Ndibalema on 28/1/2020 that being the case the affidavit was not even needed.

On the point of illegality, they also relied on the already cited case of **Lyamuya Construction Ltd vrs the YWCA of Tanzania** (supra) that, the point of law constituting illegality must be of sufficient importance, which is apparent on the face of record and such illegality

must be of the decision sought to be challenged. In their view, there is no point of law worthy to be taken as illegality, they therefore asked the court to dismiss the application in its entirely for it lacks merits.

On his rejoinder, the learned Advocate he submitted accurately on the same points, law and cases to put more emphasize on how he deserves the prayers after the court weighed both arguments.

I have dispassionately considered and weighed the rival arguments from both parties. To begin with, I feel it instructive to reiterate, as a matter of a general principle that whether to grant or refuse an application like the one at hand is entirely in the discretion of the court. But that discretion should judiciously be exercised according to the rules of reason and justice. In the case of **Mbogo vrs. Shah** (1968) EA the defunct Court of Appeal for Eastern Africa held *inter alia* that;

> *"All relevant factors must be taken into account in deciding how to exercise discretion to extend time. These factors include the length of the delay, reason for the delay, whether there is an arguable case on the appeal and the degree of prejudice to the appeal and the degree of prejudice to the defendant if the time is extended".*

The court therefore, focus on the alleged illegality of the decision desired to be impugned, It is trite law that he same has to be appoint of law of sufficient importance, which is apparent on the face of the record as it was stated in the case **of Lyamuya Construction Company Ltd Vs. Board of Registered Trustees of Young Women's Christian Association of Tanzania,** (supra). 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."*

If I may apply the above quoted principle to the case at hand, I am not in any way persuaded that the alleged illegality of any sufficient importance, is clearly apparent on the face of the record particularly on the impugned decision. As a matter of fact, I am of the view that, the same will take a long-drawn process to discover from them. It is not apparent in the decision sought to be challenged, but on the process through which that decision was reached which point needs evidence either by referring to the proceedings or other associated document not directly part of the proceedings like the affidavit of the process server.

To that end, it is justified to conclude that, the applicant has not demonstrated any good and sufficient cause that would entitle him the extension of time and leave of this court to appeal to the High Court Tanzania. This application therefore fails and I hereby dismiss it with costs.

It is accordingly ordered

DATED at **ARUSHA** this 02nd day of September, 2022.

J. C. TIGANGA

JUDGE