

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF KIGOMA)

AT KIGOMA

(APPELLATE JURISDICTION)

PC CIVIL APPEAL NO. 21 OF 2021

(Arising from Civil Application No. 10/2021 at Kigoma District Court of Kigoma, Before K.V. Mwakitalu RM, and Originating from Civil Case No. No. 113 of 2019 of Ujiji Primary Before M.J. Luchunga RM)

NYEMBO S/O MUSTAFA TEMBA.....APPELLANT

VERSUS

CHAUSIKU D/O LAURENTRESPONDENT

J U D G M E N T

17/12/2021 & 14/03/2022

L.M. MLACHA J.

This appeal raises from the decision of the district court of Kigoma in Civil Appeal No. 10 of 2021, original civil Case No. 113 of 2019 of the primary court of Kigoma district at Ujiji. The respondent, Chausiku Laurent was the plaintiff at the primary court. She filed the case against the appellant, Nyembo Mustafa Temba claiming Tshs 3,800,000/=. She told the court that Mr. Nyembo took a loan of Tshs 3,800,000/= from her in 2018 which was to be paid within one month but could not do so. The court (Y. Busungu PPCM) found for the respondent and awarded the claimed amount of Tshs 3,800,000/= with costs. The case was heard ex parte on reasons on record.

The respondent returned to the primary court and lodged execution proceedings. She prayed to attach a house of Mr. Nyembo situated at Mwandiga in execution thereof to enforce the decree of Tshs 3,800,000/=.

The court (H.H. Nkya RM) granted the application. It ordered the attachment and sale of the house in execution of the decree. Soon later a son of Mr. Nyembo, Mr. Mustafa Nyembo Mustafa Temba, appeared and lodged objection proceedings at the primary court (Application No. 2/2020) alleging that the house which was under attachment should not be sold because it is not the sole property of Nyembo Mustafa Temba but the entire family. He said that the whole family lived there and the intended sale could result in untold difficulties. He added that his father, the appellant had absconded and was nowhere to be allocated. The court (M.J. Luchunga RM) dismissed the objection on 13/11/2020.

Following the dismissal of the objection proceedings, Mr. Nyembo Mustafa Temba appeared at the primary court 12/3/2021 and lodged a letter seeking extension of time and to set aside the ex parte judgment entered on 16/8/2019. He could not be successful. He then lodged Civil Appeal No. 10/2021 at the district court of Kigoma challenging the decision of the primary court as a whole on three grounds namely; i) that the trial court

erred in law and fact for not considering the evidence adduced by the appellant that he was not served with the summons, ii) that the trial court erred in law and fact for disregarding the documentary evidence of the appellant that he took his only child to hospital in the ground that no ticket of the child and iii) that the trial court erred in law and facts by holding that the application of the appellant was time barred while did not afford the parties the right to be heard on that ground. The district court (K.V. Mwakitalu RM) dismissed the appeal.

The appellant did not see justice in the decision and sought the services of Ms. Victoria Nyembea who lodged 4 grounds of appeal which reads as under;

- 1. That the trial court and the appellate court erred in law and in fact for not considering the evidence adduced by the appellant that he was not served with the summons.*
- 2. That the trial court and the appellate court erred in law and in fact for disregarding the documentary evidence of the appellant that he took his only child to Hospital in the ground that no ticket of the child.*
- 3. That the trial court and the appellate court erred in law and in facts by holding that the application of the appellant was time*

barred while did not afford the parties the right to be heard on that ground.

- 4. That the appellate court erred in law and in facts by holding that the appellant could have lodged the application for extension of time to set aside ex-parte judgment while did not look into the appellant application in the trial court which was for extension of time and application to set aside ex-parte judgment.*

The respondent was represented by Mr. Silvester Damas Sogomba who resisted the appeal. Hearing was done by oral submissions.

In ground one, counsel for the appellant submitted that the appellant could not get a summons to appear at the primary court because he was not in Kigoma. He had family problems which made him to go to Dar es Salaam. He was not present when the case was heard. Counsel had the view that substituted service which was done by attaching a copy in the house was not good service. She had the view that the appellant was denied a right to be heard.

In ground two, counsel submitted that the lower court failed to accept the evidence contained in hospital documents which showed that he was in hospital. She added that the ticket of the appellant was good evidence to

show that he was not in Kigoma. In ground three counsel submitted that the lower courts erred to say that the appellant was time barred because he filed an application for extension of time which was not heard. In ground four, counsel submitted that the district court erred in failing to extend the time. He prayed for the appeal to be allowed with costs.

It was the submission of Mr. Silvester Damas Sogomba that the appeal is baseless. He said that civil case No. 113/2019 was heard ex parte after 5 services to the appellant. He went on to say that the summons was affixed on the door of one of his two wives who must have told him of the service. Counsel proceeded to submit that the application for extension of time was dismissed by the district court because it was supposed to be filled in the primary court. And when he returned to the primary court to seek to extend the time he could not succeed because he was late for 3 years. He proceeded to say that service was effected to the appellant through the ward and street secretaries more than 6 times. It was also served to him through the court clerk. It is not correct to say that he was not served, counsel submitted.

Counsel went on to submit that the district court addressed itself on the issue of time. The appellant sought to set aside the ex parte judgment without

extension of time. That was wrong, counsel submitted. He supported the finding and decision of the district court. Counsel added that the documents referred to by counsel for the appellant were not relevant because the court addressed itself on the aspect of time. And that, the appellant rose to object after receiving an attachment notice. He could not even account for each day of delay as required by the law. Counsel prayed the appeal to be dismissed.

Ms. Victoria joined issues with the counsel for the respondent in her rejoinder submission.

I plan to make a discussion covering all the grounds of appeal because the issues are closely related. To understand the appeal properly, I think I should reproduce part of the judgment of the district court for I think the magistrate addressed himself properly. In dismissing the appeal the district court had this to say:

*"The law of limitation in the primary court which is the THE MAGISTRATES COURTS (LIMITATION OF PROCEEDINGS UNDER CUSTOMARY LAW) RULES GN NO.311 of 1964 provides that the **application to set aside an ex parte judgment made by the primary court must be filled within 6 weeks from the date***

of the decision, this is according to item 1 of the schedule to the above rules.

*Whereby in this appeal there is no dispute that the appellant filed his application on **18/3/2021** while the ex parte judgment which the appellant wanted to set aside was delivered on **16/8/2019**, there it (sic) clear that the trial court was right to rule that the appellant application was hopelessly time barred and therefore the trial court was right to dismiss the application basing on this point, whereby this point alone was sufficient to dispose appellant application at the trial court and there was no need for the trial court to proceed to determine the merit of the application which was filled before it prematurely.....therefore the appellant erred to file an application to set aside the trial court ex parte judgment without first applying for extension of time.” (Emphasis added)*

The appellant claim that he was absent from court (Primary Court) on good cause and that the lower courts had no reason to deny him extension of time within which to set aside the ex parte judgment. He says that he had gone to Dar es Salaam to attend his sick child, he could not get a summons to come to court and thus nowhere to blame. The record show some medical chits from Muhimbili National hospital suggesting that he might have been there at some time attending a child by the name of Zuhura Nyembo. But most of them carry earlier dates (2017). I could get one for Mustafa Zuhura

dated 4/6/2019. There were no medical reports for the period which followed. Which as we shall see later, covers a period of one year and six months.

The record of Civil Case No. 113/2019 shows that it was filed on 14/6/2019 and placed before Y. Busungu PPCM. It appeared first before her on 18/6/2019, she put it for mention on 24/6/2019 with an order to notify the defendant (appellant). The summons returned with an endorsement that he was yet to return from safari. The court put the case for mention on 1/7/2019 with an order to notify the appellant. The appellant could not appear. The respondent informed the court that the appellant was avoiding service. Based on this information, the court issued an order for substituted service by affixing a summons on the door. It was affixed but there was no appearance. The case was then heard ex-parte on 6/8/2019. What followed thereafter was execution and objection proceedings. The appellant was still absent, not involved.

Looking at the records of Civil Case No. 113/2019 and the complaint raised, one can have the opinion that much as there is evidence of repeated service, but in the great interest of justice, the lower courts were supposed to give the appellant the sympathy of the court and give him extension of time within

which to file the application to set aside the ex parte judgment. But the span of time (coupled with failure to account for each day of delay) defeats this aspect. The records show that, the appellant came at the primary court on 12/3/2021 and lodged an application for extension of time within which to set aside the ex parte judgment which was delivered on 16/08/2019. There was a gap of one year, six months and 26 days. He had no reason for the delay other saying that he was in Dar es Salaam. He could not account for each day of delay. The law required him to account for each day of delay not to make a general statement see **Tanzania Coffee Board v. Rombo Millers Ltd**, CAT Civil Application No. 13 of 2015 where it was said that dismissal of an application is the consequence befalling an applicant seeking an extension of time who fails to account for each day of delay. See also **Crispian Juma Mkude v. R**, Criminal Application No. 34 of 2012 and **Bariki Israel v. R**, Criminal Application No. 4 of 2011. The lower courts were therefore justified to refuse to extend the time.

There is yet another confusion which was brought by his own son. I am not sure whether it was his own doing or a conspiracy. The records show that his own son, Mustafa Nyembo Mustafa Temba lodged objection proceedings at the primary court on 16/3/2020 entitled "**PINGAMIZI LA UUZWAJI WA**

NYUMBA ILIYOKO MWANDIGA UWANJANI KIGOMA VIJIJINI”.

When he appeared before the court and given a right to address the court, he had this to say;

”Mpingaji: *Nimekuja kuweka pingamizi la uwanja wa nyumba ya familia iliyopo Mwandiga kwa sababu tunaishi ni mimi na wadogo zangu na mama yangu mdogo, hivyo kama itauzwa tutakosa mahali pa kuishi na ***mdaiwa (Baba yangu) alitoroka nyumbani na hajulikani yuko wapi***”(emphasis added)*

I am interested in underlined words *”M daiwa (Baba yangu) alitoroka nyumbani na hajulikani yuko wapi”*. This defeats the defence that the appellant was in Dar es Salaam. If he was in Dar es Salaam attending his sick child, his son could not have said that he had deserted the family and gone to a place not known.

Subsequent in the objection proceedings, his son was recorded saying;

”Mpingaji; *Naomba Mahakama itupe mua (sic) wa wiki mbili kuangalia uwezekano wa familia kulipa deni la mdaiwa No. 1 ili nyumba isiuzwe”*

This implies that much as the case was heard ex-parte but the family was aware of the debt (family not the appellant) and was prepared to pay.

The court gave him time to pay but could not do so. During all this period the appellant was under cover. He could not show up. He appeared after the dismissal of the objection proceedings showing some secret communications. His claim lack justification.

That, said, I find the appeal to be devoid of merits. It is dismissed with costs.




L.M. MLACHA

JUDGE

14/03/2022

Court: Judgment delivered in the presence of the parties and Mr. Silvester Damas Sogomba for the respondent. Right of Appeal Explained.




L.M. MLACHA

JUDGE

14/03/2022