

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRY OF MWANZA
AT MWANZA**

MISC. CIVIL APPLICATION NO. 71 OF 2022

*(Arising from Civil Appeal No 6 of 2021 of Sengerema District court original civil Case
No. 5 of 2021 of Kasenyi Primary Court)*

LILIAN DAUD.....APPLICANT

VERSUS

MAGEMBE JOSEPH RESPONDENT

RULING

24TH August & 31st October, 2022

Kahyoza, J.

This is an application for extension of time institute by **Lilian Daud** (Lilian) against **Magembe Joseph**. The issue is whether Lilian, has adduced sufficient reason for delay.

A brief back ground is that Magembe petitioned for annulling the presumption of marriage and division of matrimonial assets. He won before the primary court Lilian appealed to the District Court and lost the appeal. The judgment on appeal was delivered via teleconference on the 15/12/2021.

The District Court's record shows that copies of judgment were read to be collected on that very day. Lilian did not appeal on time hence, she filed the instant application. Lilian deposed in her affidavit that she delayed to appeal because she was sick. She deposed that she was suffering from serious blood pressure attack for many years. She averred that from 11/11/2021 up to 28/06/2022 her condition deteriorated. She remained indoor at all the time. She attended Katunguru Health center Sengerema. The applicant attached a medical examination report showing that she was attended on 11/11/2021.

The application was heard by way of written submissions. Both parties were unrepresented.

It is settled that a party applying for extension of time must adduce sufficient reasons for delay. See the case of **Mumello v. Bank of Tanzania** [2006] E.A. 227. It was stated in that case that:

"... an application for extension of time is entirely in the discretion of court to grant or refuse and that extension of time may only be granted where it has been sufficiently established that the delay was due to sufficient cause"

The task of this court is to find out if Lilian's sole ground that she delayed because she was sick is sufficient. Lilian submitted that since

11/11/2021 up to 28/06/2022 her condition of blood pressure and heart problem suddenly changed and she was forced to remain indoors. She averred that she could not do anything, She supported her averment with a medical chit issued on 11/11/2021. To support her contention that sickness was a good ground to support her application for delay, she cited the case of **Kapapa Kampindi Vs. the Plant Manager Tanzania Breweries Limited**, where (Luanda J.A.) held that sickness is sufficient reason to allow him to file his submission out of time.

She also refused the allegation that the application has been overtaken by effects as the execution has been effected.

Magembe opposed the application. He submitted that the applicant did not adduce sufficient cause for delay. He submitted that the applicant delayed to apply appeal for five (5) months. He submitted that Lilian gave on reason for delay, that is sickness. He contended that the medical examination form attached was not a sufficient prove that she was sick. He added that Lilian applied for extension of time after the execution processes commenced.

He submitted that the applicant did not explain how sickness prevented her from appealing on time. He cited the case of **Shubilu Shefanya V.**

Omary Ally [1992] TLR 245, where it was observed that the application was dismissed because ill health without elaboration cannot amount to good reason.

In her rejoinder, Lilian argued that, sickness was a sufficient reason to allow an application for extension of time.

Indeed, sickness is a ground for extension of time. If a party fell sick before taking any step provided by law and that party can establish how sickness prevented him to take the procedural step, that amounts to a sufficient reason.

It is not in dispute that the district court delivered its judgment on 15/12/2021 and both parties knew of the fact. Lilian did not take any step to appeal against that judgment until 30/06/2022 when she filed an application for extension of time. Thus, Lilian instituted an application for extension of time after 196 days from the date District Court delivered the judgment. The reasons for delay is that she was sick. The respondent refuted the ground the applicant advanced as insufficient. I am in total agreement that Lilian's ground of delay is not sufficient to support the application. Reasons are not far-fetched; **one**, that it is highly doubtful if she was sick. To prove that she was sick, Lilian attached a medical examination form

purporting to be issued by Katunguru Health Center on 11/11/2021. While Lilian deposed that she was attended on 11/11/2021 and the doctor indicated in the medical examination form, that he attended her on on 11/11/2021, the form shows that Lilian was attended at Katunguru Health Center and she paid Tzs. 10,000/= as consultation fees on **22/05/2022** at **03:21:54**. She therefore, lied that she was attended on 11/11/2021. This is an advantage of using electronic systems including payment systems. Electronic system are not easily compromised like human being.

Given the facts above, Lilian was not sick. She lied in her affidavit. Lilian's affidavit containing false averment cannot be acted upon.

The law is settled that an affidavit containing false information cannot be relied upon by the Court to decide the matter. The Court of Appeal pronounced itself in **Damas Assey and Another vs Raymond Mgonda Paula and 8 Others**, Civil Application No. 32/17 of 2018 and **Kidodi Sugar Estate and 5 Others V Tanga Petroleum Co. Ltd**, Civil Application No. 110 of 2009, (both unreported), where it cited with approval its decision in **Ignazio Messina vs Willow Investments SPRL**, Civil Application No. 21 of 2001 that:

"An affidavit which is tainted with untruths is no affidavit at all and cannot be relied upon to support an application. False evidence cannot be acted upon to resolve any issue."

False evidence of contained in Lilian's affidavit cannot be acted upon to resolve any issue.

In addition, even if, it was true that Lilian was attended on 11/11/2021, that would not have been a sufficient reason for delaying for 196 days. Lilian did not show how her ill health on 11/11/2021 prevented her to appeal or file an application for extension of time. A person who is sick for such a long period would have sought medical attention several times. I subscribe, to the settled position contention that a party delay to take action provided by law without explanation how that person's ill health prevented him because he was sick is not sufficient cause for delay.

I find no merit in Lilian's contention that she delayed to appeal because she was sick. I now, move to consider Lilian's second ground to support an application for extension of time, which is that the decision of the district court is tainted with illegality. She contended that the proceedings and judgments of both, the trial, and appellate courts, were null and void as trial court, as a matter of law had no jurisdiction to dissolve presumption of marriage between the parties. Citing **M/S Tanzania China Friendship**

Textile Co. Limited Vs. Our Lady of Usambala Sisters Civil Appeal No.

54 of 2002 where the Court of Appeal observed that-

"But since it is about jurisdiction of the court, it can be raised at any stage even before this Court".

Lilian concluded that illegality in the judgment is sufficient ground to allow extension of time to appeal out of time.

Magembe refuted Lilian's contention that the time be extended on account of illegality. He argued that to amount to a sufficient reason for delay, illegality does not need to be discovered by long drawn argument or process. To support his position, he cited the case **Ngao Godwin Lusero Vs. Julius Mwarabu** Civil Application No. 10 of 2015 of Court of Appeal of Tanzania.

In her rejoinder, Lilian insisted that illegality of the judgment is sufficient ground to allow extension of time to appeal out of time.

Indisputably, illegality of the impugned decision is a good ground for extending time to enable the superior court to rectify the error. However, illegality to amount to sufficient ground for delay there are conditional precedents, which are; **one**, it must be on apparent on the face of record of the impugned decision. It must not be that one which can be discovered after long argument. **Two**, point of illegality must be a point law of great

importance. In the present application, the alleged illegality is not apparent on the face of record of the impugned decision. The impugned decision in this case is the decision of the district court. In addition, I do not find the alleged illegality to have any legal importance.

Furthermore, even if the alleged illegality was on the face of record of the impugned decision and of vital importance, that ground would fail because it was not raised in the affidavit. It is trite law that reasons to support an application for extension of time must be raised in the affidavit. See the case of **Lyamuya Construction Company Ltd v. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 02 of 2010, (unreported) where the Court of Appeal emphasized that the alleged **illegality must be clearly demonstrated in the applicants' affidavit in support of the application.**

The applicant's affidavit raised only one ground to support her application for delay, that is sickness. During her submission, she raised the illegality as a ground to support an application. It is the settled position of law that, submission is not evidence but the affidavit is. The applicant failed to adduce evidence that the impugned decision was tainted with illegality.

She is precluded from grounding her application for extension of time on the ground of illegality.

In the end, I find that, Lilian, the applicant failed miserably to adduce sufficient reason(s) for delaying for 196 days to appeal.

Consequently, I dismiss the application with costs.

It is ordered accordingly.



A handwritten signature in black ink, appearing to be "J.R. Kahyoza", written over a horizontal line.

J.R. Kahyoza

Judge

31/10/2022

Court: Ruling delivered in the presence of the applicant through teleconference and in the absence of the respondent. BC Ms. Jackline Present.

A handwritten signature in black ink, appearing to be "J.R. Kahyoza", written over a horizontal line.

J.R. Kahyoza

Judge

31/10/2022