

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[MOROGORO SUB-REGISTRY]

AT MOROGORO

MISC. CIVIL APPLICATION NO. 4242 OF 2024

(Originating from the decision of the Kihonda Primary Court in an application to set aside the dismissal order in Matrimonial Cause No. 08/2022 and the decision of the District Court of Morogoro at Morogoro in Matrimonial Appeal No. 17/2022)

MUGANDA MICHAEL APPLICANT

VERSUS

ELIZABETH RAPHAEL KAZIMOTO RESPONDENT

RULING

09/04/2024 & 06/05/2024

KINYAKA, J.:

Muganda Michael, the applicant herein is aggrieved by both the declination by the Primary Court of Kihonda, herein after "the trial court" to his prayers for the court to set aside its *ex parte* judgment issued in Matrimonial Cause No. 08 of 2022 on the basis that he was denied his right to be heard; and the decision of the District court of Morogoro herein after "the first appellate court" in Matrimonial Appeal No. 17 of 2022 which blessed the decision of the trial court.



The records reveal that in a bid to assail the decision of the first appellate court, the applicant lodged before this court PC Matrimonial Appeal No. 13 of 2023 herein after the "the original appeal" which was however found to be incompetent and consequently dismissed for contravening the mandatory procedures laid down in section 25(3) of the Magistrates' Courts Act, Cap. 11 R.E., 2019 and Rule 5 (3) of the Civil Procedures (Appeals in Proceedings Originating in Primary Courts) Rules G.N. No. 312 of 1964, hereinafter "the Rules".

Following the dismissal of the appeal, the applicant found himself in a web of time limitation to file a fresh appeal, he therefore preferred before this Court an application for extension of time to file the intended appeal through Misc. Civil Application No. 44 of 2023 which was also struck out for the applicant's noncompliance with Rule 3 of the Rules, hence the instant application.

In the present application the applicant sought the following reliefs:-

1. This honourable court be pleased to extend time within which to file an appeal out of time;
2. Costs of this application be provided for; and



3. Any other order or orders as this Honourable Court may deem fit and just to grant.

On the date of hearing of the application, the applicant who appeared in person, had the legal service of Mr. Deckrine Dominic Kweka, learned Advocate. On her part, the respondent who also appeared in person, was represented by Mr. Aziz Mahenge, learned Advocate. The Court ordered the disposition of the application to be done through written submissions.

Submitting in support of the application, the applicant who drew and filed his submission on his own averred that he was sick from 13th June 2023 to 16th August 2023 where he was hospitalized at Ilembo Health Centre at Mpanda District in Katavi region, hence he couldn't be able to lodge his appeal on time. He cited the case of **Hamis Macha Sancho v. Joyce Bachubila, Civil Application No.487 of 2016, CAT at Dar es Salaam (Tanzlii)** on page 5 which held that sickness is sufficient reason for extension of time.

He referred the Court to paragraphs 5 and 6 of his affidavit and informed the Court that he tried his level best to knock the doors of this Honourable Court through PC Matrimonial Appeal No. 23 of 2023 and Misc. Civil Application No. 44 of 2023 but were all of them were struck out.

Addressing the ground of illegality, the applicant lamented that he was denied his right to be heard in Matrimonial Case No. 08 of 2022 at Kihonda Primary Court, which amounted to illegality.

It was the applicant's strong opinion that if this application will be granted, the respondent herein will not suffer any irreparable loss. He added that the applicant has adduced sufficient causes for this Honourable Court to grant extension of time, as it was cemented in the case of **Mwidini Hassani Shila and 2 Others v. Asinawi Makutika and 4 Others, Land Appeal No. 04 of 2019** (unreported) which was quoted with approval in the case of **Bahati Matimba v. Jagro Enterprises Ltd, Misc. Civil Application No. 42 of 2022**, High Court of Tanzania, Iringa Registry, (Tanzlii). He concluded by urging the Court to allow the application.

In response, Advocate Aziz Mahenge who drew the respondent's written submissions cited the cases of **John Dongo & Others v. Lepasi Mbokoso. Civil Application 14 of 2018** [2019] TZCA 165 (9 April 2019), and **Shabani Mrisho Dilunga v. Rajabu Saidi Mgonanze & Another, Misc. Land Application No. 50 of 2023** [2023] TZHCLandD 16691 (25 July 2023) and illustrated that the Applicant delayed for a total of 317 (three hundred and seventeen days) that is from 22nd April 2023 in which the time

for lodging appeal expired to 1st March 2024 when he filed the application at hand. According to him, the delay is absolutely inordinate on face of it.

He submitted further that even if the exclusion is made to all the days the applicant was in court and attending health centers, still there are 63 unaccounted days from 22nd April 2023 when his time to appeal expired to 2nd May 2023 when he filed the original appeal which was dismissed; and from 30th of June 2023 after the dismissal order of the appeal to 21st August 2023 when he filed his Application No. 44 of 2023 for extension of time.

As for the time delayed when the applicant was hospitalized, it was Mr. Mahenge's submission that the applicant accounted for only 9 days out of 63 days. He cited the case of **Bahati Matimba v. Jagro Enterprises Ltd, Misc Application No. 42 of 2022** [2023] TZHC 17355 (19 May 2023) and **Osward Masatu Mwizarubi v. Tanzania Fish Processing Ltd, Civil Application No. 13 of 2010**, (unreported) and **Hamis Macha Sancho v. Joyce Bachubila, Civil Application No. 487/17 of 2016**, and elucidated that the applicant ought to have accounted for each day of delay and instead he only accounted for less than ten days.

As to the ground that the respondent will not suffer any irreparable loss, the learned counsel contended that the execution of the Primary Court in

Matrimonial Cause No. 08 of 2022 is partly completed and hence granting this application will cause unimaginable inconveniences and irreparable losses. He referred the case of the **Registered Board of Trustees of Taqwa Private Secondary Schools v. Fadhili Hamisi, Misc. Labour Application No. 15 of 2021** [2021] TZHC 6016 (13 August 2021) to fortify his submissions.

That said, the learned counsel urged this Court to dismiss the application with costs for the reason that the delay is inordinate and neither did the applicant exhibited good cause nor accounted for each and every day he delayed to file the appeal.

In his brief rejoinder, the applicant reiterated his submission in chief and prayers.

As correctly submitted by both parties, in determination of applications of this kind, the question to be deliberated is always whether the reason for the delay advanced by the applicant constitute good cause to justify the grant of the application. I have considered the affidavit and written submissions of both parties. The applicant pleaded technical delay, illegality and sickness as being the sufficient reasons for his delay to file the intended appeal out of time. What constitutes sufficient reasons have been a subject

matter in plethora of decisions of both this Court and the Court of Appeal. For instance in the case of **Murtaza Mohamed Raza Virani Another v. Mehboob Hassanali Versi, Civil Application No. 448 of 2020** (unreported), the Court of Appeal on page 7 through 8 remarked as follows:-

"It follows then that it is upon the party seeking extension of time to advance good cause for the Court to exercise its discretionary power - see: Regional Manager, TANROADS Kagera v. Ruaha Concrete Company Limited, Civil Application No. 96 of 2007; Oswald Masatu Mwizarubi v. Tanzania Fish Processing Ltd., Civil Application No. 13 of 2010; and Victoria Real Estate Development Limited v. Tanzania Investment Bank & 3 Others, Civil Application No. 225 of 2014 (all unreported). It should be noted that the Rules do not define as to what constitutes good cause but the Court in its numerous decisions has laid down certain factors that may be taken into account in order to assess as to whether the applicant had advanced good cause for the Court to grant the extension of time..."

The Court went on referring its decision in the case of **Lyamuya Construction Company Ltd. v. Board of Registered Trustee of Young**

Women's Christian Association of Tanzania, Civil Application No. 2

of 2010 (unreported), where the following factors were underlined:-

- 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; and*
- (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.*

In light of the foregoing, the question for my determination is whether from the adduced reasons, I should exercise my discretion to grant the present application in favour of the applicant.

I should state at the onset and from the above cited authorities that the applicant's argument that the respondent will not be prejudiced if the present application is granted, is misplaced. Whether or not the order granting extension of time will or will not prejudice the respondent, is not one of the ground constituting sufficient or good cause to warrant an order for extension of time.

In his first ground, the applicant contends that the delay was caused by the striking out of both his PC Matrimonial Appeal No. 23 of 2023 and Misc. Civil Application No. 44 of 2023, which means that the delay was a technical and not the actual one. The principle as to what amounts to technical and actual delays was enunciated in the case of **Fortunatus Masha v. William Shija and Another [1997] TLR 154**. In that application, the applicant prayed for extension of time within which to file the appeal after the original appeal was struck out for being incompetent. The Court of Appeal held:

"With regard to the second point, I am satisfied that a distinction should be made between cases involving real or actual delays and those like the present one which only involve what can be called technical delays in the sense that the original appeal was lodged in time but the present situation arose only because the original appeal for one reason or another has been found to be incompetent and a fresh appeal has to be instituted. In the circumstances, the negligence if any really refers to the filing of an incompetent appeal not the delay in filing it. The filing of an incompetent appeal having been duly penalised by

striking it out, the same cannot be used yet again to determine the timeousness of applying for filing the fresh appeal."

In the present matter, for the technical delay to be a sufficient ground for extension of time, the applicant was duty bound to account for each day for delay from the date when the impugned decision of the District Court of Morogoro was made, to the date he lodged his original appeal so that the Court would be in a position to ascertain whether or not, the appeal was lodged within the prescribed time. Unfortunately, neither in his affidavit nor the submissions in chief in support of the application, did the applicant disclosed the respective dates. Even if I take a judicial notice of the decision of this Court in the previous appeal in *Muganda Michael v. Elizabeth Kazimoto*, PC Matrimonial Appeal No. 13 of 2023 [2023] TZHC 18626 (30 June 2023), I would hold that the applicant failed to account for each day of delay. My finding is based on the fact that on page 1 of the decision of the District Court, it is depicted that the decision was made on 6th February 2023 while the appeal against the decision was lodged before this Court on 2nd May 2023. In this case, the applicant cannot successfully invoke the technical delay principle as at the time he filed his original appeal, he was out of the prescribed time for almost 56 days. This is based on the fact that the time

within which he was to appeal against the said decision lapsed on 8th March 2023. As such, I hold that the applicant's delay to file the intended appeal was not technical but actual one and which the applicant has failed to account for.

From the foregoing, the ground as to sickness does not hold water. If the applicant was sick from 13th June 2023 to 16th August 2023, he had already slept over his right to appeal before he became sick. As observed above, the applicant never explained the reasons for such delay in his affidavit in support of the present application.

On the ground of illegality, the applicant claimed that he was denied the right to be heard at the trial court. While I agree that illegality if proved can be a sufficient cause even if the applicant has failed to account for the delayed period of time, I am also alive to a settled position that the illegality complained of must be on the face of record of the impugned decision as it was clearly underlined in the case of **Principal Secretary Ministry of Defence and National Service v. Devram Valambia [1991] TLR 387**, where it was 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." [Emphasis Supplied]

In the present matter, although the chamber summons didn't disclose the impugned decision within which the extended time for lodging the appeal is sought, it is undoubtedly from paragraph 7 of the applicant's affidavit that the impugned decision intended to be challenged is the decision of the District Court in Matrimonial Appeal No. 17 of 2022. The said paragraph reads;

"That, I still have intention to appeal against the impugned judgment because the trial magistrate erred in law and facts for failure to consider that my right to be heard was denied by Kihonda Primary Court in Matrimonial Case No. 08 of 2022"

From the above extract, the applicant complained that he was denied his right to participate in Matrimonial Case No. 08 of 2022 before the Kihonda Primary Court. My reading of the lower courts' records indicate that it is the applicant who did not appear to defend the Matrimonial Case No. 08 of 2022 despite being notified of the proceedings. In the circumstance, I am not in

agreement with applicant that the trial court denied him the right of a hearing. I therefore do not find a point of illegality in the proceedings of the trial court in Matrimonial Case No. 08 of 2022. It follows that the ground of illegality also fails.

From the aforesaid, I am satisfied that the applicant has failed to demonstrate sufficient cause to warrant this court's exercise of its discretionary powers to grant an order for the extension of time in favour of the applicant. Consequently, I dismiss the application for want of merit. Due to the nature of the dispute between the parties, I make no order as to costs. It is so ordered.

Right of appeal fully explained.

DATED at MOROGORO this 6th day of May 2024.


H. A. KINYAKA

JUDGE

06/05/2024

