IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CIVIL APPLICATION NO. 530/01 OF 2021

ISAYA SWAI ..... APPLICANT

VERSUS

GREVEN NGOMUO ..... RESPONDENT

(Application for extension of time to file a notice of appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Juma, J.)

dated the 31st day of August, 2010
in
PC. Civil Appeal No. 36 of 2010

.....

RULING

16th & 26th May, 2023

MWANDAMBO, J.A.:

The parties to this application are an estranged couple following dissolution of their marriage by a decree of divorce issued by Kawe Primary Court sometime in 2007. The applicant has not been successful in his quest to challenge the decision of the Primary Court before the District Court of Kinondoni and later before the High Court ((Juma, J- as he then was) which dismissed the applicant's PC. Civil Appeal No. 36 of 2010 on 31/8/2010. The applicant sought to challenge that decision but his attempts have not been fruitful hence the instant application for extension

of time to lodge a notice of appeal after the first application before the High Court was dismissed on 25/5/2018. This is a second bite application preferred under rules 10 and 45A (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules).

The facts giving rise to the application are, by and large, not in dispute except for the reasons for the delay in lodging the notice of appeal by the applicant. It is not disputed that the applicant's first notice of appeal was lodged timeously after the delivery of the impugned judgment but it was struck out on 11/5/2017 for the applicant's failure to take essential steps in the institution of his appeal. According to the applicant, the first notice of appeal was wrongly struck out in his absence but nevertheless, he made an application before the High Court afterwards for extension of time which was dismissed by Kerefu, J (as she then was) in Misc. Civil Application No. 297 of 2017. It is equally not in dispute that afterwards, the applicant appealed that ruling vide Civil Appeal No. 116 of 2018 which he withdrew on 21/09/2021. The applicant avers that, his decision to withdraw the appeal was influenced by the amendments to the Rules in September 2019 introducing rule 45A (1) of the Rules to cater for second bite applications which was not the case prior to the institution of his appeal.

It is the applicant's averment that, upon withdrawal of the appeal from the ruling of refusal to extend time, he lodged an application for a second bite instead since the time for doing so had already elapsed when he was in court pursuing another cause. Besides, the applicant claims that there is an illegality in the decision sought to be appealed against in that, the petition for dissolution of the marriage was incompetent for lack of a certificate of non settlement of a matrimonial dispute from a competent marriage conciliatory board which had a bearing on the jurisdiction of the Primary Court and the resultant proceedings before it.

Not surprisingly, the respondent disputes that there is any valid reason for the delay and if so, the applicant has not accounted for such delay. On the other hand, she disputes existence of any illegality warranting the exercise of discretion in the applicant's favour.

Mr. Amini Mohamed Mshana, learned advocate appeared before me at the hearing of the application representing the applicant. He urged me to grant the application on the strength of the averments in the founding affidavit deponed by the applicant. In particular, he argued that the applicant has explained away the delay in the affidavit although not necessarily accounting for each day of delay between the key events in the pursuit of his right to appeal, that is to say; post the Court's order

striking out the notice of appeal on 11/05/2017; filing of Miscellaneous Civil Application No. 297 of 2017 before the High Court and its dismissal on 25/05/2018 and institution of Civil Appeal No. 116 of 2018 and its withdrawal on 21/09/2021 followed by the lodging of the instant application on 27/10/2021. The learned advocate implored me to accept that the delay was for good cause sufficient to extend the time. Besides, the learned advocate contended that there is an apparent illegality in the impugned decision due to the fact that the High Court wrongly dismissed a ground of appeal premised on defect of the certificate of non settlement of a marriage dispute by an unrecognised marriage conciliatory board on the basis of which the Primary Court acted in determining the petition for dissolution of a marriage against the dictates of section 101 (f) of the Law of Marriage Act. He contends that, that was fatal to the petition, proceedings and the resultant decision dissolving the marriage between the applicant and the respondent. Relying, on the Court's decision in **Hassan Ally Sandali v. Asha Ally**, Civil Appeal No. 246 of 2019 (unreported), he argued that an invalid certificate of non- settlement of marriage dispute is fatal to the petition for dissolution of a marriage. The learned advocate invited the Court to grant the application on the grounds

stated in the notice of motion supported by the averments in the founding affidavit and the oral submissions.

Mr. Frank Kilian learned advocate who represented the respondent resisted the application taking issue with the applicant's counsel in each of the arguments placed before the Court to wit, reason and length of the delay on the one hand and, existence of illegality as grounds on the other for exercising the Court's direction to extend time. Relying on the affidavit in reply, the learned advocate contended that the reason for the delay was none but applicant's negligence which resulted into the order striking out his notice of appeal for failure to take essential steps for as long as four years from the date of its lodgement.

Mr. Kilian was emphatic that the applicant has failed to account for each day of delay and thus the Court should decline exercising its discretion in his favour. Regarding existence of illegality, counsel argued that none exists other than a complaint against the decision of the High Court dismissing the applicant's second appeal. The learned advocate argued that the alleged illegality is not apparent on the face of the judgment sought to be impugned and thus the Court should not accept the invitation to extend time based on that ground. He placed reliance on the Court's decision in **Lyamuya Construction Company Limited v.**

Board of Registered Trustees of Young Women's Christian of Tanzania Association- YCWA, Civil Application No. 2 of 2010 (Unrepeated) for the proposition that an illegality should not only be apparent but it should be of sufficient importance and not one on which long drawn arguments are employed to discover it which is the case in the instant application. He urged me to dismiss the application.

As alluded to earlier on, it is common cause that the applicant's notice of appeal was truck out on 11/5/2017 for failure to take essential steps in the appeal. It is evident from the ruling dated 03/05/2017, the applicant had failed to apply for copies of certified proceedings for the purpose of the appeal contrary to the dictates of rule 90(1) of the Rules. Although the applicant has argued that his failure to do so was a result of existence of amicable settlement suggested to the parties by Bongole, J (RIP), there is no proof of such amicable settlement which could have resulted into abandoning the appeal process as urged by the applicant.

Secondly, after the High Court had dismissed the applicant's application for extension of time on 25/5/2018, the applicant sought to appeal that decision allegedly because that was the position prior to the amendment of the Rules in September, 2019 introducing second bite applications vide rule 45A (1) of the Rules and hence his resolve to with

draw Civil Appeal No 116 of 2018 on 21/09/2021. With respect, Mr. Mshana cannot be right in his argument in that regard. In my view, resorting to appeal instead making an application for a second bite before the Court was an exercise in futility considering that rule 45A (1) of the Rules was introduced by the Tanzania Court of Appeal (Amendment) Rules, G.N No. 362 of 2017 published on 22nd September, 2017 well before the ruling dismissing the applicant's application in Miscellaneous Civil Application No. 279 of 2017.

The upshot of the foregoing is that the applicant has not successfully moved me not only on the validity of the reason for the delay but also its length. Indeed, the decision of this Court in **Lyamuya Construction Co. Ltd** (supra) is directly relevant on the factors to be considered in exercising discretion under 10 of the Rules, among them, reason behind the delay and the length of it and an explanation accounting for each of such delay. This the applicant has not succeeded. I would have dismissed the application but because the applicant has claimed existence of an illegality, I will consider that aspect and determine whether there is such an illegality apparent on the face of the decision sought to be impugned. Mr. Kilian argued that there is no such illegality but a dissatisfaction of an aggrieved litigant.

As the Court held in **Principal Secretary, Ministry of Defence and National Service v. Devram Vallambia** [1992] T.L.R. 185 where there is a claim of illegality in the impugned decision, the court is empowered to extend the time even if the applicant has not accounted for the delay as it were in this application. The illegality complained of relates to the competence of the Primary Court of Kawe in entertaining a petition for dissolution of marriage in the absence of a certificate of non-settlement of a marriage by a competent marriage conciliatory board under section 101(1) of the Law of Marriage Act. Although the High Court took the view that a letter from the social welfare officer constituted a valid certificate issued by a competent board, that view could only be correct if it meets the essence of section 101 (f) of that Act. Otherwise, as the Court held in **Hassan Ally Sandali** (supra), entertaining a petition for dissolution of marriage in violation of section 101(f) of the Act is fatal to the petition and the resultant decision and order including dissolution of the marriage and decision of matrimonial assets.

In my view, it does not require any long-drawn process of argument to discover that point in the decision of the High Court on a second appeal. Neither am I prepared to say that the alleged illegality which, on the face of it appears to have bearing on the jurisdiction of trial primary court has no

sufficient importance to be wished away as Mr. Kilian appeared to suggest. Consequently, I hold that the claimed illegality does indeed exist warranting the exercise of the Court's discretion under rule 10 of the Rules regardless of the fact that the applicant has not sufficiently explained away the delay.

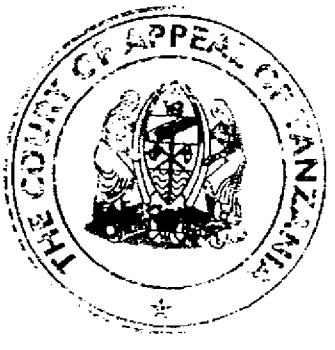
In the light of the foregoing, I grant the application and extend the time for lodging a notice of appeal from the decision of the High Court made on 31/08/2010. The notice of appeal shall be lodged not later than 30 days from the date of delivery of this ruling. Each party shall bear his own costs.

Order accordingly.

DATED at **DAR ES SALAAM** this 25th day of May, 2023.

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The Ruling delivered this 26th day of May, 2023 in the presence of Ms. Anitha Fabian, learned counsel for the Applicant and Mr. Frank Kilian, learned counsel for the Respondent, is hereby certified as a true copy of the original.



R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL