

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF MWANZA

AT MWANZA

HC CIVIL APPEAL NO. 8 OF 2022

(Originating from the Miscellaneous Civil Application No. 14 of 2021 before District Court of Geita at Geita)

ZAKAYO LAMECK APPELLANT

VERSUS

YOHANA MICHAEL JOHN 1st RESPONDENT

(Administrator of The Estate of The Late TABU BUKINDU

S.L. ISANGI AUNCTION MART & COURT BROKER 2nd RESPONDENT

PADRI JOHN LUGOLA 3rd RESPONDENT

JUDGMENT

16th September, 2022 & 23rd February 2023

ITEMBA, J

This is an appeal against the decision issued by District Court in Miscellaneous Civil Application No. 14 of 2021. In the said application, the applicant has moved the court for an order of extension of time to file revision application out of time in which the application was dismissed.

Before I proceed, I find it proper to appreciate the background of this appeal. On 23/5/2018, the 1st respondent instituted a criminal case no. 96 of 2018 at Bugando Primary Court against the appellant. Her complaints were that the appellant has used words which threatened to kill her. After the hearing, a decision was issued in favour of the 1st respondent and the appellant was convicted and sentenced to a fine of

TZS 100,000/= or 12 months imprisonment. On 2/11/2018, the 1st respondent filed a civil case no. 89/2018 before the same Bugando Primary Court against the applicant, claiming TZS 2,000,000/= as costs which she incurred in prosecuting the said criminal case no. 96 of 2018 against the appellant. As per the records, when civil case no. 89/2018 was called for hearing, the 1st respondent told the court that the appellant has denied to sign the summons. The trial magistrate ordered that the application will be heard *ex parte* because it is the second time without the appellant appearing. The 1st respondent testified and she also paraded another witness. The two, also produced receipts and list of costs incurred to prosecute the said criminal case. At the end, on 20/12/2018, a decision was issued in the 1st respondent's favour and she was awarded TZS 2,000,000/=. On 11/2/2019, in the course of trying to execute the court orders, the 1st respondent moved the court to attach the appellants' properties. The court ordered for the appellant to be summoned for that purpose. Again, the 1st respondent stated that the appellant has declined to sign the summons to show cause as to why his properties should not be attached. An order for attachment was issued against the appellants' properties to wit; milling machine, threshing machine and a plot of land located at Buswelu Mwanza. The attached properties were sold to the 3rd respondent, namely; Padri John Lugola. As a result, on 20/12/2019, the

appellant made an application for revision against the Civil case no. 89 of 2018 and execution proceedings thereof, at the District Court of Geita,. The application was struck out for being time barred. The appellant made another attempt by filing an application for extension of time to file Revision application out of time. The same was dismissed, hence this appeal.

The appellant has filed two grounds of appeal as follows:

- 1. That the District Court erred in law and fact to find that there were no grounds for extension.*
- 2. That the District Court erred in law and fact to find that there were no material irregularities in the decision of Primary Court calling for extension of time to exercise revisional power.*

At the hearing, the appellant was represented by Advocate Ernest Makene while the respondent has the services of Advocate Erick Lutehanga. Hearing was by way of written submission.

The applicants' counsel opted to argue both grounds jointly. He submitted that right to be heard is fundamental right of litigants in a trial therefore, failure of the trial court to afford a party his right to be heard amounts to illegality. He argued further that illegality constitutes a good cause for extension of time even in the absence of other reasons for the delay. He complained that failure to afford the appellant the right to be

heard in Civil Case no. 89 of 2018 contravened Article 13(6) of the Constitution of United Republic of Tanzania. He supported his submission with the cases of **Highland Estate Ltd v Kampuni ya Uchukuzi Dodoma Ltd and Consolidated Holding Corporation**, Civil Application no. 183 of 2004 CAT at Dar es salaam which stated that, *a party ought to be heard before an order adverse to it is made*, and the case of **V.I.P Engineering and Marketing Limited and others v CITIBANK Tanzania Limited (CAT) Consolidated** Civil references no. 6,7 and 8 of 2006 where the court stated inter *alia* that: *the right to be heard is so basis that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard because the violation is considered to be a breach of natural justice*’.

The appellant’s counsel stated that the trial court proceeded with sale of the appellant’s properties even though there was ‘calling for records’ of the specific file by the Resident Magistrate’s Court.

In respect of accounting for each day of delay, the learned counsel submitted that in the application for extension of time, the appellant managed to account for reach day of delay. That, after he was convicted at Bugando Primary Court, he was not given a copy of the decision despite

trying to apply for the same. That, on 13/11/2018, the appellant reminded the court through a letter without any success and it was during that time when the 1st respondent filed a civil suit against him. That, on 19/3/2018 the appellant filed an application for revision no. 6/2019 and upon realising that the 1st respondent is at execution stage and has sold his properties already, he withdrew the application and prayed for leave to file another application. He later filed the application which was struck out.

The respondent's counsel vehemently opposed the appeal. He states that the appellant claims to have filed Civil Application No. 6/2019 and then withdrew it but there is no evidence to support that. He adds that the appellant had enough time to file an application for revision but he did not prefer to file it until when he was time barred.

As for the issue of illegality, he argued that it was not raised in the District Court thus it cannot be relied at this stage of appeal. That the only ground established at District Court was that the appellant was late to be supplied with the copy of Primary Court judgment. He stated further that, the constitutional right to be heard does not mean it is not bound by other laws of the country and section 110 of the Evidence Act provides that he who alleges any fact has the burden to prove the same.

He cited the case of **Sabena Techniques Dar Limited v Michael J. Luwunzu**, Civil Application no. 451/18 of 2021 CAT (unreported) which stated that *'illegality is not a panacea for all applications for extension of time. It is only a situation where, if extension sought is granted that illegality will be addressed'*. He was of the opinion that since the intended appeal is not against the decision of the Primary Court the issue of illegality is misplaced.

In rejoinder, the appellant's counsel reiterated what he stated in submission in chief. He also added quite new arguments that actually his properties which were sold are located at Buswelu, Ilemela Mwanza therefore, the Bugando Primary, Court had no jurisdiction over it. This being a new issue it will not be considered by this court because even the respondent did not get an opportunity to reply.

Having gone through the records and both parties' submissions, the issue is whether the appeal is meritorious. This court need to evaluate on whether or not the appellant had established before the District Court sufficient grounds for extension of time.

It is trite law that extension of time will be granted on court's discretion and upon the appellant showing a good cause for the delay. There are factors which the court considers when determining whether a

good cause has been established, as introduced by various decisions. These factors though not exhaustive are such as;

- (i) the length of the delay;
- (ii) the reasons for the delay;
- (iii) the degree of prejudice the respondent stands to suffer if time is extended;
- (iv) whether the applicant was diligent; and
- (v) whether there is point of law of sufficient importance such as the illegality of the decision sought to be challenged.

These factors are found in the decisions in the cases of **Dar es Salaam City Council vs Jayantilal P. Rajani**, Civil Application No. 27 of 1987, **Tanga Cement Company Limited vs Jumanne D. Masangwa and Another**, Civil Application No. 6 of 2001 and **Lyamuya Construction Company Limited vs Board of Registered Trustees of Young Women's Christian Association of Tanzania, Civil Application No.2 of 2010** (All unreported). Further, the applicant is supposed to account for each day of delay.

In the impugned ruling, the Hon. Magistrate dismissed the application in the view that the appellant is late by 8 months and he did not account for each day of delay. As for the issue of illegality in Civil Case No. 89/2018 he was of the view that he cannot discuss it. He stated that: *'since it is as if nothing was brought in this court as no reasons for*

*delay given by the applicant. Of course, I could have such muscle to discuss if there was established sufficient cause thereto as it was held in **Valambia's Case Supra and Lyamuya Construction (Supra).***'

To start with, on whether the appellant accounted for each day of delay, it is undisputed that the appellant had delayed to file his application by 8 months. I would agree with the respondent's counsel that the allegation that the appellant had filed application no. 6/2019 then withdrew it is not supported by any evidence.

Moving to the issue of illegality, I think the Magistrate misled himself by omitting to assess the ground of illegality stating that it is because the applicant did not establish sufficient reasons for delay. Because illegality was raised as ground for extension of time, this was an independent ground. Without going to the merit of the intended revision application; still the District Magistrate would have assessed the whole decision to see if at all there was a point of law of sufficient importance.

I have keenly gone through the proceedings of Bugando Primary Court and what I can see is that, during the said *ex parte* hearing, the 1st respondent told the court that the appellant has declined to sign the summons, however, there was no proof of service to the appellant. The same happened when the 1st respondent was moving the court to attach

the appellant's properties, she was asked by the court to summon the appellant to show cause as to why his properties should not be sold. The 1st respondent, later came to the court with the same oral statement that the appellant has declined to sign the summons.

It is my firm view that, as a matter of good practice, the 1st respondent ought to have produced the said summons to satisfy the court that the appellant was actually informed of the case against him and opted not to appear. Instead, the 1st respondent gave a mere statement, without any submission of the said un-signed summons. Who knew if she just concealed the summons and claimed that the appellant had denied to sign it? If the 1st respondent brought a number of documents to prove her trips to the courts and costs thereof, she ought to have applied the same spirit in proving the denial of the appellant to appear before the court. Certainly, the appellant right to be heard which is a constitutional right, was curtailed. As much as I agree that illegality should not be taken as a panacea, or a blanket to cover all applications for an extension of time, as per the cited case laws, illegality can still be a ground for extension of time under certain circumstances. I am also aware of the crux that, each case should be considered based in its own merit. In the present case, there is a glaring irregularity which cannot be left unsettled, that the appellant was denied his right to be heard in Civil Case no. 89 of 2018 at

Buganda Primary Court. This illegality is a sufficient ground to grant the appellant with an extension of time for his revision application to be heard. For that reason, I find that the appeal has merit and it is hereby allowed.

The appellant can file his intended application for revision within thirty (30) days from the date of this judgment.

Cost to abide the outcome of the intended application.

It is so ordered.

DATED at **MWANZA** this 23rd day of February 2023.



Judgment delivered under my hand and seal of the court in chambers, in absence of the appellant, in the presence of 1st and 3rd respondents and Ms. Gladys Mnjari RMA.

A handwritten signature in blue ink, appearing to be 'L. J. Itemba', written on a light-colored rectangular background.

L. J. ITEMBA
JUDGE
23/2/2023