IN THE HIGH COURT OF TANZANIA

(MWANZA DISTRICT REGISTRY)

AT MWANZA

MISC. CIVIL APPLICATION NO. 180 OF 2019

(Arising from Matrimonial Appeal No. 16 of 2018 of Geita District Court. Before Hon. N. R. Bigirwa, RM. Originating from Matrimonial Cause No. 34/2018 of Katoro Primary Court)

MONICA FOKASI ..... APPLICANT

VERSUS

LUPANDE ZABRON ..... RESPONDENT

Date of the last Order: 31/03/2020

Date of Ruling: 15/04/2020

RULING

ISMAIL, J.

In this ruling, I am called upon to determine if the Court's discretion can be exercised to grant an extension of time within which the applicant may institute an appeal out of time. The application has been preferred under the provisions of ***section 25 (1)*** (b) of the Magistrates' Courts Act, Cap. 11 [R.E. 2002] and ***Rule 3*** of

the Civil Procedure (Appeals in Proceedings Originating from Primary Court) Rules.

The impending appeal intends to impugn the decision of the District Court of Geita at Geita, in Matrimonial Appeal No. 16 of 2018, which nullified and quashed the proceedings of the trial court, set aside the judgment, and ordered trial of the matter *de novo,* before another magistrate. What prompted the appeal proceedings in the District Court is the decision of the Primary Court of Geita at Katoro in respect of a matrimonial petition (PC Matrimonial Cause No. 34 of 2018) which was instituted by the respondent for, *inter alia*, dissolution of the marriage with the applicant. The trial court acceded to the prayer and ordered a dissolution of the marriage, simultaneous with ordering division of the matrimonial assets which were allegedly jointly acquired in the subsistence of the marriage. While the respondent had no qualms about the dissolution of the marriage, he was resentful of the verdict that ordered distribution of the assets. This built his resolve to take his battles a ladder up, to the District Court. His relentness paid a dividend when his appeal was allowed and had the trial court's decision reversed.

This decision enlisted outrage from the applicant. She has taken a serious exception to it, and she is determined to escalate her battle to this Court by way of appeal. The present application is the only thing that stands between her and the realization of that quest. While the applicant had 30 days within which to prefer an appeal against the impugned decision, this time prescription elapsed without any action. It is for that reason that the present application has been preferred to inject some lifeline in her march to this Court by being allowed to file her appeal out of time.

The application has been preferred by way of a chamber summons and it is supported by the applicant's own affidavit, setting out what she considers to be grounds for reliefs sought. The contention in the affidavit is that the applicant was not notified of the date on which the impugned decision was delivered. She avers that she became aware of it and was furnished a copy thereof when time had already ticked against her. The respondent has fervently resisted the application. Through a counter-affidavit sworn by himself, the respondent has put the conduct of the applicant in a spotlight. Quite unreservedly, the respondent contends that no genuine reasons have been advanced to justify the dilatoriness in

filing the appeal. He holds the view that delays in taking action were attributed to the applicant's negligence, and that granting the prayers sought would be an act of rewarding negligence. The respondent imputes loathness on the part of the applicant, averring that the applicant was aware of the dates that were scheduled for pronouncement of the judgment, including the 3rd of June, 2019, when it was finally pronounced, after several adjournments, all at the instance of the presiding magistrate. Holding that the application is barren of fruits, he urges this Court to have it dismissed.

Hearing of the application pitted Mr. Stephen Kaijage, learned advocate for the applicant, against Ms. Magoba who held Mr. Erick Lutehanga's brief for the respondent.

Kicking off the discussion was Mr. Kaijage who was admirably concise in his address. Praying to adopt the contents of his affidavit, the learned counsel contended that the impugned decision was delivered without notification to his client of the date of its pronouncement. Citing paragraph 4 of the supporting affidavit, Mr. Kaijage contended that before 3rd of June, 2019, delivery of the impugned judgment had been adjourned for long spells on account

of indisposition of the presiding magistrate. He submitted that the proceedings for 15th May, 2019 indicated that the judgment would be delivered on notice. While the proceedings further reveal that the matter came for orders on 3rd June, 2019, nothing shows that the said judgment was delivered on this date. Without shedding some light on when exactly the applicant was supplied with a copy of the judgment, Mr. Kaijage ferociously argued that the applicant became aware of the decision when time for taking action had long expired. This means, he contended, the applicant would not take steps to challenge the decision timeously. It was his argument that this account of facts constituted a sufficient reason for the delay. He buttressed his arguments by citing the decisions in ***Tanzania Electric Supply Co. Ltd v. Mufungo Leonard Majura & 14 Others***, CAT-Civil Appeal No. 199 of 2015; and ***Samwel Mussa Ng'ohomango (A legal representative of the Estate of the late Masumbuko Mussa) v. A.I.C. Ufundi***, CAT-Civil Application No. 26 of 2015 (both unreported). In both of the decisions, Mr. Kaijage contended, the applications for extension were granted. He wound up by contending that the application has been filed expeditiously, hence his prayer that the application be granted.

None of the applicant's contentions placated the respondent. Coming with all guns blazing, Ms. Magoba relied on the proceedings of the 1st appellate court to dispel the applicant's allegation that she was oblivious to what happened in court prior to and on the day the said judgment was delivered. Ms. Magoba made reference to page 11 of the proceedings which shows that the applicant was in attendance on 3rd June, 2019, when the judgment was read. She cast aspersion on the veracity of the applicant's contention that she was not present when the decision was pronounced.

Punching a further hole, Ms. Magoba contended that, whereas the judgment was certified on certified on 24th August, 2019, the present application was filed on 29th November, 2019. She contended that counting from the date the judgment was certified, the applicant had 30 days within which to prefer the appeal. Inexplicably, she chose to sit idly for three months, and woke up late to test this Court's mettle. The counsel threw another jab at the applicant, decrying her failure to account for each of the days of delay. In view of this failure, she prayed that the application be dismissed with costs.

In rejoinder, Mr. Kaijage took an issue with lack of legibility of the date on which certification of the judgment was done. He further argued that certification does not mean that a copy of the judgment was supplied to the applicant on the date of the certification. He prayed for this Court's indulgence, taking into account that the applicant is a lay person. He reiterated his call for having the application be granted.

From these rival submissions the profound question for our determination is whether this application has demonstrated any sufficient grounds for its grant.

Before we get to the heart of the parties' contention, I find apropos that the general principle which underlies grant or refusal of applications for extension of time be put into perspective. The trite position is that the grant of an extension of time is an equitable discretion, exercised by a court judiciously, and on a proper analysis of the facts, and application of law to facts. Such discretion is exercised upon satisfying the court, through presentation of a credible case. It also requires that the applicant should also act equitably. Underscoring this point was the Supreme Court of Kenya in

Nicholas Kiptoo Arap Korir Salat v. IEBC & 7 Others, Sup. Ct. Application 16 of 2014, wherein it was held thus:

> *"Extension of time being a creature of equity, one can only enjoy it if [one] acts equitably: he who seeks equity must do equity. Hence, one has to lay a basis that [one] was not at fault so as to let time lapse. Extension of time is not a right of a litigant against a Court, but a discretionary power of courts which litigants have to lay a basis [for], where they seek [grant of it]."*

A more lucid position in that respect was accentuated by the same Court. In ***Aviation & Allied Workers Union of Kenya v. Kenya Airways Ltd, Minister for Transport, Minister for Labour & Human Resource Development, Attorney General***, Application No. 50 of 2014, key guiding principles for application of the Court's discretion were propounded as follows:

> *"... We derive the following as the underlying principles that a court should consider in exercise of such discretion"*
>
> 1. *extension of time is not a right of a party; it is an equitable remedy that is only available to a deserving party at the discretion of the court;*
> 2. *a party who seeks extension of time has the burden of laying a basis, to the satisfaction of the Court;*
> 3. *whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis;*
> 4. *where there is [good] reason for the delay, the delay should be explained to the satisfaction of the Court;*

5. *whether there will be any prejudice suffered by the respondents if extension is granted;*
6. *whether the application has been brought without undue delay; and*
7. *whether in certain cases, like election petitions, the public interest should be a consideration for extension."*

The rationale for imposing these stringent conditions is to ensure that court orders do not benefit a party who is at fault. This reasoning was distilled by the defunct East African Court of Appeal in ***KIG Bar Grocery & Restaurant Ltd v. Gabaraki & Another*** (1972) E.A. 503, in which it was held that ***"... no court will aid a man to drive from his own wrong."*** It should be understood that, whilst the intention of imposing these stringent conditions is to put undeserving parties on check, courts are also under obligation to ensure that the applicant of the enlargement of time is not denied the right of appeal, unless circumstances of his delay in taking action are inexcusable and his or her opponent was prejudiced by it (see: ***Isadru v. Aroma & Others***, Civil Appeal No. 0033 of 2014 [2018] UGHCLD 3.

The above decisions are in consonance with the fabulous list of key conditions for grant of enlargement of time, set by the Court of Appeal of Tanzania in ***Lyamuya Construction Company Limited v.***

Board of Trustees of YWCA, CAT-Civil Application No. 2 of 2010 (unreported). These are:

> *"(a) The applicant must account for all the period of 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 he intends to take.*
>
> *(d) If the Court feels that there are other sufficient reasons, such as the existence of a point of law of sufficient importance; such as illegality of the decision sought to be challenged."*

It is worthwhile, that in applications for extension of time, sufficient cause or lack of it is gathered from affidavits filed in support of the applications. This is mainly because affidavits are evidence, unlike submissions from the bar which serve as narrations and legal arguments that complement the sworn depositions see: (***The Registered Trustees of the Archdiocese of Dar es Salaam v. The Chairman Bunju Village and 11 Others***, Civil Appeal No. 147 of 2006). Sufficiency of the reasons for the applicant's inability to take necessary steps, at the right time, is invariably discerned or gauged through these depositions.

While sufficient cause constitutes the basis for enlargement of time, there is still a grappling on what amounts to a sufficient cause.

To mitigate this fudge, Courts have laid down circumstances which, if demonstrated, they may be said to amount to sufficient cause. In ***The Registered Trustees of the Archdiocese of Dar es Salaam*** (supra), the Court of Appeal held thus:

> *"It is difficult to attempt to define the meaning of the words "sufficient cause". It is generally accepted however, that the words should receive liberal construction in order to advance substantial justice, when no negligence, or inaction or want of bonafides, is imputable to the appellant."*

The just cited case borrowed a leaf from the holding of the Court of Appeal's predecessor in ***Dephane Parry v. Murray Alexander Carson*** (1963) EA 546. The defunct Court held as follows:

> *"Though the court should no doubt give a liberal interpretation to the words "sufficient cause", its interpretation must be in accordance with judicial principles. If the appellant has a good case on the merits but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy, and the appeal should be dismissed as time-barred, even at the risk of injustice and hardship to the appellant."*

See: ***Nicholaus Mwaipyana v. The Registered Trustees of the Little Sisters of Jesus of Tanzania***, CAT-Civil Application No. 535/8 of 2019; ***Samwel Munsiro v. Chacha Mwikwabe***, CAT-Civil Application

No. 539/08 of 2019; and ***Tanzana Fish Processors Limited v. Eusto K. Ntagalinda***, CAT-Civil Application No. 41/08 of 2018 (all unreported).

Scoping the affidavit and the applicant's submissions in the course of the hearing, we gather that dilatoriness in preferring the appeal is attributed to the applicant's obliviousness to the delivery of the judgment, so much so that, when she learnt of its delivery and got hold of a certified copy, time prescription for appeals had already elapsed. This averment is found in paragraph 5 of the supporting affidavit. The applicant's counsel firmly contends, in his submission, that the confusion in which this matter is presently shrouded was caused by the trial magistrate's decision to deliver the decision clandestinely. This contention has failed to gain a spark from the respondent. Relying on the proceedings, his counsel takes the view that the applicant's contention is, at best a face saving indulgence. She is also of the view that certification of the judgment signified the availability of the judgment to the parties and that this is when action ought to have commenced.

My scrupulous review of the proceedings revealed that though the Coram for 3rd June, 2019 had the applicant recorded as one of

the parties in attendance, nothing is recorded as an order of the court for the day. It is not known if any business was transacted on the day and, if yes, what exactly it was. It casts a serious doubt, in my view, if the impugned judgment was delivered. If it was, then there would be no reason for any concealment or inability by the court to record that the same was delivered, and that both parties were in attendance. Absence of this vital information has created a cloud that is incapable of providing any certainty that this decision was delivered on the date shown in the judgment, unless it is intended to be said that it was delivered before or after the parties had gathered and their presence recorded in the proceedings.

This uncertainty leaves me with no choice except picking the 14th August, 2019, when the judgment was certified, as the cutoff date for ascertainment of the applicant's timeliness or otherwise in her action. This proposal gains credence where, as is the case here, the applicant has kept under a wrap the date on which she was supplied with the certified copy of the judgment. Thus, if it is taken that the day the judgment was certified is the day the right of action accrued in respect of the intended appeal, then the appeal ought to have been filed on or before 13th October, 2019, within 30 days

prescribed by the law. This is after reckoning or netting off the days during which the applicant was waiting to be served with a copy of the judgment, though there is no evidence that the said copy was requested. I take that the applicant did not apply for it because of her lateness in learning that the judgment had been pronounced.

My view is fortified by the position set in ***Samuel Emmanuel Fulgence v. Republic***, CAT-Criminal Appeal No. 4 of 2018 (unreported). Facing the situation which is akin to the present matter, the superior Bench adjudged the appeal entertained by the 1st appellate court as time barred. In the process, made the following observation:

> *"The record is silent as to when the proceedings were ready for collection. Nonetheless, the judgment of the Resident Magistrate Court was certified and was ready for collection on 28th day of October, 2015. The period from the date of acquittal of the appellant, that is, 21st day of August, 2015 to the date the certified copy of the judgment was ready for collection, that is, 28th day of October, 2015, is excluded in computing the forty-five days. As such the respondent ought to have filed its appeal latest on 13th day of December, 2015. It follows then that the petition of appeal filed on 26th day of February, 2016 was filed out of time. The High Court ought not to have entertained the appeal as it was time barred."*

See also: ***Aidan Chale v. Republic***, CAT-Criminal Appeal No. 130 of 2003 (unreported).

Whilst it is not disputed that the applicant was late in preferring the appeal, hence her decision to prefer the present application, decision has to be made on the sufficiency and validity of the reason given for the delay. Nothing convinces me that the delay was on account of any good cause as required by the law. This is so where the applicant has failed to tell the Court when she landed the copy of the judgment and time that elapsed after that, or what prevented her from taking action for all that long, until 20th November, 2019, when he finally resorted to the route he has taken. The applicant has not given any semblance of explanation which would satisfy this Court that, since she became aware of the decision and was time barred, she acted expeditiously. This places the applicant in a position where she cannot rely on the two decisions (***TANESCO*** and ***Ng'ohomango***) as the basis for the contention. In those two cases, applicants were able to demonstrate good cause and vigilance in their actions. Nothing falls anywhere close to the principles propounded in any of those cases and many others cited above. Absence of any good cause means that the Court is exposed to the danger of being led by sympathy where the applicant was presented with a glorious chance of convincing the

Court, only to be spurned for reasons best known to the applicant herself.

The counsel for the respondent decried the applicant's failure to account for each of the days of delay. This contention was not responded to by the counsel for the applicant who appeared to change tact and plead with the Court to exercise its indulgence that will give the applicant a life line. In this respect, I take the view that the position fronted by Ms. Magoba is in consonance with the current legal holdings. In ***Hassan Bushiri v. Latifa Lukio Mashayo***, CAT-Civil Application No. 3 of 2007 (unreported), the superior Bench held as follows:

> *"... Delay, of even a single day, has to be accounted for otherwise there would be no point of having rules prescribing periods within which certain steps have to be taken."*

See also ***Tanzania Fish Processors Limited*** (supra).

Failure by the applicant to toe the line expounded in the just cited decisions leaves the delay in taking action unjustified, and this Court is not convinced that the delay was on account of any sufficient cause. Consequently, and on the basis of the foregoing, I hold that the delay in instituting the appeal was not caused by any

semblance of reasons that fall in the realm of sufficient case. In view thereof, I find that the applicant has failed the test set for grant of extension of time. Accordingly, I dismiss the application with costs.

It is so ordered.

M.K. ISMAIL
JUDGE
15.04.2020