

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

**AT DAR ES SALAAM**

**CIVIL APPEAL NO. 165 OF 2022**

*(Arising from Miscellaneous Civil Application No. 10 of 2022)*

**FLAVIANA MATATA ..... APPELLANT**

**VERSUS**

**THE BOARD OF TRUSTEES OF PUBLIC SERVICE SOCIAL SECURITY**

**FUND..... RESPONDENT**

**JUDGMENT**

*12<sup>th</sup> December, 2022 & 10<sup>th</sup> February, 2023*

**MWANGA, J.**

The appellant is challenging decision of the trial court at the Resident Magistrate Court of Dar es Salaam at Kisutu refusing her prayer for extension of time to file an application to set aside exparte -judgement and decree in Civil Case No. 206 of 2016 dated 4<sup>th</sup> May, 2018. The ruling that is being challenged was delivered on 4<sup>th</sup> October, 2022.

Relying on various precedents, the trial magistrate dismissed the application in its entirety stating that; **One**, the application was filed after the lapse of three years and nine months since the exparte judgement was delivered and no account for each day of delay. **Two**, the delay is inordinate. **Three**, the appellant failed to make follow-up of his case and **four**, no proof offered by the appellant that she was not notified on date of decision.

It is pertinent to state that, the appellant being dissatisfied with the decision, hence he petitioned to this court on three grounds, namely: -

1. That the trial court erred in law for dismissing the application without considering that illegality is a good and sufficient reason for extension of time.
2. That, the trial court erred in law and fact for dismissing the application without considering that the principle of natural justice was violated.
3. That, the trial court erred in law and fact for by imposing its own facts and made decision based on the imposed facts.

During the hearing, the appellant was represented by Mr.Richard Kinawari the learned counsel and respondent was represented by Ms.Sukayna Farouk assisted by Ms. Paulina Msanga, both learned State Attorneys. Further to

that, in the course of hearing the appellant withdrew the third ground of appeal stating that he no longer find it useful.

Submitting on the ground of illegality, Mr. Richard relied on the decision in the **Attorney General Vs Tanzania Ports Authority & Another**, Civil Application No. 87 of 2016(Unreported), where it was held that illegality of the challenged decision constitute sufficient reason for extension of time, regardless whether or not reasonable explanation has been given by the applicant.

It was the leaned counsel contention that, decision to be challenged contained two issues of illegality; **one**, that the appellant was not informed on the date of the decision of the mentioned case.He cited the authority in **Khadija Rehire Said & 5 Other, s Vs Mohamed Abdalla Said**, Civil Application No. 39 of 2014 CAT (Unreported), where the court held that in view of the non-service of the ap]plicant on the date of judgement, the very legality of judgement is put to question and it is a good cause for extension of time. **Two**, the appellant was represented by an advocate of not her choice in Civil Case No. 206 of 2016 before the subordinate court. He supported his arguement in **NIC Bank Tanzania Ltd Vs Princes Shabaha Company &20 Others**, Civil Appeal No. 248 of 2017(Unreported) whereby

the court quashed the proceedings which were conducted by new advocate without instructions of the client. It was his further submission citing the High Court decision in **Dotto Dofu Vs Kulwa Lufwega Kija**, Civil Appeal No. 37 of 2022 that, holding brief has limitation and that the mandate cannot extend to the performing duty of the advocate who has no contractual and fiduciary relationship.

In response to the above ground of appeal, Ms. Sukayna Farouk, vehemently opposed the learned counsel argument. It was her submission that the appellant had information relating to her case at the trial court as she used to receive necessary court documents. Her fellow learned State Attorney Ms. Paulina Msanga added that, the court heard the case *exparte* due to the appellant's conducts not appearing during mediation and on the final PTC. It was her further contention that, the appellant had appeared on the date of hearing and claimed that she did not have a copy of contract to support his case. On that basis, the trial court ordered the matter to be heard *exparte* as waiting the appellant further would be wasting time of the court.

With reference to the appellant being represented by an advocate not of her choice, the learned State Attorneys submitted that, the appellant used to collect court documents stating that she would inform the newly advocate

Victor John Kikwasi, hence it is not true that she gave no instructions to the said advocate Victor John Kikwasi.

In the second ground of appeal, Mr, Kinawari referred this court in contents of paragraphs 3,4,5,6 and 7 of the applicant affidavits in support of the application for extension of time at the trial court .He submitted that there was a breach of principle of natural justice by the trial court because the appellant did not approve an arrangement to be represented by an advocate one Victor John Kikwasi who withdrew the plaint filed by the appellant and let the respondent prosecute the counter claim without notifying the appellant herein.

In her response to the point, Ms. Paulina Msenga submitted that the appellant cannot be heard to say that there was violation of the principle of natural justice on the right to be heard. She stucked to her submission that it has taken 3 years and 9 months i.e 4/05/2018 to 4/2/2022 since the decision was delivered up to now without action being taken in the applicant. According to her appellant's action was nothing but on act of negligent and being inordinate.

Ms Paulina continued her submission that, the law helps the vigilant and not the negligent. She questioned as to why the appellant had waited to submit her application in court until the time of execution. It was her addition that since the appellant had appeared on the date of hearing and claimed that she did not have a copy of contract to support to prove her case, she cannot be heard to argue that there was violation of the principle of natural justice on the right to be heard. It was the learned State Attorneys submission that, since at paragraph 2 of the counter affidavit shows that the appellant engaged Aman Tenga Advocate, she cannot blame her advocate as she never made follow up of her case neither to the advocate nor to the court.

In support of their case, the learned State Attorneys cited several authorities such as in **Lim Hang Yung & Another Vs Lucy Treases Christensen**, CAT(Unreported) that negligence or omission does not constitute good cause; the case of **Tnaga Cement Co. Ltd & Jummane Vs Amos A. Mwalwanda**, Civil Appeal No. 6 of 2001 (Unreported) that a number of factors has to be taken into account, one of them being that the application was brought promptly; the case **of Omari Ally Mnyamilege administrator of the estate of the late Selemen Ally Nyamilege &**

**20Others Vs Mwanza Engeneering Works,** Civil Application No. 94/08/2017(Unreported) that, the applicant must account each day of delay.

In rejoinder, the learned counsel Mr Kinawari stated that the appellant was not notified in person on the hearing of counter claim *exparte* and that she did follow up her case and informed by her Advocate Aman Tenga that all is well but she was not informed that another advocate had been given instructions. It was his contention further that, the said Aman Tenga was not even in the roll of advocates from the time he was engaged by the appellant, and it was this Aman Tenga who gave instructions to the Advocate Victor John Kikwasi.

Additionally, the learned Counsel argued that the appellant did not account for each day of delay because there was illegality and that the appellant did not enter appearance during the hearing. He concluded his submission that, the appellant only became aware of the trial court decision after being notified by the respondent and being served with summons to appear during executions of the decree of the trial court.

From the above summarised submission of the learned Counsel and state Attorneys and depositions of the respective parties in this appeal, the issue is whether the appellant had sufficient cause for extension of time.

What is sufficient cause? The court in the case of **Tanga Cement Company Limited Vs Jumanne D. Masangura and Amos A. Mwalwanda**, Civil Application No. 6 of 2001 (Unreported) quoted with approval in the case of **Benedict Mumelo Vs Bank of Tanzania**, Civil Appeal No. 12 of 2002 (Unreported), clarified the fact that “what amount to sufficient cause” has not been defined. However, from the authority cited, number of factors has to be taken into account including whether or not the application has been brought promptly, the absence of any valid explanation for the delay and lack of diligence on the part of the applicant.

It was the appellant’s first ground of appeal that there was illegality on the judgement of the trial court and that the same ought to be considered as a sufficient cause for extension of time. As rightly stated by the learned counsel Mr Kinawari, where illegality is established in the decision to be challenged is a good ground for extension of time. This principle is clearly echoed in the case of **Lyamuya Construction Co. Ltd Vs Board of**



**Registered of Young Women's Christian Association of Tanzania,**  
Civil Application No. 2 of 2010 [2011] CAT(Unreported).

It is clear from the submissions that, one of contentious matter that prevented the appellant from filing application within time is that she was not notified on the date of the judgement.

The law under Order XX Rule 1 of the Civil Procedure Code provides that;

*'the court, after the case has been heard shall pronounce judgement in open court, either at once or on some future day, which **due notice shall be given to the parties or their advocates'** (emphasis is mine)*

The trial court Magistrate when responding to above point, he had this to say at page 3 and 4 of the typed ruling;

*'... firstly, there is no proof adduced by applicant that she was not notified the date of the decision and secondly it does not make sense for the party to the case to stay idle without making any follow up to her case for three (3) years and nine (9) months waiting to be notified the date of the decision.'*

I think it is not the question whether the conduct of the appellant make sense or not. As I have shown above, the law requires that due notice be

given to the parties or his advocate(s). The authority in **Khadija Rehire Said & 5 Others Vs Mohamed Abdallah Said** (supra), it was held that;

***'non service of the applicant of the date of judgement, the very legality of the judgment is put to question and that this constitutes another good cause for extension of time'.***

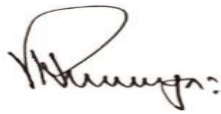
According to the decision above, should not have been condemned unless she was served with a notice of date of judgement and proof of such service be shown to the court. There is nothing on record or in the submission of the parties made to the satisfaction of the court that the appellant was duly served according to law. With due respect to the learned State Attorneys there is nothing in the law connote that appearance of the appellant during the hearing is not enough. In absence of due notice, the appellant would not be aware of the existence of such decision and take necessary steps to challenge or otherwise of that decision.

On the basis of this ground alone, I hereby quash and set aside the decision of the trial court. I find it not useful to dwell on other grounds of appeal as this one alone disposes the appeal in its entirety. I further grant application for extension of time to the appellant and the same shall be filed within 14 days from the date of this decision, for the appellant to file application for setting aside exparte judgement in Civil Case No. 206 of 2016.

For the above reasons, the appeal is merited, and it is hereby allowed.

No order to costs.

It is so ordered.

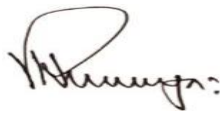


**H. R. MWANGA**

**JUDGE**

**10/02/2023**

**COURT:** Ruling delivered in the presence Ms Paulina Msanga the learned state attorney for Respondents also holding brief for Mr Kinawari for the appellant.



**H. R. MWANGA**

**JUDGE**

**10/02/2023**

