

THE UNITED REPUBLIC TANZANIA

IN THE HIGH OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

MISCELLANEOUS CIVIL APPLICATION NO. 4 OF 2023

MOHAMEDI SAIDI NDEMBO ----- APPLICANT

VERSUS

FARIDA AHMAD LIKOMBOLEKA ----- RESPONDENT

Date of last order: 18.07.2023

Date of Ruling: 14.08.2023

RULING

Ebrahim, J.:

The applicant herein has filed an application to be extended time to lodge an appeal and leave to file the same before this court against an ex-parte judgement and decree of the District Court in Matrimonial Cause No. 6 of 2021 dated 10.03.2022. The application has been preferred under the provision of **Section 14 (1) of the Law of Limitation Act, [Cap 89, R.E 2019]**; and it is supported by an Affidavit

of Mohamedi Saidi Ndembo, the applicant and Supplementary Affidavit of Saidi Hemed, the Chairman of Sogea. The application is being resisted by the Counter Affidavit sworn by Farida Ahamad Likombeleka, the respondent.

The factual background leading to this application can be briefly gleaned from his affirmed Affidavit.

The applicant was the husband of the respondent. Due to a lot of misunderstandings during their marriage, they divorced. The respondent instituted a matrimonial suit in the District Court of Mtwara in Matrimonial Cause No. 6 of 2021 of which the applicant was not aware of the suit. Summons regarding the said suit was saved to the Chairman of Sogea where the applicant and the respondent were living. Sometimes this year 2023 the applicant got a summons to appear before the Court on 18.02.2023. The respondent has lodged an application for execution of Matrimonial Cause No.6 of 2021.

With order of this court, the hearing of the application proceeded by way of written submissions whereby the Applicant was represented

by Ms. Lightness Kikao, Advocate; and the Respondent appeared in person.

Submitting in support of the application, Counsel for the applicant adopted the contents of their affidavit and Supplementary affidavit to form part of the submission and told the court that the main reason for the delay was that the applicant, **first** he was not aware on the existence of the case filed at the District Court until the time for appeal elapsed and there was no proof of summons saved to him. **Second**, although the matter was heard ex-parte he was supposed to be informed on the date of judgment. Therefore, the irregularity has tainted the entire proceedings and judgment of the District Court. **Third**, there is illegality which needs to be intervened by this court on the fact that the trial court had no jurisdiction to entertain the matter which was not reconciled by the marriage reconciliation board. Hence there was no proof that the marriage of the parties had broken down irreparably. The Applicant's Counsel cited the case of **Jeremia Mugonya Eyembe vs. Hamis Selemani**, Civil Application No. 440/08 of 2020 whereas the court stated that illegality can by itself constitute a sufficient ground for an extension

of time. She further cited the case of **Magnet Construction Limited vs. Bruce Wallace Jones**, Civil Appeal No. 459 of 2020 it was held that;

"The court has power to grant an extension of time if sufficient cause has been shown for doing so."

In responding to the submission by the Counsel for the Applicant, the Respondent adopted the contents of her Counter Affidavit and told the court that when the Petition was filed before the trial court, the Applicant was served with two summons which were properly served to him and were signed by the applicant, but the applicant negligently failed to appear before the trial court hence the suit was determined ex-parte.

Further to that she submitted that it is trite law that once the matter is determined ex-parte, the remedy is to make an application to set aside the ex-parte judgment within thirty days as per **Order IX Rule 9 of the Civil Procedure Code, [Cap. 33 R.E 2019]**, due to that reason the application is improperly before this court on the bases stated above.

She further argued that one year and three months has passed since the matter was determined. It is the applicant negligence to

file the application for extension of time to file appeal, to cement her argument she cited the case of **Stephen Masato Wasira vs. Joseph Sinde Warioba and Attorney General** (1999) TLR 334 where the court insisted that litigation has to come to an end and cannot be open ended otherwise the respondent would be prejudiced.

Further to that, she argued that the applicant is required to demonstrate sufficient cause for the court to extend time. She cited the case of **Zuberi Nassor Moh'o vs Mkurugenzi Mkuu wa Shirika la Bandari Zanzibar**, Civil Application No. 93/15 of 2018, CAT Zanzibar, to support her submissions that on the application for extension of time the applicant is required to account for each day of delay. She contended that the Applicant has filed this application on 28.03.2023 and he did not account each day of delay as per the authority attached by the Applicant in his submission i.e., the case of **Magnet Construction Limited vs. Bruce Wallace Jones**, Civil Appeal No. 459 of 2020, TZCA at Musoma. She also cited the case of **Bushfire Hassan vs. Latina Lucia Masaya**, Civil Application No. 3 of 2007 where it was stated that;

"Delay of even a single day has to be accounted for otherwise there would be no point of having rules prescribing periods within which certain steps have to be taken."

She concluded that since the applicant has failed to demonstrate sufficient cause knowingly the extension of time is the discretion of the court; she prayed the court to dismiss the application with costs.

In rejoinder, Counsel for the applicant submitted that, to set aside the ex-parte judgement is not the only remedy as provided under **Order IX Rule 13 (1) of the Civil Procedure Code, [Cap. 33 R.E 2019]**. She argued that the second option is provided under **Section 70 (2) of the Civil Procedure Code, [Cap. 33 R.E 2019]**, that;

"An appeal may lie from original decree passed ex parte."

She also cited the case of **The Registered Trustees of Pentecostal Church in Tanzania vs. Magreth Mukama (A minor by her Next friend, Edward Mukama** Civil Appeal No. 45 of 2015, page 6 and 8 where it was observed that;

"An ex parte judgement is appealable under section 70 (2) of the Civil Procedure Code, (Cap. 33 R.E 2019), this section does not impose any condition for appealing an ex parte judgment."

She contended that the said section provides for an automatic right of appeal against an original decree of a subordinate court.

Counsel for the applicant reiterated that their prayer for the extension of time has merits as it raises serious issues of illegality in the proceedings of the trial court.

Indeed, extension of time is granted by the Court upon exercising its judicial discretion on establishment of sufficient cause which prompted the delay by the applicant.

The principle has been elaborated in the case of **Mumello Vs Bank of Tanzania** [2006] 1 EA 227 where it was held that:

"It is trite law that an application for extension of time is entirely in the discretion of the court to grant or refuse it, and that extension of time may only be granted where it has been sufficiently established that the delay was with sufficient cause".

The Court of Appeal, in the case of **Lyamuya Construction Co. Ltd vs Board of Registered of Young Women's Christian Association of Tanzania** (Civil Application No. 2 of 2010) [2011] TZCA 4 (3 October 2011), has put the following guidelines for granting an application for extension of time:

" (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."

Before going to evaluate if the Applicant has advanced sufficient reasons for granting him an extension of time to lodge an appeal and leave to file the same before this court; it is imperative at this stage to know what amounts to sufficient cause. The term sufficient reason (s) was illustrated by the Court of Appeal in the case of **Regional Manager, Tanroads Kagera vs. RUAHA Congrete Company Ltd.**, Civil Application No.90F (unreported) that;

"Sufficient reasons cannot be laid down by any hard and fast rule. This must be determinedly reference to all the circumstances of each particular case. This means the applicant must place before the court material which will move the court to exercise its judicial discretion in order to extend time."

The question now is whether the Applicant demonstrated sufficient reasons to warrant this court exercise its discretionary power to grant extension of time to him lodge his appeal to this Court.

Coming to our instant application, Counsel for the Applicant said that the main reason for the delay was that the applicant was not served with the summons to appear at the trial court. She said also that the Applicant was not informed on the date of judgment and there was illegality on the fact that the trial court had no jurisdiction because the matter was not referred before the marriage reconciliation board. She said, the Applicant was aware on the ex-parte judgment when he was served with the summons for execution when he came back from the journey.

Going by the Applicant's affidavit there is nowhere that he provided the dates within which he travelled for official duties in different Regions. Also, I have perused through the file and found summons of different dates which were served to the applicant which were of 12.10.2021 and it was signed by the Applicant on 09.11.2021; and on 26.11.2021 the summons was received and signed by the Applicant on 07.12.2021.

In my view, the Applicant's affidavit and submission by his learned Counsel ought to have concentrated on the delay from the date of judgment 10.03.2022 to 28.03.2023 when this application was lodged. To that end, I find no sufficient reasons advanced by the applicant neither in his affidavit nor his Counsel's submission. The delay is about one year and four months. The entire delay has not been accounted by the Applicant. It should be noted that it has oftentimes been stressed both by this court and the Court of Appeal that each single day of delay must be accounted for by the applicant. See **Bushiri Hassan vs Latifa Lukio Mashayo**, Civil Application No.3 2007 (unreported), **Crispin Juma Mkude vs. R**, Criminal Application No.34 of 2012(unreported), and **Tanzania Coffee Board vs. Rombo Millers Ltd**, (Civil Application 13 of 2015) TZCA 49. It was stated also in the case of **Ezekiel Kiango Vs. Lake Oil Co. LTD**, Labour Revision No. 369 of 2019, HC-Dar es Salaam that;

"It is worth to note that limitation is there to speedy administration of justice. A party will not be allowed to institute proceeding as to when he wishes and choose".

Since the applicant has failed to account for each day as required by law, this court is unable to grant the prayer sought in his application.

Again, the relied illegality does not fall within the requirement set by the law that the same must be apparent on the face of the record.

In the upshot, I find this application unmerited for lack of sufficient reasons to make the Applicant not able to file the required application within prescribed time hence to invoke judicial discretion of this court to extend time. Consequently, I dismiss the application with costs.

Accordingly ordered.



R.A Ebrahim

JUDGE

Mtwara

14.08.2023