

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF SONGEA

AT SONGEA

MISCELENEOUS MATRIMONIAL APPLICATION NO.13 OF 2020

**(Arising from Matrimonial Revision No. 01 of 2015 at District Court of
Songea at Songea)**

AMIRI ALLY HANYA..... APPLICANT

Versus

BAHATI MUSTAFA RESPONDENT

RULING

Date of Last Order: 29/07/2021.

Date of Judgment: 17/08/2021.

BEFORE: S.C. MOSHI, J.

The applicant has filed this application seeking leave of the court to file an appeal out of time against the decision of the District Court of Songea in Matrimonial Revision No. 1 of 2015. The application is made under section 25(1)(b) of Magistrate Courts' Act, Cap. 11 R. E 2019. The application is supported by an affidavit deposed by Amiri Ally Hanya (the applicant). The respondent resisted the application.

The application was disposed of by way of written submissions. The applicant was represented by Mr. Dickson Ndunguru, learned advocate whereas the respondent was represented by Mr. Zuberi Maulid, advocate.

Mr. Ndunguru submitted among other things that the application was made by the respondent in the District Court by an oral complaint, the court called the file and made a decision altering the right of the

Mwalukasa, Civil Application No. 589/12 of 2018 (Unreported). He said that the applicant herein was negligent in pursuing his appeal within time, he now seeks extension of time on other ground, he purports that there were irregularities on decision which he intends to challenge. He said that not each claim of illegality constitutes sufficient reason for extension of time, it can only be granted upon being satisfied that there were illegalities which must be apparent on the face of the record not those that would be discovered by a long drawn argument or process but the applicant herein failed to establish such illegalities.

He argued that the alleged irregularities which the applicant herein pointed out in his submission do not amount to irregularities because the District Court acted within its power conferred under section 22(1) of the Magistrates' Courts Act, Cap. 11 R.E 2019 of which the court suo motto examined the proceedings of the trial court, for the purposes of satisfying itself as to the correctness, legality or propriety and further went on to revise such proceedings.

On the aspect of the right to be heard enshrined under article 13(6) (a) of the Constitution of the United Republic of Tanzania, he said that the right to be heard is fundamental one that must be complied with in administration of justice but this right does not circumvent the power of the District court to call suo motto and revise the proceedings of the

primary court as it did where it appears necessary to do so. He said that the court did correctly decide the matter before it after pointing out the illegalities in the decision of the trial court, and then went on to correct the same as it did; and that, the said conflicting decision has nothing to do with this case.

Finally, he said that, powers of this court as vested under section 25(1) (b) of the Magistrate Courts Act, Cap. 11 R.E 2019 is to be exercised judiciously upon demonstration of sufficient cause, but in the case at hand the applicant has miserably failed to demonstrate sufficient cause to warrant extension of time. He prayed the court to dismiss the application with costs.

The issue to be determined is whether the applicant has advanced good cause for this court to extend time for filing his appeal out of time prescribed by the law. The law gives power to the court to extend time to file an appeal out of time prescribed by the law upon showing good cause for not doing such act within the prescribed time. Factors to be taken into account in determining whether or not to exercise the court's discretion have been outlined in various decisions of the court of appeal and this court. Admittedly, such factors are not necessarily exhaustive but at the moment, they may include, cause of the delay, lengthy of the delay, whether or not the applicant has accounted for the delay and degree of

prejudice to the respondent and whether there is an illegality or any issue of law of sufficient public importance in the decision sought to be challenged. See the case of **Azizi Mohamedi vs. R**, Criminal Appeal No. 84/07 of 2019, Court of Appeal sitting at Mtwara (Unreported) and **Lyamuya Construction Co. Ltd vs. Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported).

Now, reverting back to the case at hand; the applicant's reasons for delay are as shown in the affidavit paragraphs five, six and eight as well as in his advocates submission; in his affidavit the applicant averred that,

5. That, the decision had been tainted with a lot of illegalities as I was not afforded with time of being heard and no summons was issued to me.

6. That, the court proceed to award the house to the respondent instead of quashing the decision of the trial court which it stated it as conflicting decisions.

8. That, for the interest of justice this application be granted otherwise the applicant will be condemned unheard.

The reason for seeking extension of time grasped from the above paragraphs is illegality. The legal position is settled, when there is an allegation of illegality, it is important to give an opportunity to the party making such allegation to have the issue considered. In the case of **The**

Principal Secretary Ministry of Defence and National Service vs.

Devram Valambia (1992) TLR 182 it was stated thus: -

"In our view when the point at issue is one alleging illegality of the decision being challenged, the court has a duty, even if it means extending the time for the purpose to ascertain the point and if the alleged illegality be established, to take appropriate measures to put the matter and the record right."

This position was reiterated in the case of **VIP Engineering and Marketing Limited vs. Citibank Tanzania Limited**, Consolidated Civil References No. 6,7 and 8 of 2006 (Unreported) thus: -

"We have already accepted it as established law in this country that where the point of law is at issue is the illegality or otherwise of the decision being challenged, that by itself constitutes sufficient reasons...."

In this case the applicant has complained of breach of fundamental right, that is a right to be heard. This allegation questions the legality of court's decision.

In view of the fact that there is an alleged illegality, I find it appropriate under the circumstances to allow the application that the issue may be considered.

In the result the application is hereby granted. The applicant should file the intended appeal within fourteen days from the date of this ruling. I make no order as to costs taking into account the relationship of the parties, were husband and wife.

It is so ordered.

Right of Appeal Explained.




S.C. MOSHI

JUDGE

17/8/2021