IN THE COURT OF APPEAL OF TANZANIA

AT BUKOBA

CIVIL APPLICATION NO. 13/04 OF 2023

JAMES KIIZA.....APPLICANT

VERSUS

ABELA NTAMBA.....RESPONDENT

(Application for extension of time to file application for revision from the judgment and decree of the High Court of Tanzania, at Bukoba)

(Mtulya, J.)

dated the 18th day of December, 2020

in

PC. Civil Appeal No. 4 of 2019

RULING

11th & 22nd March, 2024

MDEMU, J.A.:

This application is for extension of time within which James Kiiza, the applicant herein, seeks to be permitted to move the Court of Appeal to revise a matrimonial dispute between him and one Abela Ntamba, in PC. Civil Appeal No.4 of 2020 of the High Court of Tanzania sitting at Bukoba. The latter, among others, quashed the order of the District Court which decreed 30% of the applicant's pension be given to the respondent.

According to the record, the Primary Court of Gera issued a divorce order and division of matrimonial property in which the respondent acquired

40%. That percentage as per the court's order included the pension of the applicant. In an appeal to the District Court, the percentage of the applicant's pension to be distributed to the respondent was reduced to 30%. During an appeal to the High Court, Mtulya J. quashed that decision on the ground that **one**, the respondent did not pray to have any portion from the applicant's pension, **two**, there is no evidence regarding such retirement pension and **three**, whether the said pension was ever received by the applicant. As per the record, distribution of other matrimonial assets besides the contested pension did not feature in the High Court on appeal.

The applicant was not happy with that High Court decision. For reasons not apparent on record, no appeal was preferred. Having found himself out of time for revision, the instant application was lodged by way of a notice of motion. There are two grounds advanced in the affidavit appealing to enlargement of time. **One**, failure to be supplied with proceedings because of reliance from the advocate efforts, who, after he had terminated sourcing legal services from him, time for revision had already expired. **Two**, illegalities following failure of the High Court to consider all grounds of appeal.

At the hearing of this application on 11th March, 2024, both the applicant and the respondent appeared in person, unrepresented. The applicant commenced his argument by first adopting his written submissions filed in that behalf. Expounding more on his stance to have time for revision enlarged, the applicant argued that, the delay to process his revision was mainly attributed by his advocate one Byabato whose decision to proceed with parliamentary duties was definitely at the expense of the applicant's litigation. He argued further that, he did not engage advocate Gerazi Roben, who took the conduct of the matter thereafter to represent him. The deal, according to the applicant, was between the two advocates and that, he never instructed Byabato to hand over the conduct of the matter to Roben. Following this, he decided to follow up the matter himself, which, unfortunately time to apply for revision had already lapsed.

Secondly, the revision was not processed in time because the proceedings and judgment requested were not supplied to him in time. Following this state of affairs, as time to appeal had already lapsed, thus the applicant decided to have this application for enlargement of time for revision. His third account to have time enlarged is associated with illegality. His stance in this one was that, the High Court, in determining his appeal,

considered only one ground of appeal, leaving other grounds unattended. He argued in this that, the three other grounds were not determined because his advocate abandoned them, the consequence of which, no argument was advanced by that advocate at the hearing in support of the appeal in respect of the abandoned grounds. To the applicant, this constitutes illegality thus being a sufficient cause for enlargement of time for revision. On that account, the applicant urged me to grant the application with costs.

In reply, the respondent banked on her affidavit in reply which she adopted to form part of her oral submission. Regarding delays caused by the alleged desertion of the applicant's case by advocate Byabato and later the conduct of the matter by advocate Roben without applicant's instructions, the respondent found such assertion as an afterthought because advocate Byabato only handled the initial stage of the matter but throughout, advocate Roben was incharge of the matter from the District Court all through to the High Court in presence of the applicant. To her therefore, the argument of the applicant regarding the said delays to have been occasioned by the two advocates remains an afterthought.

Responding further, the respondent's argument was that, the applicant's move to have this application in place is a result of the ongoing

initiated execution processes by her. In her argument, the applicant had all the time around him to initiate revisional processes in time, if at all he had interest to do so. She thus urged me to dismiss this application without costs for want of good cause.

To begin with, the argument regarding delays caused by the conduct of the two advocates should not ruin my time. I have one reason for the undertaking. It is this that, the applicant conceded his presence all through during the conduct of the matter in the hands of advocate Roben. Assuming, for the sake of argument that advocate Roben had no instructions from the applicant to do so, the reason for the applicant to mute leaving the said advocate to proceed representing him, may not have any explanation. My take in this is that, the applicant had full knowledge on how the said advocate took over the conduct of his case after advocate Byabato advocated for servicing the parliamentary seat.

Regarding the ground of illegality, pronouncement of this Court on several occasions, allow time to be extended in circumstances where there is illegality in the impugned decision. See **Principal Secretary, Ministry of Defence and National Service v. Devram Valambhia** [1992] T.L.R. 185. In the instant application, both in the affidavit and in written and oral

submissions, the applicant's complaint hinges on failure of the High Court to consider all grounds of appeal. As alluded to above, the court's inaction to resolve the complained grounds of appeal was due to the abandonment of such grounds by the applicant's advocate. It is true according to the record of this application at page 39 that, the applicant's advocate abandoned other grounds of appeal, leaving one ground only to be argued. The learned High Court Judge in the impugned judgment at page 16 of the record of this application took note of the existence of four (4) grounds of appeal and the abandonment of all grounds, save for one ground only.

The question I am asking my self is whether, abandonment of a ground of appeal by a party followed by the endorsement by the court towards such abandonment is an illegality in the impugned decision. The applicant's position is in the affirmative as deposed in paragraphs 9, 10, 11(a) of the supporting affidavit. Actually, reading those depositions, there is addition of one more complaint which the applicant thinks is allied to the illegality, that is, the High Court have not adjudicated the abandoned grounds. This latter need not detain me. What else should the High Court have done? Certainly, is to endorse the abandonment as prayed. It may not have afterwards proceeded to determine what was abandoned in the way the applicant wants

it to be. The endorsement that the grounds have been abandoned is not in itself an illegality, so do inaction to resolve such abandoned grounds of appeal.

It is clear in the judgment of the High Court that, the averment regarding abandonment of grounds of appeal by a party and as said, the endorsement of that abandonment by the High Court, is expressly incorporated in the judgement. As raised above, is this an illegality in the impugned decision? Definitely, it is not. What it is, the case of **Charles Richard Kombe v. Kinondoni Municipal Council**, Civil Reference No. 13 of 2019 (unreported) deliberated on what amounts to illegality. After making reference to the definition of illegality in Black's Law Dictionary, 11th Edition at page 815 and also borrowing in Mulla's Code of Civil Procedure at page 1381, this Court came up with the following conclusion at page 8 of the impugned judgment regarding what constitutes illegality, it is in this way:

> *"From the above definitions, it is our conclusion that for a decision to be attacked on ground of illegality, one has to successfully argue that the court acted illegally for want of jurisdiction, or for denial of right to be heard or that the matter was time barred".*

Given the above legal position, it is not deposed in the applicant's affidavit that in the impugned judgment, the court acted illegally or that it

had no jurisdiction or that the applicant was denied the right to be heard. Abandonment of grounds of appeal and the subsequent endorsement by the court of that abandonment alone, as in this application, cannot constitute illegality. I am saying so because in the course of that abandonment and non-adjudication of the abandoned grounds, the court neither acted illegally nor denied the applicant herein the right to be heard. I thus do not find any substance in this ground.

As noted in his oral submission, the applicant also argued to have preferred this application for enlargement of time for revision because he was late to process his appeal in time. If I understood the applicant correctly, his move to have time for revision enlarged was opted because time to appeal had already expired. I am not intending at this point to open up a discussion on the settled principle of law that revision may not be preferred as an alternative to appeal and neither do I intend to deploy that principle in this application for enlargement of time for revision. However, in my considered view, a remedy available to a party who has not exercised own rights of appeal in time is to make application to appeal out of time and not, as in this application, to move a court of law to enlarged time for revision.

This move, by any standard, is in abuse of due processes of law and the applicant may not be left to benefit.

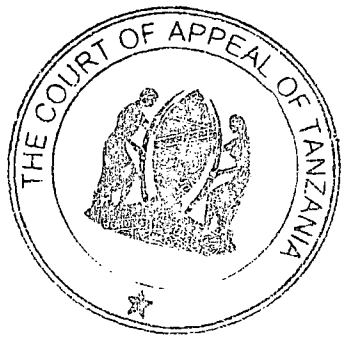
In the end therefore and as argued by the respondent, I find no substance in the entire application for want of good cause. In consequence therefore, this application is dismissed. Each party to the application to bear own costs.

It is so ordered.

DATED at **BUKOBA** this 21st day of March, 2024.

G. J. MDEMU
JUSTICE OF APPEAL

The Ruling delivered on this 22nd day of March, 2024 in the presence of the in applicant in person and in presence of the respondent in person, is hereby certified as a true copy of the original.



O. H. KINGWELE
DEPUTY REGISTRAR
COURT OF APPEAL