

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM
(CORAM: MUGASHA, J.A., LEVIRA, J.A. And MWAMPASHI, J.A.)**

CIVIL APPEAL NO. 60 OF 2019

VODACOM TANZANIA LIMITED.....APPELLANT

VERSUS

INNOCENT DANIEL NJAU.....RESPONDENT

**(Appeal from the Ruling and Order of the High Court of Tanzania,
Commercial Division at Dar es Salaam)**

(Mruma, J.)

dated the 20th day of September, 2017

in

Misc. Commercial Application No. 18 of 2017

.....

JUDGMENT OF THE COURT

4th & 7th October, 2022

LEVIRA, J.A.:

The appellant, VODACOM TANZANIA LIMITED is challenging the decision of the High Court of Tanzania, Commercial Division (the High Court) which dismissed Miscellaneous Commercial Application No.18 of 2017. In the said application, the applicant had applied for extension of time within which to file a notice of intention to appeal against the decision of the Resident Magistrate Court of Dar es Salaam at Kisutu (the trial Court) in Civil Case No.101 of 2016.

Before the trial Court, the respondent had sued the appellant claiming to be paid Tshs.140,000,000/= being the monies he won in a lottery called "JAY MILLION" plus general damages. The appellant

defaulted to file a Written Statement of Defence (the WSD) and thus on 26th July 2016 a default judgment was entered against her. However, the appellant did not take any step to challenge the decision of the trial Court until on 1st February 2017, which was over six months later when she unsuccessfully applied for extension of time before the High Court, the decision which is subject of the instant appeal. In the memorandum of appeal the appellant has advanced three grounds as follows:

- 1. That the learned Judge erred in law and facts in holding that the only reason for extension of time to file the notice of appeal was that contained in paragraph 6 of the affidavit of Olaf Mamburi. In doing so, the learned Judge failed to note other grounds contained in paragraphs 13, 14 and 15 of the same affidavit.*
- 2. That the learned Judge erred in law and facts in holding that the Appellant had failed to show sufficient grounds to warrant extension of time.*
- 3. That the learned Judge erred in law and fact in holding that the appellant conduct exhibited gross negligence.*

At the hearing of the appeal, the appellant was represented by Ms. Samah Salah, learned advocate, whereas, the respondent had the services of Mr. Abubakar Salim, also learned advocate.

Submitting in support of the appeal, Ms. Salah firstly adopted the appellant's written submissions and argued the first and second grounds of appeal together and the third one separately. As regards the first and second grounds, it was her submission that section 14 (1) of the Law of Limitation Act, Cap 89 R.E. 2002, empowers the High Court to grant extension of time where there is sufficient cause to warrant extension of time. However, she submitted, the law has not defined "sufficient cause" but the same depends on circumstances of each case.

She went on submitting that, the reason for the appellant's delay to file the notice of appeal on time was that she was not notified of the default judgment until on 20th January, 2017 upon being served with summons to show cause why execution should not proceed as stated under paragraphs 6, 7, 11 and 12 of the affidavit of Olaf Mumburi supporting chamber summons presented before the High Court as found on page 22 of the record of appeal. In addition, she referred us to paragraphs 13, 14 and 15 of the said affidavit where the deponent raised illegality as a sufficient cause for granting extension of time. It was her argument that the decision of the trial Court is tainted with illegalities as, **first**, the learned trial magistrate had no pecuniary jurisdiction to determine the matter; **second**, he pronounced the judgment in the respondent's favour without requiring him to prove his

claim *ex parte* and **third**, he awarded interest on the decretal amount over and above that which is permitted by the law. In support of her argument that illegality constitutes sufficient cause for extension of time, she cited to us the case of **VIP Engineering & marketing Limited and 2 others v. Citibank Tanzania Limited**, Consolidated Civil References No. 6, 7 and 8 of 2006 (unreported) and **Principal Secretary, Ministry of Defence, National Service v. Derran Vallambhia** [1992] TLR 185.

However, Ms. Salah submitted that the High Court did not consider the ground of illegality raised to justify extension of time. Instead, he only concentrated on the reason for delay as stated under paragraph 6 of the affidavit without scrutinizing the whole affidavit. In paragraph 6 it was deponed that: "*... no notice was issued to the applicant to receive the judgment.*" According to her, the learned Judge erred in law and fact by confining himself to the reason for delay and holding that the appellant had failed to show sufficient reason to warrant extension of time. Therefore, she urged us to determine the first and second grounds of appeal in the affirmative.

Ms. Salah referred us to page 195 of the record of appeal and submitted in respect of the third ground of appeal to the effect that, the

learned Judge misdirected himself by considering that the appellant did not file the WSD despite the fact that she was properly served with a complaint and thus was aware of the proceedings against her. According to Ms. Salah, the finding of the learned Judge in that aspect, that the appellant exhibited gross negligence, was erroneously arrived at because the appellant was not challenging the default judgment but the application before the learned High Court Judge was for extension of time. Therefore, she clarified, the learned Judge ought to have confined his decision on the facts provided in the appellant's affidavit on reasons for extension of time and not otherwise. She thus urged us to find that the appellant was not negligent as she filed the application as soon as she became aware of the default judgment, hence diligent. Finally, based on her submission Ms. Salah invited us to uphold the grounds of complaint and allow the appeal with costs.

In reply, Mr. Salim argued in respect of the first and second grounds of appeal that, issues pertaining to default judgment, illegality and pecuniary jurisdiction are grounds of appeal not for extension of time and that is why the learned judge did not consider them. He made reference to page 15 of the decision of the Court in **VIP Engineering and marketing Limited** (supra) and argued further that, not every error committed by a court amounts to an illegality and thus the present

appeal cannot be salvaged. This, he said, is due to the fact that the appellant was accorded the right to be heard and to him illegality constitutes a sufficient ground for extension of time only when the right to be heard is denied. He thus argued that the case of **Principal Secretary, Ministry of Defence, National Service** (supra) cited by the counsel for the appellant is distinguishable from the circumstances in the instant appeal.

Regarding the ground that the trial court had no pecuniary jurisdiction as raised in paragraph 13 (i) of the appellant's affidavit before the High Court as found on page 22 of the record of appeal, Mr. Salim referred us to page 192 of the record of appeal and submitted that the learned Judge correctly found that ground to be a good ground for appeal and not for extension of time. He urged us to find that the first and second grounds could not be relied upon to extend time and thus the learned Judge's decision in that aspect cannot be faulted.

Mr. Salim replied on the third ground of appeal to the effect that the appellant failed to advance sufficient reason as to why she delayed in filing the intended appeal. As such, he said, the appellant did not take steps immediately after becoming aware of the default judgment and did not advance sufficient reasons for the delay to file the

position was clearly stated in the case of **Principal Secretary, Ministry of Defence, National Service and VIP Engineering and Marketing Limited and Two others** (supra).

In the light of the established law above, in order to determine the issue we have raised, we need to consider as to whether the appellant pleaded illegality as one of the grounds for extension of time. We have closely examined the record of appeal particularly, the chamber summons and the supporting affidavit of one Olaf Mumburi which were placed before the High Court by the appellant. We note that under paragraphs 13,14 and 15 of the said affidavit, the issue of illegality was raised together with its particulars, including a claim that the trial magistrate had no pecuniary jurisdiction to entertain the matter which had been placed before him. However, upon our thorough reading of the ruling of the High Court, we observed that in determining the application, the learned Judge concentrated only on the reason for delay which is contained under paragraph six of the supporting affidavit as it can be seen on page 193 of the record of appeal. In that paragraph the appellant stated as follows:

*"That the said judgment was delivered in the absence of the Applicant because **no notice was***

issued to the Applicant to receive the judgment."[Emphasis added].

We further observe that the learned Judge determined the application on the basis of the reason for the delay advanced by the appellant from page 195 to 196 of the record of appeal without considering the ground of illegality which was also advanced as intimated above. We are of the considered opinion that the learned Judge ought to have exercised his discretion judiciously to consider even the ground of illegality which was also pleaded by the appellant because "sufficient reason" does not only entail reasons of delay, but also sound reasons for extending time. In particular, whether the ground of illegality raised by the appellant was worth consideration in determining whether or not to grant the application, the position is well settled in **Principal Secretary, Ministry of Defence, National Service** (supra) as follows:

"...when the point at issue is one alleging illegality of the decision being challenged, the court has a duty, even if it means extending the time for the purpose, to ascertain the point and, if the alleged illegality be established, to take appropriate measures to put the matter and the record right."

See also: **TANESCO v. Mufungo Leonard Majura & 15 Others**, Civil Application No. 94 of 2016 (unreported).

As intimated above, it is not contentious between the parties that the learned judge did not consider the ground of illegality raised by the appellant, we agree with them only to that extent. However, with respect, we are unable to go along with the line of argument by Mr. Salim when he made reference to page 197 of the record of appeal that the learned judge declined to consider the raised illegality because he said, that stage was yet to be reached. In fact, we have perused the record of appeal and found that the learned Judge was dealing with correctness or otherwise of the default judgment as quoted hereunder:

*"As I have intimated above, I will not deal with the issue whether or not it was correct for the trial court to enter judgment under the above quoted Rule **because that stage is yet to be reached.**" [Emphasis added]*

Having so observed, we think it is also important to address the argument by the counsel for the respondent that "illegality" stands as a sufficient cause for extension of time only when there is infringement of a right to be heard. We found this argument wanting. The law must be interpreted in its proper perspective regard being the mischief it intends

to cure. Equally in the circumstances of the present case where the appellant alleges that the trial court had no jurisdiction to determine the matter placed before it. In our view, such illegality could not be left unnoticed because the ultimate decision of the trial court affected the rights of the parties. Besides, the learned counsel for the respondent did not support with any law or decision, the argument in his narrow interpretation on what constitutes illegality as sufficient cause for enlargement of time.

We have already established that the learned Judge did not consider the ground of illegality raised by the appellant as sufficient cause for extension of time. We entertain no doubt that lack of jurisdiction is a point of illegality worth consideration in an application for extension of time. Therefore, the appellant demonstrated sufficient cause warranting the grant of extension of time to file notice of appeal. We are aware of the established principle that the Court cannot interfere with the High Court's exercise of its discretion in deciding cases unless it is satisfied that the decision concerned was made on a wrong principle or that certain factors were not taken into account – see: **Ntiga Gwisu v. Republic**, Criminal Appeal 428 of 2015 (unreported).

In the circumstances of the instant application, we find it appropriate to interfere with the decision of the High Court and it is hereby set aside. This ground alone is capable to dispose of the appeal and therefore we shall not consider other grounds of appeal. Consequently, we allow the appeal and hereby grant the appellant thirty (30) days from the date of delivery of this judgment to file a notice of the intended appeal to the High Court. Having considered circumstances of this case, we make no order as to costs.

DATED at DAR ES SALAAM this 7th day of October, 2022.

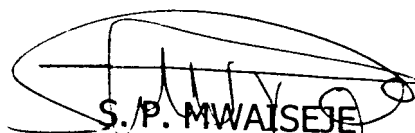
S. E. A. MUGASHA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

A.M. MWAMPASHI
JUSTICE OF APPEAL

The Judgment delivered this 7th day of October, 2022 in the presence of Mr. Abubakar Salim holding brief for Mr. Gasper Nyika Learned Counsel for the Appellant, and Mr. Abubakar Salim, Learned Counsel for the respondent, is hereby certified as a true copy of the original.




S. P. MWAISEJE
DEPUTY REGISTRAR
COURT OF APPEAL