

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

MISC CIVIL APPLICATION No. 37 OF 2022

(C/f Matrimonial Cause No. 28 of 2019 at the Resident Magistrate's of Arusha at Arusha)

CAREN STEVEN..... APPLICANT

VERSUS

STEVEN BARNOT.....RESPONDENT

RULING

Date of last order:6-7-2022

Date of Ruling:27-7-2022

B.K.PHILLIP,J

The applicant herein lodged this application 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 2019], praying for the following orders;

- i. That, this Honourable Court be pleased to grant an order for extension of time to file petition of appeal out of time.
- ii. Any other orders this Honourable shall deem fit to grant

The application is supported by an affidavit sworn by the applicant. The respondent filed a counter affidavit in opposition to the application. The learned Advocate Caroline Mollel and Ismail Shallua appeared for the applicant and respondent respectively. The application was heard viva voce.

Ms. Mollel started her submission by adopting the contents of the affidavit in support of this appeal. She went on submitting as follows; That there is a pending appeal before Honourable Judge Gwae that was lodged by the respondent herein. The appellant filed a cross

appeal but she withdrew it because it was filed out of time. The applicant has filed this application so as to obtain the leave to lodge her appeal out of time. The hearing of respondent's appeal aforesaid has been stayed to await the outcome of this application. Ms. Mollel contended that the impugned decision is tainted with illegality because the trial Court decided the issue pertaining to the ownership of matrimonial house relying on the testimony of Mr. Barnot Keleruwa, the respondent's father (DW3), who claimed that he is the owner of the alleged a matrimonial house. Consequently, the Court failed to give any order for the distribution of the said matrimonial house. She was of the view that the issue of ownership of the matrimonial house in question is a land matter, therefore it was supposed to be lodged in a proper forum. The trial court had no jurisdiction to entertain it. Relying on the decision of the Court of Appeal in the case of **Mary Rwabizi T/A Amuga Enterprises Vs National Microfinance Plc, Civil appeal No. 378/01 of 2019** (unreported), she implored this Court to grant this application basing on the alleged illegality.

In addition to the above, Ms. Mollel contended that the intended appeal has overwhelming chances of success.

In rebuttal Mr. Ismail contended that the applicant has failed to account for the days of delay as required by the law on the following reasons; That the impugned judgment was delivered on the 11th December 2020. The appellant lodged her cross appeal on the 25th February 2021 whereas the last date for filing the appeal was 25th January 2021. The Cross appeal was withdrawn on 10th February 2022. This application was filed on 30th March 2022. From the date of withdrawal of the cross appeal to the date of filing this application

there are 48 days which have not been accounted for in contravention to the laid down principles in applications of this nature which require the applicant to account for each day of delay. To cement his arguments he cited the case of **Lyamuya Construction Company Limited Vs Board of Registered Trustee of Young Women's Christian Association of Tanzania, Civil Appeal No.2/2010** (unreported).

With regard to the issue of illegality, Mr. Ismail was of a strong view that the impugned judgment is not tainted with any illegality. He contended that the appellant had a task of proving the ownership of the alleged matrimonial house. However, during the hearing she failed to prove that the alleged matrimonial house was jointly acquired during the subsistence of her marriage with the respondent. The trial Court had powers to receive the testimony of the respondent's father (DW3) and cannot be faulted for taking his testimony and relying on the same in its decision. Mr. Ismail prayed for the dismissal of this application.

In rejoinder, Ms. Mollel reiterated her submission in chief and insisted that the impugned decision is tainted with illegality pertaining to the determination of the issue of ownership of the matrimonial house.

Having made thorough analysis of the rival submissions made by the learned advocates and perused the Court's records, I wish to start by point out that granting or refusal to grant extension of time lies in the Court's discretion. However, that discretion has to be exercised judiciously and the applicant is required to adduce sufficient cause for the delay as well as account for each day of delay (See the case of **Bushiri Hassan vs Latifa Lukio Mashayo, Civil Application No.3**

of 2007). Though the term " sufficient cause" has not been defined , our Courts have set a number of factors which have to be considered when making determination of an application for extension of time. In the case of **Lyamuya Construction Company** (supra) , the Court of Appeal said the following;

" as a matter of general principle , it is in the discretion of the Court to grant extension of time. But the discretion is judicial , and so it must be exercised according to the rules of reason and justice, and not according to provate opinion arbitrarily. On the authorities however, the following guidelines may be formulated.

- i) The applicant must account for all the period of delay.*
- ii) The Delay should not be inordinate*
- iii) That applicant must show diligence , and not apathy , negligence or sloppiness in the prosecution of the action that he intends to take*
- iv) 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 this application the impugned decision was delivered on 11.12.2020. The respondent filed her cross appeal on 25 .2. 2021, that is more 70 days from the date of the impugned judgment. In her submission Ms. Mollel did not give any the reason for the delay in filing the cross appeal. Not only that ,as correctly submitted by Mr. Ismail, this application was filed 48 days after the withdrawal of the cross appeal. Again ,Ms. Mollel did account for these days. In short, the delay in this matter is inordinate and the applicant has failed completely to account for the days of delay. The applicant has not shown diligence in handling her case.

With regard to the alleged illegality, the Court's records show that parties were heard and accorded opportunity to call their witnesses. In

her testimony the appellant alleged among other things, that during the subsistence of their marriage they acquired a number of properties including a matrimonial house whereas the respondent's testimony was to effect that the alleged matrimonial house was not theirs. It belongs to his father "Mzee Barnot" who testified as DW3. In his testimony DW3 testified how he raised the money for building the house that is alleged to be a matrimonial house and told the Court that he is the owner of that house. DW3 testified in Court like any other witness. I do not see any element of illegality as far as DW3's testimony is concerned. Ms. Mollel's contention that the trial Court was not supposed to rely on the testimony of DW3 is unfounded. Likewise, the argument that the Court had no jurisdiction to determine the issue of the ownership of the matrimonial house is unfounded because the petition for divorce included a prayer for division of the matrimonial properties, including the alleged matrimonial house and there were two competing assertions from the parties. Thus, the trial Court was duty bound to decide on the existence or non-existence of the matrimonial house basing on the evidence that was brought before it. In short, there is no any illegality in the lower Court's judgment to move this Court to grant this application.

In the upshot, this application is dismissed. This being a matter involving family issues and the application has been filed under legal aid scheme, each party will bear his/her own costs.

Dated this 27th day of 2022



B.K.PHILLIP

JUDGE