

IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

MISC. CIVIL CAUSE NO. 124 OF 2004

IN THE MATTER OF ABHIBHEK

JAYPRAKASH JANI INFANT

AND

IN THE MATTER OF AN APPLICATION

FOR ADOPTION ORDER BY

SHAILESH AND CHETNA JOSHI

Date of last Order : 6/07/2009

Date of Ruling : 11/12/2009

RULING

Mwarija, J.

The applicant Violet Deelip Pandya has applied for the following:

- (a) An extension of time within which to apply for leave to appeal to the Court of Appeal.*
- (b) Leave to appeal to the Court of Appeal, and*

(c) Costs of the application.

The application has been made Under S. 14 (1) of the Law of Limitation Act, Cap. 89 R.E. 2002, S. 5 (1) (c) of the Appellant Jurisdiction Act, Cap. 141 R.E. 2002 and Rule 43 (a) of the Tanzania Court of Appeal Rules, 1979. It is also supported by an affidavit sworn by the Applicant.

With regard to the application for extension of time, the applicant intends to appeal to the Court of Appeal against the decision of this court, Oriyo, J. (as she then was) dated 17/4/2007 but since time is not on her side, she has applied for its enlargement. Under paragraphs 3 – 5 of her affidavit she states that after the above said decision, she applied for an extension of time to institute review proceedings but her application was unsuccessful. She then filed an application for leave to appeal to the Court of Appeal. That application was struck out by this court for being incompetent in that she failed to cite an enabling provision of the law for her application. This is now her second attempt.

As to the second limb of her application, the application for leave to appeal, she submits that she intends to appeal against the order of custody of a child made in the adoption proceedings between the applicant who was the objector and the petitioners, Shailesh and Chetna Joshi.

In this application the applicant was represented by Mr. Byamungu, learned counsel. Submitting on the question of extension of time, he argued that the delay in filing the application was a result of legal technicalities and not neglect or laxity on the part of the applicant. He said that the applicant had been struggling to appeal only to be always barred by legal technicalities. With regard to the matter intended to be raised on appeal, he submitted that it concerns the custody of a child, the matter which is of a paramount importance. The applicant intends to challenge the order of putting the child in the custody of the respondent. The learned counsel's argument is that the order could not have been made in the adoption proceedings without hearing the applicant and the respondent, the father of the child who had signed a consent for the child's adoption by the petitioner. Mr. Byamungu, learned counsel added that the issue of custody could and have been decided without giving the applicant, the opportunity to be heard while she had all the time been having the custody of the child and had objected to its adoption.

According to the learned counsel's submission, the ground that the applicant was not heard suffices that she to be granted extension of time to appeal and leave to appeal. To substantiate his argument on that point, he cited the cases of **John Lessa V. ZAMCARGO & Another**, Civil Application No. 14 of 1996, **VIP Engineering & Marketing Ltd & 2 others**, consolidated Civil Ref.

I have considered the submissions by the learned counsel for the applicant and the respondent. As regards the application for extension of time, as said above, the reasons for delay in instituting it has been attributed to legal technicalities encountered by the applicant. That amounts to saying that the applicant who was represented by a counsel, failed to observe the law. That reason alone cannot amount to a sufficient cause. As was held in the case of **Consolidated Holding Corporation V. Fauzia Nassor**, Civil Application No. 107 of 2003 (CA) (unreported,) failure on the part of a counsel to observe the law does not constitute a sufficient cause. Under S. 14 (1) of the Law of Limitation Act however, the court's discretion in extending time may not only be exercised upon establishment by the applicant of a sufficient cause alone. The extension may be granted upon establishment of a reasonable cause. What amounts to a reasonable cause includes existence of an arguable ground in the intended appeal which merits consideration by the Court of Appeal. That position is clearly stated in the case of **African Airlines International Ltd. V. Eastern and Southern African Trade and Development Bank** (2003) 1 EA1. In that case the Court of Appeal of Kenya held as follows:-

“ *All relevant factors must be taken into account in deciding how to exercise the discretion to extend time. These factors include the length of the delay, the reasons for the delay, whether there is an arguable case on the appeal and the*

degree of prejudice to the defendant if time is extended."

The arguable point which merits consideration on appeal as raised by the applicant concerns the order of custody. The point of contention by the applicant is that since the custody of the child was not at issue, the order could not have been made in the adoption proceedings without hearing the parties. It is contended further that the respondent who was given the custody of the child by the court had signed a consent for adoption and therefore an issue whether the order could have been given in the absence of an application from him regarding the change of custody of the child from the applicant need to ^{be} considered.

In my considered view the points raised merit consideration by the Court of Appeal. That therefore constitute reasonable cause to extend time within which to appeal. Accordingly I hereby grant the extension of time as prayed.

It follows from the above premises that since the points stated above which are intended for appeal merit consideration, leave is granted so that those matters can finally be determined by the highest Court of the land. As regards the respondent's prayer that grant of leave be conditional upon the child be ^{by} returned to him, I think that order can only be made in execution proceedings, not in this application.

In the end therefore the application for extension of time to apply for leave to appeal and leave to appeal is hereby granted as prayed. The applicant shall file her appeal within forty five days from the date of this ruling.

A. G. Mwarija

JUDGE

11/12/2009

Date : 11/12/2009

Coram : A. G. Mwarija, J.

For the Applicant: Present in person

For the Respondent: Absent

CC: Nester

Ruling delivered . Respondent to be notified of the ruling.


A. G. Mwarija

JUDGE

11/12/2009