

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

CIVIL APPEAL NO. 177 OF 2022

(Originating from Ilala District Court in Misc.Civil Application No. 173 Of 2019)

ABDALA MAKAPU APPELLANT

VERSUS

RAIYA OMARI RESPONDENT

JUDGMENT

22nd March & 02nd May, 2023

BWEGOGGE, J.

This is an appeal against the ruling and order entered by the Ilala District Court in respect of an application for extension of time lodged by the applicant herein who intended to appeal against the decision of Ukonga Primary Court beyond the prescribed time.

The background of this case as depicted by the record of lower courts is as thus: Way back in 2013 the respondent bought a wood smoothing machine (planer) from Canada worth 11,000 USD (TZS 40,000,000/=). The respondent engaged the appellant herein who worked as the forwarding and clearing agent to clear the imported machine from the Dar es Salaam port. The respondent had paid the tariff and all charges required as claimed by the respondent. However, the respondent failed to hand over the imported tool. After the lapse of one year, the respondent received information that his worthy property was about to be auctioned by Tanzania Revenues Authority for her failure to pay fiscal charges. The respondent had conducted an inquiry and found out that his purported agent never paid a single cent in respect of payable import tariff and incidental charges. The respondent sought and obtained a loan to meet the due charges to the tune of TZS 13,500,000/= and redeemed her imported property.

Further, the record entails that the respondent commenced criminal proceedings against the respondent in 2016 for obtaining money by false pretence. The appellant was eventually found guilty and convicted forthwith. He was ordered to compensate the respondent to the tune of TZS 5, 800,000/= apart from his custodial sentence. It seems the

appellant had no financial capability to pay the adjudged sum. Hence, on 29th November, 2016, the appellant entered into an agreement with the respondent to pay the judgment debt by installments at the tune of TZS 500,000/= per month whereas he pledged his house as security. And, parties herein agreed in writing that the payable amount would be TZS 7,000, 000/-. However, the appellant, likewise, failed to discharge his covenanted obligation.

After three years lapsed, the respondent successfully commenced civil proceedings against the appellant in Ukonga Primary Court in Civil Case No 173 of 2019 for payment of debt. It was until the respondent took a step to execute her decree by attachment of the appellant's property that the appellant woke up from his long slumber and lodged an application for the extension of time in Ilala District Court in which he intended to appeal against the decision of the trial court. The first appellate court found that the appellant had failed to advance sufficient cause for his two years delay. Hence, this appeal.

In an attempt to defeat the decision of the first appellate court, the appellant preferred three grounds of appeal which may be reduced to two main grounds of appeal as hereunder rephrased:

- 1. The trial court erred in law and fact in dismissing the application for extension of time irrespective of the sufficient cause advanced by the appellant.*
- 2. The trial court erred in law and fact by not considering the plea of illegality which is apparent on the face of the records.*

The appellant and respondent were represented by Mr. Mlyambelele Abedinego Levi Ng'weli and Ngassa Ganja Mboje, learned advocates. The counsel preferred to argue the appeal by written submissions whose substance is recounted hereunder.

In support of the 1st ground of appeal, Mr. Ng'weli charged that the appellant had given sufficient and credible reasons for his delay to lodge his appeal whereas the first appellate court had failed to exercise its discretion judicially.

And, in support of the 2nd limb of his ground of appeal, the counsel alleged that the trial court judgment was tainted with illegality. In substantiating his allegation, the counsel argued as follows: **One**, the trial court erred in law in relying on the unstamped agreement entered by the parties herein which was admitted contrary to the law. The cases of **Josephat L. Lugaimukamu vs. Father Canute J. Muzuwanda** (1986) TLR 69, among others, were cited to validate the point. **Second**, the first appellate

court failed to consider the fact that there are two decisions made by the lower court involving the same parties herein and on the same subject matter. That the respondent had commenced Criminal Case No. 2437 of 2016 against the appellant whereas it was ordered that the respondent be compensated at the tune of TZS 5,800,000/=. And, later on, the respondent commenced Civil Case No. 173 of 2019 instead of executing the previous order. The counsel opined that the respective conflicting decisions and orders emanating from the two cases mentioned above amount to illegality. The case of **Eqbal Ebrahim vs Alexander K. Wahyungi**, Civil Application No. 235/2017 Of 2020 CA was cited to bolster the point.

In reply to the first ground of appeal, the counsel for the respondent countered that the decision of the trial court in Civil Case No. 173 Of 2019 was entered on 11 July, 2019. The application for the extension of time was filed more than 600 days which were not accounted for by the appellant. And, the first appellate court found no materials brought before it to exercise its discretionary power to grant the application for extension of time.

And, in contesting the 2nd ground of appeal, the counsel contended that non-stamping of admissible document by itself doesn't establish illegality.

The case of **Maxinsure (T) Limited vs Cuthbert Peter Sawe**, civil appeal No. 33 of 2022 HC (unreported) was cited to make a point. Otherwise, the counsel argued that the impugned agreement was not a sale agreement chargeable with stamp duty.

Further, the counsel contended that the criminal and civil cases commenced by the respondent at the trial court are two and different cases. That the respondent had two distinctive legal recourses to take against the appellant. The counsel opined that there is no illegality occasioned by the respondent's exercise of legal recourses available to her against the appellant. Likewise, the counsel opined that the decisions of the lower court in respect of the distinctive cases commenced by the respondent do not amount to illegality.

The issue for determination is whether the appeal herein is merited.

I find it pertinent to commence with the 2nd ground of appeal pertaining to the purported illegality in the proceedings commenced in the lower court. It was further alleged by the applicant's counsel that the amount of compensation awarded to the respondent in criminal and civil proceedings amounts to illegality.

The offences affecting the rights of a person in respect to his property such as stealing, cheating or obtaining money/ goods by false pretence, fraud etc, the criminal proceedings may be commenced and the accused can be brought to justice. Likewise, civil proceedings may be commenced in these types of cases for recovery of money or property to redress the loss occasioned to the claimant. Normally, criminal proceedings precede civil proceedings. The reason is not far to see; the public interest necessitates punishment of the wrongdoers to absolve the pain and anguish of the innocent victims while criminal events are still fresh in the mind of the members of the community involved. The conviction in criminal proceedings may later be admitted as *prima facie* evidence of facts stated therein subject to rebuttal by contrary evidence. Likewise, the conviction may be accepted as conclusive of the facts stated therein. I subscribe to the counsel for the respondent in that the criminal and civil proceedings are two and different legal recourse available to the victim of offences of the like nature as there are variations in rules of procedure and degree of proof.

It suffices to point out that criminal action is not a bar to civil proceedings. This assertion is not nebulous in our jurisdiction, as there are innumerable decisions of this court to that effect. In the decision of this court in

Eliakim Jonas vs Victoria Japhet (PC Civil Appeal No. 26 of 2016)

[2018] TZHC 2121 it was held:

"I am of the considered view that the award of compensation in a criminal case is not a bar to subsequent civil suit for damages resulting from a criminal act. Indeed, compensation awarded in criminal court cannot obstruct civil claim, if extra damages can be awarded for damage arising from the same criminal act to serve the purpose for which damages are awarded for, i.e bringing the claimant to the same position she was before the commitment of the wrong act."

See also the decisions of this court in **Mohamed Kasobi Nyonge vs Aziziv Magambo Rubale** (Civil Appeal 6 of 2022) TZHC 11767; **Tatu Kiungwe vs Kassim Madai** (2005) TLR 405 and **Razia Jaffer Ali vs Ahmed Mohamed Ali Sewji and Five Others** [2006] TLR 433.

The counsel for the respondent has asserted that the enforceable orders vouched by the lower court pertaining to the amount of compensation awarded to the respondent in criminal and civil proceedings resulted in conflicting decisions which in his opinion amount to illegality. I am of the considered opinion that in the case at hand, there are no conflicting

decisions, as in both proceedings the respondent was awarded damages though slightly differ in amount. Even in cases where the criminal proceedings result in the acquittal of the wrongdoer, and the claimant succeeds in civil proceedings, the opposing decisions are not equated to conflicting decisions in strict legal sense. I find myself obliged to borrow a leaf from the Indian case of **M.S Sheriff vs The State of Madras and Others** (AIR 1954 SC 379) whereas it was held:

"We don't consider that the possibility of conflicting decisions in the civil and criminal courts is a relevant consideration. The law envisages such eventuality when it expressly refrains from making the decision of one court binding on the other, or even relevant, except for certain limited purposes, such as sentence or damages. The only relevant consideration here is the likelihood of embarrassment."

The counsel for the appellant had directed the mind of this court to the case of **Eqbal Ebrahim vs Alexander K. Wahyungi**, Civil application No. 235/17 of 2020 CA (unreported) in inviting this court to find the purported conflicting decisions as a sufficient point of law to allow the extension sought. While reiterating the fact that there are no conflicting decisions involving parties herein, I am of the settled view that the case

cited herein is irrelevant in this case. In the said case the trial judge found that there were two contradictory decrees of the High Court and District Land and Housing Tribunal involving the same parties and the same subject matter which raised the issue of illegality necessitating the extension of time so that the alleged illegality would be ascertained and if established, be corrected

It was likewise alleged that the admission in evidence of unstamped written agreement entered by the parties herein by the trial court amounted to illegality in the decision of the trial court. The argument is based on the premise that the agreement entered by the parties herein was a chargeable instrument within the meaning of the law, specifically the Stamp Duty Act. Without dwelling on the issue of whether the agreement entered by the parties herein, in which the appellant bound himself to pay judgment debt by instalments, was the chargeable instrument or not, I am of the considered opinion that even without the impugned documentary evidence in the record, the respondent's case at the trial court remains unshaken. I opine so on the following grounds: **One**, the appellant never denied the fact that he bound himself to pay judgment debt by installments. **Second**, the conviction and sentence meted against the appellant in criminal proceedings in respect of the

fraudulent act committed against the respondent bolstered her claim in civil proceedings which ended in her favour.

I, therefore, on the foregoing, find the alleged point of law and, or illegality misconceived.

I now revert to discuss the 1st ground of appeal which avers that the trial court erred in law and fact in dismissing the application for extension of time irrespective of the sufficient cause advanced by the appellant. The record of this case entails that judgment which the appeal intended to appeal against was delivered on 11/7/2019 and the appellant lodged the application for the extension of time on 23rd December, 2021, over two years later. The reason given by the appellant for the delay was that he was convicted and sentenced to a custodial sentence in the criminal proceedings commenced by the respondent against her. Therefore, the time elapsed should be considered a technical delay. However, the applicant failed to enlighten the lower court when exactly he was subjected to the custodial sentence and the particular time he was released from prison. It is obvious that this crucial information still lacks in the pleadings and submissions made by the supplicant in this court. Thus, it is difficult to gauge the promptness of the appellant in taking legal action. I have gone through the record of the court of first instance. It is

in the record that the applicant was present in court during execution proceedings on 03/09/2019, 16/07/2021, 16/08/2021 and 07/09/2021. This fact negates the assertion that the custodial sentence imposed against the applicant prevented him from lodging the appeal and, or application for extension of time earlier.

The extension of time is granted for good and, or sufficient cause. The applicant was obliged to advance good and, or sufficient cause for his delay in filing an application herein to warrant grant of extension of time sought. The good cause encompasses factors such as the length of delay involved, reasons for the delay, and degree of prejudice, if any, that each party stands to suffer if the extension sought is granted, among others. See the cases of **Jubilee Insurance Company (T) Limited vs Mohamed Sameer Khan** (Civil Application 439 of (2020) [2022] TZCA 623, **Keith Horan and Another vs Zameer Sherali Rashid and 2 Others** (Civil Application 230 of 2019) [2019] TZCA 438 and **National Housing Corporation and 2 Others vs Jing Lang LI** (Civil Application 432 of 2017) [2021] TZCA 63. I need not reiterate that the applicant failed to establish that his delay in filing the appeal within the statutory time was for sufficient cause. It is obvious that the delay in filing the application herein is inordinate in the circumstances of this case. It is apparently clear

that the respondent would be prejudiced if she is unreasonably prevented to enjoy the fruit of her decree. Therefore, I find no ground to fault the decision of the lower court in refusing grant of extension sought.

In the event, I am of the considered opinion that the applicant has failed to furnish sufficient cause to warrant grant of extension of time in which he may appeal against the decision of the court of first instance. Consequently, I find the application herein without substance. The application is hereby dismissed with costs.

Order accordingly.

DATED at DAR ES SALAAM this 02nd day of May, 2023.




O. F. Bwego
JUDGE