IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM SUB DISTRICT REGISTRY)

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 136 OF 2021

(Arising from the decision of Kinondoni District Court in Civil Appeal No. 32 of 2019)

RASHID AWAMI NJOWOKA.....APPLICANT

VERSUS

FATUMA MUSTAPHA..... RESPONDENT

RULING

Date of last Order: 1st November, 2022

Date of Ruling: 2nd December, 2022

E. E. KAKOLAKI, J.

Pursuant to section 14 (1) of the law of limitation Act, [Cap 89 RE 2019] the applicant has preferred this application for extension of time within which to file an appeal against the decision of the Kinondoni District Court issued on 3rd November 2020. The chamber summons is taken at the instance of the applicant and supported by affidavit deposed by Rashid Awami Njowoka, the applicant, stating the reasons why this application should be granted. Upon being served with the application, the respondent filed a counter affidavit resisting the application.

It is discerned from the applicant's affidavit that, he was the appellant in Matrimonial Appeal No. 32 of 2019, in which the decision of the District Court aggrieved him but could not file the appeal timely, hence forced to bring this application for extension of time for him file the appeal out of time. The applicant is relying on two grounds namely, one, medical reason and two, illegality of the decision sought to be challenged.

The application was disposed by way of written submission as both parties were unrepresented. Submitting in support of the application, the appellant having briefly stated the background of the case, submitted on the second ground first that, there is illegality noted only in the decision of the appellate Court calling for this Court's attention to make it good. He referred the said illegality of the decision as the trial Court's territorial jurisdiction to adjudicate the matter which originated from outside its jurisdiction the issue which he submitted the 1st appellate court did not consider. He referred the court to section 3 of the MCA which provides for territorial jurisdiction of the primary court and contended that, appellant and respondent were living at Madukani Kiluvya within Kisarawe District in which the jurisdiction of the Sinza/Manzese primary court does not fall within. He therefore invited the

Court to find the omission of the Court to consider that fact was an illegality which constitute a good cause for extension of time by this Court.

As regard to the medical ground, it was submitted the applicant failed to file an appeal in time because he was sick from hernia which eventually succumbed him into operation procedure, hence unable to obtain legal services timely for want of resources and strength to so do. A medical chit was annexed to the applicant's affidavit to prove this fact showing that he attended Buguruni Heath Centre on 20/11/2020 and prayed the Court to find good cause for his delay to file the appeal was advanced, hence grant the application.

In response, the respondent conceded to the applicant's submission that, the Manzese Primary Court had no jurisdiction to entertain the matter. However it was her submission that the defect is curable under Article 107A (2) (e) of the Constitution of the United Republic of Tanzania [Cap. 2 R.E 2002] which aims at doing away with technicalities in dispensing justice. She supported her stance with the case **of DT.Dobie (Tanzania) Ltd Vs. Phantom Modern Transport (1985) Ltd,** Civil Application No 141 of 2001 [CAT unreported]. The respondent submitted further that, the applicant has failed to advance sufficient reasons warranting grant of his prayer by this

Court. She added that, it is entirely the discretion of the court to grant or refuse the application for extension of time, as granting must be with sufficient reasons. To buttress her point, she referred the Court to the case of **Tanga Cement Company Vs. Jumanne D. Masangwa and Another**, Civil Application No. 6 of 2001 (CAT-unreported).

She went on submitting that, the applicant had advanced sickness as his reason for delay but he failed to account for each day of delay. In her view, the applicant's application aims at distracting the course of justice and deny her to proceed with execution. She argued that, the applicant had to account for each day of delay as stated in the case of **Bashiri Hassan Vs. Latifa Lukio Mashayo**, Civil Application No. 3 of 2007. She was of the view that, the applicant has failed to account for the number of days he had delayed and concluded by praying the Court to dismiss this application.

In a short rejoinder, the applicant attacked respondents' submission that the Court should not invoke the provision of Article 107 A (2) of the Constitution, as jurisdiction is not a matter of technicality rather a matter of procedural law which one must abide to. In his view, being a matter of law respondent cannot claim that he was not aware or ignorantly fell into as claiming that,

will amount to ignorance of law. He relied on the case of **James S/O Sendana vs Republic,** Criminal Appeal No. 279 "B" of 2013.

Concerning the submission that, the applicant failed to provide sufficient reasons for his delay, it was his submission that, he was sick from hernia and was admitted at Buguruni Health Center, and later on attended clinics from time to time as the medical report is attached. He cited the case of **John David Kashekya Vs. Attorney General**, Civil Application No.1 of 2012 which referred the case of **Pimark Profesyonel Mutfack Limited Sirket Vs. Pimark Tanzania Ltd & Another**, Commercial Case No.55/2018 HCT DSM at page 9, where the court held stated that, sickness is experienced by a person who is sick, is not shared experience. According to him sickness is a good ground for extension of time, he thus prayed for grant of the application.

I have taken time to read the affidavit, counter affidavit and considered submissions for and against this application, hence accorded them with the deserving weight. Notably this Court under section 14(1) of the law of limitation Act, [Cap. 141 R.E 2019], has discretionary powers to grant extension of time to the applicant upon good cause shown by him. Nevertheless, there are no hard or fast rules on what constitutes a

sufficient/good cause but the test depends on the circumstances of each case. This position has been discussed in plethora of cases including the case of **Tanga Cement Company Limited Vs. Jumanne D. Masangwa and Amos A. Mwalwanda**, Civil Application No. 6 of 2001 (CAT-unreported) (supra) where the Court of Appeal had this to say:

> *"What amounts to sufficient cause has not been defined. From decided cases a number of factors has to be taken into account, including whether or not the application has been brought promptly; the absence of any or valid explanation for the delay; lack of diligence on the part of the Applicant."*

Further it was adumbrated by the Court of Appeal in the case of **CRDB (1996) Limited Vs. George Kilindu,** Civil Appeal No. 162 of 2006 (CAT - unreported) that sufficient or good cause my include promptness of the applicant in bringing the application, valid explanations and lack of negligence. The Court had the following to say:

> *"…sufficient cause may include, among others, bringing the application promptly, valid explanation for the delay and lack of negligence on the part of the applicant."*

Having in mind the above position, the issue which call for the court's determination is whether the applicant has demonstrated sufficient cause to warrant this court extend him time within which to file his appeal out of time.

It is uncontroverted fact from the pleadings that, the decision sought to be appealed against by the applicant was delivered on 3rd November, 2020. As per section 80 of Law of Marriage Act as amended by Written Laws (Miscellaneous Amendment) Act No. 15 of 1980, the said appeal was supposed to be filed within 45 days. The section provides that;

> **80***(2) An appeal to the district Court or to the High Court shall be filed, respectively in the court primary court or in the district court within* ***forty-five days*** *of the decision or order against which the appeal is brought.*

In this matter therefore the applicant was supposed to file his appeal on or before 18th December 2020, but he failed to so do timely thus preference of this application for extension of time which was filed on 25th March, 2021, more than 96 days from 18th December 2020. The applicant is therefore duty bound to account for his delay for such inordinate delay of more than 96 days.

In discharging that duty as alluded to above, the applicant relied on the ground of medical reason/sickness. He stated in paragraph 3 of his affidavit that was facing medical challenges which disabled him to obtain legal services timely hence failure to file the appeal in time. A medical chit dated 20/11/2020 was annexed to the affidavit.

It is true and I am in the same line of argument with the appellant that, sickness when sufficiently established constitute good cause for extension of time as it was stated by this Court in the case of **Julieth d/o Shedrack Daudi Vs. Abel S/o Laurent Lukimbili**, Misc. Civil Application No 9 of 2020, where it stated thus:

> *"…sickness when proved is a sufficient cause upon which an application for extension of time can be granted."*

It should however be noted that, mere assertion by the applicant that he was sick as shown by his attendance in hospital only on 20/11/2020, without justifying for how long was he under sickness is not enough to constitute good cause for extension of time. The mere fact that he attended hospital on single day of 20/11/2020 as an outpatient after issue of the judgment sought to be impugned on 03/11/2020, accounts for 17 days only while leaving out more than 79 days unaccounted for, as then he was still left with 28 days out of 45 days within which to appeal for him to obtain legal services, the time which he failed to utilize fairly. In my humble view this reason of sickness does not account for the delayed days of more than 79 days after deducting the said 17 days, hence a conclusion that the applicant acted negligently for failure to pursue his appeal.

It is a well settled principle of law that, negligence on the part of the applicant has never constituted sufficient reason for extension of time as sufficient cause include lack of negligence and apathy. This principle has been stated in number of decisions including the case of **CRDB (1996) Limited Vs. George Kilindu,** Civil Appeal No 162 of 2006, (CAT-unreported), where the Court of Appeal held that:

> *"…sufficient cause may include, among others, bringing the application promptly, valid explanation for the delay and* ***lack of negligence*** *on the part of the Applicant."*

In this matter since the applicant acted negligently and since he has also failed to account for more than 79 delayed days, I find the reason of sickness is insufficient to bail him out of the duty to account for all 96 delayed days. The first ground is therefore destitute of merit and I so find.

Moving to the second reason on the issue of illegality of the decision sought to be impugned, I am at one with the applicant that when illegality of the decision sought to be challenged is established, same constitute sufficient reason for extension of time, regardless whether each and every day of delay has been accounted for. See the cases of **Transport Equipment Vs. Valambia and Attorney General** (1993) TLR 91 (CAT) and **VIP Engineering and Marketing Limited and Three Others Vs. Citibank**

Tanzania Limited, Consolidated Civil Reference No. 6, 7 and 8 of 2006 (CAT -unreported). In the case of **VIP Engineering and Marketing Limited and Three Others Vs Citibank Tanzania Limited,** the Court of Appeal patently stated:

> *"It is, therefore, settled law that a claim of illegality of the challenged decision constitutes sufficient reason for extension of time under rule 8 regardless of whether or not a reasonable explanation has been given by the applicant under the rule to account for the delay.*

This principle was also adumbrated in the case of **Principal Secretary, Ministry of Defence and National Service Vs. Devram Valambia** [1992] TLR. Where it was held that;

> *In our view, when the point at issue* ***is one alleging illegality of the decision being challenged****,* ***the court has a duty, even if it means extending the time for the purpose, to ascertain the point and if the alleged illegality be established, to take appropriate measures to put the matter and the records straight****.* (Emphasis supplied.)

However, it is the settled principle of law that, whenever raised the claimed illegality should be apparent on the face of record, as merely claiming of illegality is not enough to prove that there is sufficient reasons warranting grant of extension of time. See the case of **Lyamuya Construction**

Company Limited Vs. Board of Registered Trustees of Young Women Christian Association Tanzania, Civil Application No. 20 of 2010 (Unreported) where the Court of Appeal held that:

> *Since every party intending to appeal seeks to challenge a decision either on points of law or fact, it cannot in my view be said that, in VALAMBIAS case, the court mean to draw a general rule that every applicant who demonstrate that his intended appeal raises points of law should, as of right, be granted extension of time if he applies for one.* ***The court there emphasized that such point of law must be that of sufficient importance and I would add that 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. (Emphasis supplied)*

In the present application the applicant alleges that, the issue of territorial jurisdiction of the Manzese / Sinza Primary court which is under Kinondoni District Court, to determine their matter originating from Kiluvya – Kisarawe District, Coast Region, was not considered by the Court, hence an illegality in which this Court will have opportunity to look at and make it good should the application be granted. He therefore implored the Court to grant the application as prayed.

I have had an ample time to consider both parties submission in respect of this ground of illegality as advanced by the applicant in which the law under **Lyamuya Construction case** dictates that, the same should not only be pleaded but also be apparent or easily seen from the record and not the one to be drawn from very long arguments or submissions. Having navigated through the decision sought to be impugned, I am unable to appreciate the appellant's assertion that, the issue of whether the primary court of Sinza/Manzese primary Court had jurisdiction to determine parties matrimonial dispute was not considered by the Court in its decision. The reason I am so holding is not difficult to find as in its type judgment at pages 09 -11 the District Court of Kinondoni as appellate Court dealt with that issue at length before ruling out that, the trial court had jurisdiction to entertain the said matter. In view of the above therefore the alleged existence of ground of illegality in the decision sought to be impugned by the applicant for court's failure to consider the trial Court's jurisdiction to entertain parties dispute falls short of merit and I dismiss the same.

As the appellant has failed to account for the delayed days in filing his appeal and since he has also failed to successful advance other sufficient grounds

warranting grant of the this applicant, I find the application is devoid of merits and proceed to dismiss the same as I hereby do.

As the matter is matrimonial one, I order each party to bear its own costs.

It is so ordered.

Dated at Dar es Salaam this 2nd December, 2022.

E. E. KAKOLAKI

JUDGE

02/12/2022.

The Ruling has been delivered at Dar es Salaam today 02nd day of December, 2022 in the presence of both parties and Ms. Asha Livanga, Court clerk.

Right of Appeal explained.

E. E. KAKOLAKI

JUDGE

02/12/2022.