

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA SUB-REGISTRY

AT ARUSHA

PC CIVIL APPEAL NO. 11 OF 2023

*(C/F Revision No. 5 of 2022 before District Court of Arusha at Arusha originating from
Arusha Urban Primary Court Probate Cause no. 235 of 2021)*

ABEID IBRAHAIM OMARY.....APPLICANT

VERSUS

HAWA HASSAN MSANGI.....1ST RESPONDENT

HERRY ABDALLAH KAGONJI.....2ND RESPONDENT

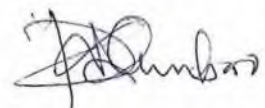
JUDGMENT

27th October, & 16th November, 2023

D. D. NDUMBARO J.

The appellant in this case is aggrieved with the decision of the ruling of the District Magistrate Court to allow the application of an extension of time without leave to apply extension of time.

The matter originated from Primary Court, whereby the applicant claimed against 1st and 2nd respondent Tsh. 20,501, 450 for a supply of fish which respondents failed to repay. The matter was instituted before the primary court, Civil Case No. 235 of 2021. 1st Respondent failed to appear



but 2nd respondent appeared and it was determined in her absence. On 27/09/2021 and ordered to pay the stated amount

The 1st respondent filed an application on 17/06/2022 to set aside the ruling claiming that the matter was determined ex parte, the trial court upheld the application and set aside the ruling on 24/06/20022 without considering an application for leave to extend time as the respondent was out of time for 269 days. The trial court set aside the ruling on the ground that part was not given the right to be heard. She was never served with summon.

The trial court agreed that the requirement for an application for an extension of time to set aside ex parte judgment out of time before making application for settings aside ex parte judgment was mandatory, but due to an anomaly on the ex parte judgment as to respondent was not served with a summons, such anomaly vitiate proceedings as respondent constitution right was infringed.

the appellant brought before this court three grounds as

1. The application to set aside was improper before the law
2. The District Court dismissed without considering that the trial court set aside ex parte judgment without leave to apply extension of time

3. The District Court dismissed the revisional application with the reasons that the trial court was heard exparte.

During the hearing, the appellant enjoyed the service of Advocate Hamis Mkindi and 1st respondent presented by Advocate Kazi Ikoda and 2nd respondent Advocate Ebrahim Kuisenge.

The appellant in his submission argued that the trial court set aside exparte judgment civil case no. 225 of 2021 without extending time contrary to law (The magistrates court, Civil Procedure in primary court) Rules GN. 310/1963 and Law of Limitation Act part III item I, which require an extension to be made within 45 days, this anomaly need to be rectified by this court.

That exparte order was made for the non-appearance of the respondent who disputed being not served with a summons to appear and defend the suit. cited a case of **Cosmas Oladi Mlungu Vs Chama Cha Madereva Wa Bajaji Victoria**, Pc Civil Appl. No. 47 of 2021 (unreported) in support of his argument.

In responding to the argument respondent faulted that, she was not served with a summons therefore her right to be heard where violated. In



supporting her argument cited the case of **Mbeya Ruvuma Autoparts and Transport Limited vs Jestina George Mwakyoma (2003) TLR.**

After going through the submission of both parties and considering the judgment in the trial court and district court, proceedings and attached document thereto. No dispute that appeals on the trial court were allowed without considering leave to apply for an extension of time, contrary to the law. The question is whether court procedure on extension of time can be undermined by parties constitutional rights to set aside *ex parte* award on ground that the right supersedes any other law.

The answer to this is well articulated in the case of **DPP vs. Benard Mpangala & 2 Others, Criminal Appeal No. 28 of 2001, CAT at Dar es Salaam (Unreported)**

It is important to note that, the question as to the limitation of time touches the jurisdiction of the Court to adjudicate the matter and therefore it cannot be considered as a technicality.

As a matter of law, the appellant upon realizing that he was out of time, the remedy was to seek an extension of time to lodge an application to set aside the said *ex parte* judgment.

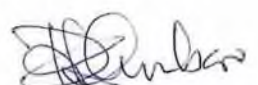


Further in the case of **Zuberi Mussa vs Shinyanga Town Council, Civil Application No. 100 of 2004 (unreported)** which addressed the purposive approach in interpreting article 107A (2) (e) of the Constitution as follows: "...

In our decided opinion, article 107A (2) (e) is so couched that in itself is both conclusive and exclusive of any opposite interpretation. A purposive interpretation makes it plain that it should be taken as a guideline for court action and not as an iron clad rule which bars the courts from taking cognizance of salutary rules of procedure which when properly employed help to enhance the quality of justice delivered."

From the above analysis, it **cannot** be said that there was no need for an application for an extension of time because the party was denied the constitutional right to be heard.

The appellant raised concern on 1st page last paragraphs of his written submission in chief that *"The court heard suit exparte against 1st respondent following her non-appearance here in dispute been served with a summons to appear in defend the suit"*



Analyzing the fact through the court record shows, in the district court ruling page 2 last paragraph and page 3, 1st paragraph 1st line a similar fact was clearly stated as

"The court heard the suit exparte following nonappearance of the respondent herein, despite being served with a summons to appear and defend the suit".

The statement that *was served but failed to appear* makes me go further into looking as to whether a summons was issued to the appellant in the trial court. I found a copy of the summons dated 19/11/2021 from the trial court file with certification, signature and mobile number 0785333882 accompanied by the wording *"the respondent refused to accept the issued summons on 2/11/2021"*,

Based on the above findings on proof of service by a court, the respondent was served and refused to accept service she cannot deny the court service rule of court procedure must be observed. This can be supported by the case of **Harsh Energy (T) Ltd vs Khamis Maganga, Civil Appeal No. 181 of 2016** The Court of Appeal observed that:

The trial Court acted without jurisdiction to entertain an appeal without considering the application of extension of time contrary to section (14 (1)) of the law Limitation Act cap 89, further, under Order IX Rule 9 of the Civil Procedure Code, Cap 33 R.E 2022, the remedy available



against an ex parte judgment is to file an application to set aside the same.

*In the case of case of **Moshi Textile Mills vs de Voest [1975] LRT***

17 it was held that

"The applicants ought to exercise such remedy before resorting to the high court to challenge the judgment which was entered ex parte. He made reference to the to buttress his position".


Based on the above analysis I, therefore, upheld the appeal, I quashed and set aside the ruling of the district Court Arusha at Arusha and restored the decision of Arusha Urban Primary Court vide Civil case no 235 of 27/09/2021.

Each part shall bear its own cost.

It is so ordered.

Parties have been informed of the right to appeal.




D.D. NDUMBARO
JUDGE

