

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

AT TABORA

MISC. CIVIL APPLICATION NO. 2 OF 2021

(Arising from Misc. Civil Application No. 77 of 2016 in the High Court of Tanzania at Tabora from Matrimonial Cause No. 20 of 2006 in the Resident Magistrate of Tabora at Tabora)

MRS JAMILA SURENDRAAPPLICANT

VERSUS

SURENDRA DHARAMSHI@MOHAMED DHEARAMSHI

JUTHA.....RESPONDENT

RULING

Date: 5/4/2022&13/5/2022

BAHATI SALEMA, J.:

The applicant, **Mrs. Jamila Surendra**, applied for an extension of time to restore the Misc. Application No. 77 of 2016 which was dismissed for want of prosecution. The dismissed application was for leave to lodge an appeal out of time against the judgment and decree of the Matrimonial Cause No. 20 of 2006, whereby the applicant was aggrieved by the decision of the Resident Magistrate Court of Tabora before Hon. Mbuya. The application is made under section 14 (1) of the

Law of Limitation Act, Cap.89 [R.E 2019] and is supported by the affidavit of the late Advocate Steven Kuwayawaya and a supplementary affidavit of the applicant together with the attachment, where the applicant prayed to the court to adopt the affidavit with its attachments and consider them as part of the submission.

The application is contested by the counter affidavit of Mr.Kamaliza Kamoga Kayaga, learned Advocate for the respondent.

During the hearing of this application, both parties were represented. The applicant was represented by Ms. Rose Suleiman and the respondent by Mr. Kamaliza Kayaga. The parties prayed to dispose of the application by way of written submissions, which the court granted and they both complied with the order.

The brief history of this application is that the applicant petitioned for divorce and division of matrimonial property in Matrimonial Cause No. 20/2006 between **Mrs. Jamila Surendra VS. Mr. Surendra Dharamshi@ Mohamed Dharamshi Jutha**, whereby judgment was delivered on 9/10/2009. The applicant, being aggrieved by the decision of the resident magistrate, appealed to the High Court of Tanzania at Tabora Registry in Matrimonial Appeal No. 3 of 2010, whereas during the hearing the appeal was struck out for being defective. In 2014, the applicant also lodged another appeal at the High Court of Tanzania

Tabora Registry under Matrimonial Appeal No. 1 of 2014, which also during the hearing was held to be out of time and was struck out. After that, the applicant applied for leave to appeal out of time in the same court. The application was dismissed for want of prosecution.

In 2016, the applicant and her advocate believed they had sufficient reason for their failure to appear during the hearing of Misc. Application No. 77/2016 because, at that time of the hearing, the applicant was attending to her sick mother, who was admitted to the Royal Hospital in the Sultanate of Oman as she was suffering and later operated on for pericardial effusion. Besides, her deceased advocate, one Kuwayawaya Steven Kuwayawaya was attending a High Court Criminal session at Dodoma. Hence, unexpectedly and outside the practice and procedure of the courts, the applicant's advocate lodged an appeal to the Court of Appeal of Tanzania against the dismissal order of the High Court. The appeal was lodged under Civil Appeal No. 282 of 2017, whereby the Court of Appeal, on the hearing of the appeal, directed the applicant's advocate to exhaust all remedies available at the High Court on the dismissal order. Hence, on 15th December, 2020, the advocate withdrew the appeal and immediately filed this application before this court, praying to set aside the dismissal order and seeking leave to appeal out of time against the judgment of Matrimonial Cause No. 20/2006.

The counsel for the applicant submitted that the applicant's non-appearance during the hearing was not intentional as she was attending to her sick mother in the Oman Sultanate, who had no one besides the applicant to take care of her.

She further submitted that on the part of the advocate, it is a well-known practice of the advocate to take criminal *probono* cases whenever assigned. Hence, the advocate's failure to appear during the hearing of Application No. 77/2016 was caused by the criminal session before the High Court of Dodoma where he was assigned to appear. She further stated that it is the discretion of the court to grant leave to the applicant for sufficient reasons, but there is no particular standard set out to identify those sufficient reasons. It only depends on the particular circumstances of the application, and each case should be looked at on its facts, merits and circumstances.

She further submitted that looking at the case at hand, she prayed to this court to exercise its discretion by considering the reason for non-appearance and the efforts of the applicant in prosecuting the case, as well as the determination of the application on merit for the interest of justice.

Furthermore, she submitted that the impugned judgment and decree were marred by serious irregularities and that the trial court

lacked jurisdiction to try the matter. The Resident Magistrate Court of Tabora at Tabora had no jurisdiction to hear and determine the matter which is purely governed by Islamic laws between the applicant and the respondent in Matrimonial Cause No. 20 of 2006.

She, therefore, prayed to this court to enlarge her time to apply for restoration of the application dismissed for non-appearance to pave the way for the court to determine the matter on merit as well as rectify the illegality found in the proceeding.

In reply, the respondent's counsel refuted the application on the ground that the applicant is only playing delay tactics to avoid execution of the decree against her and has resorted to filing endless applications as a gambling game.

He submitted that on dismissing the applicant's application for want of prosecution in Misc. Civil Application No. 77 of 2016, this court observed that the applicant had neither been serious nor diligent in prosecuting her application. In paragraph No. 3 of the counter-affidavit, he pointed out that the applicant has deliberately concealed material facts and that prior to filing Misc. Civil Application No. 77 of 2016 now sought to be re-admitted, the applicant had filed Misc. Civil Application No. 3 of 2016 seeking similar relief, which was dismissed for want of prosecution on 8/11/2016. The applicant, in her submission, has failed

to say anything about this aspect. She has taken no action against the orders of this court dated 8/11/2016.

He valiantly submitted that a serious and diligent applicant would have first of all taken action to restore that application instead of filing a new application on the same matter. Even with the evidence of the Court of Appeal in Civil Appeal No. 282 of 2017 for the applicant to exhaust all remedies available in the High Court on the dismissal orders, the applicant has taken no action in respect of Misc. Civil Application No. 3 of 2016 was dismissed on 8/11/2016 prior to filing Misc. Civil Application No. 77 of 2017 now sought to be re-admitted.

Further, the counsel submitted that the allegation that the applicant was attending to her sick mother in Oman, raised in the applicant's supplementary affidavit, is a bare assertion with no support. Had it been true, the applicant would have availed a copy of the passport or any travel document to Oman on those dates. The concocted medical reports in the supplementary affidavit are all irrelevant as the applicant is not mentioned therein. Furthermore, those allegations in the supplementary affidavit contradict what is stated in her main affidavit that the applicant was in Dar es Salaam. But there is no proof either that the advocate was engaged in the High Court sessions in Dodoma. Had it been true, a copy of the summons or

even a cause list for the alleged criminal session would have been attached to prove such allegations.

Therefore, for non-appearance, no sufficient reasons have been proved by the applicant to move this court to exercise its discretion to extend time. It is now well established that in any application of this nature, the applicant has to explain every day of the delay to warrant the court's exercising its discretion to grant the time of extension sought.

He further submitted that the applicant has failed to account for each day of the delay from 15th December 2020 when the applicant withdrew her appeal before the Court of Appeal, and 15th January 2021 when the applicant filed this application. At any rate, her application should be dismissed at this point because of the delay of 30 days that she has failed to account for. To bolster his stance, he referred to the case of **Ramadhan J. Kihwani vs. TAZARA**, Civil Application No. 401/18 of 2018, CAT DSM (Unreported).

He submitted that the applicant has complained about illegality, but the alleged illegality is not apparent on the face of the decision to be challenged. It will take a long drawn process to come to a conclusion of finding the alleged illegality. He prayed for this not to be considered. He

cited the case of **Ngao Godwin Losero vs. Julius Mwarabu**, Civil Application No. 10 of 2015 CAT, ARS, (Unreported) at pg 8.

In her brief rejoinder, the counsel for the applicant submitted that the reply from the respondent was misconceived and completely out of points; therefore, she reiterated in total the submission in chief together with its prayers to clarify certain points. She stated that the respondent objected to the supplementary affidavit to the effect that the verification had an incurable defect. That the defects in the verification of the supplementary affidavit are curable, as all defects in verification are curable, and that the paragraphs which were mentioned do not exist because of typing errors, and prayed to expunge the non-existing paragraphs and consider the existing ones as they do not prejudice the entire supplementary affidavit.

She gallantly submitted that the respondent alleged deliberately concealed material facts in Misc. Civil Application No. 3 of 2016. She averred that there was some professional negligence on the part of the deceased advocate (Kuwayawaya Stephen Kuwayawaya) in the court procedure whereby, instead of applying for restoration of the said application No. 3/2016 the advocate filed another application on the same matter, which is contrary to the court procedure. But the respondent also did not raise any complaints about the improper procedure, even when the matter was before the court of appeal.

She valiantly stated that, at this stage, when the matter is before this court, the respondent is raising the issue of concealing a material fact. The respondent is estopped from raising such an issue at this juncture.

On the contrary, the deceased advocate was not honest with the applicant as the applicant was not aware of such things done by her advocate and the applicant should not be punished for the professional negligence but rather the court to do substantive justice on the matter.

Further, she submitted that the medical reports of the sick mother are genuine, and the allegation by the counsel for the respondent should not be considered as there is no supportive evidence from the maker or any responsible authority to prove that the medical reports are concocted or fake. As to the summons or cause list, attending a criminal session in Dodoma was addressed to the advocate himself, who is now deceased. Therefore, it is not possible for the applicant to have records which were supposed to be furnished to the court by the deceased advocate. Furthermore, the contradiction alleged by the respondent is that after having operated on her sick mother in Oman, she was transferred to Tanzania, where, according to the medical practitioner's advice, she was supposed to attend a clinic checkup every week. Hence, she stayed in Dar es Salaam, where medical specialist could easily be found.

Similarly, the allegation of failure to account for each day of delay from the date she withdrew the appeal before the Court of Appeal, she submitted that the circumstances of the case at hand were so extraordinary that it was not possible for the applicant to immediately apply because of the reasonability of time spent on acquiring the copy of the ruling as well as preparing the document, hence the applicant took quick steps to file this application within 30 days as reasonable time.

As to the illegality of the judgment decree and proceedings, it is well known that the illegality alleged must be apparent on the face since it involves the jurisdiction of the court. The issue of jurisdiction was stated in the case of **Arusha General Store versus Mawji (1969) HCD 160**. The counsel for the applicant prayed to the court to extend the time and leave to apply for restoration of application No. 77 of 2016.

After carefully considering the competing arguments of the learned counsel of both parties, I figure out that the main issue calling for determination is whether or not the applicant has established good cause for the delay in the circumstances of this application.

It is a settled position of law that an application for an extension of time is grantable only upon the court's satisfaction that the applicant has

presented a credible case that warrants the grant of the extension. The rationale for this requirement has been succinctly laid down in the case of **Juluba General Supplies Ltd vs Stanbic Bank Limited, Civil Application No. 48 of 2014**, where the Court of Appeal held that;

"All applicants should be concerned in showing sufficient reasons why he should be given more time and the most persuasive reason that he can show us that the delay has not been caused or contributed by the dilatory conduct on his part."

Similarly, for this court to grant an extension of time, the applicant must state sufficient reasons for his delay and account for each day of delay as held in the case of **FINCA (T) Ltd and Another v Boniface Mwalukisa**, Civil Application No. 589/12 of 2018, Court of Appeal Iringa, (unreported).

In addition, it should be known that the power to extend time is discretionary, but such discretion must be exercised judicially, meaning the making of a logically sound decision based on rules of law that require the attention of the court to all the relevant factors and materials surrounding any particular case. These factors include the length of the delay, the reason for the delay, and whether or not there is an arguable case as stated in the cases of **Nicholaus Mwaipyana v the Registered Trustees of the Little Sisters of Jesus of Tanzania**, Civil

Application No.535/8 of 2019; and in **Lyamuya Construction Company LTD and Board of Trustees of the 4 Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported). The Court said that factors to be considered would normally include the following:- (i) That the applicant must account for all the period of delay. (ii) That, the delay should not be inordinate. (iii) That, the applicant must show diligence and not apathy negligence or sloppiness in the prosecution of action that he intends to take. (iv) That, if the Court feels that there are other sufficient reasons such as the existence of a point of law of sufficient of a point of law sufficient importance, such as the illegality of the decision sought to be challenged.

After taking into consideration what has been submitted by the applicant and the respondent's counsel, I have tried to peruse to see if the applicant has adduced sufficient reasons. Much can be said. The applicant has been seriously prosecuting her application but the circumstances which resulted in her dismissal were beyond her control since she was taking care of her sick mother, which I think is a sufficient reason. This court, having perused the medical reports attached, is of the view that they are real and genuine since there is no supportive evidence from the maker or any responsible authority to prove that the medical reports are concocted or fake.

Also, I have noted that the applicant's counsel, who is now deceased, neglected to file another application to this court instead of restoring the first application and further filed an appeal to the Court of Appeal without exhausting remedies from the High Court. This is also a sufficient reason since an applicant cannot be blamed for the conduct of his advocate. Similarly, I have noted that the one who was supposed to present the cause list of those attending a criminal session in Dodoma was the late advocate hence, the applicant should not be blamed for the misconduct of his advocate.

As to the issue regarding the applicant failure to account for each day of the delay from 15th December, 2020 when the applicant withdrew her appeal before the Court of Appeal and 15th January 2021 when the applicant filed this application which is 30 days. The applicant submitted that the circumstances of the case at hand were extraordinary and therefore, it was not possible for the applicant to file the application immediately because of the time spent acquiring the copy of the ruling as well as preparing the documents. Therefore, 30 days was a reasonable time spent. I see the reason given suffices and time spent was reasonable.

On the issue of illegality. It is already settled principle of the law that a claim of illegality amounts to sufficient cause for extension of time, as it was established in the case of **VIP Engineering and**

Marketing Limited v. Citibank (T) Ltd, Consolidated Civil Reference Nos. 6, 7 and 8 of 2006, Court of Appeal.

In the instant application, it was alleged that the court had no jurisdiction to entertain the matter. It is, significant to note that the issue of illegality when determining whether or not to extend time is well settled and it should be borne in mind that, in those cases where an extension of time was granted upon being satisfied that there was illegality, the illegalities were explained. In **Principal Secretary, Ministry of Defence and National Service v. Devram Valambhia [1999] TLR 182** and of **Lyamuya Construction Company Ltd vs Board of Registered Trustees of Young Women's Christian Association of Tanzania**, the Court in the above cases emphasized that such a point of law must be one of importance and,

"I would add, it must also be apparent on the face of the record, such as the question of jurisdiction; not one that would be discovered by a long drawn argument or process."

In respect of the application at hand, it falls within this ambit. It is a trite law that one of the accepted reasons for granting an extension of time is the illegality or otherwise of the impugned decision.

As the applicant has been in the court corridor since the dismissal of her suit and so far as she has been promptly taking necessary steps

wherever there had been a failure in her efforts to restore the suit, it cannot be said that she was inactive or seriously negligent as to be unfit to come to equity. I have also considered the fact that the grant of an order for an extension of time will not occasion any injustice to the respondent. In the interest of justice, it is desirable to extend the time and to re-admit the application. It is for the foregoing reasons that, this application is granted with no order as to costs.

Order accordingly.



A. BAHATI SALEMA

JUDGE

13/5/2022



Date: 13/5/2022

Coram: Hon. G.P.Ngaeje, Ag DR

Appellant: Present by advocate Simon Gereld Kankoshwe.

Respondent: Absent.

B/C Grace Mkemwa, RMA

Mr. Kankoshwe: The matter is coming for judgment.

Court: Ruling delivered in presence of advocate Simon Gerald Kankoshwe for the applicant in the open court.


G. P. NGAEJE

Ag DEPUTY REGISTRAR

13/05/2022

Court: Right of appeal fully explained.




G. P. NGAEJE

Ag DEPUTY REGISTRAR

13/05/2022