

**IN THE UNITED REPUBLIC OF TANZANIA**  
**THE HIGH COURT OF TANZANIA**  
**DAR ES SALAAM DISTRICT REGISTRY**  
**AT DAR ES SALAAM**

**MISC. CIVIL APPLICATION NO. 313 OF 2021**

*(Arising from Civil Appeal No. 131 of 2018 and originating from Matrimonial Cause  
No. 19 of 2017 of Kinondoni District Court)*

**ALLY MOHAMED NYONI..... APPLICANT**

**VERSUS**

**NJUMA SELEMANI..... RESPONDENT**

10<sup>th</sup> November, 2021 – 17<sup>th</sup> December, 2021

**RULING**

**N.R. MWASEBA, J.**

This is a ruling on an application for extension of time within which the applicant may apply for leave to appeal to the Court of Appeal of Tanzania against the judgment and decree of the court dated 28<sup>th</sup> February, 2020 in Civil Case No. 131 of 2018 before Hon. Mgonya, J.

The application is made under section 11(1) of the Appellate Jurisdiction Act, Cap 141, R.E 2019 and is supported by the affidavit of ALLY

MOHAMED NYONI. On 4<sup>th</sup> October, 2021 the learned counsel for the applicant, one Erick Simon prayed for the matter to be disposed of by way of written submission the prayer which was agreed by the learned counsel representing the respondent, Ms Mosana Elias and I am grateful they both filed their respective submissions timely.

Submitting in chief, the applicant prayed to adopt the content of the affidavit to form part of the submission and on the course of hearing this application the respondent filled a counter affidavit which is incurably defective to the extent that it cannot be relied by the court. The deponent of the affidavit is **Njuma Selemani** as indicated on the first page of counter affidavit, but the person signed and appeared before the commissioner for oath is **Rahma Mohamed Kombo as** per jurat of attestation which is contrary to the law as one can not swear or affirm on behalf of another person.

The applicant further stated that, if the application for extension of time to apply for the leave to appeal is granted, it will allow the applicant to move the Court of Appeal of Tanzania to intervene the way matrimonial properties were divided without considering the extent of contribution in terms of percentage made by each party as stated by paragraph 12 and

13 of the affidavit in support of the application,, as one of the grounds to appeal before this court is failure of the trial court to apply the applicable principles in dividing the matrimonial assets which is extent of contribution made by each party in acquiring the said assets. The applicant further stated that, the court committed illegality by affirming the decision of the trial court without critically assessing the contribution made by each side as required by law, and cited the case of **Marry Michael Masenge and & 7 others v Kandida Michael Masenge, Misc. Civil Application No. 540 of 2018 (unreported)**.

It is settled principal that, when the claim against the decision to be challenged relates to illegality, the court has the duty to grant extension of time and cited the case of **Selina Chibango v Finihas Chibango, Civil Application No. 182 "A" of 2007 (unreported)** hence the court of appeal will have opportunity to decide on the issue of illegality pointed out.

Lastly, the applicant stated that the delay is not inordinate, and he is a public servant residing in Mbeya. He further stated that he managed to get a copy sometimes in May, 2021 and upon reading it he had to seek

advice from his current advocate on 26<sup>th</sup> June 2021, and on 29<sup>th</sup> June 2021 this application was filed. Therefore, the delay is not ordinate.

Replying to the submission, the respondent stated that, the law does not prohibit an advocate to swear counter affidavit on facts that are within the advocate's knowledge to prove information gathered from the respondent which the advocate believes to be true. The fact that the name of the respondent appeared on the first page of the counter affidavit is a slip of the pen and mere error that can be remedied by the *Oxygen Principle* and invite the court to invoke the overriding principles introduced under **section 3A and 3B of the Appellate Jurisdiction Act, Cap 141, R.E 2019.**

Furthermore, the respondent stated that, the reasons for delay stated under paragraph 8 and 9 on the affidavit are due to applicant's negligence, lack of diligence and ignorance of the law which all together cannot surmount to sufficient cause to grant extension of time to file notice of appeal. The judgment was delivered on 28<sup>th</sup> February, 2020 and this application was filed in July 2021 after one year and seven months contrary to rule 45(a) of the Tanzania Court of Appeal Rules, Cap 141, and R.E 2019. The applicant on his submission on paragraph 9

of the affidavit stated that he had difficult communicating with his previous advocate and he got a copy of judgment in May, 2021. The applicant has not attached any proof showing when he was supplied with the copy of the judgment.

Lastly, the respondent stated that, the applicant has failed to account for the period when the judgment was delivered on 28<sup>th</sup> February, 2020 until when he alleges to have read the judgment. He has not accounted for the whole period of May until 26<sup>th</sup> June 2021 when he decided to consult a lawyer. Furthermore, the alleged illegality claimed by the appellant is not apparent on the face of record thus the application should be dismissed.

Rejoining the application, the applicant stated that the argument of the slip of the pen is uncalled and an afterthought and reiterated what he stated on his submission in chief of which I don't intend to reproduce.

Two points for determination have been raised in the case at hand concerning the validity of counter affidavit and as to whether sufficient reasons have been adduced to. In the case of **Abdul Issa Bano v Mauro Daolio, Civil Application No 563/02 of 2017, Court of**

**Appeal of Tanzania at Arusha** defined Affidavit of which I tend to adopt:

*"According to **Oxford Dictionary of Law Seventh Edition at page 23**, an affidavit is defined as, A sworn written statement of evidence used mainly to support certain applications and, in some circumstances, as evidence in court proceedings. The person who makes the affidavit must swear or affirm that the contents are true before a person authorized to take oaths in respect of the particular kind of affidavit."*

By virtue of that definition, it is clear that, affidavit is a written statement confirmed by oath or affirmation and it is used as a substitute of oral evidence, same as the counter affidavit which is also a written statement, confirmed by oath or affirmation and it is used as a substitute of oral evidence and mostly used to oppose what has been stated on the affidavit. The case of **Abdul Issa Bano v Mauro Daolio** (*supra*) also provided four ingredients of affidavit:

*"The essential ingredients of a valid affidavit are; **one**, the statement or declaration of facts, by the deponent;*



*two, a verification clause; three, a jurat; four, the signatures of the deponent and the person who in law is authorised either to administer the oath or to accept the affirmation. (See also the case of **DIRECTOR OF PUBLIC PROSECUTIONS, DODOLI KAPUFI & ANOTHER**, Criminal Application No. 11 of 2008, CAT (unreported)."*

In the instant case, the respondent did not dispute on the defect found on the counter affidavit. It is clearly seen that, the one who declared facts is **Njuma Selemani** but the person who signed is **Rahma Mohamed Kombo** thus, criteria stated in **Abdul Issa Bano's case**, have not been complied with. The respondent termed it as *a slip of a pen* and forgot to edit the name and he argued that an advocate is allowed to sign on behalf of his client. I would like to go straight to the case of **Lalago Cotton Ginnery and Oil Mills Company Limited v The Loans and Advances Realization Trust, Civil Application No. 80 of 2002, Court of Appeal of Tanzania at Dar es Salaam**, in this case it was held that:

*"...an advocate can swear and file an affidavit in proceedings which he appears for his client, but on*

*matters which are in advocate's personal knowledge only."*

The case also stated that:

*"On information supplied would still be defective on verification because one is not conversant it is believed to be true on what he was told by him. Therefore it becomes hearsay."*

Thus, in the counter affidavit, the counsel, one **Rahma Mohamed Kombo** was supplied with some information which she was not conversant with but it was believed to be true; thus it amounts to a hearsay.

Regarding the issue of extension of time, as a matter of general principle that whether to grant or refuse an application for the extension of time is entirely in the discretion of the court. But that discretion is judicial, so it must be exercised according to the rules of reason and justice. The main reasons adduced by the applicant is that, there was some miscommunication with his advocate who is based in Dar es Salaam as he resides in Mbeya (***as per paragraph 9 of the affidavit***) and there is a point of illegality (***as per paragraph 14 of affidavit***)

The guidelines for granting extension of time were laid down in **Lyamuya Construction Company Ltd v Board of Registered**



**Trustees of Young Women's Christian Association of Tanzania, Civil Application No. 2 of 2010 (unreported).** In this case, the court reiterated the following guidelines for the grant of extension of time:

*"(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 that 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 the illegality of the decision sought to be challenged."*

In the case at hand, the judgment was delivered on **28<sup>th</sup> February, 2020 (as per annexure C, attached in the affidavit)** and the applicant by virtue of **paragraph 9** of the affidavit stated that he managed to get a copy of the judgment sometimes in **May 2021**. No any effort was shown by the applicant as trying to obtain the copy of the judgment or trying to communicate with his advocate on the status of the case for the period of one year and three months. Worse enough, the applicant has not accounted for each day of delay from **May, 2021**

after claiming to obtain the copy of the judgment to **2<sup>nd</sup> July ,2021** the day of lodging this application, as it is evidently shown by **Exchequer Receipts No. EC100961396342IP.**

By virtue of **rule 45(a) of the Tanzania Court of Appeal Rules, Cap 141, R.E 2019** a person is supposed to apply for the leave within 30 days after the judgment, I quote for easy reference:

*"...where an appeal lies with the leave of the High Court, application for leave may be made informally, when the decision against which it is desired to appeal is given, or by chamber summons according to the practice of the High Court, within thirty days of the decision..."*

In the present case the applicant failed to provide proof as to when exactly he obtained the copy of the judgment and used the term **"sometimes in May, 2021"** and even failed to adduce the evidence the effort used to communicate with his previous advocate.

In the case of **Selemani Kasembe Tambala v The Commissioner General of Prisons & 2 Others, Civil Application No. 383/01 of 2020, Court of Appeal of Tanzania at Dar es Salaam** held that:

*"It is settled law that a party applying for extension of time has to account for every day of delay. (See **Yazid Kassim Mbakileki v. CRDB (1996) TLD Bukoba Branch & Another**, Civil Application No. 412/04 of 2018; **Joseph Paul Kyanka Njau & Another v. Emmanuel Paul Kyanka Njau & Another**, Civil Application No. 7/05 of 2016 (All unreported)) to mention but a few."*

Therefore, despite the fact that the counter affidavit was defective, the principles of granting extension of time still stand and I find that no sufficient reasons have been adduced to account for the delay to move this court to extend time. Therefore, I hereby dismiss the application with no order as to costs.

It is so ordered.

**DATED at DAR ES SALAAM This 17<sup>th</sup> Day of December, 2021.**



*N. R. Mwaseba*  
**Hon. N. R. MWASEBA**

**JUDGE**

**17<sup>th</sup> December, 2021**