IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MBEYA

AT MBEYA

MISC. CIVIL APPLICATION NO. 9 OF 2022

(Arising from the decision of the District Court of Mbeya in Civil Revision No. 2 of 2022 and Original Matrimonial Appeal No.26 of 2011 Mbalizi Primary Court)

LUCAS SINGOYI.....APPLICANT

VERSUS

ENEA REUBEN MWANKUSYE .....RESPONDENT

RULING

Date of last Order: 28.09.2022

Date of Ruling: 28.10.2022

Ebrahim, J:

The Applicant herein has made the instant application under **section 25(1)(b) of the Magistrate's Court Act, Cap 11 RE 2019** and **Rule 3 of the Civil Procedure (Appeals in Proceedings Originating in Primary Courts) Rules, GN. No. 312 of 1964)** praying for extension of time to lodge his appeal against the decision of the District Court of Mbeya in Civil Revision No. 2 of 2022. The application is supported by an affidavit of Lucas Singoyi, the Applicant.

Going by the Applicant's averments in his affidavit, he advanced reasons for the delay being that he was condemned unheard

against the principles of natural justice. Thus, the proceedings and ruling of the District Court of Mbeya are tainted with illegality.

The application was disposed of by way of written submission and both parties appeared in person, unrepresented.

The Applicant firstly prayed to adopt the contents of his affidavit. He claimed illegality as the main reason for the instant application as he was not availed right to be heard in Civil Revision No. 2 of 2022. He invited the court to visit the case of **Principal Secretary Ministry of Defence and National Security Vs Devran Valambhia** (1992) TLR 182 on the principle that court can extend time where the issue of irregularity or illegality has been raised. He also relied on the case of **Tanzania Breweries Limited Vs Herman Bildad Minja**, Civil Application No 11/18/2019 (CAT – DSM). He explained that he was not summoned by the District Court of Mbeya.

He contended further that the District Court was wrong to make reference to a none existing case at the Primary Court in revision proceedings. That, while the original case at the Primary Court of Mbalizi was Matrimonial Case No. 26 of 2021, the District Court made reference to Matrimonial Appeal No. 26 of 2011. From the foregoing, he prayed for the application to be allowed.

Responding to the submission by the Applicant, the Respondent contended that in Civil Revision No. 2 of 2022, the Magistrate was rightly exercising his revision powers *suo-motto* after receiving a letter from the Respondent to clarify the contradictory orders of Mbalizi Primary Court in Matrimonial Cause No. 26 of 2022. She argued that District Court intervened on the order for execution purpose as otherwise it would have been ineffective and the decree would be unenforceable. She explained the confusion on the order concerning the division of the matrimonial houses and argued further that the honourable Magistrate invoked his powers of revision under **section 22(1) of the Magistrates Court Act, Cap 11 RE 2019.**

Speaking of the citation error in the heading which read Matrimonial Appeal No. 26/2011 from Mbalizi Primary Court instead of Matrimonial Appeal No. 26/2021; she said the error does not jeopardize justice and the same can be rectified by borrowing the wisdom of **Section 96 of the Civil Procedure Code, Cap 33 RE 2019.** She further cited the case of **Yacob Magoiga Gichere Vs Penina Yusuph**, Civil Appeal No. 55 of 2018 which addressed the principle of overriding objective which urges the determination of

cases justly and fairly having regard to substantive justice. She prayed for the application to be dismissed with costs.

In rejoinder, the Applicant had nothing substantive to add than essentially repeating his submission in chief. He insisted that the mix up in description of case number goes to the root of the matter and it is not a technical issue.

I would like to point out on the outset that, I would not dwell on the issue of mix up of description of the case number as the same is a minor mistake that can be cured by the court without embarrassing the right of either party under the spirit of the oxygen principle. The assertion by the Applicant that the wrong citation of the case number goes to the root of the matter is an exaggeration.

Now coming to the real issue, I have considered the affidavit supporting the application, the counter affidavit by the Respondent and their rival submissions. as I have hinted earlier, the Applicant's reason for this court to grant extension of time is pegged on illegalities. The issue for consideration therefore is whether the illegalities raised are sufficient for this Court to grant the application.

I agree with the Applicant that the Court of Appeal has underscored that where a point at issue is illegality, the same constitutes a sufficient reason for extending time so that the illegality can be cured; see **Lyamuya Construction Company Limited v. Board of Trustees of Young Women Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported); **Principal Secretary, Ministry of Defence and National Service v. Devran Valambia (supra)**; **Mohamed Salum Nahd vs Elizabeth Jeremiah**, Civil Reference No. 14 of 2017 CAT at Dar Es Salaam (unreported).

Certainly, going through the proceedings on record, it is clear that on 20.09.2021, the Respondent herein wrote a letter to the District Magistrate In-charge praying for the court to revise the decision of Primary Court on the division of the matrimonial assets. From the said letter, the Resident Magistrate proceeded with the revision suo motto without calling both parties to hear their positions. He delivered the ruling on 15.02.2022. That was not correct.

One would say that at least the Respondent was aware of what was happening as she was the one who basically moved the court by her letter. The Applicant on the other hand had no clue of what was happening.

Needless to say that a party's right to be heard cannot be over emphasized. It is a fundamental constitutional right guaranteed under **Article 13(6)(a) of the Constitution of Tanzania (as amended).** The Court of Appeal has in a range of cases stressed on the fundamental principle of right to be heard - see the case of **Mbeya-Rukwa Auto parts and Transport Ltd V Jestina George Mwakyoma** [2003] TLR 251; **Selcom Gaming Limited V Gaming Management (T) Ltd and Gaming Board of Tanzania** [2006] TLR and **Ausdrill Tanzania Limited V Mussa Joseph Kumili and Another**, Civil Appeal No 78 of 2014 (unreported), to name but a few. Thus, one's rights cannot be adjudicated upon without being given right of audience.

In the instant matter, once the District Court Magistrate decided to conduct revision proceedings, much as he was so empowered by the law, he was required to call both parties to address him on the issue in adherence to the principles of natural justice.

Therefore, failure to call parties to address the court was a fatal procedural irregularity occasioning miscarriage of justice.

Of course, and inconsideration of the fact that the Applicant filed the instant application within two months after the decision of the

District Court, the remedy would be to condone the delay and allow the Applicant lodge his appeal on that reason.

Thus, in line with the spirit of the Court of Appeal in **Valambhia's** case and other cited cases **(supra)**, I allow the application. The Applicant is availed 30 (thirty) days from the date of this ruling to lodge his appeal. As the mishap was caused by the court and following the relationship between parties, I give no order as to costs.

Accordingly ordered.

THE HIGH COURT OF TANZANIA

R.A. Ebrahim

JUDGE

Mbeya

28.10.2022

Date: 28.10.2022.

Coram: Hon. P.R. Kahyoza -DR.

Applicant: Present.

Respondent: Present.

B/C: Gaudensia.

Applicant: This matter is coming for ruling.

Court: Ruling delivered in the presence of parties.

P.R. Kahyoza

Deputy Registrar

28.10.2022