

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MOROGORO DISTRICT REGISTRY

AT MOROGORO

CIVIL APPEAL NO. 4 OF 2023

*(Arising from Misc Civil Application no. 80 of 2022 of Morogoro District Court by
Hon.I.G. Lyatuu, SRM)*

MWALIKI MASATU RUTABU APPELLANT

VERSUS

ADVENTINA MGETA RESPONDENT

JUDGEMENT

Date of last order: 30/03/2023

Date of ruling: 05/05/2023

MALATA, J

This appeal originates from the District Court of Morogoro rejecting the application for extension of time sought by the appellant herein.

It is evident that the appellant and the respondent herein were parties at the Matrimonial Cause No. 14 of 2021 from Kingolwira Primary Court, where the respondent filed matrimonial cause praying for divorce and division of matrimonial properties. The court granted the prayers sought

by the respondent. Upon being dissatisfied by the decision of the primary court, the appellant appealed to the District Court where his appeal was faced with the preliminary objection that the appeal was time barred. The first appellate court upheld the preliminary objection thence struck out the appeal.

The appellant filed Misc Application no. 80 of 2022 seeking extension within which to file an appeal to the Morogoro District court out of time. Upon hearing both parties to the application, the Morogoro District Court found no merit in the application thus ended dismissing it.

Aggrieved thereto, the appellant preferred this appeal armed with three grounds of appeal

1. That the trial magistrate erred in law and fact for failure to take into consideration the issue of jurisdiction as the vital matter which should be taken very seriously.
2. That the trial magistrate was erred in law and fact for dismissing the application for extension of time instead of striking out if the applicant failed to attach the judgment of the Kingolwira Primary court in relation to the matrimonial cause No. 14/2021, since the application was incompetent.

3. The trial magistrate erred in law and fact for failure to adhere the principle of illegality once is raised in the extension of time application become the good ground of extension.

The application argued by way of written submissions and both parties filed their respective submissions within time.

Submitting in support of the first ground of appeal, the appellant stated that, the trial magistrate erred in law and fact for failure to take into consideration the issue of Jurisdiction. The appellant cited the case of **Tanzania Electric Supply Company Limited (TANESCO) Vs. Independent Power Tanzania Ltd (IPTL) [2000] T.L.R. 324**. He submitted that, the above case principled that, the parties by agreement cannot confer jurisdiction which do not exist under the law.

One of the pertinent issues before at the primary court was that, despite the appellant and respondent living together for more than nineteen (19) years as husband and wife but they were not married thus there no marriage and the primary court had nothing to dissolve. To him that constituted illegality on party of primary court decision sought to be challenged, as it had no jurisdiction to handle it as matrimonial cause for lack of documented marriage, he succumbed. He submitted that, the

raised point counts for illegality, thus, be considered as good cause for extension of time.

The Matrimonial Cause No. 14 of 2021 from Kingolwira Primary Court at Morogoro that is the foundation of these cases, was tried on wrong forum or jurisdiction because the parties to the case were not officially married rather, they were living under the umbrella of presumption of marriage.

Moreover, the trial primary court acknowledges it, that since the Primary Court of Kingolwira admit about the status of parties automatically the primary court was barred to entertain that case because it lacks jurisdiction to adjudicate matrimonial matter which fall under the presumption of marriage and to cement his submission the appellant cited the case of **Wilson Andrew vs. Stanley Joseph Lugwisha and another**, Civil Appeal no. 226 of 2017, Court of Appeal of Tanzanian (unreported).

As to the second ground of appeal, he submitted that, the trial magistrate erred in law and fact in dismissing the application for extension of time instead of striking out. Further, the trial magistrate one among the reason resulted into dismissal of the appellant's application none attachment the copy of judgment sought to be challenged. He submitted that, that was legally wrong.

That the third ground of appeal is the trial magistrate erred in law and fact for failure to adhere the principle of illegality once is raised in the extension of time application become a good ground for extension. The appellant supported the ground relying on the decision in **Charles Richard Kombe v Kinondoni Municipal Council**, Civil Reference No. 13 of 2019. Court of Appeal of Tanzania (unreported). Under page 8 stated that;

"From the above definitions, it is our conclusion that for a decision to be attacked on ground of illegality, one has to successfully argue that the court acted illegally for want of Jurisdiction, or for denial of right to be heard or that matter was time barred"

That the decision of Primary Court of Kingolwira in the Matrimonial Cause No. 14 of 2021 tainted with illegality of jurisdiction that is why the appellant herein raise it when applied for extension of time.

Finally, he prayed that, this honourable court be pleased to allow this appeal with costs.

The respondent first invited the court to take note that, the appellant is misdirecting the court be adducing grounds which are not the replica of the decision and reasons of the trial court. She further submitted that, the

trial court discussed the issue of illegality and came to the conclusion that illegality must be apparent on the face of record and the appellant didn't attach the copy of the judgement which contained the alleged illegality and thus failed to prove his allegation.

The respondent further submitted that the trial court also discussed on factors to be considered in an application for extension of time including the duty of the applicant to accounting for each day of delay in which at the end the appellant failed to account for, thence dismissal of the application.

Furthermore, the reasons for failure to attach judgement was not a main reason for dismissing the application but failure to advance sufficient or good cause for extension of time.

Submitting in opposition of the second ground of appeal the respondent stated that the appellant is misdirecting himself as the trial District court did not dismiss the application because of the failure to attach primary court judgement but rather because of the failure to account for each day of delay and abstinence to prosecute his application prudently thus lack good cause for extension of time. To glue her submission cited the case of **Vedastus Raphael vs. Mwanza City Council and 2 other**, Civil

Application no 594/08 of 2021 (unreported) where the court of appeal held that;

"I am satisfied that the applicant has failed to advance good cause to warrant court to grant extension of time within which to file an appeal. Consequently, the same is hereby dismissed with costs."

On the third ground the respondent while citing the case of **Charles Richard Kombe** (supra), quoted what constitutes illegality as a ground for extension of time. The respondent submitted that the applicant ought to argue the above ground successfully before the trial court as held in the District Court decision that, such illegality must be apparent on the face of record.

Finally, the respondent prayed for the decision of the District Court to be upheld and appeal be dismissed with costs.

Having carefully considered the submission from both parties and carefully examined the records and the impugned decision, it is clear that, **one**, appellant was aggrieved by the decision by the Kingolwira Primary Court issued on 9th May, 2022, **two**, the appellant appealed to the District Court vide appeal no 15 of 2022, **three**, the appellant's appeal was struck out on 28/10/2022 for being filed out of time, **four**, the appellant filed

application No. 80 of 2022 seeking extension of time within which to file an appeal out of time, **five**, on 20/12/2022, the application was dismissed for want of sufficient or good cause for extension of time, **six**, dissatisfied thereof, the appellant appealed to this court, thence the present appeal No. 4 of 2023,

it is a trite law that the power of the Court to extend time is discretionary and that it can be exercised if the applicant demonstrates good cause.

The issue for determination is whether the District Court wrongly exercised its discretion power in arriving to impugned decision.

As mentioned earlier, the appeal revolves around the exercise of discretion power by the District Court.

The question for determination by this court therefore is whether in exercising its discretion mandate the trial District Court made any error warranting interference by this Court in appeal.

Luckily, the parameters upon which superior courts are permitted to interfere with the exercise of discretionary power by the lower courts are now settled. In **Samo Ally Issack & Others v. Republic**, Criminal Appeal No. 136 of 2021 (unreported) citing **Mbogo & Another v. Shah** [1968] E.A. 93 discussing parameters on which an appellate court can act in interfering with the exercise of discretion by a lower court or tribunal,

that is to say; **one**, if the lower court misdirected itself, or; **two**, it has acted on matters on which it should not have acted, or; **three**, it has failed to take into consideration matters which it should not have considered thereby arriving at a wrong conclusion. See also: **Credo Siwale v. Republic**, Criminal Appeal No. 417 of 2013, **The Commissioner General, Tanzania Revenue Authority v. New Musoma Textile Limited**, Civil Appeal No. 119 of 2019 and **Nyabazere Gora v. Charles Buya**, Civil Appeal No. 164 of 2016 (all unreported).

Further, section 14(1) of the Law of Limitation Act, Cap. 89, R.E. 2019 extension of time vests in the High Court the discretion to extend time upon reasonable or sufficient cause being shown;

*14.-(1) Notwithstanding the provisions of this Act, the court may, for any **reasonable or sufficient** cause extend the period of limitation for the institution of an appeal or an application, other than an application for the execution of a decree, and an application for such extension may be made either before or after the expiry of the period of limitation prescribed for such appeal or application.*

There is no universal definition of good or sufficient cause but the court has developed number of factors to be taken into account in determination for application for extension of time;

In the case of **Lyamuya Construction Co. Ltd Vs. The Registered Trustees of Young Women Christian Association of Tanzania**, Civil Application No. 2 of 2010 the court principled that;

- (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 action that he intends to take.*
- (d) If the court feels that there are other sufficient reasons, such as the existence of a point of law of sufficient importance; such as the illegality of the decision sought to be challenged.*

The said power is exercisable judiciously and flexibly by considering the relevant facts of the case. In view of the circumstance of this appeal, the matters which were considered by the trial District court were; **one**, the reasons for delay, **two**, the length of the delay, **three**, diligence and not apathy and **four**, existence of alleged illegality on the impugned decision

Turning to the ground of illegality, it is a trite law that, illegality being one of good cause for extension of time must be raised timely. One cannot remain for a longer period without pursuing for his right for reasons that he shall raise illegality as ground for extension. Equally, illegality must also be timeously raised, otherwise there will be no end to litigation.

In the present appeal having considered the grounds for of appeal raised by the appellant they all attack the trial magistrate that in law for failure to acknowledge that there was illegality in the decision sought to be appealed. The illegality is of two folds, **first**, the appellant raised an issue of jurisdiction and **second**, the magistrate faults in dismissing the application instead of struck it out.

The claimed illegality in particular on jurisdiction fall squarely with what the court decided in **The Principal Secretary, Ministry of Defence and National Service v. Devram Valambhia** [1992] TLR 387 and **Lyamuya Construction Co. Ltd (supra)** in the later decision the Court stated:

"The Court... 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." [at page 9].

Charles Richard Kombe vs. Kinondoni Municipal Council, Civil Reference No. 13 of 2019 where the court of appeal after defining the word illegality came to the conclusion as I hereby quote;

*From the above decisions, it is our conclusion that for a decision to be attacked on ground of illegality, one has to successfully argue that the court **acted illegally for want of jurisdiction, or for denial of right to be heard or that the matter was time barred.***

Further, in the case **Wilson Andrew Vs Stanley John Lugwisha and another, Civil Appeal No.226 of 2017**, the court of appeal at page 14-15 of the Judgement had these to say, among others, I quote

"In addition, it is a settled position that where a man and woman live together for a certain period of time (2 years) there is a presumption under section 160 of the Law of Marriage Act that they are husband and wife. However, the said presumption is rebuttable and as such, it does not fall under the category of marriage which the primary court is vested with jurisdiction to entertain as demonstrated above."

Since, the raised issue touches jurisdiction of the court and if acted without it renders the decision a nullity, this court finds that there is need to look at it based on the court of appeal guidance as per above authorities.

In the circumstances and based on the pleaded illegality touching jurisdiction, and what the court of appeal stated in the case of **Charles Richard Kombe** cited herein above, I find that is good cause based on illegality.

at it based on the court of appeal guidance as per above authorities.
All said and done, this court do hereby interfere with District court decision as it failed to accord weight the issue of jurisdiction which goes to the very foundation of powers of the Primary Court to adjudicate such kind of cases. I am, thus inclined to agree with the appellant.

Consequently, I hereby reverse the District Court decision denying extension of time and grant it with condition that the appellant file appeal to the District Court within twenty-one (21) days from the date of this Judgement. Each party shall bear its own cost.

IT IS SO ORDERED.

DATED at MOROGORO this 5th May, 2023.



G. P. MALATA

JUDGE

05/05/2023