

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOSHI DISTRICT REGISTRY
AT MOSHI**

MISCELLANEOUS CIVIL APPEAL NO. 12 OF 2022

*(C/F Civil Appeal No. 13 Of 2021 before the District Court of Moshi at Moshi
Originating from Civil Case No. 137 Of 2019 Moshi Urban Primary Court.)*

**LEONARD CHUWAAPPELLANT
VERSUS
KIKUNDI TULIVU..... RESPONDENT**

JUDGMENT

Last order: 22/2/2023

Date of Judgment: 17/3/2023

MASABO, J.:-

This is a second appeal. It emanates from the decisions of the Primary Court for Moshi District at Moshi Urban (the trial court) in Civil Case No. 137 of 2019 and the District Court of Moshi at Moshi (the first appellate court) in Civil Appeal No. 13 of 2021. The appeal is premised on the following two grounds;

1. That the trial court erred in both law and facts by failing to consider that the appellant is suffering mental illness disease called bipolar disorder that is why he failed to file application to set aside ex-parte judgment on time; and
2. The trial court erred in facts and law by failing to assess the evidence which show the history of the appellant disease hence proved the sufficient reason within the meaning of section 14 of the Law of Limitation Act [Cap 89 RE 2019].

For appreciation of the appeal, I find it crucial to narrate, albeit briefly, its factual background. In 2019, the respondent instituted civil case No. 137/2019 before the trial court claiming from the appellant a sum of Tsh. 12,173,000/=. Hearing proceeded *ex parte* the appellant after he defaulted appearance and, in the end, the respondent emerged victorious. Aggrieved, the appellant went back to the trial court seeking to set aside the *ex parte* judgement. The prayer was not granted. Disgruntled further, he knocked the doors of the first appellate court through Civil Appeal No. 13 of 2021 which was dismissed after the court held that he rendered no valid reason. Hence, the instant appeal premised on the above stated grounds.

The hearing proceeded *viva voce* with both parties being represented. The appellant enjoyed the services of Mr. Innocent Msakyi, Advocate while the respondent enjoyed the services of Mr. Gideon Mushi, Advocate. On the 1st ground, Mr. Msakyi argued that the first appellate court failed to consider that the appellant was sick since 2016 and the disease which he was suffering from required urgent treatment else he would have suffered memory loss. He argued the court to examine the records of the case in the light of **Beatus Laurian Ndiaye v Mariam Kitoleo**, Misc. Civil Appeal No. 06 of 2021 (**HC**) where it was held that sickness is a sufficient ground for extension of time. He also cited the case of **Lyamuya Construction Co. Ltd v Board of Trustees of YWCA**, Civil Application of 2010 CAT and argued that extension of time is the discretion of the court which should be exercised judiciously based on reasons of justice. But, in his case the rules of natural justice were ignored by the appellate court. On the 2nd ground, he referred to page 6 and 7 of

the judgment of the first appellate court arguing that the court did not properly evaluate the evidence rendered in support of the prayer for extension of time. Based on this, he prayed that this court set aside the *ex parte* judgment entered by trial court.

In reply, Mr. Mushi having narrated the abbreviated facts of this appeal submitted that the *ex parte* order was justified as the appellant defaulted appearance in the trial court. He appeared only once and disappeared afterwards and in spite of being served four times, he did not enter appearance before the trial court. He submitted further that, while the matter was still pending before the trial court, the appellant filed a miscellaneous application before the district court praying for transfer of proceedings to the district court but the same was dismissed. After the pronouncement of the *ex parte* judgment, he challenged it by way of appeal in the district court but the same was dismissed for being time barred. Thereafter, he filed a review before the district court (Civil Review No. 1 of 2020) which was also dismissed. Unpleased, he filed an application for extension of time to file an appeal against the decision of the trial court which was also dismissed.

Mr. Mushi submitted that, when the appellant became aware that the respondent was in the process of execution of the decision of the trial court is when he brought the application to set aside the *ex parte* judgment and raised only ground that he was sick but the trial court found no merit and dismissed it. Hence the present appeal.

On the first ground of appeal, Mr. Mushi argued that the appellant did not render any proof that he was suffering from a mental disorder and the record is silent on the matter. In the alternative, he argued that assuming that the appellant was sick, no proof or explanation was rendered as to when did the appellant who was actively participating in court in pursuit of the numerous proceedings above stated, fell ill and that by reason of such illness was rendered incapable of filing the application for extension of time. Mr. Mushi reasoned that, the series of events pertaining to this appeal clearly demonstrate that the appellant is employing delaying tactics by instituting several proceedings and in so doing he is preventing the respondent from enjoying his fruits of the decree. He reasoned that there were no sufficient materials showing good cause.

In support of his argument that that the applicant's prayer for extension of time was unworthy, Mr. Mushi cited the case of **Barenga Mungozi V Marry Mtunzwe** [2002] TLR 141 and **Godwin Ndewesi and Caroli Ishengoma v Tanzania Audit Corporation** [1995] TLR 200 and proceeded to argue that, the original case was decided on 28/01/2020 but the application for extension was filed in 2022 approximately 2 years after the judgment which is a fairly long time. He argued that, no doubt, the appellant slept on his right as he had sufficient time to file an application to set aside the *ex parte* judgment but he failed. Lastly, the counsel cited the case of **Zilaje v Fembera** [1972] HCD where it was held that the court will not interfere if a party willfully sat on his right. He also cited **Mbogo v Shah** [1986] EA 93 where it was held that the court exercising discretion for extension of time must consider the length of delay, reasons for delay and the degree of prejudice if time is extended. He

also stated that the delay must fully be accounted for as provided in **Lyamuya Construction** (supra), a requirement which was not complied with by the appellant. He prayed the appeal be dismissed.

In rejoinder, Mr. Msakyi reiterated his submission stating that the record shows that there was proof that the appellant was sick and it was sufficiently demonstrated. There is no record that he was served summons and did not appear in trial court when required. He argued that it is not true that the appellant has instituted several matters as argued by Mr. Mushi and prayed for the court to be guided by record.

I have keenly read the records and considered the argument of both parties. It appears that there is only one issue for determination, that is, whether the trial court and the first appellate court erred in their concurrent finding that the application for extension of time was unmaintainable for want of a good cause. This being a second appeal, I find obliged to state, in prelude that, it is trite law in our jurisdiction that on a second appeal, the appellate court will rarely interfere with concurrent finding of fact made by the courts below save where the finding is perverse or demonstrably wrong and occasioning miscarriage of justice as stated by the Court of Appeal in **Wankuru Mwita v. Republic**, Criminal Appeal No. 219 of 2012 (unreported) where it was stated that:

"... The law is well-settled that on second appeal, the Court will not readily disturb concurrent findings of facts by the trial court and first appellate court unless it can be shown that they are perverse, demonstrably wrong or clearly unreasonable or are a result of a complete

misapprehension of the substance, nature or non-direction on the evidence; a violation of some principle of law or procedure or have occasioned a miscarriage of justice."

Guided by this principle, I will now move to the grounds of appeal. The appellant's counsel has passionately argued that the concurrent findings of the lower courts was misconceived as the appellant ably demonstrated a good cause warranting the extension of time as he deponed and submitted that he was inhibited to file the appeal by sickness. As correctly submitted by both counsel, extension of time is within the discretion of the court which need be exercised judiciously upon a good cause being demonstrated by the applicant. It is also correct that, the good cause is established by looking at diverse factors including, but not limited to, the duration of delay, that is whether the delay is not inordinate; whether the applicant has sufficiently accounted for the delay; whether the applicant has demonstrated diligence and not apathy, negligence or sloppiness in the prosecution of the action he intends to take; or whether there exists a point of law of sufficient importance such as the illegality of the decision sought to be challenged (see **Ngao Godwin Losero v Julius Mwarabu**, Civil Application No. 10 of 2015, CAT (unreported) and **Lyamuya Construction Co. Ltd v Board of Trustees of YWCA** (supra).

It is undisputed that, the decision sought to be challenged if this appeal sails, was pronounced on 28/1/2020 but the application for extension of time was filed on 20/4/2021 which is approximately 15 months from the date of the judgment. This is undoubtedly an inordinate delay and unless

it is accounted for it is inexcusable. From the record and as argued by both parties, the appellant herein advanced only one ground. In his application made through a letter dated 20/4/2021, he stated as follows:

“Kwa mshtuko mkubwa nilipatwa na sonona iliyopelekea kupelekwa katika hospitali ya mkoa (Mawenzi) ambapo ninatibiwa ugonjwa wa afya ya akili (mental illness).”

In substantiation, he produced several documents two of which were admitted as exhibits. One was marked KMDI containing his Mileembe hospital card dated 25/6/2021, KMDII containing a diagnostic investigation form from Mirerani hospital dated 21/6/2021 by which he was referred to Mileembe hospital for further investigation. He has in addition, appended a medical certificate from Mawenzi Regional Hospital showing that he attended at Mawenzi Regional Hospital on 8/6/2012; 2/8/2012, 4/9/2012, 2/10/2012, 1/11/2012, 3/1/2013, 9/5/2013, 25/1/2014, 23/03/2018, 2/3/2021, 21/6/2021, 25/6/2021 and 13/7/2021. The two lower courts having considered these receipts and certificates concluded that they do not suffice as a good cause. In particular, the first appellate court observed that:

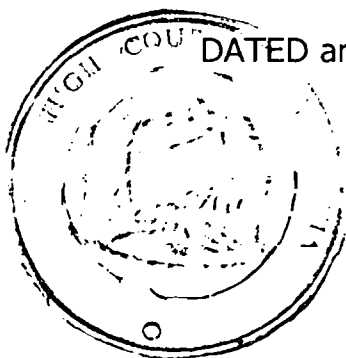
“If you take a closer look to the said dates, it is clear that the same were issued after the appellant’s application before the trial court.”

I unhesitantly agree with this observation, as stated above, the relevant period of delay ranges between 28/1/2020 when the decision intended to be challenged was pronounced and 20/4/2021 when the appellant filed his application for extension of time. This means that the relevant

certificate/receipt is the one dated 2/3/2021. The rest of the receipts/certificates are irrelevant as they either precede the *ex parte* judgment or, as correctly observed by the first appellate court, were issued after the applicant had filed his application for extension of time to set aside the *ex parte* judgment. Thus, they are irrelevant and cannot be relied upon in supporting the application for extension of the time. In the foregoing, I find no reason to fault the concurrent finding of the two lower courts that the application was unmaintainable for want of a good cause as the applicant miserably failed to account for the time of delay.

Needless to emphasize, much as sickness suffices as a good ground for extension of time, it is not sufficient for the applicant to just state that he was sick. He should demonstrate that his ailment was during the period of delay and that, it indeed inhibited him from undertaking the necessary legal step. In other words, it must be proved that, the delay was not occasioned by his apathy or sloppiness in pursuit of the respective court action a test which the appellant herein has miserably failed.

Under the premises, the concurrent finding of the lower courts is upheld and the appeal is dismissed with costs.



DATED and DELIVERED at MOSHI this 17th day of March 2023.

A handwritten signature in black ink, appearing to be 'J.L. MASABO'.

J.L. MASABO

JUDGE

17/3/2023