

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

CIVIL APPEAL NO 91 OF 2016

(Appeal from the decision of Kinondoni District Court in Misc. Civil Application No. 10 of 2015 originating from Misc. Civil Application No. 22 of 2014 from Kinondoni District Court which originated from Probate Cause No. 966 of 2012 from Manzese Primary Court)

SHAMSAMBWASA MURO.....APPELLANT

VERSUS

MEXON EXAUD MURO.....RESPONDENT

JUDGMENT

14 Dec., 2017 & 15 Mar., 2018

DYANSOBERA, J.:

The appellant, Shamsimbwasa Muro, has lodged this appeal seeking to impugn the decision of Kinondoni District Court in Misc Civil Application No 10 of 2015. The ground upon which the applicant relies in this appeal is that:

(1)The trial magistrate erred in law and fact to hold that the applicant failed to give any reasonable ground for the Court to allow extension of time to file an application to set aside the dismissal order issued by the same Court dated 8th December 2014 (Hon Lyamuke).

The brief undisputed facts of the case are that, in the year 2014, the appellant applied for a revision of Probate Cause No 96/2012 at Kinondoni District Court which was registered as Misc Civil Application No 22/2014; the same was dismissed on 8th December 2014 due to non-appearance by the applicant. The appellant further opted to pursue an application for extension to set aside the dismissal order. The application was received and registered as Mis. Civil Application No 10 /2015 at Kinondoni District Court.-

Again the same was dismissed on 8th June 2016 for failure by the applicant to give sufficient reasons for extension of time. Aggrieved with the decision of the trial Court the appellant has proffered the instant appeal.

At the hearing of this appeal, Mr. Kitale, learned advocate stood for the appellant while the respondent was represented by Mr. Thomas Massawe, learned counsel. It was agreed by learned advocates for the parties to this case that the appeal be argued by way of written submissions.

Submitting in support of the appeal Mr. Kitale submitted that the trial Court was not correct in its decision for dismissing the application for

extension of time by the appellant for the ground that it was in short of sufficient reasons. According to him, since the applicant was not aware of the hearing date after instituting her revision in Court that constituted a sufficient reason for extension of time to set aside the dismissal order. He insisted that on different occasions the appellant made a follow up in Court to know the magistrate who had been assigned the case, but the efforts were unsuccessful. To buttress the point, Counsel called in aid the provision of Section 34(1) (a) of the Magistrate's Courts Act [Cap 11 R.E.2002] on the necessity of the court to which an appeal lies to cause notice of the time and place at which the appeal will be heard to be given to the parties or their advocates. Counsel sought to impress the court that there was no notice which was served to the appellant and hence he was not aware of the hearing date.

Lastly the learned counsel for the appellant insisted that failure of the Court to notify the appellant about the hearing date was a good reason for the appellant's application for extension of time to be granted.

He prayed before this Court the appeal to be allowed, the dismissal order of Kinondoni District Court dated 8th June 2016 to be quashed and the application for extension of time to challenge the dismissal order to be granted with costs.

In response to the issue that the appellant was not issued with notice for the hearing date after instituting a revision, Mr.Thomas Massawe learned counsel for the respondent contested that the appellant instructed advocate Stephen Ally Mwakibulwa who also instructed another advocate

known as Adrian Mhina to enter appearance on his behalf as per the record.

According to him that was a sufficient proof that the appellant had notice.

The learned counsel for the respondent also pointed out that **Section 34(1)(a) of the Magistrate Court Act Cap 11 R.E 2002**, cited by the appellant is irrelevant in the circumstance of this case.

Lastly, he stated that as per **Section 14(1) of the Law of Limitation**, in order to extend time the law requires two important issues to be looked into which are any reasonable and sufficient cause.

In the view his argument the learned counsel for the respondent finds the appellant failed to provide sufficient reasons and thus he prayed this Court to dismiss the appeal with costs.

In rejoinder Mr. Symphorian Kitale submitted that she retained counsel Mwakibolwa to the extent of lodging revision but not to the extent of representing her in revision, further he submitted that even if she would have retained counsel Mwakibolwa to represent her in Court, he insisted that she was neither present when the hearing date was scheduled nor notified on the hearing date of the application for revision.

Furthermore, he retaliated that the claim by the respondent that on 13/8/2014 advocate Mhina held the brief of advocate Mwakibolwa are not in evidence thus the counsel for the respondent had the duty to prove. The learned counsel for the appellant insisted that respondent failed to prove

that the appellant was represented and that she was notified about the hearing date

Having considered the argument by both sides, I am of the view that it is not disputed that the appellant failed to appear in Court after instituting her application for revision in Court.

The major issue before me is therefore whether the applicant has sufficient ground for his application for extension of time to be granted

It is the cardinal principle of law that an extension of time is granted under the discretion power of the Court upon sufficient ground been adduced by the applicant; See Court of Appeal decision in **Kapinga and Co Advocates National Bank of Commerce, Civil Appeal No 42 of 2007; at Dar es salaam and Cement Co .Ltd V Jumanne D.Masangwa and another, Civil Application No 6 of 2001, at Tanga (Both unreported).**

In the instant application the appellant claims that the major reason for his failure to file an application for extension of time to set aside the exparte order was due to the Court's failure to notify him on the hearing date and that she did not attend the hearing of the application.

Having passed through the court record it is true as observed by the learned counsel for the respondent, the appellant lodged her application for revision in the District Court through the service of advocate Mwakibolwa. On 13/8/2014 it appears advocate Mhina appeared in Court on behalf of advocate Mwakibolwa who was assigned by the appellant.

- I hasten to agree with appellant's contention that she was not aware of the hearing date. In my view, since she had engaged an advocate it would be unjustifiable to conclude that she was not aware of the hearing date. The appellant should be responsible for her non appearance in Court .

Having observed all that, I find that the reasons prompted by the applicant for the application for extension of time were not sufficient and do not meet the standard requirement for extension of time as it was under scored in the case of Standard **Chartered Bank (Tanzania) Ltd V Bata Shoe Company (T) Ltd, Civil Appeal.No, 101 of 2006 and Salvand K.A Rwegasira V China Henan International Group Co.Ltd, Civil Reference No, 18 of 2006, at Dar es salaam (Both unreported).**

In the view of the above authority the appeal is hereby dismissed with costs to the respondent.




W.P. Dyansobera

JUDGE

15.3.2018

Delivered this 15th day of March, 2018 in the presence of the appellant but in the absence of the respondent.




W.P. Dyansobera

JUDGE