

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DAR ES SALAAM DISTRICT REGISTRY

AT DAR ES SALAAM

MISCELLANEOUS CIVIL APPLICATION NO. 284 OF 2023

**(Arising from Exparte Judgment of the District Court of Bagamoyo at
Bagamoyo in Civil Case No. 34 of 2019)**

**ACCESS BANK OF TANZANIA LIMITED.....APPLICANT
(CURRENTLY ACCESSMICROFINANCE BANK TANZANIA LIMITED)**

VERSUS

CHICHI BUSINESS COMPANY LIMITED.....1ST RESPONDENT

HANS ALBERT CHAMBASI.....2ND RESPONDENT

JOSINA CO. LTD AND AUCTIONEER3RD RESPONDENT

RULING

Date of last order: 21st December 2023

Date of Ruling: 11th January 2024

MTEMBWA, J.:

Under ***section 14 (1) of the Law of Limitation Act, Cap 89
RE 2019*** and ***section 95 of the Civil Procedure Code, RE 2019***,
the Applicant is seeking for an order of extension of time within which
to file an appeal to this Honourable Court out of time against the Ex-
parte Judgement and Decree of the District Court of Bagamoyo in Civil
Case No. 34 of 2019 dated 28th June 2021. The same was brought

under a certificate of urgency and is supported by an affidavit of **Mr. Humphrey Mwasamboma**, the learned counsel for the Applicant.

From the facts as revealed by the affidavits and attached documents, the litigants battled in the District Court of Bagamoyo in Civil Case No. 34 of 2019 where the same ended *exparte* in favour of the 1st Respondent against the Applicant herein. Having not been satisfied, the Applicant, it could appear as per the records, successfully applied for setting aside the *exparte* Judgment. As a result, the matter started afresh interparties. In between however, the Applicant disappeared without notice. Then, the matter had to proceed *exparte* against the Applicant for the second time.

The records reveal further that the Applicant opted again to apply to the same trial Court (the District Court of Bagamoyo) seeking for an order setting aside the *Exparte* Judgment in Civil Case No. 34 of 2019. In its Ruling dated 22nd November 2021 in Miscellaneous Civil Application No. 15 of 2021, the trial Court dismissed the Application for reason that the same was *res judicata*. The applicant, then, filed Miscellaneous Civil Application No. 501 of 2022 before this Honourable Court that was struck out for failure to serve summons to the Respondents by Hon. Bwegoge, J.

Still interested to demonstrate her rights, the Applicant has now filed this Application seeking for an order of extension of time within which to file an appeal to this Honourable Court out of time against the Ex-parte Judgement and Decree of the District Court of Bagamoyo in Civil Case No. 34 of 2019.

Initially, this matter was presided over by Hon. E. Kakolaki, J who has been reportedly to have been transferred to another duty station. As such therefore, it was reassigned to me for final determination. Before reassignment however, parties agreed to argue this application by way of Written Submissions. I have gone through the records only to note that the 2nd Respondent did not file his written submissions nor did he notify this Honourable Court on his inability to do so. An order of hearing ex parte against the 3rd Respondent was issued on 12th September 2023. In the circumstances therefore, I will proceed to determine the Application by considering the written submissions on records.

In this matter, the Applicant was represented **by Mr. Humphrey Mwasamboma**, the learned Counsel while the 1st Respondent enjoyed the service of **Mr. Peter R. Madaha**, the

learned counsel. As said before, hearing proceeded by way of written submissions.

Staggering the floor, Mr. Mwasamboma submitted that, a prayer for extension of time within which to file an appeal out of time is based on three grounds. Arguing on the first ground, he submitted that it is a trite law that parties must be notified of the date of Judgement irrespective of whether the same is pronounced *exparte* or *interparties*. That failure to do so contravenes with the provisions of ***Order XX Rule 1 of the Civil procedure Code (supra)*** which provides that the court after the case has been heard, shall pronounce the Judgement in open court, either at once or, on some future day, of which due notice shall be given to the parties or their advocates. On this, he finalized by arguing this Court to find that, as a defendant at the trial court, he was not notified on the date of judgment.

Arguing on the second and third grounds all together, Mr. Mwasamboma submitted that, as such, the *exparte* Judgement was premised on the proceedings tainted with illegalities which is a good ground for extension of time. He cited the case of ***the Principal Secretary Ministry of Defence and National Service V. Devram Valambia (1991) TLR 387*** where it was held that the Court has a

duty to, even if it means extending the time for the purpose, to ascertain the point and if the alleged illegality be established, to take appropriate measures to put the matter and the records straight.

As to failure to notify the parties on the date of Judgement, Mr. Mwasamboma cited the case of ***Joflo Company Limited & 3 others V. Bank of Africa Tanzania Limited, Misc. Civil Application No. 562 of 2021*** where it was held that failure to notify the parties of the date of exparte Judgement constitutes a good cause warranting the grant of an order of extension of time. He finally beseeched this court to grant the orders sought in the Chamber summons.

In reply, Mr. Madaha submitted that the Applicant was served with the summons by the process server and that the evidence can be traced from the Court file. He added further that, after the service of summons, the Applicant filed the Written Statement of Defence and had an opportunity to cross examine the 1st Respondent. However, before the pronouncement of the exparte Judgment, the Applicant's advocate disappeared. It was the submissions by Mr. Madaha that before the pronouncement of the Exparte Judgement, the Applicant was served with the summons of the date of Judgment twice by a

process server. He insisted that the evidence of service is traceable from the court file.

Replying to the second ground, Mr. Madaha submitted that the trial Magistrate upheld the preliminary objection that the application to set aside *ex parte* Judgement was *res judicate* and opined that the ground is baseless. In the outset however, I find the argument misplaced because the Applicant's counsel did not submit to that effect. I will therefore not consider the arguments in the end.

Replying to the third ground as argued by the Applicant's counsel, Mr. Madaha insisted that the Applicant was notified with summons several times by a court process server and the evidence can be found in the Court file. He added that the Applicant participated during hearing by cross examining the 1st Respondent and in between he disappeared without defending herself. He advised the Court to go through the records of the trial court for clarity.

Finally, Mr. Madaha faulted the Application for failure to account for each day of delay. He cited the case of ***Lyamuya Construction Company Limited V. Board of Registered Trustees of Young Women's Christian Association of Tanzania, Civil Application***

No. 2 of 2010. He finally implored this Court to distinguish the cases cited by the counsel for the Applicant.

Indeed, in the case of ***Mansoor Daya Chemicals v. NBC, Civil Application No. 88 of 2016, CAT at Dar es Salaam (unreported)***, the Court had this to say;

In an application for extension of time under Rule 10 of the Rules, an Applicant is required to show good cause why time should be extended. What is a good cause is a question of fact, and this may vary with the circumstances of each case. But it is common ground that in such an application the Applicant must show:-

- i. The length of the delay*
- ii. The reason(s) for the delay that would account for each day of delay.*
- iii. If there is an arguable case.*

Guided by the above position, I can now proceed to determine the Application. From what I have observed, the Applicant relies heavily on illegality on the face of records as a ground for extension of time. Mr. Mwasamboma submitted that it is a trite law that parties must be notified of the date of Judgement irrespective of whether the same is pronounced *exparte* or *interparties*. He added further that, such mandatory requirement is within the dictate of ***Order XX Rule***

1 of the Civil procedure Code (supra). He was of the views that the Applicant was not notified on the date of Judgment.

In reply, Mr. Madaha did not find purchase of the idea that the Applicant was not notified of the date of Judgment. He said, before the ex parte Judgment was pronounced, the Applicant was served with the summons to appear but very unfortunate she was not present on the day of Judgment.

Principally, the alleged illegality must be apparent on the face of records. This is what can be captured from ***Lyamuya Construction company V. Board of Registered Trustees of Young Women's Christian Association of Tanzania, Civil Appeal No. 2 of 2010.***

The point of contention therefore, from the submissions of the parties, is whether the summons to appear on the day of Judgment was properly served to the Applicant. The determination of this issue, in my conviction, will dispose this matter at once. I have so arrived on the ground that the parties are alive on the import of ***Order XX Rule 1 of the Civil procedure Code (supra)*** which, I also consider and find to be the correct position of the law. I will therefore not dudge much on this issue.

To avoid confusion, I went through the records of the trial Court and noted that on **11th May 2021**, the Applicant was served with summons to appear for hearing on **24th May 2021** at **08:00 am**. However, on the appointed date, the Applicant did not appear without reason. The original copy of summons stamped by the Applicant was tendered in court to form part of the records. Hearing, then, proceeded in her absence. In the end, the Plaintiff's case was closed following a prayer by Mr. Madaha.

The trial court records reveal further that upon closure of the Plaintiff's case, Mr. Madaha prayed for summons to appears for the Defendants who, on the material day, were recorded absent. The Court then, at page 52 of the typed script of the proceedings, noted as follows;

Order

- 1. Jugdement on 28/06/2021*
- 2. Parties to appear.*
- 3. Summons be issued.*

From the records therefore, upon prayer by Mr. Madaha, the trial Court ordered service of the summons to appear to the Defendants (the Applicant inclusive). As usual, on 28th June 2021, the Applicant did not appear. The records are silent as to whether she

was properly served or not. The Exparte Judgment then, was pronounced in her absence.

The question here is whether the summons to appear was served to the Applicant as per the order of the trial court dated 24th May 2021. I have gone through the records of the trial Court and noted that neither the returned summons nor the affidavit of the process server evidencing that the Applicant was so served could be traced. It follows therefore that the Applicant was not served with the summons to appear to receive the exparte Judgement. If so, as claimed by Mr. Madaha, that could have been reflected on the records. In the absence of such evidence, I can't venture to act on what is not on records otherwise, there would be no meaning of having court records. Even Mr. Yusufu Mkanyali who appeared for the Plaintiff on the day of Judgment did not notify the Court as to whether the summons to appears were served or not.

In the premises, I hold the views that the exparte Judgment was pronounced in contravention of ***Order XX Rule 1 of the Civil procedure Code (supra)***. I therefore see no reason not to agree with the Applicant's Counsel that the Applicant was not notified of the

date of the Judgment. That alone suffices to allow this Application on the ground of illegality.

Mr. Madaha resisted the application on the ground, among others, that the Applicant did not account for days of delay. With respect that cannot help the day because when illegality is raised as a ground for extension of time, the court looks at whether the alleged illegality is on the face of the records and not otherwise. Other factors, therefore, are left unattended.

In the result, this application is granted on point of illegality on the face of records of the trial Court. Time therefore is hereby extended for the Applicant to file an Appeal to this Court within thirty (30) days from today. Each party shall bear its own costs.

I order accordingly.

Right of appeal fully explained.

DATED at DAR ES SALAAM this 11th January 2024.




H.S. MTEMBWA
JUDGE

Ruling delivered in the presence of Mr. Humphrey Mwasamboma, Advocate for the Applicant and Mr. Adam Kasengeny holding briefs for Mr. Madaha for the 1st Respondent and in the absence of the 2nd and 3rd Respondents.




H.S. MTEMBWA
JUDGE