

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

**(ARUSHA SUB-REGISTRY)
AT ARUSHA**

CIVIL APPEAL NO. 7 OF 2022

(Originating from the Resident Magistrates' Court of Arusha, Misc. Civil Application No. 38 of 2020)

ELIMWOKOZI DEVENGELWASA MMARI APPELLANT

Versus

ELISANIA WILLIAM NGAKENYA RESPONDENT

JUDGMENT

3rd & 19th May 2023

Masara, J

The Appellant herein has preferred this appeal in a bid to challenge the decision of the Resident Magistrates' Court of Arusha ("the trial court") dated 13/12/2021, which denied him extension of time to enable him to file an application for setting aside an *ex-parte* judgment. The *ex-parte* judgment and decree were issued by the trial court on 06/04/2020, after it was alleged that the Appellant deliberately refused to file the written statement of defence, despite being dully served. The decision of the trial court subject of this appeal was based on the fact that the Appellant failed to adduce sufficient reasons for the delay to warrant him the extension of time sought.

Dissatisfied by the decision of the trial court dismissing the application, the Appellant preferred this appeal on three grounds as hereunder:

- a) *That, Honourable magistrate error (sic) in law and fact by failed (sic) to account for each days of delays (sic) and (sic);*
- b) *That, Honourable Magistrate error (sic) in law and fact by holding that the appellant did not adduce sufficient reason for the delay; and*
- c) *That honourable magistrate error in law and fact (sic) by neglecting applicant allegation (sic) that the person who appear (sic) and claim to be applicant is not applicant (sic).*

Based on the foregoing grounds of appeal, the Appellant prays that the appeal be allowed by quashing and setting aside the decision of the trial court with costs.

At the hearing of the appeal, the Appellant was represented by Mr Godfrey Mushi, learned advocate. The Respondent did not enter appearance. Efforts to secure his attendance through a court summons proved futile. Advocate for the Appellant requested for a substituted service, which was granted. Service was then made through the *Mwananchi Newspaper* of 30/11/2022. Likewise, he never appeared. Hence the appeal was heard *ex-parte*, orally.

To appreciate the basis of the appeal, it is reminiscent of me to give an expose of facts which culminated to the filing of the application for extension of time subject of this appeal. Those facts are gleaned from the records availed to this Court and are briefly that: The Respondent is the

father of a child named Nancy Elisania William. On 17/01/2019, while getting back from school, the said Nancy Elisania William was involved in a road accident that was caused by the Appellant's vehicle, a Toyota Hiace with registration numbers T 791 AWJ, driven by one Salehe Hemed Mahumburi. She sustained serious bodily injuries as a result of the said accident. The injuries sustained by the victim included haematoma (bleeding in the brain), injuries on one leg and hand and other body parts. The Respondent paid regular visits to various private and government hospitals such as KCMC Moshi, NSK, Selian and Mount Meru, seeking his daughter's treatment and medication. She had to undergo specialized treatments; including several CT scans, brain surgeries to remove the blood stains and dressing up of the sustained wounds.

After the accident, the Appellant and his driver were criminally charged vide Traffic Case No. 5 of 2019. They were both found guilty, convicted and sentenced. The Appellant was found guilty for allowing his driver to drive his motor vehicle without a driving licence.

In the course of his daughter's treatment, the Respondent incurred expenses for both medications and taking care of her, both at the hospitals where she was admitted and at home. He and the victim also suffered mental anguish due to the accident as he had to abscond from

his employment which earned him financial gain. In order to realize the costs incurred and damages suffered in the process, the Respondent instituted Civil Case No. 57 of 2019 as next of kin of the victim, against both the Appellant, as the car owner, and his driver, Salehe Hemed Mahumburi. The Respondent claimed to be paid a sum of TZS 43,586,400/= as special damages arising out of costs incurred in the victim's treatment and loss of income and earnings while he was taking care of her. He also prayed for general damages plus costs of the suit.

As already said, the Appellant did not file written statement of defence nor did he enter appearance at the trial court. The case proceeded *ex-parte* against him and the driver. After hearing seven witnesses from the Plaintiff (the respondent herein), the trial magistrate was satisfied that the Appellant, being the owner of the motor vehicle, was vicariously liable for the negligent acts of his driver which caused the accident. He was ordered to pay special damages to the tune of TZS 43,586,400/= and general damages to the tune of TZS 20,000,000/=, making a total of TZS 63,586,400/=.

According to the Appellant, he was not aware of the aforesaid *ex-parte* judgment until 26/10/2020, when the Respondent served him with a demand letter claiming payment of TZS 63,586,400/= to satisfy the

decree of the court in Civil Case No. 57 of 2019. He intended to challenge the *ex-parte* decision of the trial court. The remedy available to him was to apply to the same court to set aside the *ex-parte* judgment. He did so on 22/12/2020 by filing Misc. Civil Application No. 38 of 2020 in the trial court seeking for an extension of time to file application to set aside the *ex-parte* judgment in Civil Case No. 57 of 2019. In its decision handed down on 13/12/2021, the trial court found that the Appellant failed to adduce sufficient reasons for the delay; thus, it dismissed the application. Aggrieved, the Appellant filed this appeal on the grounds stated above.

Submitting on the substance of the appeal, Mr Mushi challenged the trial court's decision for not holding that the person who appeared as Respondent was not the right one. He stated that the Appellant made two applications before the trial court; for setting aside the *ex-parte* matter which involved parties who were not rightful ones and for extension of time. That, the Appellant notified the court that the person who appeared as Elisania William Ngakenya was not the one, but his uncle, and he did not show any identification. The Appellant was tasked to confirm that he was not the one; he then communicated with NIDA who orally confirmed that he was not the one. It was his further argument that the trial court did not give them an order to take to NIDA for confirmation of the identity

of the Respondent. He insisted that the trial court erred by failing to consider their letter which would have helped the Appellant to prove that there was an imposter in court. He concluded by urging the Court to allow the Appellant's appeal.

As hinted earlier on, the Respondent was served through publication in Mwananchi Newspaper dated 30/11/2022 but he did not enter appearance. Since the Respondent failed to appear in Court, it is implied that he failed to defend the appeal filed against him. That notwithstanding, the Appellant has a duty to prove what he alleged in this appeal. That mandates me to determine the appeal based on the appellant's submission.

Determination of this appeal revolves around the issue whether the Appellant's appeal has merits. In his grounds of appeal, the Appellant faulted the trial court's decision for holding that he did not furnish sufficient reasons to warrant him the extension of time sought. The Advocate for the Appellant in his entire submission, seemed to rely more on the third ground of appeal; that is challenging the decision of the trial court on the ground that the person who appeared in the trial court representing himself as Elisania William Ngakenya, was not in fact the one.

That such fact was confirmed by NIDA, who could not issue a written confirmation for lack of an order from the Court.

I have examined the records and observed that at page 7 of the typed proceedings, Mr Mushi, on 26/08/2021, asked the trial Court to give them an order to go to NIDA to verify the identity of the person who appeared masquerading as Elisania William Ngenya. He also applied for summons to issue to the right person. Instead of issuing the requested order, the trial court all acceded to the second prayer. A summons was issued. As the alleged masquerade did not oppose it. The matter was then adjourned to 07/09/2021. When the matter came up on that day, the Applicant appeared without his advocate. The Respondent was recorded as present. It is not recorded whether the person who appeared subsequent to the summons order and was recorded as the Respondent is the actual respondent or the impugned one. Hearing of the Application proceeded by way of written submissions. Mr Mushi never appeared again and the issue of the imposter was not raised in the written submission until judgment was delivered on 13/12/2021.

While it is not the intention of this Court to condone the partiality with which the trial magistrate treated the allegations raised against the person who appeared as the respondent, I would also not condone the partiality

with which the Applicant's counsel approached the appeal before this Court. The application at the trial court whose decision is subject of this appeal was solely for extension of time. The record shows that parties in this appeal were the same parties in the trial court in respect of Civil Case No. 57 of 2019, whose decision was subject of Misc. Civil Application No. 38 of 2020. Parties thereat were Elisania William Ngakenya, suing as next kin of Nancy Elisania William who was the Plaintiff, while Salehe Hemed Mahumburi and Elimwokozi Devangilassa were the 1st and 2nd Defendants respectively. The proceedings of the trial court in respect of Misc. Civil Application No. 38 of 2020 dated 26/08/2021 reveal that the Appellant's counsel prayed for an order to verify the name of the Respondent. He as well, prayed for summons to Elisania Ngekenya William whereas the prayer was granted. When given opportunity to respond, the Respondent informed the court that he appeared in a number of cases and was registered with NIDA the past year. One would have expected the Applicant to pursue the matter to finality, the same way one would have expected the Court to address the issue raised. Apparently, the issue raised in ground three of the appeal herein was not determined by the trial court which was in the best position to call and verify the parties.

As indicated above, since the matter was not resolved by the trial court whether the Respondent herein is the same, this Court being, an appellate one, is not in a good position to pronounce itself on it. This position is not farfetched. The authoritative decision of the Court of Appeal in **Raphael Enea Mngazija (Administrator of the estate of the late Enea Mngazija) vs Abdallah Kalonji Juma, Civil Appeal No. 240 of 2018** (unreported) is instructive. It was stated as follows:

*"On the basis of the preceding cited authority, it is therefore settled that **this Court will only look into matters which came up in the lower court and were decided; not on matters which were not raised nor decided by neither the trial court nor the High Court on appeal.**"*(Emphasis added)

I am aware that this Court is empowered, all things being equal, to revisit what transpired at the trial and make its own decision. Unfortunately, there is nothing on record that would assist the Court to reach a conclusion that the trial court manifestly abrogated its duty to confirm the identity of the person before it. Counsel for the Appellant alluded to a letter they wrote to the trial court, that letter, however, is not part of the records and the Appellant did not annex it to his appeal.

The above notwithstanding, even if the Appellant was to succeed with the issue of the imposter, he still had a duty to satisfy the trial court that the

application for Although the Appellant's counsel did not elaborate the 1st and 2nd grounds, it is apparent that in the trial court the Appellant's main reason for the delay was that he was not served with the pleadings which led to the *ex-parte* judgment. That is, he did not know of the existence of Civil Case No. 57 of 2019 until he was served with the demand letter on 26/10/2020, dated 13/10/2020. That is what he deponed under paragraphs 2 and 3 of his affidavit. However, that was countered by the Respondent herein under paragraph 3 of his counter affidavit where he stated that the Appellant was dully served but he deliberately refused summons and he also defaulted appearance.

A glance on the affidavit in support of the application filed at the trial court leads to an impeccable conclusion that the delay to file for the setting aside of the *ex-parte* judgment was in ordinate. Simply put, nothing was said by the Appellant either in his affidavit or in his written submission regarding the period of delay from 26/10/2020, when he allegedly became aware of existence of Civil Case No. 57 of 2019, to the time the application was filed in the trial court. It is trite law that a party seeking to be granted extension of time has to show that he acted promptly from the time he became aware that he was time barred. That is the precedent in the case of **Sebastian Ndaula vs Grace Rwamafa (Legal Representative of**

Joshwa Rwamafa) Civil Application No. 4 of 2014, in which the Court of Appeal cited with approval its previous decision in **Royal Insurance (T) Limited vs Kiwengwa Strand Limited, Civil Application No. 116 of 2008** (both unreported) where it held:

*"It is trite law that **an applicant before the court must satisfy the court that since becoming aware of the fact that he is out of time, act very expeditiously and that the application has been brought in a good faith.**"* (Emphasis added)

The above legal position goes hand in hand with the principle that the Applicant, in extension of time application, must account for each day of the delay as pronounced in the famous case of **Bushiri Hassan vs Latifa Mashayo, Civil Application No. 3 of 2007** (unreported).

In the appeal at hand, the Appellant stated under paragraph 2 of his affidavit that he became aware of existence of Civil Case No. 57 of 2019 on 26/10/2020. As the record depicts, Misc. Civil Application No. 38 of 2020 was filed in the trial court on 22/12/2020, that is a period of more than 50 days. In both his affidavit and the written submission, the Appellant said nothing regarding the delay of those days. Suffice it to say that, the Appellant failed to account for each day of the delay. This threshold was underscored by the Court of Appeal in the case of **John**

Dongo and 3 Others vs Lepasi Mbokoso, Civil Application No.


14/1 of 2018 (unreported), where the Court stated *inter alia* that:

*"I do not agree with the counsel for the applicants that the two month's delay is not inordinate. **The applicants are required to account for each day of delay** from when sixty days within which they were supposed to file written submission without leave of the Court expired."*(Emphasis added)

Again, under paragraphs 5 and 6 of his affidavit, the Appellant contended that he stood to suffer irreparable loss if the application was denied. Nothing was said in the submission in support of the application portraying the irreparable losses the Appellant stood to suffer. That said, it is apparent that the Appellant failed to adduce sufficient grounds to warrant him the extension of time sought.

In sum, as I have endeavoured to demonstrate above, I endorse the findings of the trial court that the Appellant failed to demonstrate sufficient reasons for the delay to file the application to set aside the *ex-parte* decision dated 06/04/2020. Accordingly, I find this Appeal to be devoid of merits. It is hereby dismissed with no orders as to costs.




Y. B. Masara

JUDGE

19th May, 2023.