

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

CIVIL APPLLCATION NO. 529/01 OF 2021

WEDAELI PHILIPO MARWA APPLICANT

VERSUS

JAPHET ALEX CHUMA RESPONDENT
(Application for extension of time within which to file an Application
for Revision in order to challenge the Decision of the High
Court of Tanzania at Dar es Salaam)

(Miyambina, J.)

dated the 18th day of June, 2021

in

Miscellaneous Application No. 384 of 2020

RULING

9th & 22nd May, 2023

GALEBA, J.A.:

Before their marriage was dissolved on 15th July 2019, Wedaeli Philipo Marwa, the applicant and Japhet Alex Chuma, the respondent were wife and husband, respectively. It was the Primary Court at Maili Moja in Kibaha that dissolved their marriage at the instance of the applicant in Matrimonial Cause No. 9 of 2019. However, some of the orders that were made by the trial court aggrieved the respondent such that he filed Matrimonial Appeal No. 10 of 2019 before the District Court at Kibaha. Dissatisfied with decision of the

District Court, the applicant filed PC Civil Appeal No. 28 of 2020 before the High Court of Tanzania at Dar es Salaam. Aggrieved by the decision of the High Court, the applicant, filed a notice of appeal to this Court, but also filed Miscellaneous Application No. 384 of 2020 before the High Court seeking for a certificate on a point of law, because the appeal before this Court would be a third appeal and by law, a certificate of the High Court ought to be procured. By the order of the High Court, dated 18th June 2021, Mlyambina J. dismissed her application because it had no merit. Although the applicant was aggrieved by that outcome, for reasons we will get to in a moment, she did not manage to file challenge it in time. This is therefore, an application for extension of time within which to file an application to challenge the decision of Mlyambina J.

The notice of motion is made under rule 10 of the Tanzania Court of Appeal Rules 2009, (the Rules), and is supported by the affidavit of the applicant. In that affidavit, the applicant swears that after the decision of the High Court by Mlyambina J. on 18th June 2021, she applied for the proceedings which would enable her to file an application to challenge the order. According to the applicant's

affidavit, on 8th October 2021, she was notified that the documents were ready for collection, she collected them but she could not file any application because her mother passed away in Musoma and she had to travel to attend her funeral. She travelled on 11th October 2021 and managed to come back on 24th October 2021 and filed this application on 27th October 2021. With the application, she attached bus tickets to and from Musoma on those dates. It is based on that set of facts, that the applicant would not catch up with the statutory timing to file the necessary application.

On his part, the respondent did not file any affidavit in reply, and when that happens the only submissions of the respondent which may be considered, are on points of law only, not any submissions challenging facts. I will come back to this, at a later stage in this ruling.

At the hearing of this application, parties appeared in person without any legal representation and both sought to rely on the written submissions they had filed in compliance with the Rules. They too, prayed that I adopt their respective written submissions, but each added one or two points.

There is however one point I wish to highlight in respect of the submissions on record as the applicant also relies on illegality patent on the decision of Mlyambina J. It is the position of the law that an illegality clearly on the face of the decision sought to be challenged, amounts to good cause for this Court to exercise its discretion in granting extension of time to challenge such decision. Illegality is a ground of extension, even where the applicant is unable to demonstrate good cause explaining the delay. This is the position of the Court as has been observed in countless decisions of this Court, including the case of **Convergence Wireless Networks (Mauritius) Limited and Three Others v. WIA Group Limited and Two Others**, [2016] 1 T.L.R 153 at 154. However, the written submissions of the applicant raise an issue of illegality in a way that is conspicuously tricky. The snare strategically set for me is that the applicant argues that the decision of Mlyambina J, is wrong because there is a point of law which he was supposed to certify. By this argument, the applicant wants me to agree or to disagree with her on that. That point cannot be determined without faulting or upholding the decision of Mlyambina J. I wish to firmly declare that I have no jurisdiction in this application to hold whether there was a

point of law for the High Court to certify or not. If I would have such mandate, then there would be no need for the applicant to apply for extension of time in order to challenge the decision of the learned Judge. Therefore, through that rough path and to that disturbing destination, I bluntly refuse to be dragged because, I cannot step into an illegality while determining an issue of illegality. Accordingly, I will disregard the entire submissions of both parties on the issue of illegality, for I will not be able to render any lawful decision on such submissions.

Thus, determination of this application will solely be based on facts explaining the delay as contained in the affidavit of the applicant in order to calibrate whether the applicant has demonstrated good cause for the delay under rule 10 of the Rules. That rule provides as follows:

"10. The Court may, upon good cause shown, extend the time limited by these Rules or by any decision of the High Court or tribunal, for the doing of any act authorized or required by these Rules, whether before or after the expiration of that time and

*whether before or after the doing of the act;
and any reference in these Rules to
any such time shall be construed as a
reference to that time as so extended.”*

Under the above provision, this Court has discretionary powers to grant extension of time if good cause has been shown for omitting to do an act for which extension is being sought. See **Michael Lessani Kweka v. John Eliafye**, (1997) T.L.R. 152; and **Lyamuya Construction Co. Ltd v. Board of Registered Trustees of Young Women’s Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported), on that aspect.

According to the affidavit of the applicant, the decision of Mlyambina J, was handed down on 18th June, 2021 and she had to lodge an application to challenge it within 60 days. She also swears that in order to contest that decision she needed the proceedings which she requested and were available to her on 8th October 2021. The following two days, that is 9th and 10th October 2021 were a Saturday and a Sunday, respectively. It transpired that, on 11th October 2021 the applicant travelled to Musoma to attend her mother’s funeral. To exhibit that fact, the applicant attached to the

affidavit two bus tickets one showing that she travelled to Musoma on 11th October 2021 and another indicating that she travelled back to Kibaha on 23rd and 24th October 2021. It is also on record that 3 days later on 27th October 2021, the applicant filed this application. At the hearing, the applicant stated that the relative who passed away was her grandmother, but the point is whether she travelled or not.

At the hearing, the respondent submitted that, the story of the applicant of having lost a relative and having travelled to and from Musoma were untrue. However, he advanced no point of law to contest the application. At this point I must reiterate the point I touched on briefly a while ago, that the respondent did not file an affidavit in reply. The law is that, if a respondent does not file an affidavit in reply under rule 56 (1) of the Rules, matters of fact in the affidavit are deemed to have been admitted, and the respondent can only argue points of law against the application. See the case of **Hashim Juma Napepa v. Bakari Ahmadi Ng'itu (Administrator of the estate of the later Galus Polipili) and Another**, Civil Application No. 07/07 of 2022 (unreported). I

therefore cannot attach any weight to his argument contesting facts in the affidavit, because death of the applicant's relative and her travel or otherwise, are matters of fact which needed filing of an affidavit in reply. Now that the facts of the applicant were not contested by way of an affidavit in reply, I hereby disregard the respondent's contentions and proceed to consider whether, the applicant's uncontroverted facts in the affidavit demonstrate good cause.

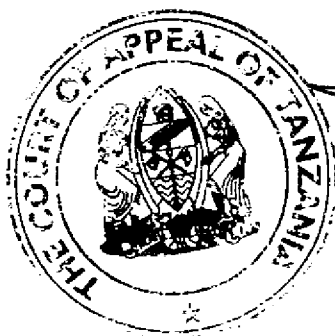
In this matter, I agree with the applicant that from 18th June 2021 to 8th October 2021, she was waiting for necessary documents to challenge the decision. I also agree that she would not have done anything on 9th and 10th October 2021 because it was a weekend and also that she travelled to Musoma on 11th to 24th October 2021 when she travelled back to Kibaha. This time of the travel is hereby excluded. The three days that remained between 24th and 27th October 2021, when this application was filed, seems to be fair time for preparing the application and file it in Court. I therefore, without hesitation hold that the applicant has fully accounted for all the days of the delay and, in my view this application has merit.

For the above reasons, under the provisions of rule 10 of the Rules, the order for extension of time to file a proceeding to contest the decision of the High Court in Miscellaneous Application No. 384 of 2020 is hereby granted. Accordingly, the applicant is granted sixty (60) days from the date of delivery of this ruling, to file the requisite proceedings in order to challenge the above ruling and order of the High Court. Considering the interests of justice in this matter, I make no order as to costs.

DATED at DAR ES SALAAM, this 19th day of May 2023.

Z. N. GALEBA
JUSTICE OF APPEAL

Judgment delivered this 22nd day of May, 2023 in the presence of the Applicant in person and in the absence of the Respondent, is hereby certified as a true copy of the original.




J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL