

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
DAR ES SALAAM SUB-REGISTRY**

CIVIL APPEAL NO. 208 OF 2017

((Arising from Misc. Civil Application No. 07 of 2017 in the District Court of Kinondoni))

NEEMA ELIMU KANDONGA..... APPELLANT

VERSUS

REBECA SOLOMONI GYUMI RESPONDENT

JUDGMENT

Date of last order : 30-11-2023

Date of Judgment: 22-2-2024

B.K. PHILLIP, J

This appeal arises from the Ruling of District Court of Kinondoni in Misc. Civil Application No. 07 of 2017 in which the District Court dismissed the appellant's application for extension of time to file an application to set aside an ex-parte judgment and decree in Civil application No. 39 of 2012. Aggrieved with the decision of the District Court, the appellant lodged this appeal on four grounds of appeal. The same are reproduced verbatim hereunder;

- i) That the trial Magistrate erred in law and in fact in holding that the appellant's application is devoid of any merits thus dismissing it.*
- ii) That, the Magistrate erred in law and fact in holding that the Applicant's affidavit contained prayers hence defective.*

iii) That, the trial Magistrate erred in law and fact for failure to determine the question of illegality raised in Applicant's application.

iv) That, the Trial Magistrate erred in law and fact for not extending the time within which the Applicant to make an application setting aside the ex-parte judgement and Decree entered in favour of the Respondent in Civil Appeal No. 39 of 2012.

The facts of this appeal as per the court's record's are as follows; that the respondent herein was the appellant in Civil Appeal No. 39 of 2012, before the District Court of Kinondoni, originating from Probate Cause No. 156 of 2009 at Kawe Primary Court, whereas the respondent herein was the 2nd respondent. It is on record that on 25th March 2013 when the matter was called for hearing, the appellant herein did not enter appearance in court, thus, the respondent herein prayed to proceed with the hearing of appeal ex-parte against the respondents in that appeal. The court granted the prayer and hearing proceeded. In its judgment the District Court found the appeal meritorious. It quashed the decision of Kawe Primary Court and ordered that the names of the children born of the wedlock and the respondent herein should be removed from the list of the heirs of the late Reuben Masika Tibariye

The appellant delayed to file her appeal to challenge the ex-parte judgment. On the 18th of January 2017, she filed an application for extension of time to file an application to set aside ex-parte Judgment and Decree. Her major reason for the delay in filing her appeal was that she was seriously sick and received medical services at Muhimbili Orthopaedic

Institution. She also raised an issue of illegality, that is, in Civil Appeal No. 39 of 2012, the respondent joined one Kokushaba Nestory while his appointment as the administrator of the deceased estate of the late Reuben Masika Tibariye was revoked by the Kawe Primary Court. District Court found the application with no merit, therefore dismissed it. The appellant was dissatisfied with the ruling of the District Court and hence filed the appeal in hand.

In this appeal, the appellant was represented by the learned Advocate Michael Yudas Mwambeta and the respondent appeared in person, unrepresented. The appeal was disposed of by way of written submissions.

Submitting in support of the Appeal, Mr. Mwambeta argued the 1st and 2nd grounds of appeal conjointly. He argued that the appellant's application at the District Court was for an extension of time within which the appellant would apply to set aside the ex parte Judgment in Civil Appeal No. 39 of 2012. The District Court's decision was based on technical issues, to wit; that the affidavit which was in support of the application was defective for containing prayers, whereas in fact that affidavit had no prayers. He contended that the application was dismissed on technicalities rather than the merit of the application.

Mr. Mwambeta went on to argue that the 3rd and 4th grounds conjointly. He pointed out two points of illegality to wit; **one** that in the Kinondoni District Court one Kokushaba Nestory was joined as a 1st respondent while the records of Kawe Primary Court reveal that Kokushaba Nestory's

appointment as the administrator of the deceased estate was revoked, thus she was not supposed to be a party to the appeal.

Two, the decision made by the appellant's former advocate to appeal to the High Court against the ex-parte judgment was illegal since the appellant had not exhausted the remedy available at the lower court. The appellant had the opportunity to set aside the ex-parte Judgment. He contended that the negligence of the appellant's advocate should not be used as a weapon against the appellant. To bolster his argument he cited the case **Secretary, Ministry of Defence and National Service vs Devram Valambia, (1992) TLR 192** together with **VIP Engineering and Marketing Ltd vs Citibank Tz Ltd, Consolidated Civil Reference No. 6,7 and 8 of 2006**, (unreported).

In conclusion of his submission, he implored this court to quash the impugned decision and grant the appellant the extension of time to file the application to set aside the ex-parte judgment.

In rebuttal, the learned advocates from Legal and Human Rights Centre Legal Aid Unit (hereinafter to be referred to as "LHRC") filed the submissions for the respondent. Their arguments were as follows; the defectiveness of an affidavit in support of the application was not the criteria for the dismissal of the appellant's application. The District court in its ruling pointed out that the grant for extension of time must be reasonably explained and accounted for to move the court grant the extension of time sought. The defects in the applicant's affidavit were just an additional flaw in the application. The District Court found that the

appellant failed to adduce reasonable/ sufficient cause for delay in applying to set aside the ex-parte judgment, thus, dismissed the application.

About the illegality alleged by the appellant, LHRC submitted that the accusation toward the appellate's advocate does not hold water in justification for the delay. The appellant was supposed to lodge her complaints about her advocate before the advocate disciplinary committee and come forth with the report to support the accusation.

Moreover, LHRC argued that issues of technicality are not relevant to this matter for the reasons the submission made by the appellant's advocate to support the issue of illegality is baseless, and accusations need to be backed by evidence. The cases cited by the applicant are all irrelevant in this application. LHRC cited the provision of section 110 (1) of the Evidence Act Cap 6, the cement their arguments. It maintained that the Appellant failed to produce any document to substantiate her assertion that she was sick.

In conclusion, LHRC maintained that the Ruling of the District Court is quite in order and clearly shows that no good reasons for the delay in taking the appropriate legal steps from 2013 to 2017 were demonstrated before the court. Moreover, LHRC pointed out that if there was illegality which may be termed as negligence and unprofessionalism by the former advocate there would have been a report/ evidence from the proper forum. In this matter, no evidence was tendered to prove what was alleged by the applicant. Contended, LHRC.

Having analyzed the rival arguments raised by both sides let me proceed with the determination of the merit of this appeal. I will deal with 1st and 2nd grounds of appeal conjointly in the same way as the appellant did. To start with I wish to point out that the impugned decision reveals that the issue of defectiveness in the affidavit in support of the application was not the major and only reason for the dismissal of the appellant's application. The District Court pointed out that the appellant failed to adduce good reason(s) for the delay for period of four (4) years from 2013 to 2017. The Impugned decision reveals that the appellant decided to appeal against the ex-parte judgment instead of applying to set it aside. This fact is supported by the court's records, thus defeats the appellant's allegation that the delay in setting aside the ex-parte judgment was due to her sickness.

It is trite law that in applications of this kind, the applicant has to account for each day of delay and the delay should not be inordinate [See the caase of **Lyamuya Construction Company Ltd Vs Board of Registered Trustees of Young Women's Christian Association of Tanzania, Civil Application No. 2 of 2010** and (unreported)]

From the foregoing it is the finding of this court that the 1st and 2nd grounds of appeal have no merit.

Coming to the 4th and 5th grounds of appeal, I am alive that illegality is sufficient ground for the court to grant extension of time as authorities dictates that a claim of illegality in the impugned decision constitutes sufficient reason for extension of time, regardless of whether or not the


applicant has accounted for each day of delay. Appellant's argument is grounded on the fact that the Civil Appeal No. 39 of 2012 the respondent herein joined one Kokushaba Nestory as 1st Respondent while the proceedings in Kawe Primary Court revoked the appointment of Kokushaba Nestory as the administrator of the estate of the late Reuben Masika Tibariye.

I have perused the impugned decision. It is true that Mr. Kokushaba Nestory was joined in Civil Appeal No. 39 of 2012 as the 1st respondent, however, that does not amount to illegality. After all, the issue on whether or not it was improper to join Mr. Kokushaba Nestory in the aforementioned appeal was not discussed by the lower court. In this appeal the appellant's advocate did not give sufficient explanations on why a mere fact that, Mr. Kokushaba Nestory was joined in the appeal culminated into illegality. Moreover, no court order was issued either against or in favor of Mr. Kokushaba Nestory. The fact that he was a party in that appeal did not cause any injustice to any party in that appeal.

In the upshot, all grounds of appeal have no merit. Thus, I hereby dismiss this appeal in its entirety. Since the respondent received legal services from LHRC, I give no order as to costs.

Date this 22nd day of February 2024




B.K. PHILLIP
JUDGE