IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 353 OF 2019

(Originating from the decision of Honourable S.H. Mhini SRM in the Civil Case No. 306 of 2013)

DR. WILLIAM T. MORRIS.....APPLICANT

VERSUS

REV. JOSEPHAT MWINGIRA.....1ST RESPONDENT

DR. PHILLIS MESHACK NYIMBI.....2ND RESPONDENT

RULING

Date of last Order: *22/07/2020*
Date of Ruling: *16/10/2020*

MLYAMBINA, J.

This is one of the application in which the Court is being called to draw a distinction between cases involving real or actual delays in the sense that the original appeal was lodged in time but found incompetent and there is a need to file a fresh appeal but it is out of time. Hence application for extension of time. It is almost the same scenario that happened in the case of **Fortunatus Masha v. William Shija and Another** (1997) TLR 152.

Basically, the Applicant in this application seeks for orders:

a) That, this Honourable Court be pleased to grant the Applicant an order for extension of time to appeal to this Honorable Court against the whole Judgment and decree of the Honourable Resident Magistrates Court of Dar es Salaam (per Honorable Mhini SRM) handed down on 26th February 2018 in *Civil Case No. 206 of 2013.*

b) That, costs of this application to follow events.

The application has been taken at the instance of Tibiita Mganga, Advocate and it is supported by the affidavit of Dr. William T. Morris, the Applicant. Paragraph 1 through paragraph 9 of the supporting affidavit states:

1. That, the Applicant in this application was the Plaintiff who has been in the pursuit of *Civil Case No. 306 of 2013* between **DR. William T. Morris and Rev. Josephat Mwingira and Dr. Philis M. Nyumbi** instituted in the Resident Magistrates Court of Dar es Salaam at Kisutu, therefore conversant with the facts I am about to depose hereafter.
2. That, on 26th February 2018 Honourable Resident Magistrates Court of Dar es Salaam as per Honourable G. J. Mhini SRM handed down a Judgment against the Applicant who was the Plaintiff in the said suit. Further that, being dissatisfied by the

said Judgment and Decree through his lawyers, he applied for certified copy of proceedings Judgment and Decree.

3. That, in the circumstances, the Applicant and his lawyer had intended to go through the Proceedings, Judgment and Decree so to know, comprehend and analyze the grounds upon which the Trial Court had relied upon in arriving at the impugned decision the comprehension which enable them to make an informed decision with regard to whether there was a need to appeal against the said decision of the trial Court.
4. That, the Honourable Resident Magistrates Court of Dar es Salaam was unable to issue to the Applicant with a certified copy of Proceedings, Judgment and Decree until on the 6th March, 2018.
5. That sequel to the above, upon reading and comprehending, it was the Applicant's Lawyer's position which the Applicant verily believes to be true that the said Judgment and Decree contain serious triable issues on point of law, facts also a number of illegalities calling for the attention and intervention of the High Court.
6. That, the Applicant upon advice from his Lawyers, he made an informed decision by instructing his Lawyer to forthwith file an appeal to the High Court of Tanzania.

7. That, on the 24th May, 2018, the Applicant was able to file the appeal in the High Court of Tanzania *Civil Appeal No. 135 of 2018* involving *Dr. William T. Morris v. Rev. Josephet Mwingira and Dr. Phillis M. Nyimbi.*
8. That, the Respondents filed a reply to the *Memorandum of Appeal* coupled with a Preliminary Objection which was not heard until 30th May, 2019 when it was disposed of in favour of the Respondents thereby the High Court struck out the appeal for being incompetent.
9. That, the extension of time sought is based on the account of delay resulting from the preliminary objection on legal technicalities which are not the fault of the Applicant and further on the account that there are serious triable issues, points of law and fact apparent glaring on the impugned trial Court Judgment.

The application was objected by the Respondents through the Counter Affidavit of Ereneus Peter Swai, Advocate. The Respondents stated that there is no evidence that the Applicant was diligent enough to apply for the said copies of Judgment and Decree on time, hence, his negligence cannot amount to a reasonable ground for extension of time.

The Respondent denied the fact that there was delay which resulted from Preliminary Objection on legal technicalities, rather the *Appeal No. 135 of 2018* was incompetent before the Court and Counsel Mganga conceded to the raised preliminary objection as a result the same was struck out.

The application has been disposed by way of written submissions. The Applicant made his submission through Counsel Tibiita L.D Muganga. The reply submission was made through Counsel Ereneus Peter Swai.

The brief facts leading to this application as can be gathered from the Applicant's submission is that on the 15th November, 2013 the Applicant instituted a *Civil Case No. 306 of 2013* in the Resident Magistrates Court of Dar es Salaam at Kisutu complaining against the Respondents that the 1st Respondent had sexual relationship with the second Respondent. As if that was not enough, the 1st Respondent made the 2nd Respondent pregnant upon whom she gave birth to an off spring namely David. Such act disrupted the marital relationship. Consequently, the Applicant tested bitterness of word and being unimportant to live. In the course of trial of the said Civil Case, the Applicant applied for the Court to order the parties to carry out the DNA Medical Test and the Child so as to establish who fathered David. However, the Court did not grant the

application. In the final analysis, the Court decided in favour of the Respondents. The Applicant was aggrieved, hence instructed his Advocate to proceed instituting the Memorandum of Appeal.

On the 30th May, 2018 the Memorandum of Appeal was instituted assigned No. 138 of 2018. The said appeal met the Preliminary objection on the date set for hearing of the Preliminary Objection. The Advocate for Applicant ready conceded to the said objection. The approach which is consonant to the decision of the Court in the case of **Seif Shariff Hamad v. SMZ** [1992] TLR 43 in which the Court expressed the obligation of Court Officer that:

> *...it is the Court officer's obligation to assist the Court in reaching a fair and just decision, they don't have to argue for the sake of argument. They have to readily concede the obvious in lieu of uncalled for stiff resistance.*

In the event, the matter was struck out to allow a proper step to be taken. Hence this application which is the subject of extension of time to file a fresh Memorandum of Appeal. In support of the application, the Applicant submitted that there are two factors usually considered by the Court before granting these kinds of application. The Applicant cited the case of **Maria and Others v. Matundure** (2004) E.A 163 in which it was held that:

The first consideration is whether the Applicant has disclosed good cause for the delay in taking the applied for action. In deciding that issue, Courts take into consideration factors like lengthy of delay and reasons for the delay. The second consideration is whether there are other grounds constituting God reasons for granting the application. An example of such good ground, has been taken to include; whether the point of law at issue is legality of the decision being challenged.

In view of the above cited grounds, the Applicant submitted that the reasons for their delay were as follows: **One**, upon being aggrieved by the Judgment and Decree delivered by Honourable Mhini SRM, Applicant upon going through the Judgment and Decree noticed the triable issued hence instructed his previous advocates to process the appeal to the High Court of United Republic of Tanzania praying among others, for the proceedings thereto be quashed and the Judgment and Decree be set aside. **Two**, the instruction was taken seriously and promptly the memorandum of appeal was filed within the time limit. **Three**, on the 30th May, 2018, the advocate prepared and filed two limbs of appeal; challenging the Judgment and Ruling on the interlocutory application, handed down by Honorable Mhini, SRM in the *Civil Case No 306 of 2013* and *Miscellaneous Civil Application No. 113*

of 2017 respectively. Nonetheless, the appeal echoed as it met the preliminary objection.

Four, the Memorandum of Appeal remained irresolute until 30th May, 2019 when her Ladyship Munisi, J. struck out the same for being incompetent to move the Court. Thus, the Applicant on the 16th July, 2019 filed this application. **Five**, in the case at hand there was no lack of diligence on the part of the Applicants.

The Applicant was of view that, considering what transpired from the time the trial Court handed down its decision on 26th February 2018 to the receiving of certified copy of Judgment on 6th March, 2018, to the lodging of Memorandum of Appeal on 24th May, 2018, it is clearly showing that the Applicant was diligent, meticulous and prompt in the process. The Applicant cited the case of **Yusuph Same and Another v. Hadija Yusuph,** Court of Appeal of Tanzania at Dar es Salaam Civil Application No. 1 of 2002 as cited in the case of **Emirates Airlines v. Irfan M. Dinani and 3 Others,** Application No. 13 of 2014, Fair Competition Tribunal at Dar es Salaam, The Court of Appeal stated as follows:

> *Generally speaking, an error made by an Advocate through negligence or lack of diligence is not sufficient cause for extension of time. This had been held in numerous decisions*

Since every party intending to appeal seeks to challenge a decision either on points of law or facts, it cannot in my view, be said that in ***Valambia's case****, the Court meant to draw a general rule that every Applicant who demonstrate that his intended appeal raised point of law should, as of right be granted extension of time if he applies for one. The Court there emphasized that such point of law must be that of sufficient importance and, I would add that. It must also be apparent on the face of the record, such as the question of jurisdiction not one that would be discovered by a long-drawn argument or process.*

According to the Respondent, the allegation of illegalities pleaded by the Applicant in their affidavit and without establishing them in his submission in chief does not pass the test put in **NGO'S Case** and **Lyamuya's Case.** Thus, the application should be dismissed with costs.

In another cited case of **Motor Matiko Mabanga v. Ophir Energy PLC and Another,** Civil Application No. 163 of 01 of 2017 (unreported) the Court of Appeal emphasized that; *allegations of illegalities should be apparent on the face of the record and consequently dismissed the application.*

I have had enough time to go through both parties' evidences, submissions and the entire records. I noted the following. **First,** the impugned Judgment dated 29th December, 2017 was pronounced on 26th February, 2018 by the Resident Magistrates Court of Dar es Salaam at Kisutu. **Second,** the certified copy of decree was issued on 6th March, 2018. **Third**, the Applicant lodged an appeal dated 24th May, 2018 by presenting Memorandum of Appeal to the Court on 30th May, 2018. **Fourth,** on 30th May, 2019 the appeal was struck out by the Court for being time barred**. Fifth,** on 16th July, 2019 the Applicant filed this application.

There are two issues to be determined. ***One,*** *whether the Applicant has accounted for the delay from 6th March, 2018 to May, 2018 and from 30th May, 2019 to 16th July, 2019.* ***Two,*** *whether there are illegalities in the impugned decision demonstrated by the Applicant.*

I will start with the second issue. Going through paragraph 5 of the affidavit, I'm satisfied that there are facts which calls for intervention of this Court. The Applicant has expounded that under the provisions of the law, it is incumbent upon the Court to order the DNA to be taken once it is confronted by issue of determining who fathered a given child. This can assist the Court to establish whether the alleged adultery took place. *Section 25 (1) and (2) of the Human DNA Regulation Act, 2009* provides:

1. *The analysis of sample for Human DNA shall be initiated by a written application by the requesting Authority to the Human DNA Laboratory of the Government Chemist Laboratory Agency or Designated Laboratories for Human DNA.*
2. *For the purpose of this act the requesting authority shall be (a) the Court where the subject matter is in dispute between the parties.*

I do agree with the Respondent cited cases of **Lyamuya Construction Co. Ltd** (*supra*) that illegality must clearly be visible on the face of the record. However, in this case, I 'm of observation that the claim by the Applicant/Plaintiff was among others for an order of DNA Test on the Child. Failure to apply for DNA Test to the Government Chief Chemists constituted an illegality visible on the face of the record. That finding alone is sufficient to grant the application.

As regards the second issue, the delay by the Applicant was partly contributed by the Court for failure to issue the extracted decree on time. It was also partly due to dilatory conduct of the Applicant on depending much from his Advocate as if the case was of the Advocate. However, after the appeal was striked out, the Applicant did not sleep much in filing this application.

It is an accepted principle that illegality is a good ground for extension of time. In the case of **TANESCO v. Mufungo Leaonard Majura and Others,** Civil Application No. 94 of 2016 Court of Appeal of Tanzania at Dar es Salaam (unreported), the Court held:

> *If the Court feels that, there are other reasons, such as the existence of the point of law of sufficient importance, such as the illegality of the decision sought to be challenged.*

In the case of **Blue Line Enterprises Ltd v. East African Development Bank** Misc. Civil Cause No. 135/95 Katiti, J (as he then was) held that:

> *It is trite law that extension of time must be for sufficient cause and that extension of time cannot be claimed as of right, that the power to grant this concession discretionary, which discretion is to be exercised judicially. Upon sufficient cause being shown which has toe objectively assessed by Court.*

In the case of **NHC and Another v. The National Estates and Designing Consultancy,** Misc. Land Application No. 496 of 2016 High Court of Tanzania at Dar es Salaam (unreported), the Court observed:

As a matter of general principle, it is in the discretion of the Court to grant extension of time, but that discretion is Judicial, and it must be exercised according to the rules of reason and justice, and not according to private opinion or arbitrarily.

In the end, the analysis by this Court on the entire findings by the trial Court has come to the conclusion that the alleged illegality needs be assessed on appeal by this Court for justice to be seen done on the merits of the case. Therefore, the application is granted. The Applicant is given 21 days to lodge his appeal from the date he is issued with the typed copy of ruling. Costs shall follow events.

Y. J. MLYAMBINA

JUDGE

16/10/2020

Ruling delivered and dated 16th October, 2020 in the presence of Counsel Tibiita Mganga for the Applicant and in the absence of the Respondent.

Y. J. MLYAMBINA

JUDGE

16/10/2020