

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA SUB REGISTRY

AT ARUSHA

MISC. CIVIL APPLICATION NO. 80 OF 2023

(C/F CIVIL CASE No. 42 of 2018 in the Resident Magistrate Court of Arusha at Arusha)

SIMON JOHN NGALESONI.....APPLICANT

VERSUS

**FATHER VELEMIR TOMIC (Suing as a Legal Representative of the
Reg. Trustees of Cathoiiic Archdiocese of Arusha).....RESPONDENT**

RULING

20/2/2024 & 26/03/2024

NDUMBARO, J

Before me, is an application for extension of time brought by the applicant under the provision of section 14 (1) of the Law of Limitation Act Cap 89 R.E 2019. In this application, the applicant is seeking for extension of time to file an appeal against an ex parte judgment and decree in Civil Appeal No. 42 of 2018.

The application is further supported by an affidavit duly sworn by the applicant where a series of events have been narrated culminating the delay of the applicant to file his appeal within time. The respondent on the other hand, opposed the application through his counter affidavit.

The applicant's affidavit is to the effect that the respondent herein was the plaintiff in Civil Case No. 42 of 2018 before the Resident Magistrate Court of Arusha at Arusha which proceeded ex parte. The applicant went on to state that he became aware of the existence of the said case in the year 2020 when the respondent had started the execution process. It was his further contention that ever since he became aware of the existence of the said suit he had never rested as he kept on challenging the ex parte judgment unsuccessfully. Among others, the following are some of the applications which were filed by the applicant unsuccessfully; Misc. Application No. 9 of 2020, Misc. Application No. 36 of 2020, Civil Revision No. 1 of 2020 and Misc. Civil Application No. 95 of 2022.

Moreover, the applicant has also alleged that he is intending to challenge the ex parte judgment on the reason that the said judgment is tainted with illegalities as follows;

- i. The judgment and decree in Civil Case No. 42 of 2018 were tainted with illegalities for failure to frame issues for determination before the commencement of the ex parte hearing.

- ii. The judgment and decree in Civil Case No. 42 of 2018 was tainted with illegalities as the applicant who was the defendant, was not saved with the amended plaint.
- iii. That the judgment and decree in Civil Case No. 42 of 2018 was tainted with illegalities as the applicant who was the defendant was not notified of the date of commencement of the ex parte hearing of the case.
- iv. That the judgment and decree in Civil Case No. 42 of 2018 was tainted with illegalities as the applicant who was the defendant was not notified of the date of delivering the judgment.
- v. That the judgment and decree in Civil Case No. 42 of 2018 was tainted with illegalities as the advocate for the respondent testified as a witness contrary to the law.

On his part, the respondent refuted the grant of this application and stated that there are no illegalities apparent on the face of the record as alleged by the applicant as the applicant was afforded the right to be heard but he declined by avoiding service. The respondent went further to state that the applicant's delay is 670 days which is so inordinate and unaccounted for this court to grant. The respondent also stated that execution in Civil Case No. 42 of 2018 had already been concluded as on

4th August 2023 the parties signed a deed of settlement where the applicant paid the respondent the decretal sum and the dispute between the parties was finalized. It was therefore the prayer of the respondent that this application be dismissed as the applicant has been negligent and reluctant in prosecuting his case.

When the matter was called on for hearing, the applicant enjoyed legal services from advocate **Fortunatus Muhalila**, on the other hand, the respondent was represented by the learned counsel **Mr. Peter Kuyoga Nyamwero**.

Submitting in support of his application, the applicant's counsel argued that his client intends to challenge the ex parte judgment delivered by the Resident Magistrate Court of Arusha at Arusha on matters of law only. The counsel went further to state that, upon being aware of the existence of the ex parte judgment, his client made several efforts to challenge the ex parte judgment unsuccessfully until when he engaged him and upon perusal he discovered that the only remedy available for his client to challenge the ex parte judgment was through appeal on points of law hence this application.

In justifying the grant of this application, Mr. Muhalila submitted that among other reasons, the applicant intends to challenge the ex parte

judgment on the reason that it is tainted with illegalities. Amplifying on this point, the counsel cited the case of **The Principal Secretary Ministry of Defence National Service vs Devram Valambhia**, 1992 TLR 387 where a principle was set by the Court of Appeal of Tanzania that illegality is a sufficient reason for the court to grant extension of time. This position was reiterated also in the case of **Ramadhani Bakari & 78 others vs Aga Khan Hospital**, Civil Application No. 5/01 of 2022 CAT at Dar es Salaam (Reported Tanzlii). The counsel expounded the said illegalities as reflected in the applicant's affidavit and added that there was a breach of the principle of natural justice as his client was denied the right to be heard.

On the issue of accounting for each day of delay, it was the submission of the learned counsel that the applicant herein ever since he became aware of the ex parte judgment has been into court corridors trying to challenge the said judgment in vain. Moreover, the counsel submitted that the ex parte judgment had already been executed as the applicant was committed as a civil prisoner before he decided to pay the debt. According to him even when the execution has already been done yet an aggrieved party is not barred from challenging the judgment. He supported his argument with the case of **Farid F. Mbaraka & another**

vs Domina Kagaruki & another, Civil Appeal No. 293 of 2022 CAT at Dar es Salaam (Reported Tanzlii). That said, the applicant's counsel prayed for the grant of this application.

Opposing the application, Mr Nyamwero maintained that the suit between the parties had already been concluded as the applicant fulfilled the decree and they both signed a deed of settlement and therefore the case was marked closed. The counsel went on to submit that, the applicant in this case has to meet all the guidelines for the grant of extension as stipulated in the case **Lyamuya Construction Company LTD vs Board of Registered Trustees of Young Women**, Civil Application No. 2 of 2010. The counsel went on to state that the applicant herein never filed any appeal, revision or review against the ex parte judgment since 2021 and therefore the delay is so inordinate and unaccounted for. It was his argument that the applicant herein was not diligent in pursuing his rights. The respondent's counsel also challenged the alleged illegalities and stated that the alleged illegalities are not concerned with jurisdiction and therefore they cannot be considered as illegalities to warrant this court to grant the relief sought. He supported his assertion with the case of **Attorney General vs Micco's International (T) LTD & another**, Civil Application

495/16 of 2022 (Reported Tanzlii) where the Court gave the meaning of the word illegality. The council concluded that the application had not demonstrated sufficient cause and therefore prayed for its dismissal.

In his short rejoinder, Mr. Muhalila basically reiterated what he submitted in his submission in chief and fact, he maintained that his client was denied the right to be heard. As to the cases cited by the respondent's counsel, Mr. Muhalila distinguished the said cases from the circumstances of this case and it was his further argument that each case must be decided according to its own facts. He therefore prayed this court to grant the application.

Having considered the parties' submissions, the question for my determination is whether the applicant has exhibited good cause to warrant this court to grant the relief sought.

It is trite law that, an application for extension of time is entirely in the discretion of the Court to grant or refuse it. This unfettered discretion however has to be exercised judicially and an overriding consideration is that there must be "sufficient cause" for doing so. What amounts to sufficient cause has not been defined. From decided cases, a number of factors have to be taken into account including whether or not the application has been brought promptly; the absence of any or

valid explanation for the delay; lack of diligence on the part of the applicant and illegality.

In the instant application, the ex parte judgment which the applicant intends to challenge was delivered on 14/02/2019 whereas this application was filed by the applicant on 18/08/2023. It has been a well-settled position of the law that a party seeking for extension of time must sufficiently account for each day of delay. See the decision in the case of **Sebastian Ndaula vs Grace Rwamafe**, Civil Appeal No. 4 of 2014 CAT at Mbeya (Reported Tanzlii) where it was held that;

"The position of this court has consistently been to the effect that in an application for extension of time, the applicant has to account for every day of delay."

In accounting for the delays of delay, Mr Muhalila's submission was to the effect that ever since the applicant was aware of the ex parte judgment, he has been in court corridors trying to challenge the said decision without success. Thus it was his argument that the time that has been spent by the applicant in court challenging the impugned decision justifies the delay of each day.

I am aware of the exclusion of time spent by an applicant or plaintiff prosecuting bonafide in Court. For ease of clarity I wish to

reproduce section 21 of the Law of Limitation Act Cap 89 R.E 2019 which states as follows;

"21. -(1) In computing the period of limitation prescribed for any suit, the time during which the plaintiff has been prosecuting, with due diligence, another civil proceeding, whether in a court of first instance or a court of appeal, against the defendant, shall be excluded, where the proceeding is founded upon the same cause of action and is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is incompetent to entertain it.

(2) In computing the period of limitation prescribed for any application, the time during which the applicant has been prosecuting, with due diligence, another civil proceeding, whether in a court of first instance or a court of appeal, against the same party, for the same relief, shall be excluded where such proceeding is prosecuted in good faith, in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it."

I have had enough time to go through the application at hand together with the rival submissions of the parties' advocates. Nevertheless, it was the observation of this court that the applicant had initially filed an application for an extension of time to set aside the ex

parte judgment at the Resident Magistrate Court vide Misc. Civil Application No. 9 of 2020. The application was however struck out for being incompetent. Thereafter, the applicant filed another application for an extension of time to set aside the ex parte judgment vide Misc. Civil Application No. 36 of 2020, the same was dismissed for lack of merit. This was followed by an application for execution filed by the respondent and on 10/12/2021 the application was granted and it was ordered that the applicant be arrested and detained as a civil prisoner. The applicant was aggrieved by the order of arrest and detention as a civil prisoner and therefore he filed Civil Revision No. 1 of 2022 challenging the said order. Unfortunately, he lost again and the application was dismissed. Still persistent, the applicant filed in this Court an application for leave to appeal to the Court of Appeal of Tanzania against the decision in Civil Revision No. 1 of 2022. Again, the application was not meritorious and consequently on 3/05/2023 it was dismissed. Nevertheless, on 14/09/2023, the respondent's counsel Mr. Nyamwero appeared before the Resident Magistrate Court and informed the Court that the applicant had paid the sum of 108,258,473/= and that the remaining balance of Tshs. 14,440,000/= were forgiven by his client (the respondent). Following the satisfaction of the debt by the

applicant, he was released as a civil prisoner and execution was marked closed.

From the above-narrated series of events, it is to the satisfaction of this court that the applicant herein had not slept over his right, but all along has been in court corridors knocking on the doors of different courts seeking for his legal rights. In that regard, it is the firm view of this court that the applicant is salvaged by the provision of section 21 of the Law of Limitation Act.

Mr. Muhalila has also alleged illegality as a reason for the grant of this application. I am certain that, a claim of illegality or otherwise of an impugned decision has, all along, constituted a good cause for extension of time. In expounding the said illegalities, the counsel argues that the decision to be challenged was passed against his client's interest as he was not accorded with the right to be heard. To me, this is a serious allegation of illegality in the impugned decision. In consideration as to whether illegality is sufficient to extend the time the Court of Appeal of Tanzania had the following to say in the case of **Finca (T) Limited & Another vs Boniface Mwalukisa**, Civil Application No. 589/12/2018 CAT sitting at Iringa (Reported Tanzlii);

*"...is well settled and it should be borne in mind that, in those cases where extension of time was granted upon being satisfied that there was illegality, the illegalities were explained. For instance, in **Principal Secretary, Ministry of Defence and National Service v. Devram Valambhia** [1999] TLR 182 the illegality alleged related to the applicant being denied an opportunity to be heard contrary to the rules of natural justice.*

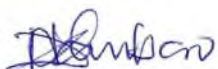
Guided by the above principle of law in relation to the application under consideration, this Court is persuaded that the alleged illegality by the applicant is apparent on the face of it and thus can be discerned as a good cause for an extension of time.

I have also noted the submission of the respondent's counsel that the execution in this matter had already been closed and the parties had entered into a settlement agreement. The counsel has also challenged the existence of the alleged illegalities stating that the applicant was served with summons but he is the one who failed to show up. With due respect, I wish to state that at this juncture, what this court needs to pronounce is only on whether sufficient grounds for the extension have been advanced by the applicant and any discussion to do with the

intended appeal it is my finding that, the conversation is subject for another day.

In the result, I am satisfied that the applicant has shown sufficient reasons to warrant an enlargement of time to file his appeal. In that regard, the intended appeal should be filed within fourteen (14) days from the date of delivery of this ruling. Costs to be in the Cause.

It is so ordered.


D. D. NDUMBARO
JUDGE
26/3/2024