

IN THE HIGH COURT OF TANZANIA

DAR ES SALAAM SUB DISTRICT REGISTRY

MISC. CIVIL APPLILCATION NO. 383 OF 2023

(Originating from the Judgment and Decree of the Juvenile Court of Dar es salaam, at Kisutu in Misc. Civil Appl. No. 127 of 2023, delivered by Hon. O.S. Mtae - RM on 28th day of June, 2023)

TIBA BRIAN WILSON MATIMBA APPLICANT

VERSUS

JUMA SADIKI KINGALURESPONDENT

RULING

Date of last Order: 15th September, 2023

Date of Ruling: 22nd September, 2023

E.E, KAKOLAKI. J.

The Applicant herein preferred this application seeking for extension of time to appeal to this Court against the decision of the Juvenile Court of Dar es salaam at Kisutu in Civil Application No. 127 of 2023, which was delivered on 28th June, 2023. The application was brought under the provision of section 14(1) of the Law of Limitation Act, [Cap 89 RE 201] and Section 95 of the Civil Procedure Code, [Cap 33 RE 2019] and supported by two affidavit sworn by Tiba Brian Wilson Matimba, the applicant and Karilo Mulembe Karilo, applicant's counsel. The application is strongly opposed by counter

affidavit deposed by Juma Sadick Kingalu, the respondent, which was later replied by the applicant.

During hearing of the application, the applicant was represented by Mr. Karilo Mulembe Karilo, learned advocate and the respondent engaged the services of Mr. Emmanuel Chengula, learned advocate. Hearing of the application was done by way of oral submission.

The brief background story of the matter is that, the applicant unsuccessfully sued the respondent in the **Juvenile Court of Dar es salaam at Kisutu**, in Civil Application No. 127 of 2023, for custody of two allegedly biological children as judgment was entered in favour of the respondent. Dissatisfied and being out of time to challenge the said decision, the applicant preferred this application seeking for enlargement of time within which to appeal against the said decision. In his affidavit he has raised mainly two grounds as to why this court should exercise its discretion to grant him the sought orders. **One**, the impugned decision was issued in his absence hence unaware of it until 19/07/2023 when he communicated with his advocate only to find out time within which to appeal had expired. **Two**, the said decision is tainted with illegality. The main issues calling for the determination by this court are whether the applicant has demonstrated

sufficient reasons for the delay and whether there is illegality in the decision sought to be impugned.

Having adopted both affidavits and reply to the counter affidavit in support of the application Mr. Karilo submitted on the first ground that, the decision was delivered in absence of the applicant and it was until on 19th July, 2023 when the applicant became aware of the said decision after meeting his advocate who had collected the copy of judgment on 30/06/2023, and that it was in the course of discussion with his advocate on 20/07/2023 when it became apparent to him that time within which to file the appeal had lapsed. He said, that is when the applicant was advised to prefer this application which was filed on 27/07/2023, seven (7) days after his knowledge of the decision, which days were spent in preparation and filing of documents in court, hence the delayed days or period has been accounted for. According to him, for this Court to grant the application of this nature applicant has to exhibit to the Court that sufficient or good cause exists, in which in this case the applicant has successfully managed to demonstrate. As to what amounts to good cause Mr. Karilo intimated there is no specific definition as that is based on the numbers of factors that prevented the applicant to act timely. He mentioned the relevant factors to include length of delay, reason for the

delay, whether there is arguable case on the appeal and the decree of prejudice of the defendant or respondent if time is extended. Reliance was made to the case of **Mbogo Vs. Shah** (1968) EA 93, coupled with the argument that, extension of time though discretionary in nature the task must be exercised judiciously. He further referred the Court to the cases of **Safe store Ltd. Vs. Zulfikarh Kareem and Another**, Civil Application No. 181 of 2013 (CAT-unreported) and **Principal Secretary, Ministry of Defence and National Service vs. Devram P. Valambia (1992) TLR 185 (CAT)**, to drive home the point that even when the delayed days are not accounted for, illegality of the decision of the Court sought to be impugned suffices to constitute good cause for extension of time.

Submitting on the ground of illegality of the decision, Mr. Kaliro informed the Court that the impugned ruling is tainted with illegalities as deposed in paragraph 7(i) and (ii) of the affidavit of Mr. Karilo, since the trial Court did not consider evidence regarding birth of children on the fact that the applicant was a biological father as found at page 10 of the ruling. In so doing he contended, the learned trial magistrate erroneously concluded that, the applicant is not the biological father of the two children despite of absence of dispute that she was the biological father to one of the child

something which constitutes illegality of the decision calling for intervention of the appellate court to make it good.

Opposing the Application Mr. Chengula having adopted the counter affidavit went on to submitting attacking the applicant's submission, starting with the point of illegality as a ground constituting good cause for extension of time. In his view the submission by Mr. Karilo that the cited grounds in paragraph 7(i),(ii) and (iii) of the affidavit of Karilo constitute illegality of the decision are misplaced as the same refers to evaluation of evidence by the court and the findings thereto and not otherwise. He had it that, the settled law as obtained in the case of **Charles Richard Kombe vs. Kinondoni Municipal Council**, Civil Reference No. 13 of 2019 (CAT-unreported) is that, when a party relies on ground of illegality for extension of time, he has to satisfy the Court on the following, **one**, the Court acted illegality for want of jurisdiction, **two**, there was a denial of right to be heard, **three**, the matter was timely barred. In this matter he argued, the fact that the trial court based its decision on the applicant's failure to conduct DNA test, the same was justified to make its finding guided by the provisions of **Rule 6.1 (5) of the Law of Child (Juvenile Court Procedure) Rules, 2016**. So, there is no illegality of the decision as the conclusion was properly drawn by

the trial Court, since when the applicant was claiming for parental care, the two children were residing with their mother and the respondent before the demise of their mother.

Regarding to the reasons for delay in filling the appeal Mr. Chengula argued that, the assertion that applicant was unaware of the outcome of the trial court's ruling which were known to the advocate already until 19th July, 2023 is not justifiable ground for extension of time as being the petitioner was not supposed to abandon his case to the advocate. That legal stance according to him was made clear in the case of **Lim Han Yung and Lim Trading Company LTD Vs. Lucy Treseas Kristensen**, Civil Appeal No. 219 of 2019 (CAT-unreported), where the Court insisted on the need of clients to make follow up of their cases and not to abandon that duty to their advocates. He was therefore of the strong view that, delay was caused by negligence of applicant and his advocate as the applicant ought to have appealed within 14 days of the decision but failed to do so, and also failed to account for more than 14 days passed since the time for filing the appeal had lapsed. He added that, the applicant in his affidavit does not even state where was he before he allegedly surfaced before his advocate on 19th July, 2023, more than 23 days after delivery of the said ruling. In his submission the position

of the law is that, even a single day of delay has to be accounted for, otherwise there will be no point of having rules prescribing periods within which certain steps have to be taken as it was held in the case of **Hyasinth Malisa Vs. John Malisa**, Civil Application No. 167/01 of 2021 (CAT), where the Court of Appeal referred to the case of **Bushiri Hassan Vs. Latifa Lukio Mashayo**, Civil Application No. 3 of 2007 (CAT-unreported). Based on these submission the learned counsel prayed this Court to dismiss this application as it is devoid of merit.

In a brief rejoinder Mr. Karilo reiterated his submission in chief that the impugned ruling is tainted with illegality. As regards to the submission that the applicant failed to account for the delayed period he countered that, as stated in the case of **Mohamed Salum Nahdi Vs. Elizabeth Jeremiah**, Civil Reference No. 14 of 2017 (CAT-unreported), once the illegality of the decision is raised, the Court has to disregard the unaccounted days and proceed to grant the extension of time to the applicant so as to pave way for its rectification during the appeal. As to the case of **Charles Richard Kombe** (supra), relied on by the respondent to challenge illegality of the decision he argued, the same is distinguishable as it is not restricted to those

three aspects mentioned therein rather it is abroad enough to cover the circumstances of this case.

As regards to the submission that, steps were not taken by the applicant to appeal in time, he replied that time to file an appeal expired on 13th July, 2023 as stated in Paragraph 6 of Karilo's Affidavit, the advocate was consulted on 19th July, 2023 though the phone, and both appellant and his advocate met on 20th July, 2023 and the request letter for issue of copy the ruling presented to the court on the same day before this application was promptly filed on 27/07/2023. With all those efforts it should not be counted that, the applicant acted negligently but rather that diligence was exercised by his advocate.

With regard to the submission on the court's findings basing on Rule 63 of the Juvenile Procedure Rules, Mr. Karilo responded that this Court should disregard the submissions by the respondent as the same are going to the merit of the case while the matter is at the stage of extension of time. He thus prayed this Court to grant the prayers as sought in the chamber summons.

Having keenly considered both parties' fighting submissions, and took time to peruse both affidavits, counter affidavit and reply to the counter affidavit in view of establishing as to whether the reasons advanced by the applicant therein constitute good cause or not warranting this Court to grant the application, I am now set to determine the application. As correctly submitted by Mr. Karilo grant of extension of time is a matter of discretion of the Court, the discretion which must be exercised judiciously. The Court of Appeal in the case of **Lyamuya Construction Company Limited Vs. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Appeal No. 2 of 2010 (unreported) though not exhaustively formulated the guidelines to be considered for the granting the extension of time. Court had this to say:

"On the authorities however, the following guidelines may be formulated:

- a) The Applicant must account for all the period of delay;*
- b) The delay should not be inordinate;*
- c) The Applicant must show diligence, not apathy, negligence or sloppiness in the prosecution of the action that he intends to take; and*

d) If the Court feels that there are other reasons, such as the existence of a point of law of sufficient importance, such as illegality of the decision sought to be challenged.

In considering the reason advanced to account for the delayed days as submitted on in the first ground, there is no dispute that the ruling sought to be impugned was delivered on 28/06/2023 in the absence of the applicant. It is also uncontroverted fact that, the appeal in this matter ought to have been filed within fourteen (14) days of the impugned decision, meaning by 12/07/2023, thus the applicant is enjoined to account for the period 14 days from 13/07/2023 to 27/07/2023, when this application was filed. What is being contested by Mr. Chengula for the respondent is the contention that, the applicant was unaware of the decision of the trial court until on 19/07/2023, when he allegedly communicated his advocate by phone and met him for discussion on the said decision on 20/07/2023, before measures were taken including application for copies of the impugned ruling on 20/07/2023 and filing of this application on 26th July, 2023, seven (7) days after meeting his advocate, the delay which he contends was actuated with negligence and lack of diligence on both parts of the applicant and his advocate in prosecuting the appeal or preferring this as the applicant ought to have made a follow up of his matter.

I agree with Mr. Chengula that, in prosecuting this matter both applicant and his advocate acted negligently and failed to exercise diligence. I so view as while the applicant is lamenting that the impugned decision was delivered in absence on 28/06/2023, neither the applicant nor his advocate in their affidavit is deposing to have not been aware of the date for delivery of ruling. in absence of that fact the drawn inference is that both were present on the day when the date for ruling was set. Further to that, the appellant does not disclose in his affidavit as to where was he at the time before and after delivery of the said ruling, before he reached his advocate over phone on 19/07/2023 and met him for discussion on 20/07/2023, 7 days passed after the deadline for filing the appeal. One would expect that, the applicant would have contacted his advocate in the period before and/or soon after delivery of ruling to exhibit his diligence, failure of which I hold he demonstrated apathy for abandoning his case to the advocate, thus a blame to share, the conduct which is very much detested as it was also held in the case of **Lim Han Yung** (supra) at page 22. Even if the applicant was truthful in his assertion which is not the case, still I would have held his advocate's inaction of communicating him timely, negligence or omission, generally does not

constitute good cause for extension of time. Thus, I hold the said 7 days have not been accounted for.

Again there is a contradiction as to when the impugned ruling was collected from trial court as deposed in paragraphs 4 and 5 of Karilo's affidavit the fact which renders the period between 20/07/2023 when allegedly the copy of ruling was requested up to the time of filing this application on 26/07/2023. While it is deposed in paragraph 5 of the said affidavit that, the copy of judgment/ruling was collected by the said advocate for the appellant on 30/06/2023 after being notified by undisclosed court clerk while he was in other business undertakings in court, to the contrary the same deponent deposes in paragraph 4 to have requested the same document on 20/06/2023, vide the letter annexed to his affidavit, meaning that the ruling was secured 20 days before the date it is alleged to have been requested. With that contradiction there is doubt as to whether the said impugned ruling was really obtained after issue of the said requesting letter as Mr. Karilo would like this Court to believe. As there is no any disclosed date of collection of the impugned ruling after filing of the requesting letter on 20/07/2023, as an important document to be annexed in this application filed on 26/07/2023, I find the other seven (7) days also are not accounted for. Since

delay of even a single day, has to be accounted for as it was propounded in the case of **Bushiri Hassan** (supra), and given the fact that a total of 14 days have not been accounted for by the applicant, I hold the first ground is barren of merit hence unestablished.

Next for determination is the ground of illegality of the decision sought to be impugned as raised by the applicant and demonstrated in paragraph 7(i),(ii) and (ii) of the affidavit by Karilo. It is now settled that, it is not sufficient to allege illegality of the decision as the same must also be apparent or visible on face of record as it was held in the case of **Ngao Godwin Losero Vs. Julius Mwarabu**, Civil Application No. 10 of 2015 (CAT-unreported) where the court of Appeal emphasized that:

“...the illegality of the impugned decision should be visible on the face of record.”

It is worth noting that in determining the ground of illegality, the Court is not enjoined to determine on facts establishing the alleged illegality, rather appreciate as whether the pointed illegalities are well demonstrated and are visible on the face of record. In this matter as alluded above the pointed illegalities as itemised in paragraph 7(i)-(iii) of Karilo’s affidavit are that:

- (i) The trial court granted custody of the children to the Respondent of stepfather and wrongly ignored the Applicant's evidence regarding the birth of the children he sired to their late mother before he estranged her.
- (ii) The trial court ignored evidence on record that the Applicant pleaded to be the biological father of the children in paragraph 2 of the Chamber Application for custody, and thereto improperly rejected the proof of the authenticity of the children respective of their certificates of births.
- (iii) The trial court drew a wrong conclusion on the issue of DNA-Test while the evidence on record discern that the test could not be conducted in the absence of the sample from the children's mother and in effect granted custody of the children to a stranger man, who had no any blood relationship with them.

After traveling through the impugned ruling and considered the pointed illegalities, I have discovered that they sound of more grounds of appeal aiming at challenging evaluation of evidence and the conclusion reached by the trial court in its decision instead of disclosing illegality of the decision. None of them is seem to be apparent on face of record to qualify or meet

the test as demonstrated in case of **Ngao Godwin Losero** (supra) and **Lyamuya Construction Company Limited** (supra), as it would require a long-drawn argument for one to discover them if any exist. In the case of **Lyamuya Construction Company Limited** (supra) the Court of Appeal observed that:

*"Since every party intending to appeal seeks to challenge a decision either on points of law or facts, it cannot in my view, be said that in VALAMBIA'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 extension of time if he applies for one. **The court there 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 record, such as the question of jurisdiction; not one would be discovered by a long drawn argument or process.**"*[Emphasis supplied]

In the final analysis, this Court is satisfied that the applicant has failed to demonstrate good cause warranting grant him extension of time. I therefore find this application devoid of merit and proceed to dismiss it in its entirety.

Given the nature of the matter, I order each party to bear own costs.

It so ordered.

Dated at Dar es salaam this 22nd day of September, 2023.



E. E. KAKOLAKI

JUDGE

22/09/2023.

The Ruling has been delivered at Dar es Salaam today 22nd day of September, 2023 in the presence of Mr. Karilo M. Karilo, advocate for the applicant, Mr. Michael Kayombo, advocate for the respondent, and Mr. Oscar Msaki, Court clerk.



E. E. KAKOLAKI

JUDGE

22/09/2023.

