

HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF KIGOMA

AT KIGOMA

(DC) CIVIL APPEAL NO. 4 OF 2022

(Arising from the decision of the District Court of Kigoma at Kigoma in Misc. Civil Application No. 20/2021, arising from Misc. Civil Application No. 43/2020 of the District Court of Kigoma and originating from Civil case No. 129 at Ujiji Primary Court No. 129/2020)

JOB JOHN GWASA t/a MBEZI AUCTION

MART AND COMPANY..... APPELLANT

VERSUS

JUMA SIMON @ DARUKA.....RESPONDENT

Date of Last order: 16 .03. 2023

Date of judgement: 21 .04. 2023

JUDGEMENT

MAGOIGA, J.

This is an appeal against the Ruling of the District Court of Kigoma dated 20th day of December, 2021 arising from Misc. Civil Application No. 3/2020 of the District Court of Kigoma and originating from Civil case No. 129/2020 at Ujiji Primary Court.

In a nutshell, in the Ujiji Primary court, the respondent **Juma Simon Daruka** sued the appellant **Job John Gwasa t/a Mbezi Auction Mart & Company**) for recovery of a sum total of Tanzanian Shillings

4,035,000/=being the money alleged to have advanced to the appellant in order to execute an eviction order to one Amos Tumaini Rusigwa (not a party to this case) which order was not complied by the appellant. On that note, the trial court after hearing parties decided in favour of the respondent. There from, the respondent herein applied for execution order vide Application for Execution No.129/2020. The trial court found that the respondent's claims are justifiable and proceeded to grant the order.

Dissatisfied, the appellant made an application for revision in the District Court of Kigoma vide Civil Revision No. 3 of 2021 in which the District Court nullified the trial court's decision and it further ordered that the respondent, if wishes, to file a fresh bill of cost separate from execution of the court's decree.

The respondent found himself out of time, made an application in the District court for extension of time through Misc. Civil Application No. 20 of 2021. After hearing of the parties, the District Court decided in favour of the respondent and granted extension for 30 days.

Aggrieved, the appellant preferred this appeal to this Court faulting the District Court in the following language, namely:



- 1. That Magistrate erred in law and fact by holding that the respondent had adduced sufficient reasons for extension of time while there was no good cause for extension of time.*
- 2. That Magistrate erred in law and fact by granting extension of time while the respondent has not account for each day of delay.*
- 3. That Magistrate erred in law and fact by reaching her decision without considering the submission of the appellant's counsel in opposing the respondent's application for extension of time*

In the end, the appellant prayed that, this appeal be allowed, the order of the District Court be quashed and set aside with costs.

At the hearing before this Court, the appellant was represented by Mr. Moses Rwegoshora learned advocate, while the respondent had the legal services of Mr. Daniel Rumenyela learned advocate.

Mr. Rwegoshora addressing this court started by submitting on the 1st ground stating that the respondent did not give any sufficient ground for extension. He strongly said that, they are alive that discretion is within the powers of the court but that has to be exercised judiciously with good cause. He braced his argument on proper definition of good cause with the case of **Marco M.S Katabi vs Habibi African Bank (T) Ltd, Civil Application No. 570/17 of 2020 CAT** at page 5 it includes accounting



for each day of delay, prompt application, exercise due diligence. He insisted that, in this case no account of delay was accounted for. He pointed out that, the decision for costs was granted on 2/2/2021 and this application was preferred on 7/10/2021 which is inordinate delay.

Mr. Rwegoshora went on submitting on this point that, the cases referred was misapplied because no illegality and extension was given without proper cause. He stood firmly to say that ignorance of law is not an excuse to comply with the law.

On the 2nd ground of appeal, the learned counsel insisted that the respondent did not account for each day of delay. The application which granted him costs was given 2/2/2021, the last day was 2/4/2021 but the affidavit was filed on October, 2021. According to Mr. Rwegoshora, the affidavit is silent as to where he was and when he went to Primary court. The delay for more than six months was not accounted in affidavit. That, from September-October there was a gap of where he was. He referred this court to page 7 of the decision given the court came up that given the situation, there must be account for delay. The counsel laments that this was not done in this case. He referred this court to the case of

Wambura N. J. Waryuba vs The Principal Secretary Ministry of Finance & Another, Civil Application NO. 320/01 of 2020 underscoring



the point. He strongly argued that there are 15 days apart from the six months not accounted for.

Mr. Rwegoshora arguing ground number 3 submitted that, the trial Magistrate did not at all consider the arguments of the respondent and no reasons were given for not considering their arguments. He said, the reasons are very important in determining a matter. In his view, in this case nowhere the trial Magistrate ever considered their prayers and arguments giving them reasons. He cited the case of **Tanzania Breweries Limited V Anthony Nyingi, Civil Appeal No. 119 of 2014 CAT at Mwanza** to buttress his point that, the decision of the trial court was arbitrary.

On the following reasons, Mr. Rwegoshora prayed the appeal to be allowed with costs.

Mr. Rumenyela for the respondent, strongly opposed the appeal and urged this court to dismiss it.

On the 1st ground Mr. Rumenyela told the court that they oppose this appeal because the issue of good cause was very well articulated and explained by the trial Magistrate.

On the issue of account for each day of delay, brief to the point Mr. Rumenyela agreed that is one reason but he was quick to point out that



it is not only limited to the grant because there may be other reasons. According to Mr. Rumenyela, the respondent has been in court for several years, and as such, the trial court was right in its decision.

On the 3rd ground, Mr. Rumenyela submitted in reply that, reasons were given and submissions were dully considered at page 2 the trial Magistrate stated to have considered very kindly. It was his view that, this appeal is devoid of any merits on what he termed that what the appellant wants to do is to avoid liability because they did not oppose the execution. He faulted the appellant for his move to frustrate the decree which is not part of the proceedings. In sum, Mr. Rumenyela prayed that this appeal be dismissed.

In rejoinder, Mr. Rwegoshora argued that execution was opposed during the execution and the court opened a duplicate file and even on hearing which is strange.

This marked the end of hearing of this appeal and the duty of this court now is to determine the merits or otherwise of this appeal. However, upon second reading of the record of appeal, I realized that, indeed, this appeal arises from an interlocutory decision of the District Court of Kigoma as such barred under the provisions of section 74(2) of the Civil Procedure Code, [Cap 33 R.E.2019], which bars an appeal of this nature. I thus,



posed here and invited the learned advocates for parties to address me on this point.

Mr. Rwegoshora upon given chance, readily conceded that the ruling subject of this appeal is interlocutory and prayed that this appeal be struck out with no order as to costs.

On other hand, Mr. Runyemera as well conceded that the instant appeal is barred and urged this court to struck out this application with no order as to costs because the point was raised by the court suo moto.

Indeed, as correctly noted and observed by this court and readily conceded by both learned counsel for parties, this appeal is incompetent for offending the provisions of section 74 (2) of the Civil Procedure Code. For easy of reference, the said section provides as follows:

"Section 74(2) Notwithstanding the provision of subsection (1) and subject to subsection (3), no appeal shall lie against or be made in respect of any preliminary or interlocutory decision or order of the District Court, Resident Magistrate's court or any other Tribunal, unless such decision or order has the effect of finally determining the suit."



Going by the literal interpretation of the above subsection 2 of section 74 is clear that the ruling subject of this appeal was an interlocutory order granting an extension of time and which order, did not determine the right of the parties, hence, falling squarely within the intention of the drafters of the above provision of the law. The subsection 2 was intended to bar unnecessarily appeals to orders which in a way create prolonged litigation and no doubt it did not determine any rights of the parties to its finality.

With that note and given the concession made by the learned counsel for parties, this court hereby finds the instant appeal misconceived and barred by law and same must be and is hereby struck out with no costs because it was the court suo moto which raised the point.

It is so ordered.

Dated at Kigoma this 21st day of April, 2023



S. M. MAGOIGA

JUDGE

21/04/2023