

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MOROGORO)

AT MOROGORO

MATRIMONIAL APPEAL NO.07 OF 2022

*(Arising from Morogoro District Court in Misc. Matrimonial Cause No. 11 of 2021
which Originates from Morogoro Urban Primary Court in Matrimonial Cause No. 107
of 2020)*

HAMSON HAMSON GHIKAS APPELLANT

VERSUS

GLADNESS LAURENT SHAO.....RESPONDENT

JUDGMENT

Final Court Order on: 27/07/2023

Judgment date on: 02/08/2023

NGWEMBE, J:

The appellant instituted this appeal before this court against the ruling and order of the district court, which granted the application for extension of time to appeal against the judgement of primary court. The respondent commenced matrimonial proceedings before primary court by seeking divorce, division of matrimonial property, and maintenance of children.

Upon hearing both parties, divorce was granted and other subsequent orders were issued. It seems the division of matrimonial property displeased the respondent, therefore she contemplated to appeal to the district court. However, she could not secure legal services timely as the copies of judgment were belatedly supplied to her. The

record shows that she collected the same 33 days from the date of delivery of judgment. She thus successfully applied for extension of time before the district court. The appellant was aggrieved by that extension of time, hence he appealed to this house of justice. In proceeding with this appeal, unfortunate the respondent appeared only once, when she told this court that her advocate was sick. Thereafter, she never appeared again. Thus, the appeal proceeded *ex parte*.

Perusing the grounds of appeal, the appellant grounded three grievances, which were much related and on the hearing the appellant just argued the first ground; *that the district court erred in law to grant extension of time while the respondent did not adduce any valid reason.* As averred above, the respondent never filed anything and never appeared in court save only once. Unfortunate to the appellant, he was not represented by an advocate, hence he had limited contribution to his appeal. He just argued that, the district court misused its powers for granting such extension of time to the respondent who had no valid reason. He convinced this court that even nonappearance in this appeal is a sign of her disinterest on the intended appeal. Thus prayed the appeal be allowed.

This court is going to decide on whether this appeal has merit. In testing the merit of this appeal, I am going to address on the question of whether the respondent established sufficient cause for extension of time before the district court. It will also consider the district court's exercise of powers under the circumstance and rule on its propriety.

The relevant principles to expound at a considerable extent, includes nature of powers of the courts to grant extension of time, proper use of that powers and the circumstances under which a superior court can interference with such powers when exercised by the lower court.

Basically, granting of extension of time is on the court's discretion. However, it is our law that, discretionary powers must be judiciously exercised. What is judicious exercise of discretionary powers? In the non-technical understanding, it entails deciding the matter by considering the statutes, doctrines, rules and equity while properly inclining towards justice and consideration of prevailing circumstance of each particular case. When the court is asked to perform any function, which is discretionary and if that court before granting or refusing to grant relief, has considered the matter in the manner presented herein, the court will have exercised its discretion judiciously. **The Black's Law Dictionary, 9th edition** gives an interpretation by what is termed as judicial discretion to mean: -

"The exercise of judgment by a judge or court based on what is fair under the circumstances and guided by the rules and principles of law; a court's power to act or not act when a litigant is not entitled to demand the act as a matter of right."

That interpretation has been followed and adopted by our courts in many cases, including the cases of **Mwita Mhere and Ibrahim Mhere Vs. R [2005] T.L.R. 107** and **Mza RTC Trading Company Limited Vs. Export Trading Company Limited (Civil Application No. 12 of 2015) [2016] TZCA 12.**

The Court of Appeal demonstrated further on judicious exercise in application for extension of time, in another case of **Selina Chibango Vs. Finihas Chibango, Civil Application No. 182A of 2007, CAT, Dsm (2011)**, where it held: -

"No particular reason or reasons have been set out as standard sufficient reasons. It all depends on the particular circumstances of each application. Each case, therefore, should be looked at in its own facts, merits and



circumstances, by looking at all the circumstances of the case before arriving at the decision on whether or not sufficient reason has been shown for extension"

This appeal has been preferred upon the district court granting to the respondent a 14 days extension of time within which, to file her appeal. What the appellant claims, in my understanding and to put it straight forward is that, the district court did not exercise its discretion properly. He submitted that, it erred to grant such extension of time to the respondent who failed to file her appeal within statutory time and adduced no ground warranting for such extension of time.

This court is aware of the rules pertaining to extension of time. Generally, extension of time is granted upon the applicant exhibiting good cause to the satisfaction of the court, that the said delay (if any) was not caused by his negligence. The court will consider the circumstance of the case and see whether it is for the interest of justice, the applicant may be granted such additional time to realise the contemplated remedy. See the case of **Mumello Vs. Bank of Tanzania [2006] 1 EA 227 (CAT)** where it was *inter alia* held: -

"It is trite law that an application for extension of time is entirely in the discretion of the court to grant or refuse it, and that extension of time may only be granted where it has been sufficiently established that the delay was with sufficient cause."

In countless decisions of this court and the Court of Appeal, it has been reiterated that, the phrase "sufficient cause" should never be isolated by any objective sense, rather a subjective concept for the purpose of court's exercise of discretion as earlier alluded. It is subjective, obviously because sufficiency cause will usually depend on the circumstance of a particular case. Again, authorities on this are



countless. But among them are the cases of **Tanga Cement Company Limited Vs. Jumanne D. Massanga and Another, Civil Application No. 6 of 2001 (unreported)** and **William Shija Vs. Fortunatus Masha [1997] TLR. 213 (CA)**, where it was *inter alia* held: -

"What amounts to "good cause" is not defined. It is based on the discretion of the Court which in most cases depends on the circumstances of the case which are to be determined judiciously."

It is on that subjectivity of good cause that, our jurisprudence has devoted a number of factors through which to test the application for extension of time to find out whether a good cause exist in their particular case. Subjectivity is significant, thus even those parameters are not exhaustive. A jurist cannot predict all the circumstances. It was observed in the case of **Moses Muchunguzi Vs. Tanzania Cigarette Co. Ltd, Civil Reference No. 3 of 2018**, that: -

"The Court has therefore developed some factors which can be considered to constitute good cause. Some of these include promptness of taking action, the length of the delay, illegality and delay in being supplied with the necessary documents."

In similar vein, other cases include, but not limited to; **Lyamuya Construction Co. Ltd Vs. Board of Registered of Young Women's Christian Association of Tanzania (Civil Application No. 2 of 2010) [2011] TZCA 4; Samwel Sichome Vs. Bulebe Hamisi (Civil Application 8 of 2015) [2016] TZCA 307** and **Henry Muyaga Vs. TTCL, Application No. 8 of 2011**, where it was reiterated as follows: -

"In considering an application under the rule, the courts may take into consideration, such factors as, the length of delay, the reason for the delay, the chance of success of the



intended appeal, and the degree of prejudice that the respondent may suffer if the application is not granted”.

The question remains whether the district court was correct in granting the respondent's extension of time. To decide on this issue, I will test as to whether the respondent established sufficient cause under the circumstance.

It should be noted that an appellate court cannot easily interfere with the lower court's discretionary powers, unless the lower court manifestly erred in its exercise either by ignoring the relevant facts, misapplication of the law or by considering some extraneous factors which according to the law, it should not have been considered. This is among the old positions of the law. It was earlier stated in the case of **Mbogo and Another Vs. Shah [1968] EA 93**, where the court held: -

"I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that, the decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong decision."

The same position has been followed in our jurisdiction in many cases, including the cases of **G.A.B Swale Vs. Tanzania Zambia Railway Authority (Civil Reference No. 5 of 2011) [2016] TZCA 566** and **D. N. Bahran Logistics Ltd & Another Vs. National Bank of Commerce Ltd & Another (Civil Reference 10 of 2017) [2021] TZCA 60**.

This court does not intend to invite any implication that discretionary powers are never questionable, such will be an abrogation of the jurisdictions of superior courts. To the contrary, there is a clear

path through which the superior court must pass when the circumstance so warrant to interfere with the lower court's discretion powers. Such path is not much broader, only if the lower court erred according to the laid down principles, that is when this court can interfere with such lower courts' powers. The fact that, the superior court would have decided otherwise under the same circumstance is not a strong point sufficient to disturb the lower court's ruling. In my thinking, no two adjudicators will think and reason exactly the same way, but variations are sure to occur. Lower court's reasoning will be discredited not only because it is different from another, but if it is contrary to the principles of law. What was observed by the Court of Appeal in the case of **UAP Insurance Tanzania Ltd Vs. Noble Motors Limited (Civil Application No. 260 of 2016) [2017] TZCA 199** is significant in this point, it held: -

"It is proper to point out that, in matters of discretion authorities are not of much value since no two cases are exactly alike and even if they were, the Court cannot be bound by the previous decision to exercise discretion in a particular way because that would be in effect putting an end to the discretion"

To resolve this sole question, the court has studiously examined the lower courts' proceedings. The following is extracted; That parties had a matrimonial case No.107/2020 before Morogoro Urban Primary Court, which was decided on 26th February, 2021, but a copy of judgment was certified on 29/03/2021. On 08/04/2021, the respondent instituted Miscellaneous Matrimonial Cause No. 11 of 2021 before the district court seeking extension of time, under section 20 (4)(a) of **The Magistrates' Courts Act, Cap 11 R.E 2019.**

Among the reasons which the respondent adduced for extension of time was the primary court's delay to supply her with copies of judgment; illegality of the primary court judgment and that the delay was not caused by her fault. This was per her affidavit in paragraphs 4, 5, 6 and 7. The district court granted the extension of time on 15/06/2021 and on 06/07/2021 the appeal was duly filed. I have noted also that, the trial magistrate on 18/08/2021 upon learning that this appeal was duly instituted before this court, she struck out the appeal waiting for the final decision of this court on appeal against granting extension of time.

As a matter of general rule, delayed supply of copies of judgment may be sufficient cause for extension of time, in some other cases, it entitles the party to an automatic exclusion of the time spent waiting for the copies of judgment. The line between the two circumstances is for sure very thin, care is needed to draw distinction. The conditions for automatic exclusion were stated in the cases of **The Registered Trustees of The Marian Faith Healing Centre @ Wanamaombi Vs. The Registered Trustees of The Catholic Church Sumbawanga Diocese, Civil Appeal No. 64 of 2006 (CAT)**, and **Valerie McGivern Vs. Salim Farkrudin Bala, Civil Appeal No. 386 of 2019** which though were much based on section 19 of the **Law of Limitation Act**, the ratio decidendi applies to cases originating from Primary Court. Those conditions are; annexing copies of judgment is a condition in the pursuit which the applicant wanted to comply with; that without copies one cannot duly file the documents. The applicant must have written a letter to the court requesting for the same, but was never supplied in time.

The respondent's case was not for the automatic exclusion. However, her circumstance was sufficient for being granted extension of

time. Copies of judgment was among the important documents in preparation of appeal, thus delay to supply same constituted a sufficient reason even if copies were not required to annex in the intended appeal. The logical question is how would a person prepare his grounds of appeal if not by the aid of a judgment or other documents? In the case of **Mary Kimaro Vs. Khalfan Mohamed [1995] T.L.R 202**; this court observed *inter alia*: -

"The appellant cannot in the circumstances be held to be responsible for the delay in obtaining copy of proceedings from the lower appellate court. It is the lower appellate court which has contributed to such delay. No doubt, copy of proceedings alongside with copy of judgment are necessary for the purposes of framing a sound memorandum of appeal"

Same position was approved by the Court of Appeal in the case of **Juma Posanyi Madati Vs. Hambasia N'kella Maeda (Civil Application No. 230 of 2016) [2016] TZCA 930**. As earlier summarized, the respondent acted promptly after securing copies. Promptness in the sequence of events by a party deserves consideration in extension of time; see the case of **Mary Mchome Mbwambo and Another Vs. Mbeya Cement Company Ltd, [2017] TLS LR 277**.

I understand that the appellant argued that ignorance of the law did not add any weight to the respondent's application, on the point that she wrongly applied for extension of time, while she was within time. I agree that the advocate who told the respondent that she was out of time for the purpose of appealing to the district court, actually misled her. Under section 80 (2) of **The Law of Marriage Act**, as amended by **Written Laws Miscellaneous Amendment Act No. 15 of 1980** she was within time as the time to appeal is 45 days. But statutes and precedents have the settled position that, application for extension of

time can be made either before or after the time has expired. The fact that she applied for extension of time before expiry did not harm and was permissible in law.

Considering the district court's reasoning under the circumstance, this court finds that, it was correct in granting the respondent extension for time, thus this court cannot fault it. There is no principle which the district court misapplied.

However, it is noted that the district court struck out the appeal which the respondent filed upon being granted extension of time. I have a settled view that the proceeding of that appeal would, instead be stayed waiting for this court's judgment. It was not meaningful for the court to strike out the appeal waiting for this court's judgment. There was no reason, in the circumstance to strike out the appeal because striking out an appeal left nothing pending before the district court.

For the interest of justice and for avoidance of contradictions, Matrimonial Appeal No. 11 of 2021 be restored and hearing of it to proceed from where it halted.

Having done and reasoned as above and save for rectification of the striking out of the appeal before the district court, I find no merit in this appeal. I proceed to dismiss it entirely. Each party shall bear his or her costs. As I have so decided, the Matrimonial Appeal No. 11 of 2021 be restored immediately and hearing to proceed where it ended.

Order accordingly.

Dated at Morogoro this 2nd day of August, 2023.



P. J. NGWEMBE

JUDGE

02/08/2023

Court: Judgment delivered at Morogoro in Chambers on this 2nd day of August, 2023 in the presence of the appellant and in the absence of the respondent.



E. Lukumai

Ag, Deputy Registrar

02/08/2023

Court: Right to appeal to the Court of Appeal explained.



E. Lukumai

Ag, Deputy Registrar

02/08/2023

