

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF ARUSHA
AT ARUSHA

MISC. CIVIL APPLICATION No. 55 OF 2022

(C/F Juvenile Court of Arusha at Arusha, Misc. Civil Application No. 47 of 2021)

RUTH IBRAHIM.....APPLICANT

VERSUS

LUSEKELO MWAKALUKWA.....RESPONDENT

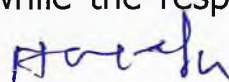
RULING

30/08/2022 & 22/09/2022

MWASEBA, J.

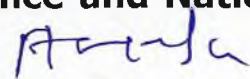
The applicant **RUTH IBRAHIM** is seeking for orders of extension of time within which to file an appeal against the exparte decision of Juvenile Court of Arusha at Arusha in Misc. Civil Application No. 47 of 2021 which was delivered on 2nd day of December 2021. The application is supported by an affidavit of Mr Jaffary Suleiman, learned counsel for the applicant. The Respondent also filed a counter affidavit to oppose the application.

The application was argued orally whereby Mr Jaffary Suleiman, Learned Advocate, represented the applicant while the respondent appeared in person, unrepresented.



Submitting in support of application, Mr Jaffary learned counsel for the applicant averred that the applicant was not notified about the existence of the application before Arusha Juvenile Court. She was not informed about the date for delivery of ruling either. But she came to be aware of the said application in March, 2022 when her father was arrested by police officers in Arusha for the offence of abducting his grandchild. By that time, she was already out of time to file an appeal. So, she filed this application for extension of time to file an appeal. Mr Jaffary referred this court to the case of **Tropical Air (TZ) Ltd Vs. Godson Eliona Moshi**, Civil Application No. 9 of 2017, Court of Appeal Sitting at Arusha in which conditions that the applicant must meet for a grant of extension of time were set.

Further to that he alleged that the said application sought to be challenged was covered with a lot of illegality. He pointed out the illegalities that the matter was determined exparte so the applicant was not given a right to be heard as per **Art 13 of the Constitution of the United Republic of Tanzania**. Further, the decision was delivered without notifying the applicant. He further averred that, illegality is a sufficient cause for granting extension of time as it was stated in the cases of **Principle Secretary Minister of Defence and National Service**

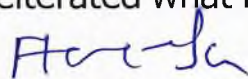


Vs. Devram Valambia, (1992) TLR No. 85, **Eliakim Swai and Another Vs Thobhias Karawa Shoo**, Civil Application No.2 of 2016, Court of Appeal sitting at Arusha. He therefore prayed that the application for extension of time be granted.

In his reply, the respondent strongly denied the allegation that the applicant was not aware of the existence of the ruling of the Rm's Court (Juvenile Court). He said, he served them by publication. And on 17/12/2021 he went to Kyela district to collect his child after being given full custody by the Juvenile Court as by then she was living with her grandparents. Further to that, they had been having amicable resolution based on the granted custody order. However, the discussion to settle the matter was not fruitful. He insisted that they were aware of the said decision since 17/12/2021 when he went to collect a child.

As to the point of illegalities he asserted that the matter was determined exparte because the applicant was nowhere to be found. He stated that even if the applicant says she came to be aware of the decision in March, why it took two months to file an application for extension of time which could have been done immediately?

In his rejoinder the counsel for the applicant reiterated what he submitted in chief.



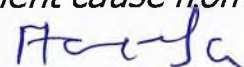
Having considered the rival submissions from both sides and going through the pleadings herein, the pertinent issue to be determined by this court is whether this application has merit.

Looking at the record and the submission from both sides, there is no dispute that the decision which is subject to be challenged by an appeal is an *ex parte* ruling. I am trying to think about the merit of this application regarding the chance of success of an appeal if this application will be granted. In the case of the **Bank of Tanzania Vs Emerenciana Chrysostom**, Civil Application No 44 of 2009, Court of Appeal sitting at Dar es Salaam (unreported) it was settled that among other circumstances to be considered in granting application for extension of time are chances of the appeal succeeding if the application is granted.

I am aware that whenever the matter has been determined *ex parte*, a party who wants to challenge it has a room to go to the same court that gave an *ex parte* judgment or ruling to set aside the said decision. And not to appeal against an *ex parte* decision. This is well provided under Order

9 Rule 9 of the Civil Procedure Code, Cap 33 R.E 2019 that:

"In any case in which a decree is passed ex parte against a defendant, he may apply to the court by which the decree was passed for an order to set it aside; and if he satisfies the court that he was prevented by any sufficient cause from



appearing when the suit was called on for hearing, the court shall make an order setting aside the decree as against him upon such terms as to costs, payment into court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit:

Provided that, where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also."

The same was held in the case of **Dangote Industries Ltd Tanzania Vs Warnercom (T) Limited**, (Civil Appeal 13 of 2021) [2022] TZCA 34 (17 February 2022) that:

"This Court was saying, basing on the authority in its previous decision in Jaffari Sanya & Another v. Saleh Sadiq Osman (supra) that, as the jurisdiction to set aside an ex parte judgment is exclusively conferred to the trial court, it cannot be addressed by way of an appeal. If we can quote from page 11 of the ruling, the Court observed as follows: -
"On the basis of the above provision and authorities, it is settled that where a defendant against whom an ex-parte judgment was passed, intends to set aside that judgment on the ground that he had sufficient cause for his absence, the appropriate remedy for him is to file an application to that effect in the court that entered the judgment"."

The court went on submitting that:

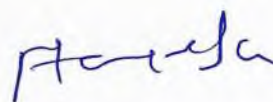


"It would appear to us to be the principle in the said authorities that, where the defendant intends to challenge both the order to proceed ex parte and the merit of the findings in the ex parte judgment, he cannot challenge the merit of the findings before dealing with an application to set aside the ex parte judgment first. This principle is based on the long-standing rule of procedure that, one cannot go for appeal or other actions to a higher court if there are remedies at the lower. He has to exhaust all available remedies to the lower court first."

Guided by the cited authority and since the applicant is challenging both the act of the court to proceed ex-parte and the merit of the finding he cannot file an appeal but an application to set aside ex-parte ruling at the trial court. In case her application to set aside ex parte ruling is rejected, then the decision upon rejection becomes appealable as per **Order XL Rule (1) (d) of the Civil Procedure Code**, Cap 33 R.E 2019 which provides that:

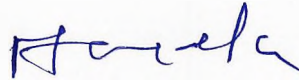
"An order under rule 13 of Order IX rejection an application (in a case open to appeal) for an order to set aside a decree or judgment passed ex parte."

Based on the cited provision an order refusing to set aside an ex parte judgment is appealable and not this one.



In the circumstances, this court finds that the application is misconceived and is hereby dismissed. Since this is a family issue, I make no order as to costs.

Ordered accordingly.



N.R. MWASEBA

JUDGE

22/09/2022

