

**IN THE HIGH COURT OF TANZANIA**  
**IN THE DISTRICT REGISTRY**  
**AT MWANZA**  
**MISC. LAND APPLICATION No. 109 OF 2020**

**APOLONIA KANOME.....APPLICANT**

**VERSUS**

**NESTORY MPONDA .....RESPONDENT**

**RULING**

22<sup>nd</sup> March & 25<sup>th</sup> May, 2021

**TIGANGA, J.**

Under section 5 (1) (c) and 11 (1) of the Appellate Jurisdiction Act [Cap 141 R. E 2019] GN No. 344 of 26/04/2019, Rule 45 and 47 of the Court of Appeal Rules and section 80(4) of the Law of Marriage Act [Cap 29 R. E. 2019], this court has been moved by the applicant, Apolonia Kanome, to give the following orders;

- i. To grant an extension of time for the applicant to file a Notice of Appeal to the Court of Appeal of Tanzania out of time,
- ii. To extend time within which the applicant to file an application for a certificate that points of law and facts are involved in this appeal,



iii. The costs of this application be in the cause.

That application was filed by a chamber summons which was supported by the affidavit sworn by the applicant.

In the supporting affidavit, both, the background information of the dispute between the parties and the reasons for this application were put to light. A brief background is that, parties to this case were wife and husband respectively, but in the year 2017, their marriage could no longer hold them together. Following that state of affairs, Matrimonial Cause No. 9/2017 was filed with the Mwanza Urban Primary Court, which its decision was appealed against in Matrimonial Appeal No. 30/2019 of Nyamagana District Court.

The decision made by the District Court also aggrieved the applicant, who appealed to the High Court via PC Matrimonial Appeal No. 11/2020, which appeal was partly allowed, at the same time sustaining some of the orders passed by the courts below.

That also aggrieved the applicant, she intends to appeal to the Court of Appeal of Tanzania, but before she so appeals or commences the appeal process, she realised that she was late, that is why she filed this





application to have time extended for her to file a notice and an application for certification of the point of law. She is now moving this court to seek the above listed orders to be able to appeal.

The reasons for delay as articulated in the affidavit filed in support of the application, are that, soon after delivery of the judgment in PC Matrimonial Appeal No. 11/2020, on 24/07/2020, her advocate asked for certified copies of the judgment, proceedings and decree in appeal, but the said copies could not be supplied in time, up to 20/08/2020 when she was supplied with a typed copy of the judgment only. That according to her, prevented her to file a Notice of Appeal and the application for certificate of point of law within time as she had no such prerequisite documents. According to her therefore, the delay was not because of negligence but it was because he was not given necessary documents.

The application was countered by the counter affidavit sworn and filed by the respondent who deposed that, at first the applicant was not aggrieved by the decision in PC Matrimonial Appeal No. 11/2020, her grievance was specked by the respondent's application for execution, therefore, this application is an afterthought.

Further to that, he also deposed that, even after the applicant had received a copy of judgment on 20/08/2020, yet still she did not take any immediate action as she stayed with the documents for almost 36 days without taking any necessary steps, until on 25/09/2020 when she filed this application. Therefore, in his considered view, the application was filed with intention of delaying justice.

Further to that, he deposed that the copy of judgment is not necessary in filing the Notice of Appeal, but no reasons as to why the notice was not lodged. He stated that even in the application and its supporting affidavit, there is no sufficient reason given to warrant for extension of time.

The reply to the counter affidavit filed by the applicant, she deposed that, the judgment was delivered over the phone through which the audience was not properly achieved, therefore it was not easy to grasp the contents of the judgment, it was until when a copy of the judgment was supplied.

When the said the application was filed on 15/09/2020 but the same was not processed on that day, it was returned to be filed through online





system, but yet still it was mistakenly returned by the Deputy Registrar without notification online, until on 25/09/2020 when the Deputy Registrar confirmed to have re admitted the application. Hence the delay is of five days due to court process, which is not a mere negligence on the part of the applicant.

He said the allegations that the copy of judgment is not necessary in filing the Notice of Appeal is a misconception as the principle governing application for certification on point of law is clear. According to the applicant, the appeal process was initiated by filing a letter dated on 27/07/2020, which was filed seven days after the delivery of judgment which letter was asking for copies of judgment and proceedings. In the end, it was deposed that the appellant advanced strong reasons to entitle her such extension.

With leave of the court, the application was argued by way of written submissions, where as Mr. Stephen Kaijage represented the applicant, while the respondent submitted in person. In support of the application Mr. Kaijage submitted that, this court has powers and discretion to extend time, he cited the case **Kalunga & Company Advocates vs National Bank of Commerce Limited** [2006] TLR 235. Where it was held that

under Rule 8 of the Court of Appeal Rules, the Court has a wide discretion to extend the time where the time has already expired.

He submitted that the decision passed by the trial court had some illegality which needs to be rectified by the Court of Appeal. He submitted further that, the authority in the case **Nazar M.H. vs Gulamali Fazar Janm Mohamed**, (1980) T.L.R. 29 which cited with approval the case of **Sikuzani Said Magambo & Another vs Mohamed Roble**, Civil Appeal No. 197/2018 CAT at Dodoma (unreported) providing for procedures for visiting the locus in quo. He prayed that court did not observe the procedures of visiting the locus in quo. That said, the counsel for the applicant asked the application to be granted.

In his reply, the respondent submitted that the applicant has totally failed to account on each day of delay in her affidavit as the length of delay is excessive. He submitted further that, the judgment in PC - Matrimonial Appeal No. 11/2020 was delivered on 21/07/2020 in the presence of both parties including the applicant's counsel; therefore they were aware of the content of the judgment.





It has also been admitted that, the lawyer collected the copy of the judgment on 20/08/2020, but stayed for 36 days without taking necessary steps to pursue her purported appeal until 25/09/2020 when she filed this application.

He further more submitted that, even if counting with effect from when a copy of the judgment was collected yet the applicant delayed for almost 36 days which have not been accounted. Supporting his stance, he relied on the case of **A-One Products & Brother vs Abdallah Almas and 25 others**, Civil Application No. 586/18 of 2017, in which the Court of Appeal dismissed the application for failure by the applicant to account for 12 days delayed, while insisting that the delay of even a single day should be accounted.

He submitted that the allegations that the Deputy Registrar attributed on the delay has not been proved, as no date is said on which the documents were returned. He said the days are not accounted.

Further to that he submitted that, the applicant had no intention of filing the Notice of Appeal and an application for certification of point of



law. That intention to appeal was activated by the execution process commenced by the respondent.

Regarding the point of illegalities, he submitted that, there is no point of law raised to warrant for extension of time. He submitted asking the court that the application at hand be dismissed with costs. He cited the case of **Zaina Salum vs Michael Masanya Kimaro**, Misc Civil Application No. 685 of 2018, in which it was held that, the applicant did not indicate the point of law which he would rely on before the Court of Appeal.

Further more, he reminded the court that, it is not every illegality is considered to be the ground for extension of time, but it must be of sufficient importance and must be apparent on the face of the record. He submitted that the case of **Ngao Godwin Losero vs Julius Mwarabu**, Civil Application No. 10 of 2015, requires so. In the end he prayed for the application at hand to be dismissed for lack of merits.

In rejoinder submission, the applicant submitted that, the point of law needs to be included in the application for extension of time but in the



application for leave as per section 80 (4) of the Law of Marriage Act [Cap 29 R. E 2019].

He cited the evidence of Medard and Mama Mariam Yahaya, who testified at the locus but their evidence did not follow the procedure in the case of **Sikuzani Said Magambo and Another vs Mohamed Robel** (supra). Regarding the issue of illegalities, he insisted on the stand in the case of **Kalunga & Company Advocate's case** (supra) he prayed the prayers in the chamber summons to be allowed.

That marked the summary of the records, the application and counter affidavit as well as the submission filed in support and against the application at hand. From the provision upon which the application has been made, this court has powers to extend time to file the Notice of Appeal and an application for leave to appeal or certification of the point of law. That power is exercisable upon the applicant advancing good cause for his delay.

Generally speaking, the area of extension of time is not a virgin ground, as there are a lot of decisions by the High Court and the Court of Appeal regarding the criteria to be followed.



In the case of **Eliakim Swai and Frank Swai vs Thobias Karawa Shoo**, Civil Application No. 02/2016 - CAT - Arusha, in which it was held *inter alia* that;

*"Extension of time may only be granted upon the applicant showing good cause of delay. It is trite law that such decision is entirely in the discretion of the court to grant or refuse it. It is also trite that such discretion is judicial and so it has to be exercised according to the rules of reason and justice and not according to private opinion, whimsical, inclinations or arbitrarily"*

Also see **Yusuph Same & Another vs Hadija Yusuph**, Civil Appeal No. 01/2002 and **Lyamuya Constructing Company Ltd vs The Board of Registered Trustee of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010, (unreported)

In **Lyamuya Construction Company Limited's** case (supra) the following principle were formulated in considering what is referred to as good caused.

- a) The application must account all days of delay,*
- b) The delay should not be in ordinate,*





- c) The applicant must show diligence and not apathy, negligence or sloppiness in prosecuting the action that he intends to take,*
- d) If the court feels that there are other reasons such as the existence of a point of law of sufficient importance such as illegality of the decision sought to be challenged.*

Looking at the principle and guideline hereinabove, the issue is whether the applicant has accounted all the days of delay. As properly submitted by the parties that the judgment of PC, Matrimonial Appeal No. 11 of 2020, was delivered on 21/07/2020 and the application was filed on 25/09/2020, the affidavit filed in support of the application relied on the failure to supply the copies of judgment and proceedings in time as the main reason as to why the applicant failed to file the Notice of Appeal in time. The copy was supplied on 20/08/2020, almost one month from the date of delivery of the judgment.

From the practice, it is a common ground that a person aggrieved by the decision of the subordinate Court must as soon as practicable after the judgment, lodge the Notice of his intention to appeal. That notice notifies the court and the opposite party of such intention, therefore a party intending to appeal needs no copy of judgment, decree or proceedings for him to file a Notice of intention to appeal.



This means the applicant had no excuse of why she failed to lodge the notice of her intention to appeal. She cannot take hide on the late supply of the copies of judgment, decree and proceedings.

That being the case, there is therefore no good cause as to why she failed to lodge the Notice of Appeal in time. She failed to account for the days delayed as she had no reason as to why she failed to do so in time.

In as far as I agree, the illegality to be good ground, I entirely agree with the counsel for the respondent that not every allegation of illegality may constitute good cause for delay, it must be a point of law of sufficient importance, and it must be apparent on the face of the record for the same to entitle the person relying on it for extension of time. That being the case, in this case, the issue is whether, the point raised as a point of law is of sufficient importance and can be apparently seen.

It is also trite, that all grounds to be relied upon for extension of time must be put forth in the affidavit filed in support of the application, in this application however, the affidavit filed in support of the application indicates nothing on illegality of the decision intended to be challenged. It has not been deposed as well in the reply to the counter affidavit, it was





introduced for the first time in the submission. It is the law as indicated case of **The Registered Trustees of the Archdiocese of Dar es salaam vs The Chairman Bunju Village Government and four Others**, Civil Appeal No. 147 of 2016 (unreported) where it was held that submission are not evidence, that for an issue to be with evidential value, it must be pleaded and deposed in the affidavit.

That said, I find the application to have no merit, the applicant has failed to account all delayed days, and has also failed to show any point of law of sufficient importance which is apparent on the record for him to be entitled for extension of time to file a Notice of appeal and application for certification of the point of law. The application therefore fails, now given the consanguinity nature of the parties, (divorcees), no order as to costs is made. It is so ordered.

**DATED** at **MWANZA**, this 25<sup>th</sup> day May 2021



**J. C. Tiganga**

**Judge**

**25/05/2021**

Judgment delivered in open chambers in the presence of the respondent in person (online through audio conference) but in the absence online of the applicant and her advocate. Right of appeal explained and guaranteed.



**J. C. TIGANGA**

**JUDGE**

**25/05/2021**

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