

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

**MISC. CIVIL APPLICATION NO. 66 OF 2022**

**ZUENA MSEKWA.....APPLICANT**

**VERSUS**

**RICHARD NSALAMBI .....RESPONDENT**

(Arising from the Ruling of Dodoma Juvenile Court)

Dated 24<sup>th</sup> day of February 2022

In

Juvenile Civil Application No. 40 of 2021

.....

**RULING**

Date of last Order: 25<sup>th</sup> October, 2023

Date of Ruling: 7<sup>th</sup> November, 2023

**SARWATT, J:**

This is an application for an extension of time to appeal against the decision of the Juvenile Court of Dodoma dated 24<sup>th</sup> February 2022 in Juvenile Civil Application No.40 of 2021 made under section 130(2) of the law of the Child Act, Cap. 13 R. E 2019, Section 95 of the Civil Procedure Code Cap 33 R. E 2019 and any other enabling provisions of the law. The applicant's affidavit supports the application affirmed on 19th December 2022.

Brief facts of this application are that the respondent, Richard Nsalambi, filed Juvenile Civil Application No. 40 of 2021 at the Juvenile Court of Dodoma for custody of his baby girl named Salome Richard Nsalambi, aged four years. He moved the Court under Rule 63(1) of the Law of the Child (Juvenile Court Procedure) G.N No. 182 of 2016. The reasons for causing the respondent to apply for custody of his beloved daughter are that her mother cannot maintain the said child, incapability of the mother's care, and it is in the child's best interest to stay with his father.

The Juvenile Court granted as the respondent sought, and the applicant was given access to the child on weekends or as the parties agreed upon. Being aggrieved by that decision of custody of her daughter to the respondent, the applicant didn't file an appeal in time, hence filed this application by way of chamber summons supported by her affidavit praying for the following orders;

- i. That this Honourable Court be pleased to extend the time for filing an appeal out of time against the Ruling and Order in Mis. Civil Application No. 40 of 2021 in the Juvenile Court of Dodoma at Dodoma.*
- ii. Costs of this Application be provided for.*

*iii. Any other relief(s) that this Court may deem fit, just and equitable.*

At the hearing on 25<sup>th</sup> October 2023, the applicant was represented by Mr. David Malugu, learned Advocate, while the respondent was represented by Mr. Majaliwa Wiga, learned Advocate.

Supporting the application, Mr. David Malugu, Learned, Advocate for the Applicant, adopted the affidavit of Zuena Msekwa, the applicant, as part of his submission. He argued that, in the applicant's affidavit, paragraphs 2,3,4,5,6,7, and 8 the applicant had narrated the reasons to support this application. The decision of the said case No.40 of 2021 was pronounced on 24<sup>th</sup> February 2022 and the applicant started to make follow up on the copy of the decision, but her efforts ended in vain. In December 2022, she engaged an advocate to assist her with the follow-up and the letter to request the said copy of the decision is attached to this application.

However, regarding illegality, Mr. David Malugu stated that the trial court did not consider the child's best interest. To him, the Court should consider the said principle of the best interest of the child. He cited the case of **Madimilo Mbogoni v Amina Ibrahim Ngasa, PC. Civil Appeal No. 11 of 2021**, on pages 9 and 10, to support his point of

illegality. He added that, as per paragraph 6 of the applicant's affidavit, the delay was not caused by the applicant. He therefore prayed this application to be granted because of the said illegality.

In reply, Mr. Majaliwa Wiga, the Learned Advocate for the respondent, adopted the respondent's counter-affidavit and submitted that the trial court decision was pronounced on 24<sup>th</sup> February 2022. Still, the applicant's affidavit does not show any effort to request copies of the judgment and the proceedings. He argued further that no copy of the letter in the Court shows that from 24<sup>th</sup> February 2022 the applicant has requested a copy of the judgment. The applicant knew the right to appeal, but she remained silent. To him, there is no document as evidence on the applicant's side.

Regarding the issue of illegality, he submitted section 39(1) (2) of the Law of the Child Act, which provides that the child must stay with the mother and stipulates that the child may remain with the father if the child's right is prejudiced. He added that the applicant submitted that she will suffer irreparable loss if this application will not be granted but did not submit how irreparable loss the applicant would suffer. He cited the provisions of section 110 of the Evidence Act that he who alleges must prove. To him, the applicant did not prove this application. He therefore,

argued that there are no sufficient grounds for the applicant to be granted this application.

In rejoinder, Mr. David Malugu, Learned Advocate for the Applicant, reiterated what he stated in the submission in chief and insisted that the applicant did not manage to make a follow-up copy of the decision because of the nature of the applicant's responsibility and her residence that sometimes she was out of Dodoma. It was until she engaged an advocate on 16<sup>th</sup> December 2022 that she started to follow up on the said copy of the decision. On the issue of illegality, he added that it is true that the age of the child allows the custody to be under the applicant, he therefore said that the trial Magistrate misdirected herself by ordering the custody to the respondent and prayed this application to be granted in order the appeal be heard on merit.

Having carefully gone through the submissions of both parties, applicant's affidavit and respondent's counter affidavit, the issue to be determined is whether the applicant has shown good and sufficient cause for this Court to enlarge time to appeal. According to Section 130(1) of the Law of the Child Act, an appeal against the decision of the Juvenile Court lies to the High Court within 14 days. However, this Court has

powers to extend the time of appealing upon good cause being established. Section 130 reads as follows: -

*"130 (1) Every appeal against an order or sentence made or passed by a Juvenile Court under the provisions of this Act shall be entered within fourteen days from the date of the order or sentence appealed against."*

However, subsection 2 of section 130 of The Law of the Child Act, Cap 33 provides that: -

*"The High Court may for good cause admit an appeal out of time."*

From the above-quoted provisions of the law, granting or refusing to grant an extension of time is at the absolute discretion of the Court, though for the same to be granted, one must show sufficient cause and account for each day of delay. In the case of **Benedict Mummello v Bank of Tanzania, Civil Application No. 12 of 2012**, the Court of Appeal stated that:

*".....It is a trite law that an application for extension of time is entirely in the discretion of the Court to grant or refuse, an extension of time may only be granted where it*

*has sufficiently established that the delay was with sufficient cause."*

There are many authorities to the effect that an application for an extension of time may be granted upon the applicant having shown good and sufficient cause. In the case at hand, the issue to be determined is whether the applicant has shown good and sufficient cause for this Court to enlarge time to appeal. In the case of **Lyamuya Construction Company Limited vs. The Board of Registered Trustees of Young Women Christian Association of Tanzania, Civil Application No. 2 of 2010** (unreported) regarding extension of time, the Court of Appeal issued the following guidelines: -

- 1. The applicant must account for all the period of delay.*
- 2. The delay should not be inordinate.*
- 3. The applicant must show diligence and not apathy, negligence or sloppiness in the prosecution of the action that he intended to take.*
- 4. If the Court feels that there are sufficient reasons such as existence of a point of law of sufficient*

*importance such as illegality of the decision ought to be challenged.*

Now, coming to the instant application, is there any good and sufficient cause shown by the applicant for this Court to extend time? Paragraph 3 and 5 of the applicant's affidavit shows two reasons for the delay: **one**, failure to have a copy of the ruling and proceedings, and **two**, irregularities and illegality on the face of the record, which need this court intervention to put the record clear in the impugned decision.

Starting with the first point of failure to have copies of the ruling and proceedings, it is on record that the ruling sought to be appealed was delivered on 24<sup>th</sup> February 2022, and the application at hand was filed on 19<sup>th</sup> December 2022, nearly ten months later. I have scrutinized the evidence supporting the application, and there is nothing to show the effort the applicant made. Looking at the affidavit and its annexures, especially Annexure ZUN-2 (letters by Applicant's Advocate firm requesting certified copies of judgment and decree) was written on 15<sup>th</sup> December 2022. From 24<sup>th</sup> February 2022 (when the decision was pronounced) to 15<sup>th</sup> December 2022 (when the applicant requested a copy of the ruling and proceedings), the applicant didn't account for those days. The mere fact that she wrote a letter requesting to be supplied with

a copy of the ruling is not sufficient evidence that she was not supplied with the same.

Furthermore, from 15<sup>th</sup> December 2022 (when the applicant requested a copy of the ruling and proceedings) to 19<sup>th</sup> December 2022 (when the applicant filed this application), the applicant did not account for reasons of delay. The applicant's advocate, on his submission, stated that the applicant engaged an advocate on 16<sup>th</sup> December 2022. Assuming that the applicant looked for an advocate after the trial decision and engaged an advocate on 16<sup>th</sup> December 2022, she still did not apply sooner after engaging an advocate. She waited two days and failed to account for each day of delay. Since the law is clear that each day of delay has to be accounted for, as was also stated in the case of **Dar es Salaam City Council vs. Group Security Co. Ltd, Civil Application No. 234 of 2015**, Court of Appeal (unreported), in the application at hand, the applicant failed to account for each day of those ten months of delay.

Regarding the issue of illegalities as submitted by Mr. David Malugu, Learned Advocate, it is settled law that, where there is illegality, an application for an extension of time may be granted even in circumstances where the applicant has failed to account for each day of the delay. This was stated in the case of **TANESCO vs. Mufongo Leonard Majura and**

**15 Others, Civil Application No. 230 of 2016**, Court of Appeal (unreported) that: -

*"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 extension of time so that the alleged illegality can be addressed by the Court."*

See also the case of **The Principal Secretary Ministry of Defence and National Service v Devran Valambia (1991) TLR 387**, the Court of Appeal held 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 be established, to take appropriate measures to put the matter and the record straight."*

To my understanding, illegality simply means being contrary to the procedures that have been laid down. I humbly agree with the principle

that where illegality is set as a ground for seeking an extension of time, the Court will always grant the application. Still, a party asserting illegality must sufficiently substantiate his or her assertions. Clearly, the Court will not grant an extension of time simply because illegality is mentioned. The party who alleged the illegality must further demonstrate what has been done, which is forbidden by law. In the case of **Magnet Construction Limited v Bruce Wallace Jones, Civil Appeal No. 459 of 2020**, page 12, the Court of Appeal stated that;

*"... not every illegality raised by an Applicant can warrant extension of time. It all depends on the circumstances of each case and the material placed before the Court."*

Furthermore, for illegality to be a ground for extension of time, it must be apparent on the face of the record. See the case of **Ngao Godwin Losero v Julius Mwarabu, Civil Application No. 10 of 2015**, Court of Appeal (unreported).


In the application at hand, the applicant alleged that there is illegality in the ruling of the Juvenile Court. The Applicant's Counsel submitted before this Court that the trial Court did not consider the child's best interest. After perusing the record and reading the trial Court's decision, there is nothing concerning the allegation of illegality, which is apparent

in the **Juvenile Civil Application No. 40 of 2021**. The law is clear that raising illegality or irregularity does not confer an automatic right to an extension of time. As we see, the Court of Appeal felt a genuine need to expound what it ruled in **Valambhia's case** when determining the application for extension of time in the case of **Lyamuya Constructions Company Ltd (supra)** and has been followed in several cases, including the famous case of **Ngao Godwin Losero (supra)** that the said irregularity must be on the face of the record. Therefore, the applicant failed to convince this Court of the ground of illegality for this Court to extend time.

For those reasons, I find no merit in this application and accordingly dismiss it. No order as to costs.


It is so ordered.



  
**S. S. SARWATT**  
**JUDGE**  
**7/11/2023**

**DATED** at **DODOMA** on the 7th day of November 2023.



  
**S. S. SARWATT**  
**JUDGE**  
**7/11/2023**