

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR-ES-SALAAM DISTRICT REGISTRY)

AT DAR-ES-SALAAM

CIVIL APPEAL NO. 123 OF 2022

(Arising from the Ruling and drawn order of the District Court of Kibaha in Civil
Application No. 18 of 2022 dated 12th August, 2022)

(J. Lyimo, SRM.)

HAMIS ABDALLAH MKUTO APPELLANT

VERSUS

ZAKIA IDDI KILETE RESPONDENT

JUDGMENT

Date: 16/03 & 24/04/2023

NKWABI, J.:

In a suit for divorce, division of the matrimonial properties and maintenance of the children, the trial Court, the primary court of Kibaha district at Mkuza granted divorce, divided the matrimonial properties and made an order for the maintenance of the two issues of the marriage. That was on 01/04/2022. The appellant was late in filing an appeal to the district court. He unsuccessfully applied for extension of time in the district court of Kibaha. He is now appealing against the refusal of extension of time having the following grounds of appeal:

1. That, the honourable resident magistrate erred in law and fact by holding that the appellant did not show sufficient cause to warrant grant of extension of time.
2. That, the honourable resident magistrate erred in law and fact by her failure to consider the appellant's reason for the delay together with the document annexed from Tanzania People's Defence Force.
3. That, the honourable resident magistrate erred in law and fact by taking into consideration the other days, that is, 1/4/2022 up to 27/4/2022 days to be accounted for to show the delay.
4. That, the honourable resident magistrate erred in law and fact by taking into consideration the respondents averments which were not pleaded in her counter affidavit hence reached into an erroneous decision.

Thus, it was prayed the appeal be allowed, set aside the decision of the district court and extend time within which the applicant could file his appeal out of time.

The hearing of this application was carried out by way of written submissions. Submissions for and against this application were filed save for rejoinder submission. Mr. Tumaini Mgonja, learned counsel drew and filed

the submission for the appellant. The respondent was represented by Mr. Mwana Ally Chipaso, also learned counsel. I highly appreciate both learned counsel for their powerful submissions.

On the 1st and 2nd grounds of appeal, the counsel for the appellant stated that the appellant clearly adduced reasons which hindered him to file an appeal within the prescribed time as per paragraph 6 of the affidavit and provided annexure HM 2 (the movement order). He stated the appellant's time lapsed on 15/05/2022.

On the respondent's side, it was contended that the appellant had to account for the delay from 15/05/2022 to 25/07/2022, if he were in Mtwara for a military task, yet he ought to have accounted for the days from 18/07/2022 to 25/07/2022. The counsel for the respondent cited among other cases the case of **Ratna v. Kumarasamy & Another** (1964) 3 All ER 933

"The rules of Court must, prima facie be obeyed, and, in order to justify a Court extending the time during which some step in procedure requires to be taken, there must be some material on which the Court can exercise its discretion. If the law were otherwise, a party in breach would have an

unqualified right to an extension which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation.”

It was stated by the counsel for the respondent that since the appellant failed to account for the other days, then the appeal should be dismissed with costs.

In my view, when considering this appeal one should have in mind the decision of the Court of appeal in **Benedict Mumello v. Bank of Tanzania**, Civil Appeal No. 12 of 2002 where it was stated:

*"In the instant case, it is common ground that the respondent applied for copies of the proceedings and judgment on 6.1.1999 which was just about 14 working days of the date of the decision intended to be appealed against. It is also common ground that the respondent was supplied with the same on 8.12.1999 after a reminder and filed the application on 16.12.1998. In our view, applying for copies of proceedings and judgment within such a short time from the date of judgment, and later making a follow up by way of reminder, **and finally lodging the application***

immediately after being supplied with the same, depicts diligence on the respondent. '[emphasis mine].

I think that the appellant, in this appeal, acted diligently in filing the application for extension of time on 25th July 2022 as per the date the affidavit and chamber application copies which show were presented in the district court. The respondent did not dispute the content of paragraphs 8 and 9 which imply that the appellant was served with the execution documents after coming back from the special task in Mtwara. There is no evidence on the part of the respondent to disprove that the appellant was in Mtwara as per the letter. I note here also that fees for filing the application was paid on 22/07/2022 at 18:15 pm while the copy of the judgment was received by the appellant on 20/07/2022. That connotes diligence on the part of the appellant.

The appellant received the copy of judgement on 20th July 2022 and filed the application on 25th July 2022. I take judicial notice that on 23rd July 2022 was on Saturday and 24th July 2022 was Sunday, so the appellant could not file his application documents on those days as they are not waking days. Had the district court had seen the decision in **Benedict Mumello** (supra),

I think, it would have decided differently regard being had to the view of the Court of Appeal that the delay for 3 days was termed as immediate. See also the case of **Kighoma Alli Malima v. Abbas Yusuf Mwingamno**, Civil Application No. 5 of 1987 (unreported):

"Sufficient reason has been considered in a number of cases. Sometimes a slight lapse by an advocate might be overlooked, but not a lapse of a fundamental nature like the non-supply of any supporting evidence for an application for enlargement of time."

That said, I find that the appellant had accounted for the delay and therefore ought to have availed extension of time within which to file his appeal. The 1st and 2nd grounds of appeal are found to be merited. Time is extended for the appellant to file his appeal within 14 days from the date of this judgment. The appeal is allowed. Costs are awarded to the appellant because the respondent asked for the dismissal of the appeal with costs and the submissions were drawn by the counsel while there is no indication that it was drawn gratis.

It is so ordered.

DATED at **DAR-ES-SALAAM** this 24th day of April, 2023.

