IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

CIVIL APPLICATION NO. 657/01 OF 2022

WINJUKA GODSON MANGARE.....APPLICANT

VERSUS

JOHN J. OTTARU.....RESPONDENT

(Application for extension of time from the Decision of the High Court of Tanzania, at Dar es Salaam)

(Kulita, J.)

dated the 8th day of December, 2021
in
Civil Appeal No. 143 of 2020

RULING

19th & 26th March, 2024

KEREFU, J.A.:

Before me is an application for extension of time made under Rule 10 of the Tanzania Court of Appeal Rules, 2009 (the Rules) seeking the indulgence of the Court to exercise its discretion to extend time within which to serve the respondent with the applicant's letter dated 5th January, 2022 addressed to the High Court's Registrar requesting to be supplied with certified copies of the High Court's proceedings in Civil Appeal No. 143 of 2020 for appeal purposes. The Application is supported by an affidavit deposed by two affidavits. The first affidavit was taken by the applicant and the second was deposed by Mr. Dickson

Paulo Sanga, learned counsel for the applicant. On the other hand, the respondent has filed an affidavit in reply opposing the application.

For a better appreciation of the issues raised herein, it is important to explore the background of the matter and the factual setting giving rise to the current application as obtained from the record of the application. That, the applicant and the respondent are husband and wife who celebrated their marriage under Christian rites in 1991 at Upanga Roman Catholic Church. During the subsistence of their marriage, they were blessed with three issues and jointly acquired various properties including four houses and some plots. They lived a happy marriage life with no difficulties and in 2011 and 2016 they celebrated 10th Anniversary and Silver Jubilee Anniversary for their marriage, respectively. The applicant stated that, misunderstandings between them started in 2019. The said dispute was referred to the marriage reconciliation board without success, hence the applicant decided to file Matrimonial Cause No. 87 of 2019 in the District Court of Kinondoni claiming for divorce, division of matrimonial properties, custody and maintenance of the third issue of the marriage who by that time was aged twelve (12) years.

On his part, the respondent admitted that he was duly married to the applicant, blessed with three issues and jointly acquired several

assets. He further admitted that they had good and happy marriage life to the extent of celebrating the said marriage anniversaries. On that basis, the respondent disputed all other applicant's claims and prayed for the dismissal of the petition as, according to him, it was with no any justifiable cause.

Having heard the evidence of witnesses from both sides, the trial court decided the matter in favour of the respondent as it was convinced that the marriage between the parties was not broken down beyond repair.

Aggrieved by that decision, the applicant unsuccessfully appealed to the High Court vide Civil Appeal No. 143 of 2020. Still unsatisfied, the applicant sought legal assistance from Women's Legal Aid Center (WLAC). WLAC assist her to craft the letter to the High Court's Registrar requesting to be supplied with certified copies of the High Court's proceedings in Civil Appeal No. 143 of 2020 for appeal purposes. It was the applicant's averment that the said letter was lodged in the High Court on 5th January, 2022 and on the following day, i.e 6th January, 2022, she lodged the notice of appeal. It was the applicant's further assertion that WLAC did not serve the said letter to the respondent. That, she discovered the said omission on 3rd October, 2022, when she approached Mr. Dickson Sanga, learned counsel to assist her to prepare

the record of appeal. Following that revelation, the applicant decided to lodge the current application as indicated above.

It was the applicant's further averment under paragraph 10 of her affidavit that the intended appeal has overwhelming chances of success as the trial court did not properly evaluate evidence adduced before it and did not take into account the provisions of section 140 of the Law of Marriage Act, Cap.29 (the LMA). Thus, the applicant prayed for the Court to grant the prayers sought in the notice of motion.

In his affidavit in reply, the respondent opposed the application by stating that the reasons for delay submitted by the applicant do not constitute sufficient reasons to warrant the Court to grant extension of time. The respondent contended further that the applicant has not accounted for the delay of each day, in his affidavit, as required by the law. As such, the respondent prayed for the application to be dismissed.

When the application was placed before me for hearing, the applicant and the respondent were represented by Messrs. Dickson Paulo Sanga and Elisaria J. Mosha, both learned advocates respectively.

Submitting in support of the application, Mr. Sanga commenced his submission by adopting the contents of the notice of motion, the supporting affidavit and the written submission. The large part of the

said documents had narrated the historical background to this application as indicated above. Mr. Sanga argued that, the reason for the applicant's delay to serve the said letter to the respondent, was on her reliance on the services provided by WLAC who had the conduct of her case. That, due to the said reliance and trust, the applicant was not aware if the said letter was not served to the respondent until 3rd October, 2022 when she approached him. Although, the learned counsel was aware that negligence by an advocate does not constitute good cause for the delay, urged me not to condemn the applicant for the mistakes performed by WLAC. He based his argument on the decision of the High Court of Tanzania at Tabora in **Judith Emmanuel Lusohoka v. Pastory Binyura Mlekule & 2 Others,** Misc. Land Application No. 74 of 2018 (unreported) where Matuma, J. reasoned that negligence or incompetence of an advocate constitutes a good cause for the delay. He urged me to be persuaded by that decision.

Upon being probed, if the applicant has accounted for the delay of each day in her affidavit and specifically, the period from 14th June, 2022 when she was granted leave to appeal to 3rd October, 2022 when she approached him and also from 3rd October, 2022 when she became aware of the said omission to 21st October, 2022 when she lodged this current application, Mr. Sanga, although conceded that the applicant has

not accounted for the delay of each day in her affidavit, he urged me to find that, the extension of time is still warranted as, ground 4 in the notice of motion and paragraph 10 of the affidavit, the applicant has alleged issues of illegality in the impugned decision. He secured his stand by citing the cases of **Yusuph Nyembo @ Kachuo v. Republic**, Criminal Application No. 5 of 2013 (unreported) and **Tanzania National Parks (TANAPA) v. Joseph K. Magombi**, Civil Application No. 471/18 of 2016 [2017] TZCA 307: [8 JUNE 2017: TanzLII] and argued that, when there is an allegation of illegality it constitutes a good cause for extension of time regardless of the period of delay. He clarified that, the said illegality is the failure by the trial court to evaluate the evidence adduced before it and grant divorce to the applicant while aware that the applicant and the respondent are no longer living together as husband and wife and they cannot be forced to cohabit. In the circumstances, the learned counsel urged me to find that the alleged omission constitutes an illegality in the impugned decision. He then insisted that, the extension of time is still warranted as the applicant had advanced good cause to enable the Court to exercise its discretion.

The respondent resisted the application with some force. Speaking through Mr. Mosha, and having adopted the affidavit in reply and the reply written submission earlier filed to form part of his oral arguments,

he argued that, the applicant has completely failed to demonstrate good cause for extension of time. He clarified that, the reasons for the delay advanced by the applicant in her affidavit together with Mr. Sanga's oral submission before the Court do not constitute good cause for grant of an application of this nature. He added that, in her affidavit, the applicant has completely failed to account for the delay of each day as readily conceded by Mr. Sanga.

On the alleged illegality, Mr. Mosha argued that the same is not stated in clear terms. He contended that the applicant's general claims that the trial court did not properly evaluate the evidence tendered before it and that in its decision did not take into account the provisions of section 140 of the LMA do not constitute an illegality. To buttress his proposition, he cited the case of **Lyamuya Construction Company Ltd v. Board of Registered Trustees of Young Women's Christian Association of Tanzania,** Civil Application No. 02 of 2010 (unreported). He then clarified that, for an issue of illegality to constitute a sufficient reason for extension of time it must be apparent on the face of the record. He thus implored me to find that, since the applicant has failed to specify the alleged illegality in his affidavit, the said ground cannot be relied upon to grant the application. He also challenged an attempt of his learned friend to clarify the alleged illegalities in his

written and oral submission that the same is nothing but an afterthought. Based on his submission, Mr. Mosha urged me to dismiss the application on account of failure by the applicant to demonstrate good cause for the delay.

In his brief rejoinder, Mr. Sanga reiterated what he submitted earlier and emphasized that the Court should condone the delay and grant the application on the basis of the ground of illegality.

Having heard the counsel for the parties, the main issue for my consideration is whether the applicant has submitted good cause for the delay to warrant grant of this application. It is essential to reiterate that the Court's power of extending time under Rule 10 of the Rules is both wide-ranging and discretional but the same is exercisable judiciously upon good cause being shown. It may not be possible to lay down an invariable or constant definition of the phrase "good cause", but the Court consistently considers such factors like, the length of delay involved, the reasons for the delay; the degree of prejudice, if any, that each party stands to suffer depending on how the Court exercises its discretion; the conduct of the parties, and the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal. There are numerous authorities to this effect. See for instance

the cases of **Kalunga & Company Advocates Ltd v. National Bank of Commerce Ltd** (2006) TLR 235, **Dar es Salaam City Council v. Jayantilal P. Rajani,** Civil Application No. 27 of 1987 and **Attorney General v. Tanzania Ports Authority & Another,** Civil Application No. 87 of 2016 (both unreported).

It is equally important to stress the general principle of law that, an application for extension of time shall not be granted where the delay is due to indolent, inaction and or lack of vigilance on the part of the applicant or her counsel, if has one. See for instance our previous decisions in **Loswaki Village Council & Another v. Shibeshi Abebe**, [2000] T.L.R. 204 and **Mwananchi Engineering and Constructing Corporation v. Manna Investimates (PTY) Limited and Holtan Investiments Company Limited**, Civil Application No. 5 of 2006 (unreported), where the Court stressed that those who seek the aid of the law by instituting proceedings in a court of justice must file such proceedings within the period prescribed by law, and that they must demonstrate diligence.

Now, in the application at hand, the two reasons advanced in the notice of motion, supporting affidavit and submission by Mr. Sanga are; **first,** the negligence of WLAC, who did not serve the respondent with the applicant's letter requesting to be supplied with the certified copy of

the High Court's proceedings within the prescribed time; and **two,** that the impugned decision is tainted with an illegality.

Starting with the first reason, it is on record that, the impugned decision of the High Court was handed down on 8th December, 2021 and on 5th January, 2022 the applicant lodged a letter in the High Court requesting to be supplied with certified copy of High Court's proceedings for appeal purposes. However, the said letter was not served to the respondent as required by Rule 90 (3) of the Rules. It is the applicant's contention that she discovered the said omission on 3rd October, 2022, after lapse of almost ten (10) months reckoned from the date of the impugned decision, when she approached Mr. Sanga to assist her to prepare the record of appeal. Anyhow, if the said period will be reckoned from 14th June, 2022, when the applicant was granted with leave to appeal as indicated under paragraph 8 of the affidavit, then, is after lapse of almost ninety (90) days which is still inordinate delay.

Unfortunately, and as well conceded by both learned counsel for the parties, in her affidavit, the applicant has not accounted for the said period of delay. It is a settled position that, any applicant seeking for extension of time under Rule 10 of the Rules is required to account for the delay of each day. Indeed, the Court has reiterated that position in numerous cases – see for instance the cases of **Bushiri Hassan v.**

Latifa Lukio Mashayo, Civil Application No. 03 of 2007 and **Sebastian Ndaula v. Grace Rwamafa**, Civil Application No. 04 of 2014 (both unreported). Specifically in the former case, the Court emphasized that:

> ***"...Delay of even a single day, has to be accounted for,*** *otherwise there would be no point of having rules prescribing period within which certain steps have to be taken."* [Emphasis added].

Being guided by the above authorities, I agree with the submissions advanced by the learned counsel for the parties that, in the instant application, the applicant has completely failed to account for the delay of each day.

I am mindful of the fact that, under paragraph 7 of the applicant's affidavit, the applicant has attributed the delay to serve the said letter to the respondent with the negligence of WLAC, though in her affidavit, she did not state the specific name of the advocate from WLAC who was handling her case and/or when exactly she instructed him or her to pursue the appeal. By any standard, and as rightly argued by Mr. Mosha, it is settled that the negligence of an advocate is not a sufficient cause for the delay. See **Loswaki Village Council and Another** (supra); **Mwananchi Engineering and Constructing Corporation**

(supra) and **Bahati M. Ngowi v. Paul Aidan Ulungi**, Misc. Civil Application No. 490/13 of 2020 [2023] TZCA 17503: [16 August 2023: TanzLII] where the Court refused to bless the negligence of the applicant's counsel. Similarly, in this application, the negligence of the applicant's former counsel cannot be blessed by this Court. With respect, I find the submission of Mr. Sanga on this point to have no basis, as the High Court's decision he relied upon, is not binding and not applicable in the circumstances of this application.

As for the second ground, I am mindful of the fact that, in his submission, Mr. Sanga referred me to ground 4 in the notice of motion and paragraph 10 of the applicant's affidavit and argued that, since the applicant has pleaded issues of illegality in the impugned decision, the same constitute sufficient ground for grant of this application. For clarity, ground 4 in the notice of motion state that:

> *"4. The intended appeal has overwhelming chances of success as the trial court did not evaluate properly evidence tendered before it and, in its decision, it did not take into regard section 140 of the Law of Marriage Act, Cap. 29 [R.E. 2019].*

Furthermore, under paragraph 10 of the affidavit in support of the application, the applicant averred that:

"...the intended appeal has overwhelming chances of success for the trial court did not evaluate the evidence properly and did not take due regard that the applicant and the respondent are not living together to date."

It is clear from the above extracted paragraphs, and as correctly argued by Mr. Mosha, the applicant had only stated in general terms that the trial court did not properly evaluate the evidence tendered before it and did not take into account the provisions of section 140 of the LMA. The applicant has not specified the apparent error on the face of the record on the impugned decision. Admittedly, the law is settled in this jurisdiction that illegality of the impugned decision is a good cause and may be used to extend time under Rule 10 of the Rules. However, the said illegality must be apparent on the face of record. See for instance, **Principal Secretary Ministry of Defence and National Service Vs Divram P. Valambhia** (1992) TLR 387; **Lyamuya Construction Company Limited** (supra) and **Ngao Godwin Losero v Julius Mwarabu**, Civil Application No. 10 of 2015 [2016] TZCA 302: (13th October, 2016: TanzLII). In all these cases, the Court emphasized that an alleged illegality must be apparent on the face of record of the impugned decision. Specifically, in **Lyamuya Construction Company Limited,** (supra) the Court made the following observation: -

> *"Since every party intending to appeal seeks to challenge a decision either on points of law or facts,* ***it cannot in my view, be said that in VALAMBIA's case, the court meant to draw a general rule that every appiicant who demonstrates that his intended appeal raises point of law should, as of right, be granted extension of time if he applies for one.*** *The Court there emphasized that* ***such point of law must be that of sufficient importance and, I would add that, it must also be apparent on the face of the record,*** *such as the question of jurisdiction; not one that would be discovered by a long-drawn argument or process"* [Emphasis supplied].

Again, in **Ngao Godwin Losero,** (supra) the Court emphasized that, "***The illegality in the impugned decision should be clearly visible on the face of record.***" [Emphasis added].

Applying the foregoing principle to the application at hand, I am not persuaded that the alleged illegality herein is clearly apparent on the face of the record. Certainly, it will take a long-drawn process to decipher from the impugned decision the alleged illegality of failure by the trial court to evaluate the evidence tendered before it. I therefore agree with the submission advanced by Mr. Mosha that the alleged

illegality in this application does not constitutes a good cause to warrant grant of extension of time.

In the event and for the foregoing reasons, I must conclude that, the applicant has failed to demonstrate good cause that would entitle her extension of time. Consequently, this application fails and is, accordingly, dismissed. On the other hand, and considering the circumstances of this application, I order each party to shoulder its own costs.

DATED at **DAR ES SALAAM** this 25th day of March, 2024.

R. J. KEREFU
JUSTICE OF APPEAL

The Ruling delivered this 26th day of March, 2024 in the presence of the applicant and the respondent both appeared in person, is hereby certified as a true copy of the original.

R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL