

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOROGORO DISTRICT REGISTRY
AT MOROGORO

MISC. CIVIL APPLICATION NO. 05 OF 2022

(Arising from Civil Appeal No. 22/2020, in the District Court of Kilombero, at Ifakara; Originating from Shauri la Talaka na Ndoa Na. 10 of 2020)

FAUSTINE FAUSTINE MAHIMBO APPLICANT

VERSUS

SALVINA SELESTINI LIGAMBASI RESPONDENT

R U L I N G

29th March & 13th April, 2022

CHABA, J.

By way of Chamber Summons, the applicant has moved this Court under Section 14 (1) of the Law of Limitation Act [Cap. 89 R.E. 2019] (the LLA) and Section 95 of the Civil Procedure Code [Cap. 33 R.E. 2019] (the CPC), seeking for an extension of time within which to file an appeal against the decision of the District Court of Kilombero, at Ifakara. The application is supported by an affidavit deposed by the applicant.

Briefly, this application arises as follows; sometimes in the year 2020 the applicant had petitioned the Primary Court of Mkamba within the District of Kilombero for a Decree of Divorce before the Primary Court of Mkamba within the District of Kilombero due to conflicts prevailed in his marriage. The Primary Court unanimously granted the petition and dissolved their marriage. Dissatisfied with the decision of the Primary Court, the respondent successfully appealed to the District Court of Kilombero, at Ifakara, whereby the Court partly allowed the appeal and upheld part of the trial Court decision. It seems that the

applicant was unhappy with the decision of the District Court, but he didn't lodge an appeal within the period prescribed by the law. Consequently, he found himself out of time. He therefore, preferred the present application seeking for an extension of time within which to file an appeal against the decision of the District Court in respect of Civil Appeal No. 22 of 2020 dated 15/04/2021.

When this application was called on for hearing on 29/03/2022, both parties appeared in persons, unrepresented. Upon being invited by the Court to argue his application, the applicant commenced by adopting the contents of his sworn affidavit and briefly submitted that he failed to file his appeal within the prescribed period due to sickness. He added that, he was suffering from blood pressure and chest ailment. He prayed this Court to consider the medical chits as relevant documents to rely on.

On the other hand, the respondent also prayed this court to adopt her counter affidavit and briefly narrated that she has never heard that the applicant was once admitted and hospitalized at Mkamba Health Centre, at Kidatu area. She insisted that the applicant didn't encounter health problem and he has been regularly visiting at her home to see their son. She highlighted that, when the trial Court delivered her judgment on 15/04/2021, she afterward, tried her level best to make follow-ups on this case, i.e. Civil Appeal No. 22 of 2020 for almost a year, but her efforts ended in vain. When the file was traced and recovered, she instituted execution proceedings before the District Court. Upon noticing the presence of execution proceedings, the applicant immediately rushed before this Court and lodged the instant application. She thus prayed this Court to reject the application.

After considering the proceedings and evidence on record on one hand and the respective oral submissions by the parties on the other hand, the following are the deliberations of this Court in a bid to dispose this application.

At the outset, I find it apposite to start with the question whether this application is proper before this Court or not. As a matter of procedure, it is a trite law that whenever there is a point of law, be it in a suit, criminal case or any application, it is inevitable first to deal with them. Normally, those matters are preferred by parties as the preliminary objection(s).

Since there is no any objection from the opposite side, I have decided to deal with this facet *suo motto* taking into account that the matter did originate from the domain of the Primary Court. There is no doubt that, the governing law for all matters originating from the Primary Court is the Magistrates Courts Act [Cap. 11 R.E. 2019] (the MCA).

As shown above, the applicant seeks for an extension of time within which to file an appeal against the decision of the District Court. To move this Court, he has preferred this application under the auspices of chamber summons made under Sections 14 (1) of the LLA and of the CPC (*supra*). According to the records, the matter stemmed from the Primary Court. It follows therefore that the provisions under which this application was preferred do not confer this Court powers to grant the orders sought. The proper Law to move this court in the instant application is section 25 (1) (b) of the Magistrates Courts Act. Section 25 (1) (b) of the MCA provides that:

"Section 25 (1) Save as hereinafter provided:

(a) ... N/A,

(b) in any other proceedings any party, if aggrieved by the decision or order of a district court in the exercise of its appellate or revisional jurisdiction may, within thirty days after the date of the decision or order, appeal there from to the High Court; and the High Court may extend the time for filing an appeal either before or after such period of thirty days has expired".

From the above position of the law, it is clear that this application is not proper before this Court for obvious reason that the provisions cited in the chamber summons are not the ones envisaged for the orders sought in this application. It suffices to state that this application has been erroneously preferred under wrong citation of the laws.

The crucial question is, should I strike out the application at this juncture on account of failure by the applicant to cite the relevant provisions of the law? In my opinion, I think the answer is negative and the reasons are obvious. I say so because with introduction of overriding objective, Courts have been called upon to focus on substantive justice and do away with the technicalities which may impede dispensation of justice.

Having stated the proper law which, the applicant ought to have cited in his application, I now turn to the crux of this application. It is a long-established rule that in cases of application for extension of time within which to file an appeal out of time, the Court is clothed with discretionary powers on whether to grant such an extension of time or not. In so doing, the Court must exercise such powers judiciously. The

Court of Appeal of Tanzania has discussed this matter in a number of cases including the famous case of **Lyamuya Construction Company Ltd v. Board of Registered Trustees of Young Women Christians Associations**, Civil Application No. 2 of 2010 (unreported) where it established guidelines to be observed by Courts in granting extension of time. The Court held inter alia that:

*"Four guidelines which should be observed by Court in granting extension of time: that is: **One;** The applicant must account for all the period of delay; **Two;** The delay should not be inordinate **Three;** The applicant must show diligence; and not apathy, negligence or sloppiness in the prosecution of the act that he intends to take, and **Four;** 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".*

Reverting to the Court records, the applicant through para 3 to 7 of the sworn affidavit stated that the District Court delivered her judgment on 15th April, 2021 whereas on 20th April, 2021 he wrote a letter to the District Court requesting for a certified copy of judgment. He however, fell sick on 13th May, 2021 where he was admitted and hospitalized at Mkamba Health Centre, at Kidatu area. He stayed at the said Health Centre till on 17th May, 2021 when he was discharged and alas found himself out of time. He accentuated that failure to appeal within time, was not born out by negligence or loss of interest to lodge his appeal. But it was beyond his control. He added, if his prayers will not be granted, perhaps will suffer great loss.

As regards to the reasons narrated as grounds for delay, in my view, the same are not in line with the applicant's version. The reason behind is that the applicant did not account for all the period of delay, and had an inordinate delay of almost nine (9) months as he filed this application on 21st January, 2022. It follows therefore that, there was a dire need for sufficient cause to be shown. Even the medical chits craved to form part and parcel of his affidavit, on the face of it have exposed full of suspicions because amongst of the four documents, only one document dated 17th May, 2021 bears the seal of Mkamba Health Centre. The other documents dated 12th, 14th, 15th and 16th May, 2021 bears no seal of the Health Centre. The medical report further reveals that the applicant used to visit the Mkamba Health Centre for diagnosis or treatment as an outpatient but there is no any document which vindicate that he was hospitalized. It must be noted that, sickness is not an automatic ground to justify an extension of time. It will only be a good ground if the applicant managed to prove that, he was seriously sick for the entire period of delay to the extent that, he was unable to file an appeal within the period prescribed by the law. That being the case, I find that the applicant has failed to advance good reasons to warrant this court to exercise its discretion to enlarge time within which to file an appeal out of time as prayed

On the basis of the forgoing reasons, I find that this application is non-meritorious.

In the final event, the application is devoid of merit and is hereby dismissed with no orders as to costs.

It is so ordered.

DATED at MOROGORO this 31st day of March, 2022.



M. J. Chaba

Judge

31/03/2022

Court:

Ruling delivered at my Hand and Seal of this Court in Chambers this 31st day of March, 2022 in the presence of the applicant and respondent who appeared in persons, unrepresented.



M. J. Chaba

Judge

31/03/2022

Rights of the parties fully explained.



M. J. Chaba

Judge

31/03/2022

