

**THE UNITED REPUBLIC OF TANZANIA**

**JUDICIARY**

**IN THE HIGH COURT OF TANZANIA**

**SUMBAWANGA DISTRICT REGISTRY**

**AT SUMBAWANGA**

**CIVIL APPEAL NO. 05 OF 2022**

(Originating from Misc. Application No. 20 of 2021 of Sumbawanga District Court at Sumbawanga in Civil Case No. 10 of 2019)

**TINDOSSY PAULO MAGANGA ..... APPELLANT**

**VERSUS**

**ASAYILE PAULO MSAKU @ LONDON .....RESPONDENT**

*Date of Last of Order: 14/11/2022*

*Date of Judgment: 31/01/2023*

**JUDGEMENT**

**NDUNGURU, J.**

Before the District Court of Sumbawanga the appellant herein had filed an application for extension of time to file an application to set aside an ex-parte judgement out of time. Having heard the application on merits, the same was dismissed by the District Court with costs.

Aggrieved by that decision, the appellant preferred the present appeal to this Court whereby his Memorandum of Appeal consisted of five grounds of appeal which are as reproduced hereunder;

1. That, Honourable learned Resident Magistrate erred both in point of law and fact when he dismissed the application for extension of time to file an application to set aside an ex-parte judgement out of time in total dis-regard to the illegality namely Failure of the trial Resident Magistrate to abide with Order XX Rule 1 of the Civil Procedure Code, Cap. 33 R. E. 2019 before delivering an ex-parte judgement.
2. That, Honourable learned Resident Magistrate erred both in point of law and fact when he dismissed the application for extension of time to file an application to set aside an ex-parte judgement out of time in total dis-regard to the illegality namely admitting photocopy exhibits P1, P2, P3 and P4.
3. That, Honourable learned Resident Magistrate erred both in point of law and fact when he dismissed the application for extension of time to file an application to set aside an ex-parte judgement out of time in total dis-regard to the illegality namely delivering ex-parte judgement in absence of the parties.
4. That, Honourable learned Resident Magistrate erred both in point of law and fact when he dismissed the application for extension of time to file an application to set aside an ex-parte judgement out of time in total dis-regard to the illegality namely charging Court Rate at 15%.

5. That the decision was based on a criminal case No. 303 of 2018 without affording an opportunity to the applicant. The applicant was given a chance to controvert what was the contents in the judgement.

Whereas, the appellant prays for this appeal to be allowed with costs and an order that the ruling of the Trial Court be quashed and order to grant an extension of time to file an application to set aside an ex-parte judgement out of time.

Essentially, the respondent refuted the grounds of appeal paraded 'in discontent of the findings' of the decision of the trial court. During the hearing of this appeal, the appellant was represented by Mr. Simon Mwakolo learned Advocate while the respondent was represented by Ms. Tunu Mahundi also learned Advocate, whereas both sides agreed on battling out this appeal by way of written submissions, a choice which was gladly granted by this court.

The counsel for the appellant started off by submitting that the decision of the trial court consists of illegalities which he believes are good reasons for extending time to file an application to set aside an ex-parte judgement out of time. He added that the appellant avers that there was a breach of natural justice when the case was heard ex-parte as well as when the ex-parte judgement was delivered.

Mr. Mwakolo proceeded that, the illegalities noted in the ex-parte judgement are, first, the applicant was condemned unheard for failure on the part of the respondent to serve the applicant with the summons to appear and a summons for orders to file a written statement of defence as per the requirement under Order VIII Rule 1(1) and (2) of the Civil Procedure Code, Cap 33 R.E. 2019. In addition to that, the learned counsel said that the court record does not show that the above provision was observed by the trial court, and failure to comply with the provision is an illegality which goes to the root of the case for the condemning the appellant unheard.

Secondly, Mr. Mwakolo proceeded to submit that the applicant was not notified to appear and attend on the date of judgement dated 20/03/2020. Order XX Rule 1 of the Civil Procedure Code, Cap. 33 R.E. 2019 provides in a mandatory form that before the court pronounces a judgement in the open court, it shall issue a notice to the parties or their Advocates, the learned Counsel went on and reproduced the particular provision. And therefore, Mr. Mwakolo believes the principle of natural justice was not adhered to in breach of the provision above, and referred this court to the High Court case in Dar es Salaam in PC. Civil Appeal No. 193 of 2004 between Ohamed Kitwaa vs Mohamed Mang'uro, Shangwa J, at page 5 which held that;

“a denial of a right to a fair hearing renders the decision void in law”

Mr. Mwakolo identified another illegality and submitted to it that the trial Magistrate delivered his judgement alone in the absence of both parties. He added that this was an illegality and was contrary to Order XX Rule 1 of the CPC as cited earlier in his submission, as it is required the parties or their advocates to be notified and attend the date of the judgement.

Submitting further on illegalities, Mr. Mwakolo said that the trial court admitted exhibits P1, P2, P3 and P4 which were photocopies and he believes it is contrary to Section 66 of the Evidence Act, Cap. 6 R.E. 2019 which requires documents to be proved by primary evidence, meaning originals except otherwise provided in the Act. He argued that in the proceedings and the ex-parte judgement there was no reason given as to why the original documents were not tendered.

In Concluding, Mr. Mwakolo submitted that another illegality concerns the decision which was based on a criminal case No. 303 of 2018 without affording an opportunity to the appellant, that he was not given a chance to controvert what was the contents in the judgement. However, he added that the decision was based on an inflation court rate at 15% while there was no such issue and was contrary to the law, in the sense that court rates are awardable at 7% to 12% and not more than that, and so awarding 15% as court to Mr. Mwakolo regards it as illegal.

To this extent, Mr. Mwakolo believes that the illegalities raised above a good reason enough to grant an extension of time, and therefore on behalf of his client, he prays for this court to grant extension of time to file an application to set aside an ex-parte judgement out of time and costs to follow in the main suit.

In reply the respondent counsel Ms. Mahundi submitted that firstly the respondent herein prays before this court to adopt the reply to the memorandum of appeal and continue to reply the appellant counsel submission as he argued.

She started with first argument by the counsel for the appellant, that there was no any breach of justice all procedures were followed by the court to hear the case ex-parte, and the cited provisions by the counsel for the appellant is irrelevant to this case as the appellant was served with the summons but he did not show up and the court decided to serve him through substituted service through Uhuru newspaper dated on 14<sup>th</sup> January, 2020 but still he did not show up, and that made the trial court to be satisfied that the summons was duly served as according to Order v rule 16 (2) of the Civil Procedure Code [Cap 33 R.E 2019] which provides that, learned counsel quoted;

*“Service substituted by order of the court shall be as effectual as if it had been made on the defendant personally”*

She insisted that the appellant was duly served but opted to ignore the service for the reasons best known to himself.

Secondly, Ms. Mahundi proceeded that the parties were notified as the case was heard ex-parte the appellant (herein) was not affected with anything but the respondent was the one who suffered from the appellant conduct and behavior of running away with his money. She proceeded that, the case cited here by the appellant's counsel is not relevant to this case at hand, that the appellant herein was avoiding respondent by all means that's why he refused to appear in court so that, he continues to disturb the respondent by instituting miscellaneous application for extension of time to set aside ex-parte judgment.

The learned advocate for the respondent proceeded that, the said Order XX rule 1 was not violated at all, that the parties were notified and the side in need of justice appeared before the trial court but as the appellant knew he had no right refused to appear in court for his own reason, whereas the appellant's counsel cited the provisions of the law which are not relevant in this case because all procedures were followed and all parties were aware of the proceedings and the date of the judgement.

Ms. Mahundi submitted further that, the counsel for Appellant misdirected himself by contesting that the trial court admitted exhibits p1, p2, p3 and p4 which were photocopies and that it was contrary to section

66 of the Evidence Act Cap.6 RE 2022. She clarified that, in the said provision there is an exception to the general rule that's why the court admitted the secondary evidence as provide under section 67(1) (a) (i) of the Evidence Act Cap 6 RE 2022. She furtherly argued that, the main reason for the court to admit them was because the original receipts were with the appellant himself. And therefore, she insisted that in reaction to the above provision to the trial Court, it was correct to admit exhibit p1, p2, p3 and p4 tendered by the respondent and therefore there was no any illegality on admitting those exhibits.

The learned counsel proceeded that, since the suit instituted must come to an end, the ex-part hearing has to be exercised which resulted to ex-part judgment, whereas the Appellant induced it out of his own negligence, in which the respondent was aware of all the dated and he attended. Ms. Mahundi added that, the learned counsel for the Appellant misdirected himself by holding that the judgment was delivered in absence of the parties, which it is totally false, the respondent was present.

Ms. Mahundi continued further by submitting against the 4<sup>th</sup> ground of appeal, that the court rate is the discretion of the court according to the nature of the case at hand, and that the respondent deserved it as it was the trial court's finding that the loss incurred by the respondent from the date of judgment until the day he receives his payment, and that the



counsel for the appellant cited no law that was violated by the trial magistrate.

Ms. Mahundi proceeded that the decision of trial Court was not only based on criminal Case No.303 of 2018 but also the finding of the trial court based on exhibits p1,p2,p3 and p4 as tendered by the respondent as the Case was proceeded ex-parte. She insisted that, the Appellant had not appeared in court since the institution of the suit despite being served the Summons through Uhuru newspaper dated 14<sup>th</sup> February 2020, whereas the appellant decided not appear and in so doing, he waived his right to be heard by his own negligence.

Again, Ms. Mahundi argued that the Honorable Resident Magistrate was correct in both law and facts in dismissing the application for extension of time to file an application to set aside the ex-parte judgment as the failure of the appellant to show good cause for his delay since the ex-parte judgment was delivered. In support of her argument, she referred this court to the case of **ADDIJA RAMADHAN (BINTI PAZI) VS SYLIVESTER W. MKAMA Civil Application no.13/17/2018 Court of Appeal (UNREPORTED)**, where an applicant's application was dismissed for failure to account each day of delay and give reason.

In winding up, Ms. Mahundi insisted that there was no any illegalities on the face of the ex-parte judgment and the failure of the Appellant to show sufficient reason for his delay led to the dismissal of his application

and in that, she prays for this Honorable Court to dismiss this appeal with cost, and upheld the decision of the District Court.

In rejoinder, Mr. Mwakolo generally reiterated what he submitted in chief earlier but insisted that though the case was heard ex-parte, it was not proved on the balance of preponderance and in that, it was tainted with illegalities on the face of record which cannot be rectified.

After a careful perusal of the submissions made the learned counsels from both camps, and reading between the lines the trial court's records, I am firmly fortified that, in determining this appeal the main issue is ***whether the appeal before this Court is meritorious.*** In that, I will deal with all the grounds of appeal at once for they all together suggest that the trial court proceedings was tainted with illegalities.

The counsel for the appellant have raised issue of illegalities involving service to appear during the hearing, the tendering of secondary documents as evidence, delivering ex-parte judgement in the absence of the parties, the court rate fixed at 15% and that the decision was based on a criminal case No. 303 of 2018 without affording an opportunity to the applicant.

It is true that, generally it is a set of principle of law that extension of time can be considered by the Court when the point at issue is one alleging illegality (see the case of **Principle Secretary, Ministry of**

**Defence and National Service vs. Devram Valambhia [1992] TLR 387).**

However, there are circumstances upon which the Court of Appeal has drawn a line on when the point of illegality can be raised and be termed as a good and sufficient cause for extension of time. The case of **Ngao Godwin Losero vs Julius Mwarabu, Civil Application No. 10 of 2015** CAT at Arusha (unreported), the Court of Appeal set the rule that illegality is only accepted when it is apparent on the face of record such as the question of jurisdiction; not one that would be discovered by a long-drawn argument or process.

As I have observed the submissions by parties and evidence on Court records, the illegalities claimed by the counsel for the appellant are drawn arguments, for example that the process of issuance of summons to the appellant deeming it to be full of irregularities, Mr. Mwakolo's submission was to whether the appellant was served or not, whereas the records of the trial court shows the contrary that the appellant was dully served and the service was even substituted through the Uhuru Newspaper as submitted by the counsel for the respondent, but still the appellant faulted appearance.

And again, the records reveal that the respondent was present during the delivering of the ex-parte judgement, and therefore it is not true as claimed by Mr. Mwakolo that the ex-parte judgement was delivered in

the absence of the parties, in this only the appellant was absent for the reasons best known to himself, and this does not form illegality as claimed by Mr. Mwakolo. In addition to that, on the admission of the secondary evidence by the trial court cannot be termed as illegality, however, the appellant was not present during the trial to object the admission of the said documents, and therefore the appellant had made his own bed so that he would lie on.

However, as I have explained and analysed hereinabove, the irregularities and illegalities as claimed by Mr. Mwakolo have drawn a long process of arguments, whereas, when one goes through the grounds of appeal and the trial court's records, it would be seen that there are no any illegalities to either the proceedings or the ex-parte judgment as claimed by the counsel for the appellant. Therefore, I entirely agree with the findings of the Trial Court which considered the raised illegalities and found them to have no basis.

Basing on that, I find that, this appeal lacks merit and I proceed to dismiss it, with costs.

It is so ordered.



  
**D. B. NDUNGURU**

**JUDGE**

**30/01/2023**

Date - 31/01/2023  
Coram - Hon. M. S. Kasonde – DR  
Appellant - Present in person  
Respondent - Present in person  
B/C - J.J. Kabata

**Court:** Judgment delivered in the absence of both parties this 31<sup>st</sup> day of January, 2023.

  
**M.S. KASONDE**

**DEPUTY REGISTRAR**

**31/01/2023**



Right of appeal fully explained.



  
**M.S. KASONDE**

**DEPUTY REGISTRAR**

**31/01/2023**