

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MWANZA DISTRICT REGISTRY
AT MWANZA
CIVIL APPEAL No. 32 OF 2021**

(Arising from the Ruling of Misc. Civil Application No. 46 of 2021, originating from RM Civil Case No. 95 of 2020)

LETSHEGO BANK (T) LTD ----- APPELLANT

VERSUS

MATHIAS JAMES LUSAJO -----RESPONDENT

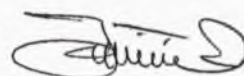
JUDGMENT

17th November, 2021 & 10th February, 2022

TIGANGA, J

This appeal is from the decision of the court of Resident Magistrate of Mwanza dated 26th July 2021, which dismissed the application for extension of time by the applicant to file an application to set aside the *ex parte* judgment passed by the said court in RM Civil Case No. 95 of 2020 which was filed by the respondent against the appellant.

To appreciate the facts which gave rise to the case at hand, I find it important to point out the historical background of the case at hand. The fact of the case as revealed by the record are that, in early 2020 the respondent filed RM Civil Case No. 95 of 2020 before the court of Resident



Magistrates of Mwanza claiming from the respondent a number of reliefs which included, the refund of the total sum of Tshs. 60,000,000/= being a purchase price of the mortgaged house situated on plot No. 442 Block D Nyegezi and 24% interest per year of the purchase price from 17/02/2018 to 17/12/2020 which is a total amount of 43,200,000/= as well as a total payment of Tshs. 82,476,538/= as interest to be paid by the defendant now the appellant and the interest of the amount claimed at a commercial rate from the date of judgment to the day of full satisfaction of the decree, damage and loss of the profit and cost of the suit.

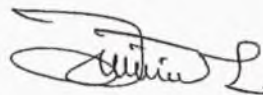
The suit was heard and determined *exparte* following the failure of the appellant, who was by then the defendant to appear and defend the suit. After full trial, the trial court found the claim to have been proved and awarded the claims to the extent elaborated in the judgment of the trial court.

Following that decision which had its judgment delivered on 01/03/2021 on 01/06/2021 the appellant filed the application under certificate of urgency seeking for the extension of time to file an application to set aside the judgment which was passed *exparte*. The application based on two main grounds, **one**, that he was not aware of the case and

the order which ordered the matter to be heard exparte and **two**, that, the exparte judgment was tainted with illegalities.

Gathering from the contents of the affidavit filed in support of the application, one Sileo Mazullah who swore the affidavit, stated that the appellant was informed by one Michael Nyoni, a Bank Customer that the respondent had instituted a case and obtained the judgment exparte which he was about to execute. That information triggered the appellant which instructed the Advocate to make follow up. That follow up involved the perusal of the record and revealed that, there was such a case and an exparte judgment. Counting days, he found that statutory days within which to file an application to set aside an exparte judgment had already expired; it was when the appellant filed the application for extension of time to file an application to set aside the exparte judgment. The grounds for that application were six which for easy reference they are reproduced as follows.

1. That the court proceeded with the hearing of the case without satisfying itself as to whether it is clothed with the requisite jurisdiction.



2. The applicant was not afforded with its one of the cardinal principle of natural justice i.e right to be heard.
3. That the applicant was neither served with the summons to appear for the hearing of the case nor was not notified when the exparte judgment would be delivered.
4. That the court did take reasonable precaution to find out as to whether the summons to file written statement of defence was properly served and received by the applicant.
5. The summons to file written statement of defence purporting to have been served to the applicant had its affidavit for process server were never served to her and acknowledged for they do not disclose the name recipient and the rubber stamp affixed to the summons is not of the applicant. sic
6. That the reasons under the subparagraphs (a) and (e) herein above sufficiently accounts for the period delayed.

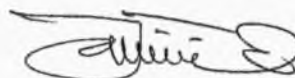
The court found all the grounds to have no merits, and proceeded to dismiss the application for want of merit, with an order that each party bear its own costs.



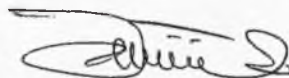
Following that decision the appellant filed this appeal in a memorandum of appeal with five grounds of appeal as follows:

- i. That the Honourable trial Court erred in law and facts for determining issues of jurisdiction in an application for extension of time.
- ii. That, the Honourable Trial Court erred in law and facts to reach into erroneous findings in regard to jurisdiction.
- iii. That, the Honourable Trial court erred in law and facts for disregarding precedents from superior courts without distinguishing or assigning reasons for the same.
- iv. That, the Honourable trial Court erred in law and facts for holding that the application lacked merits while admitted that the application was actually made prior to the lapse of time set by law.
- v. That the Honourable trial Court erred in law and facts for disregarding irregularities and illegalities transpired in an exparte judgment.

The appellant proposed this court to allow the appeal and make the following orders:



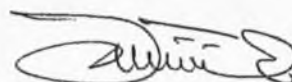
- (a) That the court decrees that, the trial court erred in law and in fact for determining issues of jurisdiction in an application for extension of time.
- (b) That the court decrees that, the trial court erred in law and in fact to reach into erroneous findings in regard to jurisdiction.
- (c) That the court decrees that, the trial court erred in law and in fact for disregarding the precedents from superior court without distinguishing or assigning reasons for the same.
- (d) That the court decrees that, the trial court erred in law and in fact for holding that an application lacked merits while admitted that the application was actually made prior to the lapse of the time set by the law.
- (e) That the court decrees that, the trial court erred in law and in fact for disregarding irregularities and illegalities transpired in the exparte judgment.



(f) That this court be pleased to allow this appeal with costs and extend time to file an application to set aside an exparte judgment of RM Civil Case No. 95 of 2020

With leave of the court and consent of the parties, the appeal was argued by written submissions. Parties filed their respective submissions according to the schedule. I have keenly passed through the submissions filed by counsel for both parties, my quick assessment of the same is that, parties have overstretched in their arguments regarding to what was actually in issue before the trial court for which this appeal has been filed. It should be noted that, before the trial court the appellant was asking for extension of time within which to file an application to set aside the the judgment which was passed exparte.

The ground for which the application was filed were actually two namely that the applicant (now the appellant) was not aware of the existence of the suit filed by the respondent, and the judgment which was passed exparte. The second ground was the illegalities in the judgment sought to be set aside. Citing the particulars of illegalities, the applicant cited the issue of jurisdiction of the trial court, and the issues of the right to be heard. Therefore, the trial court was supposed in its findings to

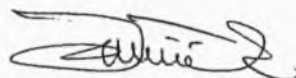


confine itself on those two premises. Regarding the particulars of illegalities, I am afraid that the trial court was not supposed to go into details to discuss the legality or illegality of the case, as what was before it was a mere application for extension of time. The merit of the points raised as illegality were the subject of the application to set aside or the main case of course after the exparte judgment had been successfully set aside.

Therefore, without meandering, I find all issues which were not related to extension of time, were dealt with and decided prematurely and per incuriam. On that base, this ruling will not in any way deal with the submissions made in that respect. I will deal with the actual dispute which needs the decision of this court at this stage of the proceedings.

Now having so held, the question for determination by this court is whether, looking at the materials before the trial court, the trial court was justified to refuse the application for extension of time, for the applicant (now the appellant) to file an application to set aside the exparte judgment?

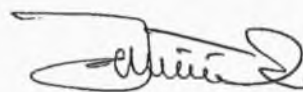
It is the law that, where the time to take legal action set by law has been expired, the court before which such action has to be taken has powers under either the Law of Limitation Act, [Cap 89 R.E 2019] or any



other law, to extend time within which such action can be taken. The power to grant or refuse application for extension of time is discretionary; however, such discretion must be exercised judiciously. The position of law on the principle regarding the factors to consider in granting or refusing the application for extension of time is now settled, as a number of decisions of the Court of Appeal have already enriched our jurisprudence on the area. The general principle is that for a person to be entitled for extension of time, he must prove to the court, that he had good cause for his delay. The guideline of what amount to good cause were formulated by the court of Appeal of Tanzania in the case of **Lyamuya Construction Company Limited vs. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No.02 of 2010 (unreported), CAT, it was held that;

"On the authorities however, the following guideline may be formulated;

- (a) The applicant must account for all days of delay,*
- (b) The delay should not be inordinate,*
- (c) The applicant must show diligence and not apathy, negligence or sloppiness in the*



prosecution of the action that he intends to take.

(d) If the court feels that there are other sufficient reasons such as the existence of a point of law of sufficient importance such as illegality of the decision sought to be challenged."

In the ruling by the trial court, the court was satisfied that, the applicant was still in time but held that that is immaterial because the law allows an application to be made before or after the lapse of time. Having so found, it was not proper for the learned trial Magistrate to dismiss the application on the ground that the application had no merit. He was supposed to give directive to the applicant before it to go and file the application to set aside for which he was asking for extension of time.

Even if we assume, for the sake of argument that the applicant was even out of time and the findings that the law allows the party to file it before the expiry of date, by raising the ground of illegalities of the decision sought to be set aside, that was sufficient to warrant for extension of time in terms of the authority in **Lyamuya Construction vs Board of Trustee of YWCA** (supra).

That said I find the appeal at hand to have merits, it is therefore allowed. The appellant is hereby given 14 within which to file an application for setting aside the ex parte judgment before the trial court. By this order the Hon. Deputy Registrar is hereby directed to as soon as practicable, return the original record to the Court of Resident Magistrate for the necessary action by the parties in compliance with this judgment. The time of 14 days will start running on a day the original case file is received by the Court of Resident Magistrate.

It is accordingly ordered.

DATED at **MWANZA**, this 10th, February 2022




J. C. TIGANGA
JUDGE