

**IN THE UNITED REPUBLIC OF TANZANIA**  
**THE HIGH COURT OF TANZANIA**  
**(DAR ES SALAAM DISTRICT REGISTRY)**  
**AT DAR ES SALAAM**

**MISC. CIVIL APPLICATION NO. 342 OF 2019**

(Arising from Civil Appeal No. 171 of 2017. Originating from Resident Magistrates Court of Dar es Salaam at Kisutu in Matrimonial Cause No. 46 of 2014 and Misc. Civil Application No. 157 of 2014)

**HENRY MICHAEL DOMZALSKI JNR ----- APPLICANT**

*VERSUS*

**THANDA DOMZALSKI ----- RESPONDENT**

**RULING**

**MUTUNGI, J.**

Before this court, the applicant is seeking for the following orders: -

1. *That this honourable court be pleased to grant an extension of time within which to apply for setting aside an order of this court dated 14<sup>th</sup> May, 2019 by Hon. Madam Justice B. R. Mutungi dismissing Civil Appeal No. 171 of 2017 for want of prosecution.*

2. *Subject to the granting of extension of time, this Honourable Court set aside the dismissal order dated 14<sup>th</sup> May, 2019 in Civil Appeal No. 171 of 2017.*
3. *Costs be provided thereto.*
4. *Any other relief to which the court may deem fit and just to grant.*

The instant application is supported by an Affidavit sworn by May Mukami Messo having been granted a Power of Attorney by the applicant. Whereas, the respondent through the Counter Affidavit sworn by Mr. Mbogoro, learned counsel on her behalf strongly opposed the application.

According to the said Affidavit, the applicant alleged that, the parties herein were husband and wife respectively way back from 25/04/2000 in Australia. During the subsistence of their marriage, the parties were blessed with one issue who is a minor. In Matrimonial Cause No. 46 of 2014 before the Resident Magistrate Court of Kisutu at Dar es Salaam the respondent successfully petitioned for separation and maintenance. The applicant was dissatisfied with the decision and lodged his appeal herein in Civil Appeal No. 171 of 2017. The applicant engaged an Advocate one Godfrey Taisamo to represent him in the said appeal.

The applicant further alleged that, since he was a citizen of the United States of America, he occasionally visited Tanzania under a Resident permit or visitor's permit issued by the Immigration Department. In view thereof, on 01/12/2018 the applicant was denied entry in Tanzania at Mwalimu Julius Nyerere Airport for unknown reasons. The said ban lasted for about 13 months. As a result, during that period the applicant alleged that, he was communicating with his counsel through WhatsApp and E-mail. However, communication broke down and his counsel was not responding to the messages or E-mails. In the event, on 20/06/2019 the applicant opted to find and engage another counsel one Mr. Mwitasi.

In view of the above turn of events, the applicant had no case file as a result on 21/06/2019 Mr. Mwitasi wrote a letter to this court requesting to peruse the court file. The counsel perused the court file on 24/06/2019 and discovered the appeal was dismissed for want of prosecution. The same was done on 14/05/2019. The counsel wrote to this court requesting to be supplied with the said dismissal order. The

same was availed to him on 01/07/2019. The instant application was lodged on 05/07/2019.

In view thereof the applicant alleged that, he was not negligent to prosecute his appeal since the same was abandoned without his knowledge, more so considering the fact the applicant has no permanent residence in Tanzania.

The applicant went further by suggesting the trial court's judgment sought to be challenged is clothed with illegalities. These are;

1. *The trial court had no jurisdiction to entertain the matter to which parties contracted their marriage abroad with a very different legal regime.*
2. *That the trial court misdirected itself by forcing parties to continue the marriage against their wishes.*
3. *That the order of separation is problematic and illegal as it does not give the direction to the spouses what to do after the expiry of two years ordered of separation.*
4. *The order for maintenance is against the law.*
5. *That the consideration or enquiry of relevant factors for ordering maintenance were not done hence*

*rendering an unfair decision against the applicant among other things.*

On the other hand, Mr. Mbogoro in the Counter – Affidavit strongly objected the application and what had been alleged by the applicant. Mr. Mbogoro stated that, if there was at all a communication break down with his counsel, the applicant was supposed to find other means to look for him. It is well known his counsel is a lecturer at the University of Dar es Salaam and the Law School of Tanzania. Mr. Mbogoro suggested the applicant was negligent.

On 17/09/2019 when the application was called for hearing, Mr. Mwitasi and Mbogoro, learned counsel appeared for the applicant and respondent respectively. From the outset Mr. Mwitasi expounded that the application revolves around an issue of illegality and the conduct of the applicant's counsel. Issues of illegality amount to sufficient cause for the sought extension. He cited the case of **LYAMUYA CONSTRUCTION LTD VERSUS BOARD OF REGISTERED TRUSTEES OF THE YOUNG WOMEN CHRISTIAN ASSOCIATION OF TANZANIA, CIVIL APPLICATION NO. 2 OF 2018** and **YUSUF SAME & ANOTHER VERSUS HADIJA YUSUF, CIVIL APPEAL NO. 1 OF 2002 (both unreported)**. Further the counsel referred the court to the

decision of the High Court in **GHANIA J. KIMAMBI VERSUS SHADRACK RUEBEN NG'AMBI, MISCELLANEOUS APPLICATION NO. 692 OF 2018** which stated the party should not be punished for the conduct of an Advocate.

Mr. Mwitasi insisted, the applicant should not be punished for the conduct of his counsel (Godfrey Taisamo). The court record reveals the counsel had all along been in attendance and when he could not attend notified the court through the letter that he was sick. This was recorded on 13/03/2019. However, the court dismissed the appeal on a single non-appearance on 14/05/2019. The applicant with the assistance of his friend (Mary Messo) had traced the said Advocate in vain.

Further, Mr. Mwitasi reiterated what has been stated in the Affidavit and insisted the reliefs sought are to be granted. He further cited the case of **CHARLES MOSES VERSUS SHAMTE KHATIBU, PC CIVIL APPEAL NO. 1 OF 2002 (HIGH COURT OF TANZANIA) (DSM – unreported)** to support his stance.

In reply, Mr. Mbogoro submitted the applicant had a tendency of changing advocates. In a year he had engaged three advocates. He suggested the same has led

to the non-appearance of the counsel as a result the court dismissed the appeal for want of prosecution. Mr. Mbogoro insisted the applicant was negligent in handling his appeal since the applicant was supposed to look for an alternative arrangement before he left the country.

Further Mr. Mbogoro opposed the issues of illegality as alleged by the applicant's counsel. The reason being the alleged illegalities were already determined in the trial court. In his concluding remarks, Mr. Mbogoro prayed the application be dismissed with costs.

In his rejoinder, regarding the issue of changing advocates Mr. Mwitasi submitted that, the same is not illegal since the other advocates were holding the briefs of the applicant's previous Advocate. Even through the applicant had no knowledge that Mr. Taisamo was a lecturer at the University of Dar es Salaam. Mr. Mwitasi reiterated that the applicant has advanced sufficient reasons in support of the application. He thus prayed the same be granted with costs. The issue is whether the applicant has advanced sufficient reason for the sought extension. It is trite law that, what amounts to a sufficient or good cause includes whether or

not the application has been brought promptly, absence of any valid explanation for the delay and lack of diligent on the part of the applicant. See; **EZRON MAGEA MARYOGO VERSUS MOHAMED SAID & ANOTHER, CIVIL APPLICATION NO. 227 OF 2015 (CAR-DSM) (UNREPORTED)** and **ZAHARA KITINDI & ANOTHER VERSUS JUMA SWALEHE & 9 OTHERS, CIVIL APPLICATION NO. 4/05 OF 2016 (CAT-AR) (UNREPORTED)**.

Further, the other reason is illegalities as found in the case of **TANESCO VERSUS MUFUNGO LEONARD MAJURA & 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.*  
[Emphasis mine]

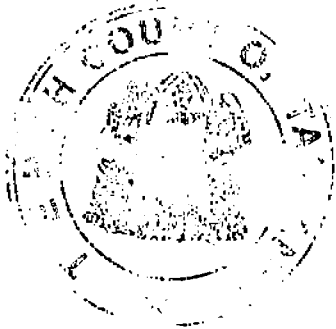
In deliberating on this application I will start with the issue of illegalities. The applicant's counsel has raised among others the issue of jurisdiction. He explained that initially, the applicant had raised a preliminary objection, that the court was not clothed with jurisdiction to determine the matter before it. The same was heard but found to hold no water and the court proceeded to the end. The applicant is still not convinced that the trial court had the requisite jurisdiction to try the said matter, hence has made this issue one of the grounds to be determined by this court on appeal. I have revisited the Memorandum of Appeal filed in this court in the dismissed appeal, I find indeed this is the first ground on the list. It has been settled in our jurisprudence that a question of jurisdiction can be raised at any stage even at the appeal level as the applicant had done.

Mr. Mbogoro for the respondent, had pressed upon the court in his submission that this was an issue which had been

determined and settled before the trial court. Indeed, as already noted the same was heard and determined but the applicant is still aggrieved. He is thus permitted to raise the same at the appeal level.

The court in line with the directives in the **TANESCO CASE (supra)** feels there is a point of law of sufficient importance. In this case the issue of jurisdiction should be brought to the attention of this court and looked into. In that regard, the applicant has availed the court with sufficient reasons to grant him the extension sought. Having so found, there will be no need in going through and deliberating on the other reasons advanced by the applicant's counsel. It will serve no purpose as it will merely be an academic exercise. The court has taken note that not only had the applicant prayed for extension of time to file his application to set aside the dismissal order but had also prayed that, in the event the court grants the sought extension, then should proceed to set aside the dismissal outrightly. The court is in no way convinced by that argument. The applicant was supposed to first seek for the extension of time, then proceed with the application to set aside the dismissal order. The applicant had put the cart before the horse and this is not the way to

go. He is thus advised now that he has been granted the extension of time should do so within 21 days from the delivery of this ruling and file the application to set aside the dismissal order. It is so ordered.

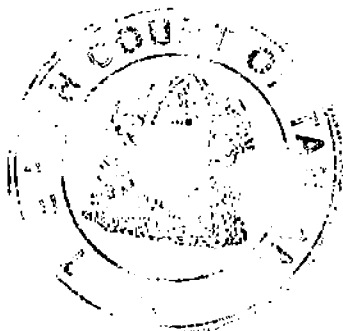


B. R. Mutungi

**JUDGE**

**16/10/2019**

Ruling read this day of 16/10/2019 in presence of Mr. Mwitasi for the applicant and the respondent in person.

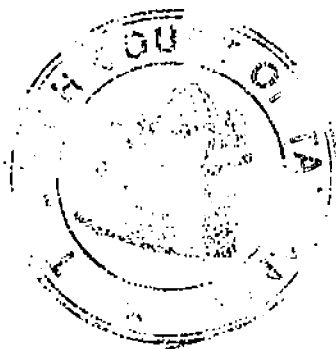


B. R. Mutungi

**JUDGE**

**16/10/2019**

Right of appeal explained.



B. R. Mutungi

**JUDGE**

**16/10/2019**