

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
IN THE DISTRICT REGISTRY OF ARUSHA**

**AT ARUSHA**

**MISC. CIVIL APPLICATION NO. 28 OF 2022**

**(C/F Matrimonial Cause No. 06 of 2021 in the District Court of arusha at Arusha)**

**JOYCE PETER JOSEPH.....APPLICANT**

**VERSUS**

**EMILIAN ANTHONY KONDELA.....RESPONDENT**

**RULING**

**29/10/22 & 24/10/2022**

**GWAE, J**

The applicant, Joyce Peter Joseph and the respondent were wife and husband respectively, whose marriage was dissolved by the District Court of Arusha at Arusha after it had been satisfied that the marriage between the couple had broken beyond repair. In its judgment, the trial court among others gave an order that, the parties were to fulfil the parental duties and responsibilities to the children as provided under section 8 (1) and section 9 (3) of the Law of the Child Act, 2009. As to the division of the matrimonial property, the trial court ordered that the

parties to have fifty (50) percent shares each in respect of the matrimonial house acquired during the subsistence of their marriage.

The applicant is seen to have been dissatisfied with the delivered judgment in respect of the distribution of matrimonial property and maintenance of the children and wishes to appeal to this court. However, for reasons advanced into the applicant's affidavit the applicant failed to file his appeal out of time on reason that she obtained the copies of judgment, decree and proceedings after the lapse of the required time to appeal (45 days).

Expounding on the reasons for the delay, the applicant contended that, she has been making follow ups to the court to obtain the necessary documents for filling her appeal but she was informed by the court registry officers that the Magistrate who heard the case was transferred and that the decree had to be prepared and signed by the successor Magistrate who was to be assigned by the District Magistrate in Charge who had not yet reported in the station.

The applicant has brought this application under the provision of section 14 of the Law of Limitation Act Cap 89 R.E 2019 and section 95 of the Civil Procedure Code Cap 33 R.E 2019 seeking an order extending time within which to file an appeal to this court out of time.

The respondent on the other hand opposed the application through his counter affidavit where he contended that, the applicant's intention to appeal is an afterthought. The respondent further averred that there is no evidence proving that the applicant herein was making serious follow ups on the said documents, he went on stating that, the law has not made it mandatory for such documents to be necessary for an appeal purpose. More so, the respondent has also stated that the applicant has not given an account of each day of delay and therefore he was of the view that this application lacks merit.

On 29<sup>th</sup> August 2022 when the matter was called on for hearing, the parties were represented by the learned advocates namely; **Mr. Simon Mbwambo** and **Mr. Molland** respectively. The application was argued orally.

Supporting the application, Mr. Mbwambo reiteratedly submitted that they were late to file their intended appeal as they were late to be supplied with a certified copy of the decree on the 10<sup>th</sup> March 2022 and main reason being that the magistrate who heard and determined the matter was transferred to another station (**Kisinda-SRM**). He supported his argument by citing the case of **Mic Tanzania Ltd vs. Hamis Mwinjuma**, Civil Appeal No. 64 of 2016 (Unreported-H.C) as well as in

the case of **Paul vs. Felister**, Probate Appeal No. 36 of 2020 (Unreported-H.C). The applicant's counsel added that there is also a point for irregularity especially on the amount specifically awarded to the maintenance taking into account that the children are still too young. More so, that, the division of matrimonial assets at the rate of 50 % to each parties did not consider the extent of contribution. He thus prayed for the grant of this application.

The respondent on his part argued that in this case, the matter was matrimonial whose procedure provided is under section 80 (3) of the Law of Marriage Act, Cap 29, Revised Edition 2019 also the Law of Marriage Matrimonial Proceedings Rules, GN. 246 of 1997 and not the Civil Procedure Code. The counsel went further to state that in the present case it is silent when the applicant requested to be availed with the copy of judgment and decree.

According to the respondent's counsel, the respondent requested the same on 21<sup>st</sup> February 2022 and that the decree was duly signed on 30<sup>th</sup> November 2021. It was therefore his submission that, the applicant never exercised due diligence and has even failed to account for the days of delay. He cemented his argument with the case of **MZA RTC Ltd vs.**

**Export Trading Co. Ltd**, Civil Application No. 12 of 2915 (unreported-CAT).

In the rejoinder the applicant's counsel maintained that, attachment of the decree or order is a legal requirement in the appeal in matrimonial cases.

Having summarized brief facts giving rise to this matter and the parties' submissions above, it is now time for the determination of the application, and the main issue to be considered is whether the applicant has given sufficient reasons to enable this court to exercise its discretion powers to grant the relief sought. It was held in the case of **Livingstone Silay Haru v. Collifred Temu** [2002] TLR 268, that: -

*"It is discretion on the part of the court to grant the extension of time depending on sufficient reason being given to explain the delay"*

From the records, the applicant has demonstrated the reason for her delay being the delay to obtain the copies of judgment, decree and proceedings on time. In her affidavit the applicant alleges at paragraph 7 of the application that she failed to obtain the decree on time as the magistrate who heard and composed the judgment had shifted the station before composing the decree. According to him this information was furnished to her by the court's registry officer however the applicant did

not produce an affidavit to that effect. The Court of Appeal of Tanzania in the case of **Phares Wambura and 15 others vs. Ranzania Electric Supply Company Limited (TANESCO)**, Civil Application No. 186 of 2016 (Unreported) has made it mandatory for any averment to be supported by an affidavit, it was stated;

*"The applicants' averments therefore remain to be a bare claim with no proof. In the circumstances I agree with the counsel for the respondent that there was a need for the said court clerk to swear affidavit to prove what the applicants and their counsel had alleged in their supporting affidavits.....the court clerk could have been useful to substantiate the applicants' assertions of her/his involvement in the matter."*

Nevertheless, despite the failure to produce an affidavit to prove the applicant's assertions, this court has taken judicial notice of the judgment and decree attached to the application. While the judgment appears to be composed by Hon. Kisinda-SRM on the other hand the decree was signed by a successor Magistrate Hon. Meena-RM, this court therefore has no doubt that the decree was indeed composed by a successor magistrate who perhaps ought to have indicated the date she drafted the same in order to do away with flimsy complaints or unnecessary justification. However, in this application the applicant has absolutely failed to show as to when she requested the said copies nor did she demonstrate as to

when she obtained the judgment and proceedings in exclusion of the copies of the decree. Moreover, the applicant has alleged that she obtained the copies of the decree on 10<sup>th</sup> March 2022 and that she signed the dispatch book of the court acknowledging the receipt of the said decree, however, for reasons known by her no proof of acknowledgment of the said copy of the decree that is attached to prove that she received the same on 10<sup>th</sup> March 2022. This court is of the view that such proof is very vital as the said copy appears to have been signed on 30<sup>th</sup> November, 2021 but the same does not show as to when it was issued to the either applicant or respondent.

The requirement to account for the days of delay has been stressed in a number of decisions by this court and the Court of Appeal of Tanzania for example in **William Kasanga vs. Republic**, (Criminal Application No. 79 of 2020) [2021] TZCA 145 [15 April 2021 TANZLII] the Court stated that;

*"It is settled position that an application for extension of time, the applicant must account for every day of delay."*

Being guided by the above judicial precedent and from what this court has gathered in this application, the applicant has failed to give an

account for each day of delay from when she requested the said copies, and at what time she was able to obtain the same.

This court has also considered the respondent's argument that appeals to the High Court in Matrimonial Proceedings does not require the attachment of the decree. Provisions of Rule 37 (1)&(3) of the Matrimonial Proceedings Rules has provided for mandatory terms on how to handle matrimonial appeals to the High Court. The Rule stipulates as follows;

*"37. Memorandum of appeal*

*(1) An appeal to the High Court under section 80 of the Act shall be commenced by a memorandum of appeal filed in the subordinate court which made or passed the decision, order or decree appealed against.*

*(2) N/A*

*(3) Upon the receipt of the memorandum of appeal, the subordinate court shall transmit to the High Court, the memorandum of appeal together with the complete record of the matrimonial proceeding to which the appeal relates."*

This position was reiterated by my learned sister Oriyo, J (retired-JA) in the case of **Edwin Shaidi vs Doroth Shaidi**, Misc. Civil Appeal No. 8 of 2004 (Unreported) cited with approval in the case of **Deodatus Rutagwerela vs Deograsia Ramadhan Mtego**, Matrimonial Appeal No. 2 of 2020 (High Court-Iringa) (Reported Tanzlii), it was stated that;



*"The Law makes it mandatory that, appeals have to be filed in a trial court which is obliged to transmit the Memorandum of Appeal and the complete trial record to this court."*

From the above cited authorities, this court is of the same view as that of the respondent's counsel that decree is not a necessary document in matrimonial appeals to the High Court on the reason that, the memorandum of appeal is filed with the trial court or 1<sup>st</sup> appellate court. Therefore, it is the trial court which is obliged to transmit the complete records of the appeal to the High Court including the proceedings, judgment, decree and proceedings. Thus, the applicant in this application was only required to file his memorandum of appeal at the District Court of Arusha on time without wasting time to request for the copies of the decree and proceedings since the same would have been transmitted to the High Court by the trial court.

On the alleged illegality, I do not find if the order by the trial court directing the parties to have full responsibilities to the welfare of their children is illegal. Specification of amount of money sometimes depends on the parties' calibre and by specifying amount may also deny children some of rights when one of the parent gains a green pasture or vice versa.

In the final analysis and in the account of what has been stated above, this court finds that the applicant has failed to disclose good cause for the court to exercise its jurisdiction to enlarge time. Accordingly, this application is dismissed in its entirety with no order as to costs.

It is so ordered.

**DATED** at **ARUSHA** this 24<sup>th</sup> day of October, 2022



  
**M. R. GWAE**  
**JUDGE**