

IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

MISCELLANEOUS CIVIL APPLICATION NO. 136 OF 2017

**(Originating from the decision of the District Court of Ilala at
Samora Avenue in Matrimonial Cause No. 33 of 2014)**

LETIKA K. FELIX.....APPLICANT

Versus

BONEVENTURE MIDALA.....RESPONDENT

RULING

B.R. MUTUNGI, J:

In the instant application, LETIKA K. FELIX (the applicant)
is seeking for the following prayers;

- 1. That this Honourable court be pleased to grant
leave to the applicant in order to file an appeal
out of time.*
- 2. That the costs of the application be provided for.*
- 3. That, any other relief that this Honourable Court
may deem just to grant.*

The applicant is moving this honourable court through a chamber summons made under section 14 (1) of the Law of Limitation Act [Cap. 89 R.E 2002] supported by an affidavit sworn by the applicant.

Basically, as per the said sworn affidavit the applicant petitioned for the divorce in Matrimonial Cause No. 33 of 2014 which was successfully issued on 22/12/2016. She deponed further that, on 27/12/2016 had requested for the certified copies of judgment, decree and proceedings. The said certified copies were issued to the applicant on 22/2/2017. Thereafter the applicant had proceeded to file the present application on 24/2/2017.

In reply thereof in the counter affidavit sworn by the respondent, he strongly objected the application for the reason that, there is no proof as to whether the applicant requested for the said copies of judgment, decree and proceedings of the trial court. The respondent's view is that,

there is no sufficient reason to justify the delay so occasioned.

When the matter was called for the hearing, the court ordered the same be argued by way of written submissions. The court record reveal both parties complied with the scheduling order in filing their written submissions.

The applicant in her written submission started off by underscoring the principle that the time limit for filing the intended appeal is 45 days from the date of the decision. This is as per section 80 (2) of the Law of Marriage Act [Cap. 29 R.E 2002]. According to the applicant, the decision sought to be challenged was delivered on 22/12/2016 and she promptly applied for the requisite copies on 27/12/2016 with the assistance of TAWLA but these had consequently abandoned her. The applicant further submitted that the said copies were supplied to her on 10/2/2017 and on 24/2/2017 the applicant through the legal services of MZS

Law Chambers filed the instant application. Under the said circumstances, the applicant prayed that there was no negligence on the her part, in fact she had shown due diligence in handling her matter.

The applicant went further by submitting that, she has managed to advance sufficient reasons and she referred this court to the case of **BENEDICT MUMELLO VERSUS BANK OF TANZANIA, CIVIL APPEAL NO. 12 OF 2002 (CAT-DSM) (UNREPORTED)**. More so, the applicant has called upon this honourable court to dispense justice under the umbrella of **Article 107 A of the Constitution of the United Republic of Tanzania, 1977 (as amended from time to time)** in the event the court finds her negligent.

In her concluding remark, the applicant prayed the application be granted taking into account she is a layperson depending on legal aid.

On the other side of the coin, the respondent through the legal services of Mwambene Adam A.E Advocate submitted, the applicant has failed to show sufficient cause in support of her filed application. He went further by arguing the applicant has not attached the alleged letter (dated 27/12/2016) which the applicant alleges she had written requesting to be supplied with the copies of judgment, decree and proceedings (appeal documents).

The respondent further argued, matrimonial proceedings are covered by rule 37 (1) and (3) of the Law of Marriage (Matrimonial Proceedings) Rules, GN No. 246 of 1997 which requires an aggrieved party to file his/ her intended appeal at the trial court and the same need not be accompanied with copies of judgment, decree and proceedings. He thus suggested it was wrong for the applicant's counsel to wait to be supplied with the said copies.

Regarding the cited cases by the applicant, the respondent argued the said case laws have laid down a principle that “**sufficient cause**” is to be interpreted in a wider sense. He further argued these cited cases are distinguishable with the instant application. Further the respondent submitted the applicant's allegation that she is a layperson depending on legal aid has no merit at all.

Conclusively, the respondent called upon the court to reject and dismiss the application with costs.

The issue here is whether applicant has demonstrated sufficient reasons in this application. From the outset I agree with the disputing parties that an application of the like can only be granted where sufficient reasons are shown by the applicant. There is a plethora of authorities from the Tanzania Court of Appeal. To mention but a few the cases of **BENEDICT MUMELLO VERSUS BANK OF TANZANIA (supra); D.N. BAHRANI LOGISTICS LTD AND ANOTHER VERSUS**

NATIONAL BANK OF COMMERCE LTD, CIVIL APPLICATION NO. 44/16 OF 2016 (CAT-DSM); PHILIP TILYA VERSUS VEDASTIN BWOGI, CIVIL APPLICATION NO. 448/17 OF 2016 (CAT-DSM) and TANESCO VERSUS MUFUNGO LEONARD MAJURA, CIVIL APPLICATION NO. 94 OF 2016 (CAT-DSM) (ALL UNREPORTED). In the TANESCO's (*supra*) case at page 10 the Court cited with approval the case of LYAMUYA CONSTRUCTION COMPANY LIMITED VERSUS BOARD OF TRUSTEES OF YOUNG WOMEN'S CHRISTIANS ASSOCIATION OF TANZANIA, CIVIL APPLICATION NO. 2 OF 2010 (UNREPORTED) where the conditions to be considered in such an application were enumerated. These are as follows;

1. *The applicant must account for the delay for the period of delay.*
2. *The delay should not be inordinate.*
3. ***The applicant must show diligence, and not apathy, negligence or sloppiness in prosecution of the action that he intends to take.***

4. *If the court feels that, there are other reasons, such as the existence of a point of law of sufficient importance, such as the illegality of the decision sought to be challenged.*

Turning to the application at hand, the court records reveal the intended decision of the trial court (Matrimonial Cause No. 33 of 2014) was delivered on 22/12/2016 and the instant application was filed on 24/2/2017. The reasons for the delay as stated earlier, the applicant alleged to have requested to be supplied with the copies of judgment, decree and proceedings on 27/12/2017 which were consequently supplied late.

However, in my settled view I agree with the respondent's position on the point that, the alleged letter was not even attached or tendered to confirm the applicant's efforts of having the appeal documents supplied on time. Thus, the said allegation remains as a hearsay evidence which is not admissible.

Be as it may, I agree with the applicant's side to the extent that matrimonial proceedings from the subordinate court to this honourable court are governed by **section 80 (2) of the Law of Marriage Act (supra)** that is, the time frame to appeal is within 45 days from the date of the decision sought to be challenged. However, **under Rule 37 (1) and (3) of the Law of Marriage (Matrimonial Proceedings) Rules (supra)** as property propounded by the respondent's side, the applicant was not supposed to seek to be supplied with the copies of the judgment, decree and proceedings. Instead the applicant was supposed to file her memorandum of appeal at the trial court within 45 days from the date of the decision and the said court would proceed to transmit the same to this honourable court with the complete documents.

For the sake of clarity, **Rule 37 (1) and (3) of the Law of Marriage (Matrimonial Proceedings) Rules (supra)** states as follows;

37 (1) An appeal to the High Court under section 80 of the Act shall be commenced by a memorandum of appeal filed in the subordinate court which made or passed the decision, order or decree appealed against.

(3) Upon receipt of the memorandum of appeal, the subordinate court shall transmit to the High Court, the memorandum of appeal together with complete record of the matrimonial proceeding to which the appeal relates.

Having in mind the above position of the law as well as the circumstances which had transpired herein, I find the delay to file the intended appeal was caused by the applicant's negligence and no sufficient reasons have been shown to the contrary.

The applicant prays the application be granted on the reason that, she is a layperson depending on legal aid and hence the court should invoke Article 107A of the Constitution of the United Republic of Tanzania (supra) so as to dispense justice. I totally disagree with her on both prepositions. I say so because, the mere allegation that she is a lay person and depends on the legal aid is no excuse at all. This was amplified by the Court of Appeal of Tanzania in the case of **THOMAS DAVID KIRUMBUYO AND ANOTHER VERSUS TANZANIA TELECOMMUNICATION CO. LTD, CIVIL APPELICATION NO. 1 OF 2005 (CAT-DSM) (UNREPORTED)** where it was held;

'In order to ensure that the machinery of administering justice is not hampered, the court is bound to apply the rules at all times stringently. There is no exception provided under the rules for a relaxed application when laymen are involved as the case here...'

In the event, I hereby subscribe to what has been stated in the above cited case law.

In regards to the applicability of Article 107A (2) (a) of the Constitution on dispensation of justice without being bound by the technicality. To this I make reference to the said article. For the sake clarity **Article 107A (2) (e)** states as follows;

"107A: (2).In delivering decisions in matters of Civil and Criminal nature in accordance with the laws the court shall observe the following principles, that is to say:-

(e) to dispense justice without being tied up with undue technical provisions which may obstruct dispensation of justice" '

In the case of **ABUBAKAR ALI HIMID VERSUS EDWARD NYELUSYE, CIVIL APPEAL NO. 70 OF 2010 (CAT-DSM) (UNREPORTED)** at page 10 the Court of Appeal citing with an approval the case of **ZUBERI MUSA VERSUS SHINYANGA**

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(UNREPORTED) construed the applicability of the said Article and held;

*'...Article 107A (2) (e) is so couched that in itself it is both conclusive and exclusive of any opposite interpretation. **A purposive interpretation makes it plain that it should be taken as a guideline for court action and not as iron clad rule which bars the courts from taking cognizance of salutary rules of procedure which when properly employed help to enhance the quality of justice. It recognizes the importance of such rules in the orderly and predictable administration of justice....'***[Emphasis supplied]

Furthermore, at page 11 the Court of Appeal went citing with approval the case of **CHINA HERNAN INTERNATIONAL CORPORATION GROUP VERSUS SALVAND K.A. RWE GASIRA, CIVIL REGERENCE NO. 22 OF 2005 (UNREPORTED)** where it was held;

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Furthermore, at page 11 the Court of Appeal went citing with approval the case of **CHINA HERNAN INTERNATIONAL CORPORATION GROUP VERSUS SALVAND K.A. RWE GASIRA, CIVIL REGERENCE NO. 22 OF 2005 (UNREPORTED)** where it was held;

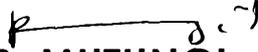
*'...In this case, as already indicated, the circumstances are such that we hardly glean any element of technicalities involved. **The role of rules of procedure in the administration of justice is fundamental.** As stated by Collins, in *Re Coles and Ravenshear* (1907) 1 KB 1, rules of procedure are intended to be that of handmaids rather than mistresses. That is, their function is to facilitate the administration of justice...'* [Emphasis supplied]

In the event, the applicant was supposed to follow the established rules of procedure on how to file an appeal but not seeking for the sympathy of the court hiding under the umbrella of our Constitution.

From the above analysis, I find the applicant has failed to advance sufficient reasons to support her application. In view thereof it is hereby dismissed with no order to costs due to the nature of the relationship the parties had before the dispute arose.

It is so ordered.



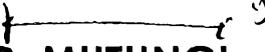

B.R. MUTUNGI

JUDGE

14/3/2018

Read this day of 14/3/2018 in the presence of the applicant,
respondent and Aron Ndyetabula for the respondent.




B.R. MUTUNGI

JUDGE

14/3/2018

Right of Appeal Explained.




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JUDGE

14/3/2018

