

IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

MISCELLANEOUS CIVIL APPLICATION NO. 746 OF 2016

**(Originating from the decision of the District Court of
Kinondoni in Miscellaneous Civil Cause No. 14 of 2013)**

DONATIAN L. KATABARO.....APPLICANT

Versus

1. HELENA KATABARO.....1ST RESPONDENT

2. LAWRENCE KAIJAGE KATABARO.....2ND RESPONDENT

RULING

B.R. MUTUNGI, J:

The applicant is seeking for an extension of time to file an appeal herein out of time against the decision of Kinondoni District Court in Misc. Civil Cause No. 14 of 2013.

The application is made by a chamber summons pursuant to section 14 (1) of the Law of Limitation Act [Cap. 89 R.E 2002] supported by an affidavit sworn by Juvenalis J. Ngowi, the applicant's counsel.

In the corresponding affidavit it is averred that the applicant was the respondent, in Misc. Civil Cause No. 14 of 2013 residing outside the country by then. In October 2016 the applicant informed his counsel that, there was a ruling delivered in respect of the said suit. Thus, his counsel wrote a letter to the trial court requesting to be supplied with the copy of the ruling. On 10th October, 2016 the trial court supplied the applicant's counsel a copy of the ruling and drawn order only to find the said ruling was delivered on 11th July, 2016 contrary to the information he had received from the applicant. However, the applicant was dissatisfied with the said ruling and intends to appeal against the same hence this application.

On the other hand, basically the respondents who have been enjoying the legal services of Makarious J. Tairo opposed the application in their counter affidavit accompanied by an affidavit sworn by. Mr. Makarious J.

Tairo. Among other things he deponed the applicant has not disclosed the person who informed him of the delivery of the said decision and when he became aware of the same.

When this application was called for hearing, parties agreed to dispose the same by written submissions and the court record reveals both parties did file their written submissions on time as ordered.

The applicant in his written submissions insisted that, he was not aware of the date of the decision so delivered, considering the fact that there was no summons issued by the trial court to enable the parties to appear for Judgment. It follows, by the time he became aware of the said decision, the appeal period had already elapsed. This scenario according to the applicant amounts to a sufficient reason for extension of time sought. He referred this court to the case of **YUSUFU SAME & ANOTHER VERSUS HADIJA**

YUSUFU, CIVIL APPEAL NO. 1 OF 2002 (CAT-DSM)

(UNREPORTED) and the case of Tanzania Sewing Machines

Company Limited Versus Njake Enterprises Ltd, Civil Appeal

No. 56 of 2007 (Unreported) to hammer his point home.

Further, the applicant alleged the decision of the trial court is clothed with illegalities in the proceedings. **One;** the court had no jurisdiction to entertain the matter relating to parentage. To support this point, the applicant cited sections 3 and 97 (1) of the Law of the Child Act [No. 21 of 2009] which ousts the court's jurisdiction.. **Two;** the trial court had no jurisdiction to entertain the same because there was a pending application before this Court for Revision in respect of another order issued by the trial court.

On the other side of the coin, the respondents in their written submission strongly opposed the application on the basis that, the applicant was negligent in handling this matter. Thus, the respondents on this stance prayed the

application be dismissed with costs and referred this court to the case of **Benedicto Mumello Versus Bank of Tanzania, Civil Appeal No. 12 of 2002, Court of Appeal of Tanzania at Dar es Salaam (Unreported)** in support thereof.

Regarding the issue on jurisdiction of the trial court raised by the applicant, this was challenged. It was submitted that this was a 2013 matter instituted before the Juvenile Rules were in operation (Child (Juvenile Court Procedure) Rules, 2016). The respondents in that regard in terms of the Law of the Child Act, 2009 had filed the matter in a proper court. To add salt to the wound, by then the second respondent was no longer a child and they had to obtain a special leave.

On the issue raised on the existing revision filed in this court in respect of the trial court, the respondents submitted that the applicant has not shown any connection or relation between **“another order”** and the order from Misc. Civil

Case No. 14 of 2013, hence his allegations rendered highly uncertain.

The respondents called upon the court to find that, the applicant was basing his application on affidavits that contain false statements, hearsay statements, contradictions and the highest degree of negligence on his part.

In his rejoinder the applicant reiterated his stand as submitted earlier. That is, he has advanced sufficient reasons which led to the delay in filing the intended appeal within the prescribed time. He went further by alleging the trial court had no jurisdiction to entertain the dispute hence this renders the entire trial court's proceedings and judgment a nullity.

The issue here is whether the instant application has merits or not. In the upshot the guiding factor is whether there are sufficient reasons advanced by the applicant. In determining as to what amounts to sufficient reasons, the highest Court of this land in the case of **TANESCO VERSUS MUFUNGO LEONARD MAJURA AND 15 OTHERS, CIVIL APPLICATION NO. 94 OF 2016 (CAT-DSM) (UNREPORTED)** at page 10 the Court cited with approval the case of **Lyamuya Construction Company Ltd Versus Board of Trustees of Young Women's Christians Association of Tanzania, Civil Application No. 2 of 2010** where it was stated;

- a) The applicant must account for the delay for the period of the 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.*

d) If the court feels that, there are other 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 a similar vein, in the case of **TANESCO VERSUS MAFUNGO LEONARD MAJURA AND 15 OTHERS (supra)** at page 10 the same Court cited with approval the case of **LYAMUYA CONSTRUCTION COMPANY LIMITED VERSUS BOARD OF TRUSTEES OF YOUNG WOMEN'S CHRISTIANS ASSOCIATION OF TANZANIA, CIVIL APPLICATION NO. 2 OF 2010**, where among other things, it was stated;

'...the applicant must show diligence, and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take.'

Turning to the application at hand, the fact that the applicant was unaware as to when the said ruling was delivered since he was outside the country, in my view, the

- applicant has failed to state clearly when he was informed about the delivery of the ruling; the person who informed him is unknown and more so which country the applicant was residing in and when he did come back to Tanzania.

Basically, there is no Affidavit from the said source of the above facts to back up the applicant's allegations. All in all, this indicates the applicant was sloppy in prosecuting his appeal, considering the fact the applicant took so long to come before this court after the trial court had delivered its ruling on 11/7/2016 and the applicant filing the instant application on 2/11/2016. This was more than four (4) months from the date of the ruling. Thus, the first ground advanced by the applicant is hereby dismissed.

Coming down to the issue of illegality, specifically as to whether the trial court had jurisdiction to entertain the matter or otherwise. It is worth to determine first the effect where there is found illegality in a matter.

In the case of **TANESCO VERSUS MAFUNGO LEONARD MAJURA AND 15 OTHERS (SUPRA)** at page 10 the Court of Appeal of Tanzania elaborating on the issue of illegality as one of the grounds for an extension of time held;

***'If the court feels that, there are other reasons, such as the existence of a point of law of sufficient importance, such as the illegality of the decision sought to be challenged.'* then the time is to be extended.**

The dispute between the parties in the trial court was on parentage of LAWRENCE KAIJAGE KATABARO (the second respondent). It has been argued very vehemently by the disputing camps on the jurisdiction of the trial court in so far as the law of the Child is concerned (No. 21 of 2009). It is obvious from the submissions that there is a question of jurisdiction to be considered first. The only avenue would be on appeal.

For the above reason, even without venturing in to the other points raised, this court is of the view that there is an issue on illegality in the decision sought to be challenged hence that amounts to sufficient reason to warrant extension of time to the applicant. Therefore, the applicant is given **thirty (30) days** from the date of this ruling to file his intended appeal if he so wishes. It follows the application is granted with no order to costs.

It is so ordered.


B.R. MUTUNGI

JUDGE

16/3/2018

Ruling read this day of 16/3/2018 in presence of Miss. Zainabu Wandili for the respondents and in absence of the Applicant dully notified.

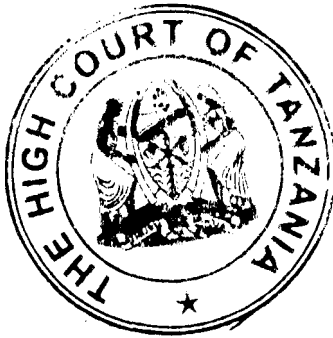



B.R. MUTUNGI

JUDGE

16/3/2018

Right of Appeal Explained.




B.R. MUTUNGI

JUDGE

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