THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY OF DODOMA

AT DODOMA

DC. CIVIL APPEAL NO.11 OF 2022

(Originates from the Decision of the District Court of Singida at Singida in Misc. Civil Application No. 2 of 2022)

SALEHE HAMISI HONGOA..... APPELLANT

VERSUS

MUSTAPHA JUMA NKUNGU .....RESPONDENT

JUDGMENT

Date of Judgment: 13/07/2022

Mambi, J.

This Judgment emanates from appeal filed by the appellant. In the District court the appellant had filed an application for extension of time within which to file an application to set aside an ex-parte judgment. This resulted from the decision of the District Court which determined the matter (Misc. Civil Application No. 2 of 2022) in the absence of the appellant (ex-parte). The trial court dismissed the application on the ground that there was no sufficient reason. The appellant was aggrieved by the decision of the trial court and

appealed to this court. In his memorandum of appeal, the appellant is challenging the decision of the District Court basing on three similar grounds of appeal. The appellant is complaining that it was wrong for the matter to be determined exparte without informing him while he was at the prison as a civil prisoner.

During hearing, the appellant appeared under the service Mr. Sululu, the learned counsel while the respondent was represented by the learned Counsel Mr Onesmo.

The appellant counsel briefly submitted that the trial court was required to consider that the appellant being a civil prisoner was the sufficient reason for his failure to appear on the date of hearing. He argued that it was wrong for the trial court to deny the appellant the right to appear and defend the Misc. Civil Application No. 2 of 2022. The learned counsel referred the decision of this court in **ALBINA SACKITAIDA VS WILBARD SOLOMON Misc Land Application No.52 of 2021**.

In response, the respondent counsel briefly submitted that the trial court was right in its decision since appellant did not indicate any good reasons. He argued that the affidavit at the trial court did not indicate any sufficient reason.

I have considerably considered the submissions by both parties in line with the perusal of the documents from the trial court. The main issue to be determine is whether the appellant had advanced sufficient reasons at the trial court in his application or not. It is on the records that the matter (Misc. Civil Application No. 2 of 2022) at

the trial court was determined exparte while the appellant was absent. There is no any proof to show if the appellant was informed of the date of hearing. Now if the Trial court did not satisfy itself if the appellant was duly served with summons to appear why the court decided to determine the matter exparte taking into account that the appellant was a civil prisoner?. This in my view means that the appellant was not availed with the right to be heard. In my considered view, any party is entitled to know the fate of his case and the final outcome. The party has also to be told when the judgment will be delivered so that he may, if he wishes, attend as certain consequences may follow.

I am of the settled view that failure to notify the other party renders such proceedings and decision null. This is due to the fact that such omission denies the other party right to take necessary steps to protect his right where the judgment is prejudicial to his interests. This court can also borrow a leaf from the relevant persuasive decisions from other common law jurisdictions such as England. For instance, in one of a persuasive decision in ***Kanda v. Government of Malaya [1962]2 WLR 1153*** on page 1162. **Lord Denning L.J** observed and pointed out that:

> *"If the right to be heard is to be a real right which is worth anything it must carry with it a right in the accused man to know the case which is made against him.* ***He must know what evidence has been given and what statements have been made affecting him;*** *and then he must be given a fair*

opportunity to correct or contradict them". (emphasis supplied with).

In my firm view, this implies that the right to be heard was not fully availed to the appellant. Reference can also be made to the decision made Appeal by the Court of Appeal in ***MBEYA-RUKWA AUTO PARTS & TRANSPORT LIMITED vs. JESTINA GEORGE MWAKYOMA Civil Appeal No.45 of 2000*** where it was held that:

"In this country, natural justice is not merely principle of common law, it has become a fundamental constitutional right. Article 13(6) (a) includes the right to be heard amongst the attributes of the equality before the law, and declares in part"

"Wakati haki na Wajibu wa mtu yeyote vinahitaji kufanyiwa uamuzi wa mahakama au chombo kingine kinachohusika, basi mtu huyo atakuwa na ***haki ya kupewa fursa ya kusikilizwa kwa ukamilifu".***

The Court of Appeal in ***ABBAS SHERALLY & ANOTHER VS. ABDUL (supra)*** reiterated that:

*"****....That right is so basic that a decision which is arrived at in violation of it will be nullified even if the same decision would have been reached had the party been heard,*** *because the violation is concerned to be a breach of natural justice."*

I also wish to refer the decision of the court in ***Tanzania Portland Cement Co. Ltd v. Minister For labour, Misc. Civil Application No. 147 of 1994*** (as correctly cited by the applicant). The court in this case at page 5 held that:

"I therefore agree with the learned applicants counsel that there was no negligence in their part in not applying on time. The reasons are that the Court itself did not obey its own order. The order to notify the parties of the date the ruling would be delivered. That information is not found in the Court proceedings or copies of notices Issued to the parties. ***It is, I should say, that when the court makes its orders, it should follow and obey them****. Failure of obey its own orders could lead to such applications like this one, which can lead to the giving of benefit of doubts, perhaps to a party who did not deserve it. (emphasis supplied)".*

In this regard, the appellant was denied right to be heard from the beginning of the matter.

The other question is whether the appellant had sufficient reason for his application for extension of time at the trial court.
I have gone through the applicant's document including his affidavit in line with his submission and found that the applicant at the trial court had indicated sufficient cause to enable the trial court to consider and grant his application. It is on the record that the applicant was a civil prisoner and he was not informed on the date of hearing and date of ruling. In my view being in the prison was a good reason for his application to be granted by the trial court. In the application before the trial court, the applicant in his affidavit had clearly indicated that he had good reasons for his delay. Indeed, good reasons for the delay of filling an appeal or an application for setting aside an ex-parte judgment has in most occasion been considered by the court to grant application for an extension of time.

This was also underscored by the court in ***TANGA CEMENT AND ANOTHER CIVIL APPLICATION NO 6 OF 2001.*** In this case the court observed and held that:

> *"What amounts to sufficient cause has not been defined. From decided cases a number of factors has to be taken into account including whether or not the application has been brought promptly; the absence of any or valid explanation for delay; lack of diligence on the part of the applicant".*

Furthermore, the curt in ***REGIONAL MANAGER TANROADS KAGERA VS RUAHA CONCRETE CO LTD CIVIL APPLICATION NO 96 of 2007*** observed that:

> ***"the applicant must place before the court material which will move the court to exercise judicial discretion in order to extend time limited by rules****"(emphasis supplied).*

I am aware that the position of the law is clear that granting an extension of time is in the discretion of the magistrate or judge but such discretion must be judiciously used. Had the trial magistrate judiciously used his discretion basing on the circumstance of the case and interest of justice, he could have made a different decision. I agree with the appellant that he advanced and presented sufficient reasons for delay and the extent of such delay in his application before the trial court. I also wish to refer the Law of Limitation Act. The relevant provision is section 14 (1) of the Law of Limitation Act Cap.89 [R.E. 2019] which provides as follows:·

> *"14-(1) 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 such 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 (emphasis mine)".*

I am of the considered view that this appeal has merit and is accordingly allowed. In premises, this court finds proper the appellant (who was the applicant at the trial court) to be granted an extension of time to file his matter at the trial court if he wishes to do so.

The applicant shall file his application at the trial court within sixty days from the date of this ruling.

A. J. MAMBI

JUDGE

13/07/2022

Ruling delivered in Chambers this 13th day of July, 2022 in presence of both parties.

A. J. MAMBI

JUDGE

13/07/2022