

**IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY
AT MWANZA**

MISCELLANEOUS CIVIL APPLICATION NO. 121 OF 2019

(Arising from the High Court of the United Republic of Tanzania at Mwanza District Registry in PC Matrimonial Appeal No. 7 of 2018 before Hon. Matupa, J. originating from Mkuyuni Primary Court Civil Case No. 71 of 2017 and Matrimonial Appeal No. 02 of 2018 of Nyamagana District Court at Mwanza).

SALMA ATHUMANI.....APPLICANT

VERSUS

MAGANGA BUCHEY..... RESPONDENT

RULING

Date of last Order: 05/05/2020

Date of Judgment: 19/05/2020

F. K. MANYANDA, J.

This Court has been moved under Section 14(1) of the Law of Limitation Act, [Cap. 89 R. E. 2019] and Section 95 of the Civil Procedure Code, [Cap 33 R. E. 2029] and any other enabling provision of law to grant the orders prayed in the Chamber Summons namely:-

- (i) This Honourable Court be pleased to extend the time within which the Applicant can file application for review in respect of PC Matrimonial Appeal No. 7 of 2018; and
- (ii) Any other order(s) or/and relief(s) as this Honourable Court may deem fit and just to grant.

The application is brought by way of a Chamber Summons supported with an affidavit affirmed by the Applicant Salma Athumani which together with other records give the background of this matter. In 2017 the

Applicant petitioned for divorce and division of matrimonial properties in the trial court at Mkuyuni Primary Court in Matrimonial Cause No. 17 of 2017. The trial Court granted divorce and ordered matrimonial assets division at a ratio of 20% to the Applicant and 80% to the Respondent. Dissatisfied with that decision she appealed to the District Court of Nyamagana in Matrimonial Appeal No. 02 of 2018 which enhanced her share including payment by the Respondent of TShs. 500,000/= as proceeds from a motor cycle and awarded her a plot on which a house was under construction commonly known as *boma* or *pagale*. This time the Respondent got dissatisfied and appealed to the High Court which on 12th April, 2019 decided equal distribution of their assets. It is alleged by the Applicant that the appellate judge overlooked distribution of the said boma after ordering equal distribution of all other properties. She chose to come back to this court by way of review but found herself to be out of the prescribed time within which to apply for review. Hence she filed the instant application seeking enlargement of time because the delay was out of her control due to ill health.

Hearing of the application was ordered to be disposed by way of written submissions, thank to both parties as both filed their submissions in time as ordered. At the hearing the Applicant was represented by Ms. Dorothea Ndalifanye Method, learned Advocate who drew and filed the written submissions in support of the application. The Respondent enjoyed the representation services of Mr. Mathew Patrick Kija, learned Advocate who also drew and filed the written submissions in opposition to the application.

In her short but focused submissions Ms. Dorothea after adopting the contents of the Chamber Summons and the Affidavit argued that the applicant reasons for delay are averred in Paragraph 7 of the affidavit in which she stated that she got hospitalized at Salaama Health Center where she was admitted for almost three months and thereafter remained on bed rest for two other months hence could not file her application for review within the prescribed time. This was, according to Ms. Dorothea good cause for this court to exercise its discretionary powers and extend the requested time.

On his side Mr. Kija opposed the application arguing that according to Item 3 of Part III of the Schedule to the Law of Limitation Act, [Cap. 89 R. E. 2019] the time to file for review is limited to thirty (30) days. That since the impugned decision was delivered on 12th April, 2019 this application was supposed to be filed on 11th May, 2019. However, it was filed on 15th August, 2019 completely out of time; the Applicant delayed for 122 days. He was of the view that the Applicant failed to establish good reasons to convince this court to exercise its discretionary powers and extend the requested time. Moreover he contended that since the Applicant managed to file an application for execution of the court order for distribution of properties at Mkuyuni Primary Court, then she was able also to file for extension of time in this Court.

Moreover, Mr. Kija brought a new matter not born out in the counter affidavit that the Applicant has pegged her application on a wrong provision of the law. That she has used the Civil Procedure Code, [Cap. 33 R. E. 2019], hereafter referred to as the CPC, which is disapplied by

Section 2 thereof on matters originating from Primary courts. He was of the view that the CPC applies only to the High Court and the court of the resident magistrate and district courts. It was a grave error for the applicant to bring this application under this law. Those were the submissions by the counsels.

I have earnestly gone through the rival submissions by the counsels, the chamber summons, affidavit, counter affidavit and the records of this matter. I am of the view that the issue to be determined is whether the Applicant has established sufficient cause to enable this court exercise its discretionary powers to extend the time within which the Applicant to file a review. Ms. Dorothea argued that her client, the Applicant was unable to file the application for review within the time of thirty (30) days from the date of the judgment as provided by item 3 of Part III of the Schedule to the Law of Limitations Act, [Cap. 89 R. E. 2002] because she fell sick and got hospitalized at Salaaman Health Center immediately after delivery of the judgment on 12th April, 2019. She was suffering from PTB and Pneumonia for four months until on 15th July, 2019 when she was discharged but still was bed ridden at her home for further two months. Going through a discharge chit annexed to the affidavit under Paragraph 7 of the affidavit it is indicated that a female person known as Salma Athumani aged 24 years old was admitted at Salaaman Health Center from on 12th April, 2019 suffering from PTB and Pneumonia for four months until on 15th July, 2019 when she was discharged. Yet she was put under bed rest for further two months at her home. The chit is signed by one Dr. Sangawe. The Respondent did not contradict this fact. I have no doubt

with this annexure; I am convinced that the Applicant has made a case capable of moving this Court to exercise its discretionary powers to extend the time within which to appeal. It is clear to me that the Applicant was incapacitated by act of nature from fulfilling her legal obligations of filing her application for review in the prescribed time. The Applicant was admitted on the same day the judgement was delivered on 12th April, 2019 until 15th July, 2019 when she was discharge. After been discharged, she acted promptly by filing the instant application a month later on 15th August, 2019 while still under the two months bed rest of home treatment. Quick efforts by a party in pursuing his or her rights have been taken to account for delay therefore constituting good cause. In the case of **Mary Mchome Mbwambo and Another Versus Mbeya Cement Company Ltd** [2017] TSLR 277 the Court of Appeal of Tanzania found as a matter of facts that the sequence of efforts made by an applicant to pursue her right of appeal positively accounted for the delay as such she cannot be blamed for been an action or negligent.

This ground suffices to allow the application; however, in order to exercise the discretion of this Court I must have the correct avenue through which to act on. This brings me to the issue of law which Mr. Kija has raised in his submissions that the Applicant has pegged her application on a wrong provision of the law. That, she has used the Civil Procedure Code, [Cap. 33 R. E. 2019], hereafter referred to as the CPC, which is disapplied by Section 2 thereof on matters originating from Primary courts. He was of the view that the CPC applies only to the High Court and the court of the Resident Magistrate and District Courts save for Primary

Courts. It was a grave error for the applicant to bring this application under this law. This is an issue of law which sometimes is referred to as preliminary objection on point of law. It is trite law that such issues must be disposed. The Court of Appeal of Tanzania instructively aired this position of the law in the case of **Shahida Abdul Hassanali v. Mahed M.G. Karji**, Civil Application No. 42 of 1999 (CAT) inter alia that:-

*"The law is well established that a court seized with a preliminary objection is first required to determine that objection before going into the merits or the substance of the case or application before it. In **Bank of Tanzania Ltd vs. Devran P. Valambia** Civil Application No. 15 of 2002 (CAT) (unreported) the Court observed:*

"The aim of a preliminary objection is to save the time of the court and of the parties by not going into the merits of the application because there is a point of law that will dispose of the matter summarily."

Furthermore, given that one of the points raised in the preliminary objection concerned the court's jurisdiction, it was therefore even more imperative for it not only to be heard but also to be determined fully by the trial court before the continuation of the main suit... With respect, therefore, the failure by the learned Resident Magistrate with extended jurisdiction to deliver the ruling on the preliminary objection... constituted a colossal procedural flaw that went to the root of the trial. It matters not, whether it was inadvertent or not. The trial court was duty bound to dispose of it fully, by pronouncement of the ruling before dealing with the merits of the suit. This it did not do. The result is to render all subsequent proceedings a nullity."

As stated in the introduction of this ruling, this Court has been moved under Section 14(1) of the Law of Limitation Act, [Cap. 89 R. E. 2019] and Section 95 of the CPC, and any other enabling provision of law the law. Mr. Kija attacks the application for wrong citation of the law basing on section 95 of the CPC which is cited by the Applicant intending to invite this Court to use its inherent powers provided under that section to extend the time limit within which to apply for review. It is true that Section 2 disapplies the CPC in matters emanating from Primary Courts. However, the Applicant also cited Section 14(1) of the Law of Limitations Act, which empowers this Court to extend the time within which to file an application for review, it reads:

"14.Extension of period in certain cases

*(1)Notwithstanding the provisions of this Act, **the court may, for any reasonable or sufficient cause, extend the period of limitation for the institution of an appeal or an application, other than an application for the execution of a decree, and an application for such extension may be made either before or after the expiry of the period of limitation prescribed for such appeal or application.**" (emphasis added)*

Section 14(2) adds that the "the court" under section 14(1) means the court having jurisdiction to entertain the appeal or, as the case may be, the application. This Court has the power to entertain the application. Therefore the Applicant cited both correct and wrong provisions of law. My view is that an application cannot be rendered incompetent by mere citing both correct and wrong provisions of the law because the court can act on the correct provision and abandon the wrong one. In a legal dilemma

circumstances like this one the guidance is found in the case of **Dabenco Enterprises Ltd vs. Triact East Africa Ltd**, Miscellaneous Commercial Cause No. 11 of 2015 (unreported) where My Lord Mwambegele, J. (as he then was) held at page 8 that:

"At this juncture I pause to observe that there is a difference between citing and pegging an application on wrong provisions of the law, on the one hand, and citing an improper provision(s) of the law on the other hand in that in the latter, the improperly cited provision can be ignored and the court proceed to act on the proper one, whereas in the former the application is rendered incompetent."

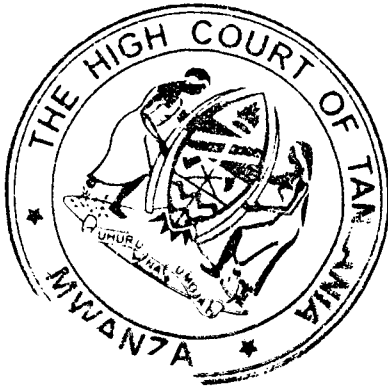
See also the case of **CRDB Bank PLC Versus Intersystem Holdings and Another**, Commercial case No. 107 of 2009 (unreported). Going by the decisions in the two cases above I am of the opinion that citation of section 14(1) of the Law of Limitations Act gives this Court jurisdiction to entertain the application. The irregularity raised by Mr. Kija is curable as it does not lead to any miscarriage of justice to the parties.


In the upshot and for the reasons stated above, I allow the application and grant the orders prayed in the Chamber Summons by extending the time within which to file application for review out of time. My understanding of the law is that a court cannot extend the time beyond or less than that prescribed by the law. The Court of Appeal said in the case of **Betty Mbapa Versus Dipak Vessa and Joseph Moshi**, Civil Appeal No. 48 of 2010 that:

"The High Court in our considered judgment, in granting an order extending the time within which to lodge the notice of appeal was bound by the express provisions of Rule 76 (2) of

the Rules. Although the order did not expressly set the time limit for doing so, the same was subject to the limit prescribed in sub-rule (2). Neither the High Court nor this Court for that matter, has jurisdiction to set a limit for the lodging of the notice of appeal beyond the prescribed period or in violation of the express provisions of the law."

The time limit provided in item 3 under Part III of the Schedule to the Law of Limitations, [Cap. 89 R. E. 2002] is thirty (30) days. In the premise, I hereby extend the time for thirty (30) days from the date of this ruling. I make no order as to costs. It is so ordered.




F. K. MANYANDA
JUDGE
19/05/2020