THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MBEYA)

AT MBEYA

CIVIL APPEAL NO. 28 OF 2022

(From the District Court of Mbeya at Mbeya (Hon. A. P. Scout, SRM), in Misc. Application No. 23 of 2022.Originating from Civil Case No. 63 of 2022 in the Primary Court of Mbeya at Mbeya Urban)

FADHILI DENIS SONTA (Administrator of

the Estate of the Late **ALBERT TANGULIA SONTA**).....**APPELLANT**

VERSUS

IRENE WILLIAD MWANILONGA.....**RESPONDENT**

JUDGMENT

Date of Last Order: 21.06.2023
Date of Judgment: 20.12.2023

MONGELLA, J.

The appeal at hand is brought under the following four grounds:

1. *The district court Magistrate erred in law for denying the appellant's prayer for extension of time despite sufficient reasons advanced to the court.*

2. *The district court Magistrate erred in law for departing from the substance of the matter and dwelling on extraneous matters.*

3. *The district court did not assign reasons for denying the appellant's application.*

4. *Having found that the application had no merits the district court Magistrate erred in law for holding that, he varies the decision of the primary court hence contradicted himself to the detriment of the appellant.*

The brief background of the case is to the effect that: the respondent filed a claim against the deceased, Albert Tangulia Sonta, for T.shs. 13,000,000/-, which he borrowed to clear a bank loan which he had failed to repay. The matter was filed in the Urban primary court vide Civil Case No. 63 of 2022. It was finalized on 04.04.2022 whereby the deceased was ordered to repay the amount claimed with the primary court fixing the repayment instalments. On 29.04.2022 the deceased died. The appellant herein was appointed to administer the deceased's estate on 25.05.2022.

Seeking to challenge the primary court decision against the deceased, he applied for copies of judgment and proceedings. He was supplied copies of proceedings on 18.07.2022. Noting that the time to file an appeal had lapsed, he applied for extension of time to file an appeal out of time in the district court of Mbeya at Mbeya vide

Misc. Application 23 of 2022. The district court ordered the application to be argued by written submissions whereby the appellant was required to file his submission in chief on or before 21.09.2022. On that date however, the appellant filed a "reply to counter affidavit" instead of filing his written submission in chief. Consequently, the district court finding that the appellant defaulted its order, dismissed the application for want of prosecution. It further varied the payment instalments settled by the primary court.

Aggrieved, the appellant preferred the appeal at hand on the grounds already stated hereinabove. While the appellant personally drafted and filed his written submission, the respondent's submission was drawn and filed ex *gratis* by one, Andrew Siwale, a legal officer at Tanzania Legal Knowledge and Aids Centre.

Arguing on the grounds of appeal the appellant argued the 1st and 3rd grounds of appeal separately and the 2nd and 4th grounds collectively. Addressing the 1st ground, he faulted the district court for not considering the reasons for delay presented under paragraphs 5, 6, 8 and 9 of his supporting affidavit. He claimed that immediately after obtaining the letters of administration of the deceased's estate, he rushed to file the application for extension of time as the statutory time limit had elapsed. He claimed that he clearly stated in his application that the delay in lodging his appeal was neither deliberate nor negligent, but due to the reason that he had to process

first for letters of administration and apply for certified copies of the primary court documents. He complained against the district court's omission to consider this reason.

With regard to the 2nd and 4th grounds of appeal, he challenged the district court for engaging in what he considered extraneous matters. He contended that what was before the district court was an application for extension of time to file appeal, but not an appeal. However, he said, the district court departed from deciding on what was before it and instead determined the merit of the would-be appeal. Explaining his point further, he referred the court to page 4 of the district court Ruling whereby the district court varied the primary court orders and ordered the appellant to pay T.shs. 13,000,000/- within three months. Considering the anomaly, he contended that the district court, by deciding matters not before it, denied him the right to be heard. He referred the court to the case of **Lewis Mtoi & 3 Others vs. NOKIA Solution and Networks Tanzania Ltd.**, Labour Revision No. 23 of 2019 (HC at Mbeya, unreported), in support of his argument.

Arguing on the 3rd ground, he contended that the district court never assigned reasons for dismissing his application for extension of time. He complained that the district court never decided on whether the reasons advanced by him on his delay were sufficient or not. Without citing any authority, he argued that it is canon principle of law that when the court is requested to determine an application which is

supported by an affidavit, it has to consider the facts stated in the affidavit as evidence. He added that under our laws, an affidavit is a narration of evidential facts thus even if no submission is made, the court has to consider the merits of the application.

On the other hand, he contended that the district court condemned the appellant for failure to file his written submission, but the same was occasioned by the appellant's ignorance whereby he confused the court orders. He concluded by insisting that he was deprived of his right to extension of time despite assigning good and sufficient reasons for his delay. He thus prayed for the appeal to be allowed, with costs and for the lower court decision to be reversed.

The respondent vehemently opposed the appeal. In her submission, she appears to have generally addressed all grounds of appeal. She was convinced that the district court correctly reached its verdict for interest of justice. She contended that the primary court delivered its decision in the presence of her, the defendant (the deceased) and the appellant in this matter, who was representing the deceased by then. She added that the deceased admitted the claim in the primary court in the presence of the appellant, rendering the verdict to be issued. She said that, after the decision, no appeal was preferred by the deceased or the appellant despite the court explaining to them their right to appeal. She contended that 26 days passed from the

date of the decision to the date the deceased passed away, that is, on 29.04.2022 and were never accounted for.

Addressing the conditions for grant of extension of time, she itemized a number of factors to be considered by the court in granting extension of time, being that: (a) the reasons for the delay as well as the likelihood of success of the intended appeal; (b) whether the applicant advanced sufficient or shown good cause; (c) those who come to court must not show unnecessary delay in doing so, they must show diligence; (d) each day of delay must be accounted. In addition, she referred the case of **Mathew T. Kiatmbala vs. Rabson Grayson & Republic** (Misc. Criminal Application No. 38 of 2018) [2020] TZ(HC (sic); and that of **Salum Sururu Nabhani vs. Zahor Abdulla Zahor** [1998] TLR 41 (CA), which settled that good cause must be shown for extension of time to be granted.

Considering the requirement to account for each day of delay, she argued that the applicant failed to account for the delayed dates in his affidavit or submission. She further challenged the reason advanced by the appellant in his affidavit to the effect that he waited to be furnished copies of judgment and to obtain letters of administration of the deceased estates. On this, she argued that there is no law requiring an aggrieved party, like the appellant, to seek for copies of judgment for filing an appeal in the district court. She referred **section 20 (3) of the Magistrates' Courts Act, Cap 11 R.E. 2019**

to that effect. She further found the appellant's argument that he needed letters of administration being false as the appellant was given power of attorney to represent the deceased from the beginning. In the circumstances, she contended that the appellant could have filed the appeal before the deceased's death.

With regard to the appellant's argument that the district court never considered his grounds for delay, she argued that the appellant was given an opportunity to submit his written submission on 21.09.2022 and rejoinder, if any, on 03.10.2022, but failed to comply with the court orders and instead filed a reply to counter affidavit. In those bases she found the case of **Lewis Mtoi & 3 Others** (supra), cited by the appellant being irrelevant to the case at hand. She concluded by praying for the appeal to be dismissed with costs.

The appellant utilized his opportunity to rejoin on the respondent's submission. Apart from reiterating his submission in chief, he vehemently disputed the respondent's contention that he was part of the proceedings in the primary court representing his father, the deceased, as to be bound by whatever transpired in the court.

In addition, he contended that among the factors listed by the respondent in consideration of an application for extension of time, the one on advancing sufficient/good cause is the most important. He insisted that the reason for delay whereby he had to obtain first

letters of administration of the deceased's estate was not only a sufficient reason, but also a legal requirement.

With regard to the respondent's argument that he failed to submit his written submission as ordered by the court, he contended that, had the district court found it being fatal, it should not have gone to the merits of the application and made findings on the intended appeal, which was yet to be filed in court. In the circumstances, he maintained his stance that he was deprived his rights and prayed for the appeal to be allowed and the district court's decision to be set aside, with costs.

I have accorded the grounds of appeal and the rival submissions by both parties, due consideration. In my view, I find it convenient to collectively address the grounds of appeal by considering the main question as to whether the district court was correct in its decision and orders.

The appellant contended that the district court never assigned reasons for its decision. I however, find the contention misconceived. It is clear on record that the district court dismissed the appellant's application for extension of time on the sole reason of want of prosecution. This followed default by the appellant (which he never denied in his submissions in this appeal) in filing his submission in chief as ordered by the court. It is clear on record, as observed by the

respondent and the district court, that the appellant filed a "reply to counter affidavit" instead of filing his written submission in chief. In my view, this was a clear default on the part of the appellant in honouring the court orders.

In his submission in chief, in the appeal at hand, he claimed that he failed to file his submission in chief as ordered by the district court due to being ignorant. Though not stated ignorance in which bases, I suppose he meant ignorance in law/legal procedures. However, it is trite law that ignorance of the law is not an excuse. See: **Charles Machota Salugi vs. The Republic** (Criminal Application No. 3 of 2011) [2013] TZCA 250.

The appellant further argued that the district court erred in not considering the reasons for delay advanced in his supporting affidavit. He had the stance that though no written submission was filed, the district court ought to have considered the contents of his supporting affidavit and decide on whether the appellant had advanced therein sufficient reasons for the delay or not. I as well find this argument a misconception on the part of the appellant. This is simply because the court cannot rely on the contents of the supporting affidavit without the applicant praying first for the court to adopt the affidavit as his/her submission. The record does not indicate such prayer being made by the appellant, thus rendering his argument baseless.

Further, it being clear that the appellant's application was dismissed for default in filing written submission in chief, it is trite law that such default is as good as failure to enter appearance on the date fixed for hearing. The consequence thereof is to dismiss the matter where the defaulter is the applicant/plaintiff and to proceed *ex parte* where the defaulter is the respondent/defendant. In the circumstances, I find nothing to fault the district court in its decision to dismiss the appellant's application for want of prosecution. This legal position has been settled by the courts in various decisions as shall be demonstrated hereunder:

In ***Harold Maleko vs. Harry Mwasanjala***, DC Civil Appeal No. 16 of 2000, (HC-Mbeya, unreported), Makanja, J. (as he then was) held:

> *"I, hold, therefore that the failure to file written submission inside the time prescribed by the court order was inexcusable and amounted to failure to prosecute the appeal. Accordingly, the appeal is dismissed with costs."*

In ***Geofrey Chawe vs. Nathaniel K. Chawe***, Misc. Civil Application No. 22 of 1998 it was held:

> *"...failure to file written arguments on the part of the learned counsel for the applicant is an omission which constitutes want of prosecution. I would dismiss the application on that account."*

In another case of ***Olam Tanzania Limited vs. Halawa Kwilabya***, DC Civil Appeal No. 17 of 1999 it was also held:

> *"Now what is the effect of a court order that carrier instructions which are to be carried out within a pre-determined period? Obviously, such an order is binding. Court orders are made in order to be implemented; they must be obeyed. If orders made by courts are disregarded or if they are ignored, the system of justice will grind to a halt or it will be so chaotic that everyone will decide to do only that which is conversant to them. In addition, an order for filing submission is part of hearing. So, if a party fails to act within prescribed time, he will be guilty of in-diligence in like measure as if he defaulted to appear...This should not be allowed to occur. Courts of law should always control proceedings, to allow such an act is to create a bad precedent and in turn invite chaos."*

In ***P3525 LT Idahya Maganga Gregory vs. The Judge Advocate General***, Court Martial Criminal Appeal No. 2 of 2002 (unreported) the Court held:

> *"It is now settled in our jurisprudence that the practice of filling written submissions is tantamount to a hearing and; therefore, failure to file the submission as ordered is equivalent to non-appearance at a hearing or want of prosecution. The attendant consequences of failure to file written submissions are similar to those of failure to appear and prosecute or defend, as the case may be. Court decision on the subject matter is bound...Similarly, courts have not been soft with the litigants who fail to*

comply with court orders, including failure to file written submissions within the time frame ordered..."

On the strength of the above decisions, I find the appellant's arguments lacking merit. On the other hand, even if the appellant had adopted the contents of his affidavit and the court had decided to consider the contents of the affidavit, I still find no sufficient cause for the delay being advanced. As much as the applicant had to obtain the letter of administration, being a legal requirement, it is clear on record that he obtained the letters of administration on 25.05.2022. The application before the district court was filed on 29.07.2022, which was more than 60 days. This period constitutes additional delay and ought to have been accounted for as required under the law.

The appellant further contended that he was waiting to be availed copies of judgment and proceedings by the primary court. However, as argued by the respondent, to which I subscribe, the law does not make it a requirement for the copies of judgment and proceedings to accompany an appeal before the district court. As clearly stated under **section 20 (3) of the Magistrates' Courts Act, Cap 11 R.E. 2019**, the appellant to the district court is only required to lodge a petition in the district court within 30 days. It was thus a misconception on the part of the appellant to claim to have waited for the said copies. Nevertheless, even if that was a requirement, still the appellant would have been required to account for the 11 additional delayed days. This is because, the copies were availed to him on 18.07.2022 and he

filed the application in the district court on 29.07.2022. The law is trite that a delay of even a single day has to be accounted for and failure to do that renders the application unsupported by sufficient cause. See: ***Bushiri Hassan vs. Latifa Lukio Mashayo,*** Civil Application No. 03 of 2007 (unreported) in which the Court of Appeal held:

> *"...delay of even a single day, has to be accounted for, otherwise there would be no point of having rules prescribing period within which certain steps have to be taken."*

See also, ***Lyamuya Construction Company Ltd. vs. Board of Registered Trustees of Young Women's Christian Association of Tanzania*** (Civil Application No. 2 of 2010) [2011] TZCA 4, and ***Moto Matiko Mabanga vs. Ophir Energy PLC, Ophir Services PTY LTD & British Gas Tanzania Limited*** (Civil Application No. 463 of 2017) [2019] TZCA 135.

With regard to the appellant's claim that the district court while dismissing the appellant's application went further to make orders varying the primary court orders on payment schedules. He had the view that in doing so the primary court addressed matters that ought to have been addressed in appeal. I, in fact, agree with the appellant on this point. The application before the district court was for extension of time to file appeal. What the district court was to decide upon was whether sufficient cause was advanced for the delay. Given the fact that the appellant defaulted in filing his written submission in chief and

the district court correctly dismissed the application for want of prosecution, it was supposed to end there. Varying the orders by the primary court was indeed extraneous as no such claim was placed before the district court. Even if the respondent had raised the claim, the district court ought to have not entertained the claim as it was not formally placed before it. As such, I quash the order by the district court varying the schedule of payment of the ordered sum of T.shs. 13,000,000/- within three months. The primary court orders are hereby restored.

To this point, with exception of the 2nd and 4th grounds of appeal, the rest of the grounds of appeal fail miserably and are hereby dismissed. Considering this outcome, I order for each party to bear his/her own costs of the case.

Appeal partly allowed.

Dated and delivered at Mbeya on this 20th day of December 2023.

THE HIGH COURT OF TANZANIA

X

L. M. MONGELLA
JUDGE
Signed by: L. M. MONGELLA