

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY

AT MBEYA

MISCELLANEOUS CIVIL APPLICATION NO.6 OF 2021

(From the decision of the High Court of Tanzania at Mbeya in Matrimonial Appeal No. 07 of 2020, emanates from Matrimonial Appeal No.02 of 2019 of the Momba District Court, Originating from Matrimonial Cause No. 102 of 2019 of the Tunduma Primary Court)

ADAMSON KAPYAGHILILEAPPLICANT

VERSUS

HANA OMARY KAPUNGU.....RESPONDENT

RULING

Date of last order: 30.09.2021

Date of Ruling: 05.11.2021

Ebrahim, J:

The applicant, Adamson Kapyaghilile having lost at all three stages, Tunduma Primary Court, Momba District Court and at Mbeya High Court, wishes to appeal to the Court of Appeal. Being a third

appeal, it requires a certificate by this court that there a point of law that needs to be determined by the Court of Appeal. However, he delayed to file an application for certificate on point of law, hence the instant application where he is seeking for extension of time to lodge an application for a certificate on point of law so that he can appeal to the Court of Appeal. The application is supported by an affidavit sworn by Adam Kapyaghilile the applicant.

This application was argued by way of written submission whereby the applicant appeared in person and the respondent was represented by advocate Rose Kayombo.

In his submission the applicant adopted the contents of his affidavit and pegged the reason for the delay being that there was a delay in availing him with the judgement of Momba District Court. He said soon after getting a copy of judgement, he immediately filed notice of appeal. He prayed for the application to be allowed.

In response, counsel for the respondent pointed out that the application and its affidavit does not demonstrate the guiding principles for extension of time. She pointed out that while the

application is for extension of time to apply for certificate on point of law, the submission is on extension of time to appeal out of time which has been brought prematurely. In showing the position of law for factors to be considered in an application for extension of time, she cited the case of **Lyamuya Construction Company Limited Vs Board of Registered Trustees of YWCA (T)**, Civil Application No. 2 of 2010 CAT.

Submitting on the issue of illegality he contended that the instant application for extension of time shall not cure the illegality intended to be dealt with by the Court of Appeal which is to be certified by the High Court, but the intended illegality which supposes to be good reason for extension of time, is that of the decision sought to be challenged. Thus, the applicant is still supposed to account for each day of delay, contended counsel for the respondent. She cited the case of **Sabena Technics Dar Limited Vs Michael J. Luwunzu**, Civil Application No. 541/18 of 2020 CAT.

On the requirement to account for each day of delay, counsel for the respondent cited the case of **Da O'Bambe Iko (by William**

Daniko as the administrator of estates Vs Public Service Social Security Fund and The Treasury Registrar, Civil Application No. 182 of 2005, CAT-DSM. She thus prayed for the application to be dismissed with costs for failure to establish reasons for the delay and account for each day of delay.

In brief rejoinder, the applicant recanted the assertion by the counsel for the respondent that the submissions were for extension of time to file appeal but rather he said he had no way to apply for certificate on point of law. If it read an appeal, then it was a typing error, he argued.

Insisting on the issue of illegality as a good cause to extend time, he cited the Court of Appeal case of **Mohamed Salum Nahdi Vs Elizabeth Jeremiah**, Civil Reference No. 4 of 2017 pg 7. He concluded therefore that in the application for certificate on point of law is a path of filing an appeal for the purpose to enable the higher Court to rectify the issue of illegality. He reiterated his previous prayers.

Extension of time is a discretionary power of the court to be exercised judiciously. The Court of Appeal has in the case of **Lyamuya Construction Company Ltd Vs Board of Registered Trustees of Young Women Christians Associations**, Civil Application No. 2 of 2010 (see also the case of **Hamisi Mohamed (as an administrator of the estate of the late Risasi Ngawe) Vs. Mtumwa Moshi (as administratrix of the estate of the late Moshi Abdallah)**, Civil Application No. 407 of 2019 on the requirement to show that the delay was caused by a good cause) established guidelines to be observed by Court in granting extension of time. The Court held as follows:

"Four guidelines which should be observed by Court in granting extension of time: that is:

- a) The applicant must account for all the period of delay;*
- b) The delay should not be inordinate*
- c) The applicant must show diligence; and not apathy, negligence or sloppiness in the prosecution of the act that he intends to take, and*
- d) If the court feels that there are other sufficient reasons, such as existence of the point of law of sufficient importance; such as the illegality of the decision sought to be challenged"*

At para 5 and 6 of the affidavit, the applicant has pointed out the illegalities which I would safely say that they are the ones that he

wishes this court to certify them as points of law to be determined by the Court of Appeal. He said the issues of illegality are whether the Ward Conciliation Board was fully involved before the marriage was declared irreparably broken; and whether the custodian of children who are above seven years was lawfully made to be under the custodian of the respondent?

I must state out-rightly here that the applicant has misconceived the illegality intended by the Court of Appeal as a good ground for extension of time, and the points of law which have yet to be certified by the High Court that they are really points of law that deserve the attention of the Court of Appeal.

While I subscribe to the positions of the Court of Appeal that once illegality is advanced as a reason to extend time as stated in the cited case of **Mohamed Salum Nahdi Vs Elizabeth Jeremiah (supra)**, in the same vein Court of Appeal of Tanzania has also laid a principle that not every allegation of illegality will constitute a sufficient reason for extending time. The point here being that for an allegation of illegality to constitute a sufficient reason it will depend

much on the circumstances of each case as guided by the Court of Appeal in the case of **Tanzania Harbour Authority v. Mohamed R. Mohamed [2003] TLR. 76**. In the case of **Lyamuya Construction Company Ltd Vs Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported) Court of Appeal observed as follows:

*"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 applicant who demonstrates that his intended appeal raises points 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 is mine].*

I join hands with the observation by the counsel for the respondent that the illegality stated by the applicant in this case cannot be cured by this court on the intended application for certification on

point of law intended to be filed. This position has been clearly enunciated by the Court of Appeal in the cited case of **SABENA TECHNICS DAR LTD (supra)** where it was held as follows:

"an illegality of the impugned decision will not be used to extend time in the circumstance of this case, no room will be available to rectify it in the application for stay of execution intended to be filed. Illegality of the impugned decision is not a panacea for all applications for extension of time. It is only one situation where the extension of time sought is granted that illegality will be addressed".

The above observation of the Court of Appeal fall in ten with the circumstances of this case. As alluded earlier, the applicant advances the issue of illegality on the points of law which would firstly need to be ascertained as to whether they are really point of law. Without going further, the illegality envisaged by the Court of Appeal for being a good cause of extension of time is not on the issues of interpretation or application of the law by the court or tribunal in the adjudication of the matter. Those are matters that would be determined after arguments and mostly are grounds of appeal. The illegality of the impugned decision as envisaged by the

Court of Appeal the way I understand it is that the said decision is illegal from the face of the record e.g., the court that delivered the judgement had no jurisdiction, fundamental principles of natural justice were not adhered, etc.

In this case, let say for argument sake the court grants extension of time, this court would not adjudicate on whether the Ward Reconciliation Board was fully involved or not; or whether it was lawful for the children above seven years to be under the custody of the mother.

It is from the above findings, I am of the firm position that the illegality pleaded in this application, does not qualify for consideration as a ground of extension of time.

Coming to the establishment of good cause for extension of time as stated above- **Lyamuya Construction Company Ltd Vs Board of Registered Trustees of Young Women's Christian Association of Tanzania(supra)**; and the case of **Da O'Bambe Iko (by William Daniko as the administrator of estates Vs Public Service Social**

Security Fund and The Treasury Registrar (supra) which calls for the applicant to account for each day of delay.

In this case, the applicant has neither accounted for the days of delay nor given any other reason as to why he delayed to file an application for certification on point of law on time. I find that the delay was caused by the applicant's apathy and lack of diligence.

From the above findings I find that the applicant has not demonstrated sufficient reasons for this court to grant the prayed extension of time. Consequently, I dismiss the application with costs.

Accordingly ordered.



Mbeya
05.11.2021


R.A. Ebrahim
JUDGE.