

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

SONGEA DISTRICT REGISTRY

AT SONGEA

MATRIMONIAL APPLICATION NO 4/2019

SHAIBU LAMECK CHENGULA.....APPLICANT

VERSUS

JOYCE LAZARO MWINUKA.....RESPONDENT

RULING

Date of Last Order: 24/03/2019

Date of Ruling: 28/05/2019

BEFORE: S.C. MOSHI, J

By way of chamber summons, SHAIBU LAMECK CHENGULA, the applicant, filed an application under section 14(1) of the Law of Limitation Act, Cap.89 R.E 2002 and section 95 of the Civil Procedure Code, Cap. 33 R.E 2002 applying for the following orders;

1. An order granting leave to the applicant to file an appeal to this court out of time.
2. Costs of the application be provided for.

The application is supported by the affidavit of SHAIBU LAMECK CHENGULA and it emanates from Matrimonial Cause No. 4/2017 of Songea District Court whose decision was delivered on 28.11.2018.

The applicant was represented by Mr. Dickson Ndunguru, advocate, whereas the respondent was represented by Mr. Hilary Ndumbaro, advocate. The application was disposed of by way of written submissions.

The applicant in his affidavit as well as in his submission stated that, the matter at the trial court was tainted with a lot of irregularities as the matter was instituted by petition instead of mandatory requirement by summons in chamber as provided for under section 81(b) of the Law of Marriage Act Cap. 29 R.E 2002, which provides that:-

"b) every application for maintenance, or for custody of children, or for any other matrimonial relief whatsoever shall, unless included in a petition for a declaratory decree or for annulment, separation or divorce, be by summons in chambers."

He made reference to the case of **Transport Equipment Ltd V. D.P Valambia** (1993) TLR 91 where it was held that,

"When the point at issue is one alleging illegality of the decision being challenged the court has a duty even if it means extending the time for the purposes to ascertain the point and, if the alleged illegality be established, to take appropriate measures to put the matter and record right".

He also cited the case of **Kalunga and Company Advocates Vs. NBC Ltd** (2006) TLR 235 where the Court of Appeal held that: -

"Since the point at issue is one alleging illegality of the decision of being challenged i.e. the validity of the high court decision in interpreting a statutory provision and propriety of the judge raising issues suo motto and making decision without parties concerned being heard upon it, sufficient reasons has been shown for granting an extension of time to file an application to appeal to the court of appeal".

On the second ground he submitted that, no notice was issued to the applicant when the matter came for the last date of hearing. He referred to the case of **Cosmas Construction Co Ltd VS Arrows Garments**

Limited (1992) TLR 127. The case at hand proceeded without issuing notice to the applicant in person. He was to be served in person because there was information by his advocate that, the applicant was not available.

He submitted further that, page 39 of the typed proceeding shows that there were some crucial issues which were raised by the court and were decided without issuing notice to the applicant. The issues include the custody of children. The court proceeded with the matter and came to the conclusion that the children be under custody of the mother. He argued that, this was tantamount to denial of opportunity of being heard which is against the constitution, he made reference to the case **of Kalunga and Company Advocate** (supra). He also cited the case of **Ndesamburu Vs. A.G** (1997) TLR 137, where it was held that: -

"The principle of natural justice which requires the person should be afforded an opportunity to defend himself necessarily implied that the person determining the matter would consider the parties defense before making decision which affect the right of parties".

He further referred to the case of **Yahaya Selemani Mralya (Administrator of Estate of the Late Selemani Mlarya Vs. Stephano Sijia 2 others**, Civil Application No. 316/2017, Court of Appeal (Unreported), where the Court of Appeal did not strike out a defective appeal but it invoked its revisionary power so errors occasioned by failure to observe principle of natural justice could be corrected.

Third reason was that the applicant was attending his sick brother at a traditional healer.

In reply thereto, the counsel for the respondent submitted that, the applicant has no good cause to move this court to grant him an extension of time. The matter was supposed to be filed by petition and not otherwise for the good reasons that, among other things the respondent lived with the applicant for 18 years before institution of the petition in which the respondent sought a divorce among other things as per s. 81(a) of the Law of Marriage Act Cap. 29 R.E 2002. It is requirement of law that, the declaration for the reputation of being husband and wife under the presumption of Marriage and divorce must be filed by way of petition as the respondent did in Matrimonial Cause No. 4/2017.

He argued that, the applicant and respondent lived for 18 years before institution of petition No 4/2017 and they were blessed with three issues hence among other prayers sought was a declaratory order that the respondent acquired a status of being husband and wife hence divorce. Therefore, it was correct and proper form of proceeding as per requirement of the Law of Marriage Act, Cap. 29 R.E 2002.

Regarding right to be heard he submitted that, the procedure and the practice is that any excuse is made either orally to the magistrate or by written notice of absence. However, neither oral notice nor written notice of absence was brought by the applicant before the trial court. In absence of the above one cannot say that he/she was denied a right to be heard.

He said that, the applicant was duly represented by Advocate Abel Ngilangwa who was present in all days of the proceedings. Furthermore, his advocate consented that the court should proceed, and the said advocate was present and fully aware of every proceedings and date of judgement.

He submitted further that, there is no any illegality and therefore the case of **Transport Equipment Ltd Versus D.P Valambhia** (1993) TLR

91 is distinguishable to this application. The applicant was aware of the matter as he filed his written statement of Defense, he then appeared on 23rd November 2017, 25th January 2018, 06th February 2018, on 1st March 2018, 23rd April 2018, 28th June 2018, and 26th July 2018, The scenario is quite different from the case of **Cosmas Construction C Ltd Vs Arrow Garments Ltd** (supra) where the applicant refused to accept service of summons. In cited case the applicant was not aware of anything because he never attended even a single day of the court proceedings. However, in the case at hand the applicant was aware of the case but opted not to make a defence by not attending court, leaving his advocate alone.

He stated that, what the trial court did on page 39 of the typed proceedings is the outcome of what was sought by the respondent on page 8 of the typed proceedings as the respondent prayed for custody of the children.

He argued that, if the applicant intended to bring his defence he would have notified the court of his absence. However, the applicant had been disobedient not only to the court but also to his advocate. Therefore, it was the applicant himself who did not want to be heard.

He refuted the fact that the applicant was attending his sick brother; this story was neither stated in his affidavit nor in his written submission. Furthermore, there was no medical sheet in support of the allegations. The applicant failed even to have supplementary affidavit of a doctor who attended the alleged sick brother.

He contended that, the applicant has to account for all period of delay, the delay should not be inordinate, and the applicant must show diligence and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take. However, the applicant has failed to account for the period delayed and he has not stated the date when he became aware of the judgement though he was aware of his case from the beginning of the Matrimonial Cause No 4/2017.

He finally argued that; the applicant has no good cause to move the court to grant extension of time for he has been negligent. He cited the case of **Tropical Air TZ Ltd Versus Godson Eliona Moshi**, Civil Application No 9/2017, Court of Appeal at Arusha (Unreported) on Page 9 to 10.

I have carefully considered the submissions from both sides, the issue to be determined is whether the applicant has been able to advance sufficient reasons to justify leave to file appeal out of time.

It is settled principle of the law that an application for extension of time is entirely on the discretion of the court to grant or refuse it, this discretion however has to be exercised judicially and the overriding consideration is that there must be sufficient cause for doing so. See the case of **Yusuph Same and Hawa Dada Versus Hadija Yusuph**, Civil Appeal no 1/2002, Court of Appeal at Dar es salaam and the case of **Kalunga and Company Advocates Versus NBC**, Civil Application no 12/2005, Court of Appeal at Dar es salaam (Unreported).

Again, in the case of **Lyamuya Construction Company Ltd Versus The Board of Registered Trustees of young Women's Christian Association of Tanzania**, Civil Application no 2/2010, the court reiterated the following guidelines for the grant of extension of time:-

1. That, the applicant must account for all the period of delay
2. The delay should not be inordinate

3. The applicant must show diligence and, not apathy, negligence or sloppiness in the prosecution of the action that he intends to take
4. the court feels that there are other reasons, such as the existence

If of a point of sufficient importance, such as illegality of the decision sought to be challenged. Likewise, in the case of the

Transport Equipment Ltd Vs. D.P Valambhia (1993) TLR 91

"In our view, when the point at issue is one alleging illegality of the decision being challenged, the court has a duty, even if it means extending the time for the purpose, to ascertain the point and if the illegality be established, to take appropriate measures to put the matter and the record straight"

I have related the circumstances of the case at hand and the law. I first at the outset find that the reason that the applicant delayed to file an appeal because he had taken his sick brother to a traditional healer is not backed by evidence. If that was so, the said traditional healer ought to have sworn an affidavit to support the allegations.

However I have decided to grant the application basing on the complaint of irregularities; so the court can get an opportunity to consider


whether the petition was properly preferred in court and whether the applicant was dully heard.

That said, I allow the application. The applicant should file the intended appeal within 14 days.

Each party to bear its own costs.

It is so ordered.

Right of appeal is explained to the parties.



S.C. MOSHI
JUDGE
28/05/2020