

UNITED REPUBLIC OF TANZANIA
IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IRINGA REGISTRY

AT IRINGA

CIVIL APPEAL CASE NO. 04 OF 2023

(Arising from the District Court of Iringa at Iringa in Misc. Civil Application No. 07 of 2021)

DOMINICUS LUGALA.....APPELLANT

VERSUS

GLORIA MHEHE.....RESPONDENT

JUDGMENT

Date of the Last Order: 30/08/2023

Date of the Judgment: 15.09.2023

A.E. Mwipopo, J.

Gloria Mhehe, the respondent, petitioned before Isimani Primary Court in Matrimonial Cause No. 07 of 2021 for a decree of divorce, division of matrimonial properties and custody of a child against Dominicus Lugala, the appellant, who is her former husband. After hearing the evidence from both sides, the Isimani Primary Court granted the decree of divorce, divided

matrimonial properties and the child was ordered to be under the custody of the appellant. The appellant was aggrieved with the decision of the trial Primary Court and applied for an extension of time to file an appeal out of time in the District Court for Iringa District at Iringa. The application was registered by the District Court as Misc. Application No. 01 of 2022. After hearing both sides, the Iringa District Court dismissed the application for want of merits.

The appellant was aggrieved with the decision of the District Court, and he preferred this appeal with a total of two grounds of appeal as follows:-

- 1. That, the District Court erred in fact and law for refusing to grant the extension of time to appeal sought while there were apparent reasons for granting such an extension.*
- 2. That, the District Court erred in fact and law for failure to apply proper principles of the law to the relevant circumstances of the case.*

During the hearing, Mr. Edrick Mwinuka, advocate, appeared for the appellant, while the respondent appeared in person. The matter was disposed of by way of oral submissions.

In support of the appeal, Mr. Edrick Mwinuka submitted that this appeal originates from Misc. Civil Application No. 1 of 2022 in the District Court of Iringa at Iringa, where the appellant applied for an extension of time to file an appeal against the decision of the Isimani Primary Court. The District Court dismissed the application for an extension of time to file an appeal for want of merits. The reason for the extension of time was based on illegalities found in the judgment and proceedings of Isimani Primary Court. The appellant submitted jointly on both grounds of appeal as they are interrelated.

The counsel said that the Iringa District Court erred in dismissing the application for an extension of time as there was illegality in the judgment of the Isimani Primary Court in the distribution of Matrimonial properties. The Primary Court should have followed section 104 (2) of the Law of Marriage Act, Cap. 29 R.E. 2019, which requires the Court to consider properties acquired during marriage to be distributed as matrimonial assets. The Primary Court also failed to consider the child's need if there is a child in the distribution of matrimonial properties. The appellant was given custody of their child, and the Court did not consider this in distributing matrimonial assets. These two illegalities were sufficient reasons for the Court to extend the time to file an appeal.

In her reply, the respondent submitted that the decision of Isimani Primary Court was proper and had no error on the face of it to require the intervention of the District Court. There was proof before the trial Primary Court that those properties were matrimonial. The distributed properties were matrimonial. On the claim that the Court was supposed to consider that the appellant had the custody of the child and the same was supposed to be considered in the distribution of matrimonial properties, the respondent said that the claim has no merits as the assets were acquired by the spouses and not the child.

The respondent stated further that the decision of the District Court was delivered on 19/07/2021. But, the appellant waited for 100 days without appealing. The law clearly states that even a single day's delay must be accounted for. The appellant failed to account for the delay. The Primary Court Magistrate informed all of them to take a copy of the judgment within seven days, and she took the copy of the judgment at the Primary Court after seven days. The appellant went to take a copy of the judgment on 29/10/2021. The applicant waited for 85 days to apply for an extension of time. The appellant failed to account for the delay for those 85 days after receiving the judgment. The applicant was negligent in filing the appeal within

time. The decision of the District Court was proper, and there is no sufficient reason for this appeal.

In a rejoinder, Mr. Mwinuka retaliated his submission in chief and prayed for the appeal to be allowed.

Having heard the respective submissions by the parties, the main issue is whether the appeal has merits.

The epicentre of this appeal is the decision of the Iringa District Court dismissing the appellant's application for an extension of time to lodge his appeal. It is settled law that the District Court has discretion to extend time to appeal against decision of the Primary Court after the time limitation for filing a request has expired. The position is stated under 14(1) of the Law of Limitation Act, Cap. 89 R.E. 2019, and section 20 (4) (a) of the Magistrates' Courts Act, Cap. 11, R.E. 2019.

The above cited provisions provide for the powers of the District Court to extend the time for filing an appeal from Primary Court either before or after the period limitation. The time limitation for filing an appeal in matrimonial cases provided by the law is 45 days from the date of the decision

or order in which the appeal is brought according to section 80(2) of the Law of Marriage Act, Cap. 29 R.E. 2019.

It is settled that where the Court has the discretion to grant an application for an extension of time, the same has to be exercised judiciously. The discretion has to be exercised upon a good cause shown. In **Tanga Cement Company vs. Jumanne D. Masangwa and Another**, Civil Application no. 6 of 2001, Court of Appeal of Tanzania at Tanga, (Unreported), it was held that:

".....an application for extension of time is entirely in the discretion of the Court to grant or refuse it. However, this unfettered discretion of the Court has to be exercised judicially, and the overriding consideration is that there must be sufficient cause for doing so. What amounts to sufficient cause has not been defined. From decided cases, a number of factors have been taken into account, including whether or not the application was brought promptly; the absence of any valid explanation for the delay; lack of diligence on the part of the applicant."

In the present case, the appellant's reason for the extension of time presented before the District Court is the presence of illegalities in the judgment and proceedings of the trial Primary Court. The complained illegalities include that the trial Primary Court failed to consider the properties acquired during the subsistence of the marriage in the distribution of

matrimonial assets, and the trial Primary Court Magistrate was unable to consider the child's need in the distribution of matrimonial assets. In contention, the respondent said that the decision of Isimani Primary Court was proper, and there was no error on the face of it to require the intervention of the District Court. The evidence proved that the distributed properties were matrimonial assets, and the custody of the child had nothing to do with the distribution of matrimonial properties acquired by the spouses.

This Court agrees that illegality is a sufficient reason for the extension of time. In the case of **Principle Secretary, Ministry of Defence and National Service vs. Devlam Valambhia [1992] TLR.185**, it was held on page 189 that;

"In our view, when the point at issue is one alleging illegality of the decision being challenged, the court has a duty, even if it means extending the time for the purpose, to ascertain the point and if the alleged illegality is established, to take appropriate measures to put the matter and the record straight."

In the case of **Chiku Harid Chionda vs. Gertrude Nguge Mtinga as Administratrix of the Late Yohane Claude Dugu**, Civil Application No. 509/01 of 2018, Court of Appeal of Tanzania at Dar es Salaam (unreported), at page 12-13 the Court of Appeal referred to its previous

decision in the case of **Ngao Godwin Losero vs. Julius Mwarabu**, Civil Application No. 10 of 2015, Court of Appeal of Tanzania at Arusha (unreported), where the Court held that:-

"It is noteworthy that in Valambhia's case (supra), the illegality of the impugned decision was clearly visible on the face of the record."

From the above-cited decisions, illegality is not a reason constituting delay in filing an appeal. But, it is a legal mistake that ought to be corrected by an appellate court to put right and rectify the position of the law as it was held in the case of **Stade Mwaseba vs. Edward Mwakatundu**, Misc. Land Application No. 19 of 2019, High Court, at Mbeya, (Unreported). The exact position was stated in the case of **Tanesco vs. Mufungo Leonard Majura and 15 Others**, [2017] T.L.R. 525, where the Court of Appeal held on page 532:-

"Notwithstanding the fact that the applicant in the instant application has failed to sufficiently account for the delay in lodging the application, the fact that there is a complaint of illegality in the decision intended to be impugned... suffices to move the Court to grant an extension of times so that the alleged illegality can be addressed by the Court."

The illegality which is a sufficient cause is the one which is apparent on the face of the record that need not be discovered by long drawn argument. See. **Ngao Godwin Losero vs. Julius Mwarabu**, (supra), and **Efrasia Mfugale vs. Andrew J. Ndimbo and Another**, Civil Application No. 38/10 of 2017, Court of Appeal of Tanzania, at Iringa (unreported).

The Court of Appeal elaborated more about illegality, which is sufficient reason for the extension of time, in the case of **Lyamuya Construction Co. Ltd vs. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application 2 of 2010, Court of Appeal of Tanzania at Arusha (unreported), where it held on pages 9 and 10 of the judgment that:-

"In VALAMBHIA's case (supra), this Court held that a point of law of importance, such as the legality of the decision sought to be challenged, could constitute a sufficient reason to extend time. But in that case, the errors of law were clear on the face of the record. The High Court there had issued a garnishee order against the Government without hearing the applicant, contrary to the Government Proceedings Rules and rules of natural justice. Since every party intending to appeal seeks to challenge a decision either on points of law or fact, it cannot, in my view, be said that in VALAMBHIA's case, the Court meant to draw

a general rule that every applicant who demonstrates that his intended appeal raises points of law should as of right, be granted an extension of time if he applies for one. The Court there emphasized that such a point of law must be "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."

In this case, the appellant's illegalities are the failure of the trial Primary Court to consider the properties acquired during the subsistence of marriage and the failure of the trial Primary Court Magistrate to consider the need of the child to distribute matrimonial assets. None of the claimed illegalities appear to be apparent on the face of the record. The issue of the properties acquired during the subsistence of marriage subject of distribution is the issue of facts, which depends on the evidence available to prove how the properties were acquired. Similarly, the issue of consideration of the child's need in the distribution of matrimonial assets by the trial Primary Court is not apparent on the face of the record. The claimed issues are not law issues and would only be discovered with a long drawn argument or process. Thus, there are no illegalities apparent on the face of the record, as the District Court rightly held it.

Further, the decision sought to be challenged was delivered on 19/07/2021 by the trial Primary Court. The appellant stated in his affidavit in the application for an extension of time before the Iringa District Court that he was supplied with the copies on 29/10/2021. The application at the Iringa District Court was filed on 24/01/2022. The application was delayed for more than four months after 45 days limitation to appeal from the date of judgment has expired. Even if we assume that the appellant was supplied with the copies on 29/10/2021, the delay was for almost three months. The appellant was supposed to account for each day delayed. The Court of Appeal emphasized the duty to accounting for every day of delay in the case of **Bushiri Hassan vs. Latifa Lutiko, Mashayo**, Civil Appeal No.3 of 2007 (unreported), where it held that:-

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

From the reasons advanced by the appellant in the District Court, I find that he have not shown good cause and accounted for the delay to the standard required.

Therefore, nothing has been advanced by the appellant on illegality that can make this Court intervene in the exercise of judicial discretion of the Iringa District Court to extend the time to appeal against the decision of Isimani Primary Court, and there is no explanation for the delay to file an appeal within time. The appellant failed to show good cause for the delay and could not account for each day of the delay. Hence, this appeal has no merits and is hereby dismissed with cost. It so ordered accordingly.



A handwritten signature in blue ink, consisting of stylized, overlapping loops and a long horizontal stroke extending to the right.

A.E. MWIPOPO

JUDGE

15/09/2023