

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**  
**ARUSHA DISTRICT REGISTRY**  
**AT ARUSHA**

**MISC. CIVIL APPLICATION NO. 160 OF 2022**

*(C/f Misc. Civil Application No. 41 of 2020 Juvenile Court of Arusha at Arusha)*

**BEATRICE BARTAZAR PREMSINGH ..... APPLICANT**

**VERSUS**

**PETER GABRIEL MSOFI ..... RESPONDENT**

**RULING**

12<sup>th</sup> July & 25<sup>th</sup> August, 2023

**TIGANGA, J.**

In this application, the applicant prays for extension of time so that she can appeal out of time against the decision of the Juvenile Court of Arusha at Arusha (the trial court) in Misc. Civil Application No. 41 of 2020 was delivered on 24<sup>th</sup> November 2020. The application was filed under section 130 (2) of the **Law of the Child Act**, [Cap. 13 R.E. 2019] (Cap 13) and was supported by the applicant's affidavit,

In her affidavit, the applicant deposed that, after the trial court had delivered its decision, she immediately applied for copies of the ruling and drawn order. However she was not supplied with the same and in March 2021, she was served with the application for execution intending to execute the trial court's orders. Following that unexpected act, she filed an application for extension of time before this Court to be allowed to

appeal out of time but the same was struck out for being brought under the wrong provisions of the law, before he filed the current application. She also deponed that, there is an issue of illegality as there was no justification by the trial court to grant the respondent custody of their child aged 5 years to the respondent to be taken care by a housemaid while the applicant, her mother is still alive. Thus, she believes that she has a high chances of success in her intended appeal.

The application was opposed by the respondent by filed the counter affidavit in which he condemned the applicant for being negligent in making follow-ups on the copies of the ruling and drawn orders as the same were ready for collection from the 1<sup>st</sup> week of February 2021. He also deponed that, this application has been overtaken by events because the child had already been handed over to him and resumed school hence, any disturbance to the child will cause irreparable trauma to the child in question. He stated that there were not enough reasons adduced to support the applicant's delay in filing the intended appeal in time.

During the hearing of the application which was by way of written submission, the applicant was represented by Mr. Wilbard Massawe, Advocate, whereas the respondent was represented by Mr. Alute Mughwai learned senior Advocate.

Supporting the application, Mr. Massawe prayed for the court to adopt the applicant's affidavit to form part of his submission. He submitted that there are three limbs to discuss in granting the extension of time. **First**, that there was a delay in obtaining the requisite copies of the Ruling and Drawn Order after the decision was delivered on 24<sup>th</sup> November 2020. According to him, the applicant wrote a letter to the trial court on 25<sup>th</sup> November 2020 requesting to be supplied with the said copies but the same were not given to her, hence, she decided to file the first application for extension of time which was struck out for citing wrong provision. He submitted that, since rule 123 (1) and (2) of the **Law of the Child (Juvenile Court Procedure) Rules, 2016** (Law of the Child Rules) requires an appeal to be filed within fourteen days, the applicant could not have done so without having documents requisite for filing the said appeal.

To cement his argument, he cited the case of **Mohamed Salimini vs. Jumanne Omary Mapesa**, Civil Appeal No. 345 of 2019 CAT at Dodoma (unreported) which interpreted section 19 (2) of the **Law of Limitation Act**, [Cap 89 R.E. 2019] which provides for automatic exclusion of the days spent in waiting for the requisite documents required for the appeal.

On the second limb, the learned counsel submitted that there is illegality on the face of the record as there is no justification as to why the trial court granted custody to the respondent while the child was still five years old. He argued that there is a presumption that, it is in the best interest of a child that, children under seven years should be placed under the custody of the mother and not the father. He cited the case of **Hassan Abdulhamid vs. Erasto Eliphase**, Civil Application No. 402 of 2019 CAT at Dsm (unreported) which underscored a claim of illegality as sufficient cause for the extension of time.

On the last limb, Mr. Massawe submitted that what happened to the applicant as she failed to timely file her appeal was due to technical delay and not on her own volition or negligence. He referred the Court to the case of **The Director LAPF Pensions Fund vs. Pascal Ngalo**, Civil Application No. 76/08 of 2018, CAT at Mwanza (unreported), and prayed that this Court grant the application and extend time so that the applicant can file her appeal out of time.

Opposing the appeal Mr. Mughwai submitted that, according to Section 130 (1) of Cap 13, an appeal against any order should be made within 14 days from the day the order was given. However, the applicant herein failed to do so and even the initial application which was struck out

was filed 107 days after the order. He argued that, unlike other legislations, the law of the child requires matters involving children to be disposed of expeditiously as it is in their best interest for them to be protected from lengthy litigations between their parents. He further submitted that, in determining whether or not to extend time, the court has to consider; the reason and the length of delay, the other aspect to consider is the issue whether the applicant was diligent, and last is the degree of prejudice to the respondent if time is extended.

It was the learned counsel's submission that, according to the case of **Wambele Mtumwa Shahame vs. Mohamed Hamis**, Civil Reference No. 8 of 2016, CAT at Dsm (unreported), the applicant has failed to show good and sufficient cause for the delay, as there is no proof that the applicant made any follow-ups of the needed copies as alleged in her affidavit. More so, she did not disclose when exactly she obtained such copies for the exclusion of days under section 19 (2) of the Law of Limitation Act to apply. He said, the said copies were available for collection on the 4<sup>th</sup> week of January but the applicant did not go to the trial court to collect them. He also challenged the length of delay, as the same was inordinate i.e. 107 days from when the decision was delivered to when the previous application for extension of time was filed.

The learned counsel also argued that there was no technical delay because according to the records, it is clear that, the applicant woke up from her slumber after realizing that, the respondent was taking a step further in executing the order. He also challenged the fact of illegality on the ground that, according to the case of **Hussein Abdul Hamid vs. Erasto Eliphas** (supra) cited by the applicant's counsel, it specifically held to the effect that, illegality has to be apparent on the face of the record. However, in the application at hand, such illegality is not apparent as the trial magistrate was well aware of the age of the child in question but still made her findings and granted custody to the father. Thus, one has to go into details as to why she reached such a decision. He further argued that the respondent will be prejudiced if the extension of time is granted unless the status quo of the child is maintained. i.e. he remains in the custody of the child until the final determination of the case.

He prayed that this application be dismissed as it is not in the best interest of the welfare of the child if he will be caught up in a feud between his parents by being moved back and forth from Arusha to Dar es Salaam because he is now settled in Arusha and resumed school.

In his brief rejoinder, the applicant's counsel reiterated his earlier submission and insisted that the applicant deserves the granting of her application so that he can appeal out of time.

Having gone through the parties' affidavits and submissions, the pertinent question for determination is whether this application for extension of time is meritorious.

It is a trite principle that granting or refusing extension of time is purely discretionary in nature hence, it must be exercised judiciously and according to the rules of reason and justice. It can only be exercised upon the court being furnished with good reasons by the applicant as held in the case of **Robert Schelters vs. Mr. Baldev Norataram Varma and Two Others**, Civil Application No. 536/16 CAT at Dsm (unreported) where it was held that;

*"... in **Oswald Masatu Mwizarubi vs. Tanzania Fish Processing Ltd**, Civil Application No. 13 of 2010, the Court held that:-*

*"What constitutes **good cause cannot be laid down by any hard and fast rules**. The term **"good Causes"** is a relative one and is dependent upon the party seeking extension of time **to provide the relevant material to move the court to exercise its discretion.**" [Emphasis added].*

Also in the famous 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, CAT at Arusha (unreported) the Court of Appeal held *inter alia* that,

*"As a matter of general principle, it is the discretion of the Court to grant extension of time. But that discretion is judicial, and so it must be exercised according to the rules of reason and justice, and not according to the private opinion or arbitrarily."*

Applying the above principles in the application at hand, the applicant claimed that, her failure to file an appeal on time was because she was never supplied copies of the ruling and drawn order on time. She prayed that pursuant to section 19 (2) of the Law of Limitation Act, such time be excluded as there was a technical delay. However, looking at her affidavit and the submission she filed, she did not specify when exactly was she served with the said copies for the exclusion of time under section 19 (2) of the **Law of Limitation Act** to apply. The record also shows that she initially filed another application, in Misc. Application No. 20 of 2022 on 10<sup>th</sup> March 2022 which was struck out by this Court on 26<sup>th</sup> August 2022 for being incompetent. But it is not certain if 10<sup>th</sup> March 2022 is when she was availed with the alleged documents or filed the application.



Be as it may, when the previous application was struck out for incompetence on 26<sup>th</sup> August 2022, she waited until 15<sup>th</sup> November 2022 to file the current application. That is almost three months later and it is not clear as to why she waited for that long as her affidavit as well as her submission is silent on the same. Her inaction to file her appeal timely as well as the unsubstantiated delay from when the previous application was struck out to the present application shows negligence and sloppiness. She did not furnish the Court with sufficient reasons for her delay.

The applicant has also claimed that there is an illegality in the decision she intends to appeal against, however, in the case of **Ngao Godwin Losero vs. Julius Mwarabu**, Civil Application No. 10 of 2015, CAT, at Arusha (unreported), it was held that illegality has to be apparent on the face of record not that which will require scrutiny of the proceedings and long drawn arguments. She claims that there is a presumption under the law that, it is the welfare of a child and the best interest also that, children under 5 years should best be put under the custody of a mother, not a father, but the trial court did vice versa without justification. As rightly argued by the respondent's counsel, the trial magistrate is well aware of the presumption under the law but decided to decide as she did after analysis of the evidence. Thus, illegality if any, will

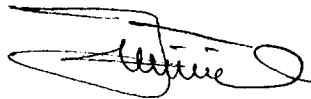
require one to inquire from the evidence and its analysis hence, not apparent on the face of record. The ground of illegality also fails.

For the reasons stated hereinabove, I find this application to be without merit and proceed to dismiss it. Parties being co-parents, each party to bear own costs.

It is accordingly ordered.

**DATED** and delivered at **ARUSHA** this 25<sup>th</sup> day of August 2023



  
**J.C. TIGANGA**  
**JUDGE**