

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

AT DAR ES SALAAM

CIVIL APPEAL NO. 28 OF 2022

(Arising from the Resident Magistrates' Court of Dar es Salaam in Misc. Civil Application No. 137 of 2021)

ABRAHAM AUGUSTO LUPIA APPELLANT

VERSUS

UPENDO TAINOSY KYANDO..... 1ST RESPONDENT

DAVIS OSWARD MSANGI..... 2ND RESPONDENT

JUDGMENT

06th July & 05th October, 2023

BWEGOGGE, J.

This is an appeal lodged by the appellant herein seeking to defeat the decision of the Resident Magistrates' Courts of Dar es Salaam in Misc. Civil Application No. 137 of 2021 which granted an extension of time for the respondents herein to lodge an application for setting aside an *ex parte* judgment entered against the same in Civil Case No. 56 of 2020.

The facts of this case, albeit briefly, are as follows: The 1st respondent herein is the spouse of the appellant herein. Allegedly, the 1st respondent parted company with the appellant and cohabited with the 2nd respondent.

Consequently, in 2020, the appellant herein commenced civil proceedings (Civil Case No. 56 of 2020) in the Resident Magistrates' Court of Dar es Salaam against the respondents herein claiming for specific and general damages for adultery, among other. The respondents failed to file defence within statutory period. The trial court had granted extension of 10 days for the respondents' counsel to file defence. Likewise, the respondents' counsel failed to file defence within the specified period. Further prayer for extension of time was refused.

The respondents' counsel instituted formal application (Misc. Civil Application No. 146 of 2020) for extension of time within which the same would file defence out of prescribed time. The application was successfully objected on ground that the trial court was *functus officio* to preside the matter.

Undaunted, the respondents appealed in this court. The appeal was dismissed on technical ground at the earliest stage. And, the main suit (Civil Case No. 56 of 2020) proceeded *ex parte* and eventually concluded in the trial court. Later on, the respondents filed the application (Misc. Civil Application No. 137 of 2021) for extension of time within which to institute the application for setting aside the *ex parte* judgment. The

application was granted. The appellant was not amused. Hence, this appeal.

The appellant herein lodged a single ground of appeal as thus:

- 1. The learned trial magistrate erred in law and fact by granting the respondents the extension of time within which to set aside the exparte judgement based on the insufficient ground.*

The appellant fended for himself whereas the respondents were represented by Mr. Ambrose Nkwera, learned advocate.

Mr. Lupia, the appellant herein, in a bid to substantiate the appeal herein, submitted that the learned resident trial magistrate erred in granting the extension of time based on the ground that the main case (Civil Case No. 56 of 2020) proceeded with hearing while the appeal (Civil Appeal No. 305 of 2020) was pending in this court whereas the said appeal emanated from a different case (Misc. Civil Application No. 146 of 2020). That the ground upon which the trial court hinged its grant of extension is that the trial court, in proceedings with the hearing of a suit while there was a pending appeal (on interlocutory order), amounted to illegality. The appellant opined that the presence of an appeal in this court doesn't operate as an order for a stay of proceedings in the lower Court. The appellant directed the mind of this court to the provisions of Order XXXIX, rule 5 (1) of the CPC to bring his point home.

Further, the appellant submitted that the appeal (Civil Appeal No. 305 of 2020) lodged in this court was not tenable in law having emanated from an interlocutory order. That upon appearing in this court, he raised the preliminary objection on point of law to that effect and the counsel for the respondents conceded thereto. Consequently, this court struck out the appeal. Therefore, the trial court based its extension order on something which never existed.

In tandem with the above, the appellant enlightened this court that the respondents filed Civil Application No. 146 of 2020 requesting the trial Court to extend time in which the same would file defence out of time. That the respective application was struck out on the ground that the trial court was *functus officio*. Moreso, the appellant clarified that the appeal (Civil Appeal No. 305 of 2020) was instituted to challenge the decision of the trial court in Civil Application No. 146 of 2020, not the main suit (Civil Case No. 56 of 2020) which was pending in the subordinate court.

Based on the above, the appellant opined that there was no sufficient ground to grant an application for extension of time. He prayed that the appeal herein be granted and the decision and orders entered by the trial Court be quashed and set aside.

On the other hand, Mr. Nkwera submitted that the essence of this appeal is based on the premise that the trial Court, vide Civil Application No. 137 of 2021, granted the respondent leave to file an application to set aside *ex parte* judgment out of time. That it should be noted that grant of extension of time is at the discretion of the court based on good grounds demonstrated by the applicant. That the applicant in the impugned decision, raised a plea of illegality which, as well known, is the best ground for extension of time. The counsel referred the case of **A.G. vs. Emmanuel Marangakisi and 3 others**, Civil Appeal No. 138 of 2019 [2019] TZCA 185 to bolster the point.

The counsel enlightened this court that the impugned decision entered by the trial Court is to the effect that it was prudent, as a matter of legal practice, the proceedings in the lower court to have been stayed pending the determination of the appeal which would have an adverse effect on the respective suit. The counsel asserted that it is the legal practice that the pendency of appeal has the effect of staying proceedings in the lower Court. Hence, for this ground, the trial court found it prudent that the extension of time be granted.

The counsel concluded by opining that the appeal herein is misconceived. And, he enlightened this court that the trial court having extended time

in which the respondent would file an application to set aside the exparte judgment, the respondent successfully lodged an application to set aside exparte judgment. Therefore, the application herein has been taken by event. The case of **Yusto Levilian Kaijage vs. Abdi Mshangama**, Land Revision No. 07 of 2022) [2022] TZHC LandD 264, was cited to validate the assertion. He prayed the appeal herein be dismissed with costs.

In rejoinder, the appellant replicated his earlier stance which I find it needless to reiterate herein.

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

The record of the trial court entails that the application lodged by the respondents in the lower court was made under the provision of section 14(1) of the Law of Limitation Act [CAP. 89 R.E.2019]. The relevant provision provides as thus:

*"Notwithstanding the provisions of this Act, **the court may, for any reasonable or sufficient cause**, extend the period of limitation for the institution of an appeal or an application, other than an application for the execution of a decree, and an application for such extension may be made either before or after the expiry of the period of limitation prescribed for such appeal or application."*
[Emphasis supplied].

The above revisited provision in no uncertain terms instructs that the extension of time of limitation for the institution of the application may only be granted for reasonable or sufficient cause. The court is vested with a legal obligation to judiciously determine what amounts to reasonable or sufficient cause based on the circumstances of the case. See also the cases of **Wambele Mtumwa Shahame vs. Mohamed Hamis** (Civil Reference 08 of 2016) [2018] TZCA 39 and **Bertha Bwire vs. Alex Maganga** (Civil Reference 07 of 2016) [2017] TZCA 133 and **Tanga Cement Company Ltd vs Jumanne Masangwa & Another**, Civil Application No. 06 of 2001, CA (unreported) . Particularly, in the case of **Wambele Mtumwa Shahame vs. Mohamed Hamis** (supra), the Apex Court opined:

"It is trite that extension of time is a matter of discretion on the part of the Court and that such discretion must be exercised judiciously and flexibly with regard to the relevant facts of the particular case. Whilest it may not be possible to lay down an invariable definition of good so as to guide the exercise of the Court's discretion, the Court is enjoined to consider, inter-alia, the reasons for the delay, the length of the delay, whether the applicant was diligent and the degree of prejudice to the respondent if time is extended."

Further, the Court citing the decision in the case of **Shanti vs. Handocha** [1973] EA 2007, said:

*"The position of an application for extension of time is entirely different from an application for leave to appeal. He is concerned with showing **"sufficient reason"** why **he should be given more time** and the most persuasive reason he can show is that the delay has not been caused or contributed to by dilatory conduct on his part. But there may be other reasons and these are all matters of degree."*

I would now revert to the record of this case to ascertain whether the respondent's case in the trial court met the legal test aforesaid. The record of the lower court entails that the respondents advanced two main grounds for the grant of extension. **First**, the impugned ex parte judgment of the trial court was tainted with illegality in that the judgment was delivered without notice being given to the respondents as the case was heard ex parte while the appeal (Civil Appeal No. 305 of 2020) was pending in the High Court. **Second**, the respondent was denied the right to be heard.

The trial principal resident magistrate found that the respondents failed to account for the whole period of delay. Likewise, the same found that the allegation of denial of the right to be heard was unfounded as the respondents failed to file defence within the prescribed period though extension was provided and no valid grounds for failure to file defence

were given by their counsel. In the same vein, the allegation that the respondents were not notified of the date of judgment was found to be without substance in that evidence of service of notice of the date scheduled for judgment was duly communicated to the respondents.

However, the trial principal resident magistrate changed course and found that the trial court had proceeded with a case *ex parte* while there was a pending appeal in this court. For this sole ground, the extension was granted. The pertinent question arising herein is whether the finding of the trial court was justifiable.

The appellant contended that the purported appeal arose from the Application Case No. 147 of 2021. That the purported appeal was struck out by this court at the earliest opportunity whereas the main suit (Civil Case No. 56 of 2021) proceeded to finality. The record entails that when the respondents failed to file defence having granted extension of time, the suit proceeded *ex parte*. The application for further extension of time in which to file defence was refused. Then the respondents filed Application Case No. 146 of 2020 seeking the extension through the back door. The proceedings were successfully objected on the principle of *functus officio*. Consequently, the application was dismissed.

Based on the above facts, I join hands with the appellant in that there was nothing to impede the trial court from proceeding with the main suit. Likewise, the purported appeal having struck out at the earliest opportunity, I find no cogent ground to fault the trial court for proceeding with *ex parte* hearing of the main suit.

It follows, therefore, that the allegation made by the appellant in that the trial principal resident trial magistrate had extended time based on the flimsy ground of purported illegality has substance. Undeniably, illegality of the decision sought to be challenged constitute sufficient cause for extension of time as per the principle enunciated in the case of **Principal Secretary, Ministry of Defence & National Service vs. Devram Valambia** [1992] TLR 185. However, for the above principle to apply, the point of law must be:

".....that of sufficient importance apparent on the face of record, such as the question of jurisdiction not one that would be discovered by the long-drawn argument or process." See the case of **Principal Secretary, Ministry of Defence & National Service** (*supra*).

Based on the principle revisited above, as aforesaid, it is my considered opinion that the ground of illegality invoked by the trial principal resident magistrate to grant the impugned extension of time was misconceived. It suffices to point out that, taking into consideration in the circumstances

of the case before the trial court, there was no good ground demonstrated to warrant extension of time granted to the respondents.

Before I pen down, I wish to address the issue raised by the respondent's counsel in that the matter herein has been taken by event. The counsel stated that, while this appeal was pending, the respondents successfully filed an application to set aside the *ex parte* judgment. The counsel referred the mind of this case to the Land Revision Case No. 07 of 2022 between **Yusto Levilian Kaijage vs. Abdi Mshangama** (*supra*) to bolster his point in that the matter herein has been taken by event.

Admittedly, in the case of **Yusto Levilian Kaijage vs. Abdi Mshangama** (*supra*) this court dismissed an application for revision on the ground that the impugned eviction/demolition order sought to be vacated had been executed prior to the institution of the relevant application in this court, rendering the matter without purpose to serve. The circumstances in the above case are different from the circumstances of this case. Hence, the rule invoked thereof cannot apply herein.

I, therefore, refuse to purchase the assertion made by the respondent's counsel in that the appeal herein has been taken by event. The respondent's counsel herein regularly appeared in this court for the respondents. The same appears in the record of the lower court to have

been prosecuting the application for setting aside the impugned exparte judgment to its finality. Therefore, the respondent's counsel was aware of the pending appeal herein which has the effect of rendering the purported preemptive proceedings nugatory, but opted to proceed with his endeavour. He had acted at his own peril. The same cannot be heard telling this court that the appeal herein has been taken by event. I find it strange that the counsel herein having forcefully asserted that the legal practice entails that the pendency of appeal in the superior court has the effect of staying the proceedings in the subordinate court, he now contradicts himself by seeking to justify his preemptive legal action. It suffices to point out that the appeal before this court would not be rendered nugatory merely on account of the preemptive legal action taken by the respondent's counsel herein.

That said, I find the appeal herein meritorious. Consequently, the appeal herein is hereby allowed. The decision and orders entered by the lower court are hereby quashed and set aside.

I so order.

DATED at **DAR ES SALAAM** this 05th day of October, 2023.



A handwritten signature in black ink, appearing to read "O. F. Bwego", is written over the printed name.

O. F. BWEGOGHE

JUDGE