

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

**AT DAR ES SALAAM**

**CIVIL APPEAL NO. 149 OF 2022**

*(Appeal against the Ruling and Drawn Order of the Resident Magistrate  
Court of Dar es Salaam at Kisutu (Hon. E. N. Kyaruzi, PRM) dated 12<sup>th</sup>  
September 2022 in Misc. Civil Application No.65 of 2022)*

**RAHABU ERNEST RUBAGO..... APPELLANT**

**VERSUS**

**VICTORIA FINANCE PLC.....RESPONDENT**

**JUDGEMENT**

*Date of Last Order: 30/10/2023*

*Date of Ruling: 10/11/2023*

**MWAKAPEJE, J.:**

The appellant, aggrieved by the decision of the Resident Magistrates Court of Dar es Salaam at Kisutu in Misc. Civil Application No. 65 of 2022 appealed to this Court. In her appeal, she raised four (4) grounds of appeal as follows:

- (a) The Honourable Magistrate erred in law and in fact for holding that the Appellant's affidavit did not reflect the fact that the decree was issued to the Appellant on 08 March 2019 despite having earlier noted that it was on 12

December 2021 when it came to Appellant's knowledge that the Respondent was running a Civil Case No.64 of 2018 against the Appellant hence the Appellant could not have been possibly issued with a Decree on 08 March 2019.

- (b) That the Honourable Magistrate erred in law and in fact for holding that the Appellant did not give an account of delay from 08 March 2019 (date of issue of ex-parte Decree) up to the date when the Application (subject of this Appeal) was filed despite having earlier noted that it was on 12 December 2021 when it came to Appellant's knowledge that the Respondent was running a Civil Case No.64 of 2018 against the Appellant and hence the Appellant could not have possibly given an account of delay from 08 March,2019.
- (c) That failure to take Judicial Notice of the fact that Misc. Application No.65 of 2022 (subject of this Appeal) filed on 12 May 2022 for an extension of time to set aside the ex-parte judgment was the Appellant's second attempt after a previous failed in Misc. Application No.4 of 2022 was filed on 28 January 2022 and struck out on 5 May 2022 for technical grounds.

- (d) The Honourable Magistrate erred in law and fact for refusing to grant an extension of time to set aside an *ex-parte* judgment despite serious allegations of illegality regarding the proceedings giving rise to the said judgment.

It is from these grounds that the appellant is praying for orders that the decision of the trial court be quashed and set aside; and grant her an extension of time within which to file an application to set aside *ex parte* judgment in Civil Case No. 64 of 2018 at the Resident Magistrate's Court of Dar es Salaam at Kisutu; costs of this appeal; and any reliefs this Court deems fit and just to grant.

Before I proceed with the determination of the appeal at hand, I wish to state a summary of the history behind this appeal. On 08 September 2016, the Appellant and Respondent entered into a loan agreement. The Respondent advanced the Appellant a loan amounting to **TZS 20,000,000/=** which was supposed to be re-paid at an interest rate of 3.5% per month. The total amount to be paid was **TZS 28,399,992/=** which was to be serviced for twelve months at an equal instalment of **TZS 2,366,666/=** per month.

The Appellant did not honour the terms and conditions of the loan agreement as she defaulted to repay the said loan as agreed. On 21

March 2018, the Respondent filed a Civil Case No. 64 of 2018 claiming for the outstanding balance which included the Principal amount, penalties and interests that had accumulated to the tune of **TZS 32,763,207.5/=** against the Appellant.

When the case was called for a hearing, the Appellant's whereabouts to attend court to defend herself were unknown. This pushed the trial court to proceed and determine the matter before it *ex parte*. On 11 December 2018 the *ex parte* judgment was entered against her. Upon execution of the judgment through arrest and detention, the Appellant managed to file an application for an extension of time within which to file an application to set aside an *ex parte* judgment in Civil Case No. 64 of 2018. The same was dismissed for lack of merits and failure of the Appellant to account for delayed days, hence this appeal in this Court.

This matter was disposed of by way of written submissions. In her submission in chief, the Appellant, on the first ground of appeal, stated that she was not present when Civil Case No. 64 of 2018 was prosecuted. She further stated that at the time when *ex parte* judgment was entered against her on 11 December 2018. She contends that when she applied for an extension of time within which to apply for setting

aside the *exparte* judgment, she did not know of the existence of Civil Case No. 64 of 2018 until 12 December 2021 at the execution stage.

On the second ground of appeal, the Appellant contended that the learned trial magistrate erred in holding that the applicant did not give an account for his delay while the same took note of the fact that the Appellant never knew that the Respondent was prosecuting Civil Case No. 64 of 2018 against her until 12 December 2021. She moreover, disputes the fact that she was supplied with a copy of the decree indicating that the same was issued to the Appellant on 08 March 2019. The appellant further stated that it was wrong for the trial court to expect her to give an account for delay from 08 March 2019 the date the decree was issued against her while she was not informed.

On the third ground of appeal, she cries out that the trial court could have taken judicial notice of the fact that Misc. Application No.65 of 2022 (subject of this Appeal) filed on 12 May 2022 for an extension of time to set aside the *exparte* judgment was the Appellant's second attempt. The first attempt which failed was in Misc. Application No.4 of 2022 which was filed on 28 January 2022 and struck out on 5 May 2022 for technical grounds. The appellant is of the view that since Misc. Application No.4 of 2022 was dismissed on 05 May 2022 with leave to

refile the same, the trial Magistrate could have treated the delay to apply for an extension of time to set aside the *ex parte* judgment from 12 December 2021 to 12 May 2022 as a mere technical delay and not a real or actual delay. In support of his argument, he referred to the case of **Fortunatus Masha vs William Shija and Another [1997] TLR 154** quoted with approval by the approval of the Court of Appeal in the case of **Emmanuel R. Maira vs The District Executive Director Bunda District Council (Civil Application 66 of 2010) [2010] TZCA 87**. According to the applicant, from the time she knew of the fact that there was a decree against her on 12 December 2021, she timely pursued her rights.

On the fourth ground of appeal, the appellant was of the view that the trial magistrate erred by refusing to grant an order for an extension of time despite raising the point of serious illegality in respect of the proceedings giving rise to the said ruling. Under this, the appellant contends that she was not heard which is one of the three factors to grant extension, the other two being jurisdiction and limitation as was stated in the case of **Charles Richard Kombe vs Kinondoni Municipal Council (Civil Reference No. 13 of 2019) [2023] TZCA 137**.

In the appeal at hand, the Appellant stated that she was denied unjustifiably of her right to be heard since there were no personal services to summons, substituted service was done in contravention of Order V Rule 16(1) of the CPC and that she was not notified of the date of pronouncing the *exparte* judgement as was stated in **Abutwalib Musa Msuya & Others vs Capital Breweries Ltd & Others (Civil Revision 2 of 2012) [2016] TZCA 549**. According to the appellant, the violation occasioned injustice to her by unjustly denying her the right to be heard.

On the other hand, the Respondent submitted on the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> grounds of appeal that as it has been properly recorded in the Ruling, the Appellant became aware of the *exparte* Judgement in Civil Case No.64 of 2018 on 08 March 2019 and that she was served with the said Decree on the same date (08 March 2019) and not 12 December 2022. The Respondent further submits that the Appellant kept ignoring the said Decree without taking any action until the Respondent opted to take further action to execute the same and served the Appellant with the Court Order to arrest and detain her in prison until the full amount in satisfaction of the Decree is paid.

In support of his submission, the Respondent cited two cases of ***Lyamuya Construction Company Limited vs. Board of Registered Trustees of Young Women's Christian Association of Tanzania, Civil Application No.2 of 2010 (CAT), (Unreported)*** and that of ***Mary Mbwambo and Another Vs. Mbeya Cement Ltd [2017] TLS LR 277***. In the **Lyamuya** case the Court had this to say;

*"As a matter of general principle, it is in the discretion of the Court to grant an extension of time. But that discretion is judicial, and so it must be exercised according to rules of reason and justice, and not according to private opinion or arbitrarily. On the Authorities, however, the following guidelines may be formulated: -*

- (a) The Applicant must account for all the period of delay*
- (b) The delay should not be inordinate*
- (c) The Applicant must show diligence, and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take*
- (d) If the court feels that there are other sufficient reasons, such as the existence of a point of law of sufficient*



*importance; such as the illegality of the decision sought to be challenged”.*

The Respondent further stated that, according to evidence on the record, the Court summoned the Appellant to appear to defend her case, the efforts which proved futile. As a result, the Court used a substituted means of publishing the summons in the Mwananchi Newspaper dated 19 July 2018. The Respondent supported this argument by quoting **Lyamuya’s case (supra)** which stated that it is the discretion of the Court to grant an extension of time. But that discretion is judicial, and so it must be exercised according to rules of reason and justice, and not according to private opinion or arbitrarily.

The Respondent further stated that in applications for an extension of time to appeal out of time, one has to establish sufficient /or good cause to enable the Court to exercise its discretionary jurisdiction. Factors for a good cause were well established in the case of **Joel Silomba vs Republic, (Criminal Application 5 of 2012) [2013] TZCA 332**, to be;

*"(i) "the length of the delay;*

*(ii) the reason for the delay, was the delay caused or contributed by the dilatory conduct of the applicant?*

*(iii) whether there is an arguable case, such as, whether there is a point of law or the illegality or otherwise of the decision sought to be challenged; and*

*(iv) the degree of prejudice to the opposite party if the application is granted."*

The Respondent also contended that, since it is the already established principle that whoever seeks to enlarge time, he ought to have taken steps within time that the delay was not caused by his fault. He cemented his argument with the case of **Mary Mchome Mbwambo & Amos Mbwambo vs Mbeya Cement Company Ltd (Civil Appeal 161 of 2019) [2022] TZCA 179.**

On the illegality factor, the Respondent was of the opinion that the issue of illegality found on the face of record amounts to an extension of time but the said avenue is subject to limitations that include that the applicant must show clearly and plead in her application that the matter involves illegality on the face of the record and not the otherwise as stated in the case of **Mary Rwabizi t/a Amuga Enterprises vs National Microfinance Plc (Civil Application 378 of 2019) [2020] TZCA 355.** It is the prayer of the Respondent that the Appeal is devoid

of merit and the same should be dismissed with costs in favour of the Respondent.

In rejoinder, the Appellant reiterated what he submitted in chief and she stated further that in Misc. Application No. 65 of 2022 stipulated issues of illegality in Paragraphs 3, 4(a)&(b), 5 and 6 of her Affidavit. The Appellant further submitted that her contentions were right since the Respondent has not disputed the fact that there was no personal service summons requiring her to enter an appearance, substituted service was done in contravention of Order V rule 16(1) of the CPC and that she was not notified of the date of the pronouncement of *exparte* judgement. She maintained her prayers as in her submission in chief.

Having heard the parties, it is clear from the above fact that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> grounds of appeal stemmed from the fact that the delay to file an application for the extension of time within which to file an application setting aside the *exparte* judgement was caused by the appellant's having no knowledge of the existence of a case against him. I am now obligated to answer the question as to whether the appellant has shown good cause for delay.

According to Paragraph 5 of Part III of the Schedule to the Law of Limitation Act, Cap. 89 [R.E 2019], the period of limitation to set aside

the *ex parte* Decree is thirty (30) days from the date it was pronounced. The *ex parte* judgement in Misc. Application No. 64 of 2018 was entered on 08 March 2018 and the Appellant, on the other hand, applied for an extension of time within which to apply to set aside the *ex parte* judgement on 12 May 2022. The reason for her delay was the fact that she did not know of the said Civil Case No. 64 of 2018, until 12 December 2021. The appellant contends that after she became aware of the said case, on 28 January 2022 she applied for setting aside the *ex parte* judgment which was struck out on 05 May 2022 and later refiled on her application on 12 May 2022.

As a general principle, it is the discretion of the Court to extend the time limit. It follows therefore that, in an application for extension of time, the applicant has to advance good cause for the Court to exercise its discretionary powers. However, good cause has never been defined, rather is a question of fact, depending on the facts of each case (**See Hyasintha Malisa Versus John Malisa, Civil Application No. 167/01 of 2021 TZCA.**

The Court of Appeal has propounded what amounts to good cause. Factors to consider as good cause for the grant of application for an extension of time are those listed in the case of **Lyamuya (*supra*)**.

More so, and as a principle of law, the applicant for an order of an extension of the time of limitation has to account for each day of delay as stated in the case of **Bushiri Hassan vs. Latifa Lukio Mashayo, Civil Application No. 3 of 2007 (unreported)**.

In the application at hand, the appellant contends the main reason for the delay was that she was not aware of the fact that she was being prosecuted in Civil Case No. 64 of 2018 neither was she aware of the decree on *ex parte* judgment rendered against her on 11 December 2018. This hindered her from applying for setting aside the said *ex parte* judgment on time.

The appellant also in her affidavit stated that she did not know that a decree was executed against her until when she was arrested. This fact was not disproved by the Respondent. What the Respondent stated was that the Appellant had knowledge but was negligent in taking action on time. In addition, apart from summoning the Appellant on substituted service, there is no proof that there was personal service which is the preferred mode as was stated in the case of **Abutwalib Musa Msuya & Others (supra)** this fact was as well not disproved by the Respondent. For one to know that there is a case against them, he has to be summoned to attend and defend his case according to Order V

Rule 8 of the Civil Procedure Code, Cap. 33 [CPC - R.E. 2019]. Where challenges as to service occasion to the satisfaction of the court, the court may use substituted service under Order V Rule 16(1) which provides for substituted service. The same reads-

*"16.-(1) Where the court is **satisfied that there is reason to believe that the defendant is keeping out of the way to avoid service** or that, for any other reason, **the summons cannot be served ordinarily**, the court shall order the summons to be served by affixing a copy thereof in some conspicuous place in the court-house and also upon some conspicuous part of the house (if any) in which the defendant is known to have last resided or carried on business or personally worked for gain or in such other manner as the court thinks fit."***[Emphasis Supplied]**

In the case at hand, we are not told how the Appellant knew there was a case against him apart from the substituted service on the Mwananchi Newspaper. There is no proof at all that efforts were made to procure the attendance of the Appellant as far as Order V rule 16(1) is concerned. The question I asked myself was how was it possible to locate her on 08 March 201 when dispatching the execution of the decree in Civil Case No.64 of 2018 and it was not possible to do the same at the hearing of the said case.

The fact that the appellant did not know her being prosecuted in Misc. application No. 64 of 2018 is a good cause of delay. And since there was proof which was not disputed that after the said knowledge, she filed an application in Misc. Application No. 4 of 2022 for extension of time within which to file an application for setting aside the *ex parte* judgement. In accordance with the case of ***Mary Mbwambo and Another (supra)***, to me this is good cause and with the proof that the Appellant accounted for the delay and took necessary steps. See the cases of **Lyamuya and Joel; and Bushiri Hassan (supra)**.

I now turn to the fourth ground of appeal in which the appellant contended that the trial court refused to grant an extension of time to set aside an *ex parte* judgment despite serious allegations of illegality regarding the proceedings giving rise to the said *ex-parte* judgment.

What constitutes illegality has already been provided for by the Court of Appeal in the case of **Charles Richard Kombe vs Kinondoni Municipal Council (Civil Reference No. 13 of 2019) [2023] TZCA 137** where it was stated that:

*".....it is our conclusion that for a decision to be attacked on the ground of illegality, one has to successfully argue that the court **acted illegally for want of jurisdiction, or for denial of the right to be heard or***

***that the matter was time barred” [Emphasis supplied]***

The Court of Appeal was persuaded by a statement in the case of **Chunila Dahyabhai v. Dharamshi Nanji and Others, AIR 1969 Guj 213 (1969) GLR 734, Supreme Court of India** as quoted in **Charles Richard Kombe’s case** (*supra*) where it was stated that:

*“.....the words 'illegally' and 'material irregularity' do not cover either errors of fact or law. They do not refer to the decision arrived at **but to the manner in which it is reached. The errors contemplated relate to material defects of procedure** and not errors of either law or fact after the formalities which the law prescribes have been complied with.” [Emphasis Supplied]*

Looking at the facts of the appeal at hand, the question is whether the same fits in the cited cases. The Appellant contended that she had no opportunity to defend her case in Civil Case No. 64 of 2018 as she had no knowledge of its existence and there is no record of personally being serviced with summons. I had time to visit the ruling of the trial court in Civil Case No. 64 of 2018 and I agree with the appellant claim that there was no evidence indicating that she was summoned or refused to attend in court to prosecute her case or the hearing of the said *exparte* judgment.



Indeed under Order V, there are other modes of service used after proving the failure of personal service to secure attendance. In the case of **Abutwalib Musa Msuya and others (*supra*)**, it was stated that

*"Other modes of services are resorted to only when it is shown by affidavit of service that personal service is not feasible in the circumstances of the case concerned."*

Submissions by parties show that the Respondent has not disputed the fact that there was no personal service summons requiring her to enter an appearance. Also, it is not disputed that substituted service was done in contravention of Order V rule 16(1) of the CPC and that the appellant was not notified of the date of the pronouncement of *exparte* judgement. In **Abutwalib Musa Msuya & Others (*supra*)** it was stressed that it was stated-

*"that substituted service did not dispense with the duty the trial Judge had, to cause the two **defendants to be notified of the date when the exparte judgment against them was scheduled to be delivered. No affidavit of service was duly filed by the process server to show attempts to notify the defendants were made but they could not be found or were avoiding service.**"*

In the case at hand, the procedure used to secure her attendance was questionable and that is her cry that she was not heard and even

when the *ex parte* judgement was delivered in Civil Case No. 64 of 2018 she was not summoned. Further, the appellant pleaded illegality in her affidavit in the trial court (Misc. Civil Appeal No. 65 of 2022) but the same was not addressed in the ruling of the trial court, again not heard.

It has already been laid down as a principle that where there are serious legal issues that require determination, then the same becomes a sufficient reason for the extension of time for the same to be straightened. In the case of **Kalunga and Co. Advocates vs NBC Ltd (2006) TLR 235**, it was stated that:

*"When there are serious legal points involved, then that is sufficient reason to grant an extension of time. In the present case, there is a serious legal issue that requires a determination of the court"*

I therefore agree with the appellant on her fourth ground of appeal that there was a serious legal point as addressed herein which was sufficient to grant an extension of time for the same to be determined. Therefore appropriate measures are to be taken to put the matter and record straight (See the case of **Principle Secretary Ministry of Defence V. Davian Vhalambhia (1992) TLR 182** and **Paradise Holiday Resort Limited vs Theodore N. Lyimo, Civil Application No.435/01 of 2018**).

In the circumstances and for reasons stated herein, I allow this appeal. I therefore quash and set aside the Ruling and orders of the Resident Magistrate Court of Dar es Salaam at Kisutu in Civil Application No. 65 of 2022. I further extend Twenty One (21) days from the date of this judgment within which the applicant may file an application to set aside *ex parte* judgement in Civil Case No. 64 of 2018. Taking cognizance of the circumstances of this appeal, I make no order as to costs.

It is so ordered



**G.V. MWAKAPEJE**

**JUDGE**

**10/11/2023**

Right of appeal explained.

Judgment is delivered in Court this 10 November 2023 in the presence of Mr. James Ndossi, learned Advocate for the Appellant and Ms Halima Semanda Advocate for the Respondent.



**G.V. MWAKAPEJE**

**JUDGE**

**10/11/2023**