

IN THE HIGH COURT OF TANZANIA

(IN THE DISTRICT REGISTRY)

AT MWANZA

MISC. CIVIL APPLICATION NO.133 OF 2020

(Arising from Misc. Civil Application No. 11 of 2020)

ASHURA SALAM APPLICANT

VERSUS

SAZA GWASA SEBABILI RESPONDENT

RULING

Date of last Order: 15.12.2020

Date of Ruling Date: 16.12.2020

A.Z.MGEYEKWA, J

The applicant has instituted an application which is brought under section 14 (1) of the Law of Limitation Act, Cap. 89 [R.E 2019]. The Order sought is extension of time to file an appeal against the decision of the Juvenile Court of Nyamagana District at Mwanza in Misc. Application No.11 of 2020.

The application is supported by an affidavit deposed by Ashura Salam, the applicant. The respondent resisted the application and has demonstrated his resistance by a counter-affidavit deposed by Saza Gwasa Sebabili, the respondent.

In prosecuting this application, the applicant enjoyed the legal service of Mr. Maduhu, learned counsel while the respondents enjoyed the legal service of Mr. Nasimire, learned counsel.

It was Mr. Maduhu, learned counsel for the applicant who was the first one to kick the ball rolling. In addressing the Court, he sought to adopt the affidavit in support of the application. Mr. Maduhu submitted that the applicant was dissatisfied by the lower court decision but she found herself out of time since the appeal was required to be filed within 14 days. Mr. Maduhu went on to pray for this court to extend time based on the nature of the case, the child involved is 6 years old. He stated that the parties are not familiar with the enacted laws and rules which govern the right of the child specifically in the area of the jurisprudence of custody of the child.

Mr. Maduhu also submitted that the reason for the delay is specified on paragraph 5 of the applicant's affidavit whereas the applicant thought that

the appeal is required to be filed within 30 days. He added that the same stated in the judgment of the trial court District Court it is ruling he stated that the right to appeal is within 30 days, although he did not explain the same in the typed judgment. Mr. Maduhu contended that the biological mother was only allowed to visit her child on holiday with the permission of the street chairman. To fortify his argumentation he referred this court on the last page of the typed Judgment.

On the strength of the above submissions, Mr. Maduhu urged this court to consider the reliefs sought in chamber summons and grounds raised in the affidavit and allow the application.

Mr. Nasimire, learned counsel resisted the application with some force. He urged this court to adopt the counter affidavit and form part of their submission. He lamented that the applicant did not file a reply to the counter affidavit. In his view, failure to file a reply to the counter affidavit means that the counter affidavit is not contested.

It was his view that in the application for extension of time, the applicant is required to state the reasons for her delay as was stated by the Court in the case of **Hellen Jacob v Ramadhani Rajabu (1996) TLR**

439. He went on to state that the applicant's affidavit does not show good reasons for her delay. Mr. Nasimire strenuously argued that the ground saying that the applicant was not familiar with the new enacted Juvenile Courts Rules is not a good reason because ignorance of the law is not a defence.

Mr. Nasimire asserts that as per paragraphs 3 and 4 of the counter affidavit, the applicant stated that the Magistrate informed the parties that any aggrieved party is required to file an appeal within 14 days therefore the applicant's complaint that an aggrieved party is required to file an appeal within 30 days is not true. He urged this court to disregard the said submission. Mr. Nasimire fortified his submission by citing the cases of **Felister Kamilembe Kilitanjwa v President of the UR Tanzania and 2 others. Misc Civil Application No. 52 of 2019. H/C** (unreported) and **Ignazio Msina v Willow Investment CPRA Civil Application No. 21 of 2001 HC** (unreported), this court stated that an affidavit which is tainted with untrue cannot be relied upon to support an application. Mr. Nasimire submitted that in case this court finds that the applicant's application is untruth thus proceed to expunge it from the court records.

The learned counsel for the respondent did not end there, he argues that the applicant in her affidavit complained that she was informed by the learned counsel that the limitation time of filing an appeal is 14 days. In his view, the statement of the applicant remains to be hearsay. To bolster his submission he referred this court to the case of **Gilliad G. Mbwambo v Mary Mchome Mbwambo & Another**, Misc. Civil Application No. 449 of 2019 H/C (unreported). Regarding the issue of custody, Mr. Nasimire stated that the issue of custody of a 6 years old child can be granted even to any person who is not a biological parent what matters is the welfare of the child.

On the strength of the above submissions, Mr. Nasimire was of the view that the application lacks merits. He implored the Court to disregard it for failure to state the reason for the delay.

In his brief rejoinder, the learned counsel for the applicant rebutted that the affidavit is tainted with untruth because what the applicant has stated is what she heard. He blamed the learned counsel for the respondent for failure to support the respondent statement as stated in paragraph 3 of his affidavit. He distinguished the cited case of Willow Investment. He went on to state in case this court will find that the cited case is applicable then even the counter affidavit specifically paragraph 3 will be as well affected. He

insisted that the fault trial Magistrate for not considering the issue of custody of a child. To buttress his submission he referred this court to the last paragraph of his Judgment which allows the applicant to visit the child every weekend with a condition that she must be permitted first.

Insisting, Mr. Maduhu stated that the applicant was informed that she was required to file her appeal within 30 days and she filed the memorandum of petition of appeal before the 30 days as stated by the District Magistrate Court. In his view, since the applicant complied with the order means she was not negligent.

In conclusion, Mr. Maduhu urged this court to allow the application as stated in the chamber summons and affidavit.

Having heard the contending submissions of the parties, it now behooves the Court to determine whether this is a fitting occasion to condone the delay involved and proceed to enlarge time to lodge an appeal to this Court. The central issue for consideration and determination is whether or not the applicant has shown good cause to justify her application.

To begin with, I wish to restate that the court's power for extending time is both wide-ranging and discretionary but it is exercisable judiciously upon sufficient reasons being shown. It may not be possible to lay down an invariable or constant definition of the phrase 'sufficient reason' but the court consistently considers factors such as the delay were with sufficient cause, the degree of prejudice, if any, that each party stands to suffer depending on how the court exercise its discretion; the conduct of the parties, the need to balance the interest of a party who has a constitutionally underpinned right of appeal.

There are a plethora of legal authorities in this respect. As it was decided in numerous decisions of the Court of Appeal of Tanzania, in the case of **Benedict Mumello v Bank of Tanzania**, Civil Appeal No. 12 of 2002 (unreported), **Republic v Yona Kaponda and 9 others** [1985] TLR 84 and in the case **Blueline Enterprises Ltd v East African Development Bank** Misc. Civil Cause No. 135 of 1995 the Court of Appeal of Tanzania decisively held that:-

"It is trite law that extension of time must be for sufficient cause and that the extension of time cannot be claimed as of right, that the power to grant this concession is discretionary, which

discretion is to be exercised judicially, upon sufficient cause being shown which has to be objectively assessed by the court."

Similarly, in the case of **Republic v Yona Kaponda** (supra) the Court of Appeal of Tanzania set the yardstick of the circumstances under which extension of time can be granted, the Court held that:-

" Granting application for extension is it is now settled that in an application for extension of time applicant is required to show sufficient cause for delay. Sufficient cause would be shown for the delay in taking the necessary steps in instituting an appeal or filing an application as it is the time prescribed under the specific law. However, it is to be observed that the court can only exercise its powers under the law, to extend time if sufficient cause is shown to explain the delay."

Based on the above authority and groping what transpired in the applicant's affidavit, I find that the Applicant's reason for the delay is based on ignorance of the law, misinformation and on arguable ground of the case. To resuscitate the applicant's request for extension of time, the applicant's Advocate submitted that the applicant on paragraph 3, claimed that the trial Magistrate explained to the parties that a resentful party has a right to appeal

within 30 days from the delivery of the ruling. On his side, the respondent stated that the trial Magistrate explained to them that an aggrieved party can file an appeal within 14 days from the delivery of the ruling. I had pursued the judgment of the court and noted that the applicant's and the respondent's submissions in regard to the days of filing an appeal are mere words.

I am saying so because the trial Magistrate in his ruling has stated that the right to appeal is explained without mentioning the duration. It should be noted that the court is bound by the court proceedings not otherwise. The applicant's affidavit is centered on the trial Magistrate information that he explained to the parties that a dissatisfied party can file an appeal within 30 days. The issue of arguable ground as raised by the learned counsel for the applicant is not featured in the applicant's affidavit. I am in accord with the learned counsel for the respondent that an affidavit being a substitution for oral evidence, should only contain true statements of facts and circumstances which the applicant disposes her personal knowledge or from information believed to be true. The fact that the applicant's affidavit contains untrue statements means it is not trustworthy and the same means

that the affidavit is defective. In the case of **Ignazio Messina** (supra) the court held that:-

"An affidavit which is tainted with untruth is not an affidavit at all and cannot be relied upon to support an application. The rules governing the form of affidavits cannot be deliberately flouted in the hope that the court can always pick the seed from the chaff, but that would be an abuse of the court process. The only assistance the Court can give in such a situation is to strike out the affidavit."

Based on the above authority, it is clear that the affidavit which contains statements that are not supported by any document cannot be relied upon by the court. Therefore, the applicant's affidavit is incompetent.

Additionally, I have examined the ground raised by the applicant's learned counsel that there is an arguable ground that attracts the attention of this court. This could have been a ground for extension of time. However, I have noted that the applicant's advocate has raised an issue that was not featured in the applicant's affidavit. Nevertheless, the applicant's Advocate has submitted that there is an arguable ground that attracts the attention of this court. To support his argument the applicant's Advocate has annexed the memorandum of appeal to demonstrate the arguability of the intended

appeal. But to the contrary, the same is not featured in the applicant's affidavit.

In my view had the applicant's Advocate covered that important aspect in the affidavit there would be a wide room for this court to weigh the applicant's Advocate concern. Unfortunately, it was not covered instead the applicant's Advocate brought the same during his submission that means it is an afterthought and a mere statement from the bar.

Applying the above authority, I find that the applicant's Advocate submission is not fit ground for extension of time the same is hereby is disregarded.

Again, the applicant's counsel reason that the delay stemmed from ignorance of the law, this court regards this reason as insufficient. This was predicated on the case law position that ignorance of the law was not a good cause for an extension of time. The same was observed by the Court of Appeal of Tanzania in the case of **Losero v Mwarabu**, Civil Application No.10 of 2015 (unreported).

In view of the above, I would conclude that the applicant's affidavit is incompetent for containing an untrue statement. As alluded above the remedy of a defective affidavit is to strike out the application without costs.

Order accordingly.

DATED at Mwanza this 16th December, 2020.




A.Z.MGEYEKWA

JUDGE

16.12.2020

Ruling delivered on the 16th December, 2020 in the presence of Ms. Beatrice Manyori, learned counsel holding brief for Mr. Maduhu, learned counsel for the applicant as well as Mr. Nasimire, learned counsel for the respondent.


A.Z.MGEYEKWA

JUDGE

16.12.2020