IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF ARUSHA)

AT ARUSHA

PC. CIVIL APPEAL NO. 8 OF 2019

(Arising from the judgment of the District Court of Arusha in Civil Appeal No. 28 of 2018 *originating from the decision of the Arusha Urban Primary Court in Application/Matrimonial* Cause No. 137 of 2010)

NEEMA YOHANA KILEVO.....APPELLANT

VERSUS

ERNEST FLAVIAN MUSHI ..... RESPONDENT

JUDGMENT OF THE COURT

28/07/2021 & 30/09/2021

GWAE, J

The appellant and respondent named herein were wife and husband respectively. Their marriage was contracted on the 23rd day of December 1995. The respondent on the 5th October 2010 referred the Matrimonial Cause to the Urban Primary Court-Arusha (Trial court) for only prayer for divorce. The matter was however heard and determined ex-parte and was decided in the respondent's favour. The decision of the trial court was delivered on the 3rd January 2011 despite the efforts by **Mr. Siay**, the learned advocate to have the matter transferred to District Court.

On the 19th September 2012, the appellant wrote a letter in form of an application for setting aside the trial ex-parte judgment so that issues on division matrimonial assets and maintenance of children and the respondent made a reply through his letter dated 26th October 2012 contesting the appellant's application. The parties were eventually heard and the appellant's application to set aside was allowed on the 20th December 2012.

Aggrieved by the trial court's decision, the respondent unsuccessfully appealed to the District Court of Arusha at Arusha (1st appellate court). The 1st appellate court found that it was a misdirection on the part of the trial court to grant the application for setting aside ex-parte judgment since the same was extremely filed out of time contravening provisions of the Law of Limitation Act, Cap 89 Revised Edition, 2002. The appellate court's decision was delivered on the 15th August 2013.

Seemingly, the appellant did not take any action till February 2018 when she filed an application in the trial court for extension of time within which to set aside the exparte judgment pronounced in the year 2011. The trial court through its decision dated 15th May 2018 refused the appellant's prayer of enlargement of time on the ground that she had not given sufficient cause for the delay of five (5) years since her appeal was dismissed by the District Court. Aggrieved by the trial court's decision refusing to extend time, the appellant unsuccessfully appealed to the 1st appellate court vide Civil Appeal No. 28 of

2018, the parties were heard and the decision was delivered on the 23rd January 2019.

Still unpleased, the appellant knocked the doors of this court and duly filed her appeal on the 7th February 2019. Before the court, she is armed with three grounds of appeal, namely;

1. That, the 1st appellate court erred in law by holding that the matter between the parties was not reconciled which amounts to illegality and therefore capable of extending time to set aside ex-parte judgment.
2. That, the 1st appellate court erred in law by holding that there was lapse of time since the trial court decision was delivered without regard to the fact that the appellant was seriously litigating in courts of law
3. That, the 1st appellate court erred in law when it dismissed the appellant's appeal by holding that, the appeal was without substance

When the matter was called on before me, the appellant appeared in person, unrepresented whilst the respondent was represented by Mr. John Shirima, the learned counsel. With the parties' consensus, this appeal was

argued by way of written submission. I shall consider the parties' written submissions while determining the appellant's grounds of appeal herein above.

> As to the 1st ground of appeal which reads; **that, the 1st appellate court erred in law by holding that the matter between the parties was not reconciled which amounts to illegality and therefore capable of extending time to set aside ex-parte judgment.**

I am not unsound of the principle that, courts are empowered to grant extension of time where issue of illegalities is raised and noted on the face of the decisions or proceedings. The appellant is complaining that the matter, the marriage dispute was not reconciled by any conciliatory Board. Hence, non-compliance with the requirement of the law which goes to the issue of jurisdiction of the trial court (section 101 of the Law of Marriage Act, CAP 29 R.E, 2019. The Court of Appeal of Tanzania sitting at Mtwara in **Hassani Ally Sandali v. Asha Ally**, Civil Appeal No. 246 of 2019 (unreported) correctly held that in the absence of a valid certificate from the Conciliatory Board, any proceedings conducted in respect of matrimonial proceedings in any court were said to be nothing but a nullity (See also the case of **Shillo Mzee v. Fatuma Ahmed** (1984) TLR 112). But as was rightly found by the 1st appellate court that there are exceptions where the courts may be entitled to dispense with such legal requirement as was correctly held in **Halima Ahuma v. Maulid**

Hamis (1991) TLR 179, a precedent cited by the appellant's counsel, where this court at Dodoma (**late Mwalusanya, J**) had these to say;

> "The mere fact that the Board that reconciled the parties was not a Moslem Conciliatory Board did not render the reconciliation a nullity; (ii) under section 101 (f) of the Law of Marriage Act the court may dispense with reference to a Marriage Conciliatory Board if it is satisfied that there are extraordinary circumstances which make reference to the Board impracticable; the appellant had succeeded to prove that the marriage was broken down beyond repair".

The same position was stressed the decision of this court **(Lugakingira,** J as he then was**) in Mariam Tumbo v. Tarold Tumbo** (1983) TLR 293) where conduct or departure from normal standards of conjugal kindness causes injuries or an apprehension of it or cruelty or desertion were found to be factors for grant of divorce. In the two precedents aforementioned, the emphasis of the court being that; the court must be satisfied that there were extraordinary circumstances that made the statutory reference impossible to pursue.

In our present matter, it is evident from the trial court's record that there was a reconciliation of the parties' marriage by a Christian Conciliatory Board-Holy Family Parish Catholic Archdiocese of Arusha through its reference letter dated 29th September 2010 which was addressed to the trial court. Despite the fact that the respondent's advocate skipped responding to the first

ground yet as was correctly observed by the 1st appellate court that there was reconciliation by church which found the marriage was no further reconcilable.

I am further of the view, that if it were true that the parties' marriage was not reconciled, yet considering the length of period since the divorce was granted that is to say from 2011 till to date, issue of reconciliation of the parties' marriage is rendered fruitless since the marriage between the parties, in ordinary sense, must have been irreparably broken down. The 1st ground of appeal is therefore dismissed for lack of merit.

> As to the 2nd ground**; that, the 1st appellate court erred in law by holding that there was lapse of time since the trial court decision was delivered without regard to the fact that the appellant was seriously litigating in courts of law".**

As rightly raised by the appellant nonetheless not argued that is, time during bonafide continuous litigation in courts is always excluded in computation of days of delay as was precisely stated by the Court of Appeal in **Citibank Tanzania Limited vs. TTCL and 4 others,** Civil Application No. 97 of 2003 (Unreported), where it was stated and I quote:

> "The delay was not deliberate as urged by the counsel the time taken during pendency of Civil Application NO. 64 OF 2003 until it was struck out".

However, in our present matter the appellant had never stated where she was after 2013 till 2018 or whether there was any case between them relating the same matter pending in any court of law including this court or Court of Appeal. If the appellant had referred an application for extension of time immediately or promptly after delivery of the 1st appellate court's decision dated 15th August 2013, her previous wrong litigation would have been excluded. As of now, the appellant did not tell the trial court what transpired after decision of the District Court allowing the respondent's appeal on the ground that, her application for setting aside ex-parte judgment was extremely time barred. This ground is also found to be unsubstantiated.

> In the 3rd ground; **that, the 1st appellate court erred in law when it dismissed the appellant's appeal by holding that, the appeal was without substance**

In this ground of appeal, the appellant argued that, the trial court erred in law by dismissing the appellant's application without regard to the fact that there was no proof of service to the appellant. Whereas the respondent's attacked this argument on the ground that, it is new ground of appeal. I entirely agree with the learned counsel for the respondent that, it is wrong for the appellant to raise new ground of appeal at appeal while the same was not argued during hearing by the trial. This position of the law prohibiting introduction of new ground of appeal or dealing with matter not pleaded or

raised in the trial court was emphasized in the case of **Hotel Travertine Ltd and 2 others vs. NBC** (2006) TLR 133.

Nevertheless, if I were to consider the appellant's assertion that she was not duly served yet I would not decide in her favour for reason that, it was the appellant who said that she defaulted appearance due to her sickness as vividly depicted by her application and oral argument in respect of her application to set aside exparte judgment ("Tarehe 25/10/2010 kwa madai ya talaka ya kisheria sikuweza kufika tarehe tajwa hapo juu kwani nilikuwa mgonjwa ila niliwatuma Bwana Mosses Ritoine NA Bibi Mary Yohana").

As earlier explained in the 2nd ground of appeal, the appellant's application for extension of time was not substantiated as no reason or good cause was given for the delay of five (5) years to file an application for extension of time, subject of this appeal. The delay is so inordinate to the effect that, this court cannot be justified to hold different view from the courts below. Though grant or refusal to grant an application for extension is subject to court's discretion but such discretion should be judiciously exercised by adhering to the established principles. I would wholly subscribe my holding to the case of **Benedict Mumello vs. Bank of Tanzania,** Civil Appeal No. 12 of 2002 (Unreported-CAT at DSM) it was stated that:

> "An application for extension of time is entirely in the discretion of the court and that extension of time

may only be granted where it has been sufficiently established that the delay was with sufficient cause."

In our instant matter, it is evident that the appellant's delay is quite inordinate and pertaining with no reason at all which envisages that, the appellant's inaction for **five (5)** years constitutes negligence or sloppiness in the prosecution of the intended action that she intends to take. Equally, the 3rd ground is of no worth.

For the foregoing reasons, this appeal is therefore dismissed with no order as to costs.

It is so ordered.

M. R. GWAE,
JUDGE
30/09/2021

Right of appeal fully explained

M. R. GWAE,
JUDGE
30/09/2021