IN THE HIGH COURT OF TANZANIA

AT TABORA

MISC. CIVIL APPLICATION NO. 77 OF 2016

(Arising from Misc. Civil Application Case No. 20 of 2016 at High Court of Tabora)

JAMILA SURENDRA..APPLICANT

VERSUS

SURENDRA DHARAMSHI JUTHA
@MOHAMED DARAMSHI JUTHA .... RESPONDENT

RULING

Date of Submission: 03/08/2022

Date of Delivery: 02/09/2022

AMOUR S. KHAMIS, J:

Jamila Surendra was the petitioner in Matrimonial Cause No. 1 of 2006 against Surendra Dharamshi Jutha @ Mohamed Dharamshi Jutha whose Judgment was delivered on 22 July 2013.

She is aggrieved with that judgement and her efforts to approach this Court by way of appeal met dead ends for the last nine (9) years.

The present application was lodged on 7 December 2016 and for almost six (6) years, did not reach to finality.

In the application, Jamila Surendra moved this Court for enlargement of time to enable her lodge an appeal to the High Court.

The application was made by way of Chamber Summons under Section 80(2) of the Law of Marriage Act, Cap 29, R.E 2002 and

Section 14(1) of the Law of Limitation Act, Cap 89, R.E 2002 (now R.E. 2019).

The application was made at the instance of the Central Region Law Chambers (Advocates) and supported by an affidavit sworn by the late Kuwayawaya Stephen Kuwayawaya, learned advocate (as he then was).

In the said affidavit, Kuwayawaya Stephen Kuwayawaya stated that:

> *"2) That the applicant lost in matrimonial cause in the Resident Magistrate's Court of Tabora. She appealed to this Court under my service, the appeal which was struck out for some defects found in it, namely being filed out of time. Photocopy of the ruling is annexed herewith marked "A".*
>
> *3) That the defects were in actual fact occasioned by circumstances beyond my control, as well as my client's control and when it came for hearing, such defects, though contested was not found to avoid the appeal to terminate.*
>
> *4) That we filed another application which had some technical defects and we agreed with the counsel for the respondent to withdraw it, but on the date of the intended to, I was not in Court, as I was attending High Court Criminal Sessions in Dodoma. My Client was Dar to attend her sick relative and the application was dismissed for non appearance.*

5) That if this application will not be granted, the applicant will suffer irreparable loss, that is losing of her properties which even does not fall in the matrimonial property, her more than17 years of labouring in the cohabitation with the respondent and her right to be heard in the higher authority, the High Court in matters of contention."

In a counter affidavit sworn by Kamaliza Kamoga Kayaga, learned senior advocate for the respondent, it was deposed that the application was made in bad faith and calculated to delay execution.

Further it was alleged that apart from the cases disclosed by the late Kuwayawaya Stephen Kuwayawaya, the applicant also filed Dc. Civil Appeal No. 3 of 2010, Dc. Civil Appeal No. 33 of 2011, Dc. Civil Appeal No. 20 of 2013 and Misc. Civil Application No. 3 of 2016 which were struck out or dismissed for want of prosecution.

Mr. Kamaliza Kayaga averred that the applicant employed delay tactics to prevent the respondent from enjoying fruits of his victory in Matrimonial Cause No. 20 of 2006.

Subsequently, Jamila Surendra filed Misc. Civil Application No. 2 of 2021 for enlargement of time to reinstate (for restoration) of the application dismissed for want of prosecution.

On 13 May 2022, this Court (A.B. Salema, J) granted an extension of time and restored the dismissed application for hearing interparties.

Before me, the applicant was represented by Ms. Rose Suleiman, learned advocate, while Mr. Kelvin Kayaga, learned advocate, acted for the respondent.

For timely disposal, the application was canvassed by way of written submissions and both sides adhered to the timeline set by the Court.

I have read and considered the rival submissions presented by Ms. Rose Suleiman and Mr. Kelvin Kayaga, learned advocates for the applicant and respondent respectively.

Basically, the learned advocates argued in the line of the affidavits of Kuwayawaya S. Kuwayawaya and Kamaliza Kamoga Kayaga, that were referred to before.

The main issue is whether the applicant showed a sufficient cause for extension of time.

Section 80(2) of THE LAW OF MARRIAGE ACT, CAP 29, R.E 2019 provides that an appeal to the High Court on any decision of a Court of Resident Magistrate or District Court shall be filed in the Magistrate's Court within forty five (45) days of the decision or order against which the appeal is brought.

Section 14(1) of THE LAW OF LIMITATION ACT, CAP 89, R.E 2019 provides that the Court may for any reasonable or sufficient cause, extend the period of limitation for the institution of an appeal or an application, other than an application for execution of decree.

In ***ALLISON SILA V THA, CIVIL REFERENCE NO. 14 OF 1998*** (Unreported), the Court of Appeal held that:

"It is settled that where the time limited by the rules has expired, sufficient reason should be shown for the delay….."

In the present case, the applicant and the respondent alike, demonstrated that for almost nine (9) years, the applicant did not seat on her rights.

Both sides demonstrated that the applicant actively and repeatedly knocked doors of this Court through various proceedings geared to challenge the trial Court's impugned Judgment.

Records show that almost all those proceedings were struck out on account of technical omissions which had nothing to do with the applicant's inaction, negligence or disobedience to the Court process.

Such procedural default is named as technical delay as well explained by my Senior brother, Justice John Utamwa in ***THE REGISTRERED TRUSTEES OF REDEEMED ASSEMBLIES OF GOD IN TANZANIA (TAG) V OBED HEZIRON SICHEMBE & THE REGISTERED TRUSTEES OF TANZANIA ASSEMBLIES OF GOD (TAG), MISC. LAND APPLICATION NO. 82 OF 2020, HIGH COURT OF TANZANIA AT MBEYA*** (Unreported) thus:

"Concerning the doctrine of technical delay, the sub – issue is whether under the circumstances of the matter under consideration the principle of technical delay can be invoked in favour of the applicants. Indeed, in our jurisdiction this principle can be traced back from the case of ***FORTUNATUS MASHA V WILLIAM SHIJA AND ANOTHER (1997) TLR***

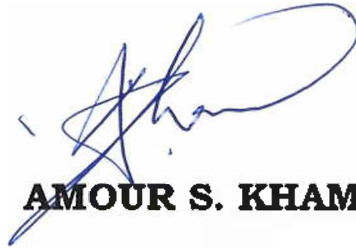
154. *In that precedent a single, Justice of Appeal (Mfalila JA as he then was) made useful remarks on this principle at page 155. The substantial part of the remarks were also quoted with approval by the CAT in the VENANCE – KAZURI case (supra, at page 14 – 15 of the typed version of the Ruling) cited by the learned counsel for the applicants in supporting their case. I also quote the remarks verbatim for a ready made reference:*

"I am satisfied that a distinction should be made between cases real or actual delays and those like the present one which only involve what can be called technical delays in the sense that the original appeal was lodged in time but the present situation arose only because the original appeal for one reason or another has been found to be incompetent and a fresh appeal has to be instituted. In the circumstances, the negligency if any really refers to the filing of an incompetent appeal not the delay in filing it. The filing of an incompetent appeal having been duly penalised by striking it out, the same cannot be used yet again to determine the timeousness of applying for filing the fresh appeal......."

In the circumstances, and on strength of the above authority, I am satisfied that a sufficient cause for extension of time has been shown.

The application is thus granted. Let the applicant file the intended appeal within forty five (45) days from the date of delivery of this ruling.

It is so ordered.



AMOUR S. KHAMIS

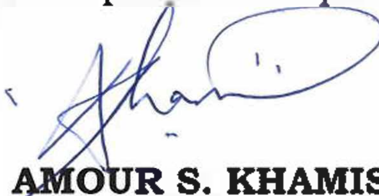
JUDGE

2/09/2022

ORDER

Ruling delivered in Chamber in presence of Mr. Kamaliza Kayaga, advocate for the respondent and also holding brief of Ms. Rose Suleiman, advocate for the applicant.

The applicant is also present in person. Right of Appeal is Explained.



AMOUR S. KHAMIS

JUDGE

2/09/2022