IN THE UNITED HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO. 253 OF 2021

(Originating from Miscellaneous Civil Application No. 177 of 2020 of District Court of Temeke at Temeke)

FRANCIS MATIKU MANG'IRA.....APPELLANT

VERSUS

ANASTAZIA MASIRORI MWITA.....RESPONDENT

JUDGMENT

Date of last order: - 16/2/2022
Date of judgment: - 16/03/2022

OPIYO, J.

The appellant herein being dissatisfied with the decision of the District Court of Temeke at Temeke vide Miscellaneous Civil Application No. 177 of 2020 appeals to this court based on the following grounds:-

1. That, the trial Magistrate grossly erred both in law and facts for denying the applicant's prayers for extension of time while the respondent's petition for divorce of the marriage to be annulled is manifested with illegalities apparent on its face by respondent admitting herself that she has been guilty of misconduct during their marriage with appellant.

2. That, the trial magistrate totally erred and misdirected herself in her findings when injudiciously failed to evaluate and consider the sufficient reasons and credible evidence adduced by the appellant.

3. That, the trial magistrate failed judiciously to exercise her discretionary powers vested on her in dismissing the appellant's application based on facts and documentary evidence pleaded by the respondent which have been overtaken by events.

4. That, the trial magistrate strangely and unfairly admitted the evidence of the respondent which ventured and delved into the merits of the appellants intended petition for annulment of marriage.

5. That, the trial magistrate erred by denying appellants application based on sympathy, sentiments, personal feelings towards the respondents, and the length of time of the existence of the marriage of 37 years between the applicant and respondent.

6. That, the trial Magistrate misdirected herself in holding that the appellant and the respondent continued living as husband and wife after the alleged 37 years, fact which was not true as they were separated.
7. That, the trial Magistrate erred in both law and facts for hold that the exclusion of two children as being not the seeds of the appellant does not fault any right for not being an issue of inheritance.

8. That, the magistrate erred both in law and facts for being bias and unfair in denying the applicants application for extension of time, by injudiciously oversighting and untouching other prayers sought and addressed by the applicant.

Wherefore, the appellant prays for the appeal to be allowed with costs and the appellant be allowed to petition for annulment of marriage out of time. The appeal was heard orally on 15th February 2022. In this matter the respondent enjoyed the services of Hamisi Mfinanga, learned counsel while the appellant appeared in person.

Submitting on the first ground the appellant stated that, on 7th October, 2020 the respondent filed petition for divorce at the District Court and in the petition stated how they got married and issues they had in marriage. But, she did not include the period they started to cohabit as husband and wife. She also mentioned only four children leaving two elder children namely Bhoke and Mwita. He stated that he was surprised by that and secretly made follow-ups and found that she had written a note to the respective two children telling them that he was not their father. It is upon such realisation that he believes their marriage was based on a serious misrepresentation. Thus, he thought of applying for annulment of the said marriage. However, he realised that he was already time barred to make the application, thus he had to apply for extension of time vide application no 177 of 2020, to enable him file annulment application out of time. The said application was however dismissed on 16th June 2021 without any legal basis, he so argued.

Arguing for the second ground, the appellant stated that, the testimony and the exhibits he tendered were disregarded despite the fact that he did not know that the children were not his. These included the note the respondent had written to the said two children explaining who their father was. That the magistrate did not consider respondent's own admission through clinic card she tendered in court not bearing appellant's name as a father. To him, that was an express admission of misconduct that was not considered by the trial magistrate, constituting an error on trial court's part he wishes to challenge.

On the third ground he argued that the trial magistrate based her decision on unrelated exhibits which was a letter written in 1986 claiming to be of appellants mother informing him of the respondent's bad habit of seeing other men. This letter is overtaken by events, he submits. He contends that there is no one in his community who would tolerate his wife seeing other men within his knowledge and keep quiet. This itself shows he did not know about the two children not being his as he could not withstand it.

Arguing on the fourth ground the appellant stated that, the Magistrate erred in admitting irrelevant documents, which could have been relevant only if the appellant was allowed to file the application for annulment of the marriage. He is making reference to the letter alleged he received from his mother in 1986 which was tendered by the respondent.

On the fifth ground his submission is that the trial court's decision was based on sympathy and emotions and her own perceptions of the towards the respondent. That, the magistrate ignored his rights for the pain he had to endure mentally as a result of sudden information that the two children he had always thought were his were not actually his. The court could have reflected how the appellant had given them the necessary parental care providing all their necessities as a father instead of measuring the years the marriage subsisted. He submitted that their marriage is said to have subsisted for 37 years for the only reason that it was not yet legally dissolved, but in real sense they had spent many years in separation.

On the same footing he continued to state on ground six that the trial magistrate erred in facts when in holding that they stayed together and continued getting conjugal rights for all 37 years which is contrary to the truth he had stated that they were separated since 2012 and that even before that they had stopped enjoying conjugal rights for long.

On the seventh ground, the trial magistrate did not consider the effect such information could have in both the appellant and the children themselves. The pain both have to endure as outcome of the information. He argued that, if he could have considered the whole situation in its totality he could not have held how he did.

On the eighth ground, the appellant stated that the trial magistrate did not consider all issues involved in the application, including not touching prayer for stay of the respondent's petition pending determination of the

current appeal, the fact which is so prejudicial to him. Thus, he prayed for this appeal to be allowed.

Resisting the appeal, the respondent through his counsel stated on the first ground that, this appeal emanates from Misc. Application No. 117 of 2020, in which the appellant had prayed for extension of time to file a petition for annulment their marriage of many years. He continued to state that by the time the two stated their relationship the respondent already had one child and was pregnant with the second child. The appellant was informed of the circumstances, and he agreed with it, he stated. That means, he was aware of them not being his children right from the beginning, that is why in 2012 he chased away the two children away from his home and the two went to live at their mother's house in Mwanza. He cannot claim sudden knowledge of such facts from the respondent's petition for divorce.

He continued to argue that the application for extension of time to file annulment application is not a result of any new information but the desire to protect his concubine, one Leticia Matali whom they are jointly sued in the respondent's petition for divorce. He contended that, other matters the plaintiff has argued on this ground has no connection to this matter. In as much as he agrees that illegality is a ground for extension of time, but there is no any illegality identified by the applicant which was worth considering by the trial court in granting his application. That, he is insinuating illegality in matrimonial cause, the matter that, even if it is there it cannot influence things in his application for extension of time.

That, in the application the appellant was required to give account of long silence to act for the issue he was aware of long ago.

On the second ground, the counsel submitted that what the appellant referred to the exhibits which were not considered are the birth certificates of those two children. These made him argue that if they were not his children why did the certificates has his name as a father, but he forgets that the issue of certificates was talked about at trial and the court agreed with the respondent's contention that those certificates did not reflect the truth in presence of clinic cards not bearing his name and indicating different particulars concerning the children including names and dates of birth.

He continued to argue that, after all, the appellant is the one who facilitated making of those certificates, and even signing them as Registrar. Therefore, the issue of birth certificates bearing his name is best known to himself as he is the one who chose to indicate so, different from the clinic card. That, according to clinic card there was a child by the name Tumaini whose name was later changed to Mwita Chacha who was born in 1983 while birth certificate showed the year of birth is 1984. Also, as he is the one who signed them as he one authorised to sign the birth certificates, they are of his own making the way he voluntarily chose them to appear. Therefore, the appellant's argument that he did not know that the two children were not his is baseless. He knew since inception and that was never a problem in their marriage, he submitted.

On the third ground his submission is that, the claim that the documents are overtaken by the events is a mere afterthought that cannot be entertained by the court. All exhibits are relevant to our case and none is overtaken by any event. That the alleged letter was from his mother, and it shows that he had a long knowledge about respondent's previous relationships that produced two children before they got married. Such kind of document cannot be overtaken by events as it establishes duration of his long knowledge of the issue of respondent having previous relationships.

On the fifth ground, the respondent counsel stated that the trial Magistrate did not decide the case based on sympathy, sentiments, and personal feelings but based on evidence and exhibits available proving that the appellant was aware long ago that the children were not his as stated on page 6 of the ruling. The court based on the legal principles in granting extension of time referring to a number of authorities and held that the appellant did not meet those criteria.

The counsel for the appellant stated on the sixth ground that, it is the appellant who raised the issue of 37 years of marriage in paragraph 6 of his affidavit. Therefore, they were all along husband and wife, if not the coming in of the concubine he is set to protect by preferring annulment over divorce proceeding though both procedures determine the same rights of ending their marriage they no longer want.

His argument on the seventh ground that the exclusion of two children as being not the seeds of the appellant did not fault any right for not being

an issue of inheritance is that this phrase was just a by the way assertion which did not influence the decision of the trial court. After all, if there is any rights relating to the children, the same will be determined in the matrimonial cause respondent have already filed.

On the last ground that the trial court was biased, he submitted that this is strong allegations against the court that required proof in terms of the holdings in the case of **Laurean Rugaimukamu v IGP & Another, Civil Appeal No. 13/1999, CAT cited in Alhaji Issa Nkingilea v Bukoba DC, Land Appeal No. 21/2019, HC Bukoba** which he did not do. The basis of this claim is that some of his prayers were not taken on board. However, this claim is not true as he had only two claims which were for extension of time and stay of petition for divorce. That both claims were considered as divorce proceedings were stayed until determination of application for extension of time was completed and the application for extension of time was also determined on merits resulting to this appeal. Thus, there is nothing that court did indicating biasness.

In rejoinder, the appellant almost reiterated what he submitted in chief and insisted that, the illegality he is referring to in ground no 1 is that the magistrate brought in some legal issues that were not raised by any of the parties at page 5 and 6 of the judgement like requirement of counting of each day of delay. He argued that this is contrary section 106(1)(e) of the Law of Marriage Act which require the issue to be discussed must have been raised by the petitioner. And that all what has been submitted by the counsel for the respondent does not show his knowledge that the

petitioner had a child and was pregnant at the time of their marriage with another man or that he accepted the facts as alleged.

He contended that he had disputed the letter alleged to have been written by his late mother as she was illiterate and there is no way to prove that she wrote that letter. And even if she did write the letter, it does not prove that the alleged previous relationships produced children before their marriage.

Both sides have submitted extensively in support of their respective stands. Their efforts are highly appreciated. However, in examining the grounds I found that they are too wide going beyond what is required in dissatisfaction with the dismissal of extension of time application. Some arguments would be valid if the application for annulment was filed and finally determined. In short, they devolve into the merits of the intended application of annulment, which was not in place yet. For the reason, I will not go on each ground separately, but discuss them jointly touching only those that crop down to the dismissal of the application for extension of time.

I had a time to painstakingly going through the records of the trial court and all documents relating to this matter. Through the records of the trial court, it is evident that the appellant filed an application for extension of time vide Misc. Application No. 117 of 2020 which was dismissed for lack of merits on 16th June, 2021 leading to this appeal. It is also noted that the application was for extension of time to enable the appellant file application for annulment of marriage application out of time. So, like any

application for extension of time, the 1st determinant factor is the sufficiency of the reason for delay to act in time. This is reflected under section 14 (1) of Cap 89 RE 2019 under which the application was based. The section reads:-

> *14.-(1) Notwithstanding the provisions of this Act, 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 the execution of a decree, and an application for such extension may be made either before or after the expiry of the period of limitation prescribed for such appeal or application.*

Thus, the first issue to look into is whether the applicant complied with the above provision in that he had sufficient reasons to warrant the court to extend time for him to file petition for annulment, but the same was denied to him. In such determination the above provision is to be read together with section 96(1) (i)-(iii) of the law of marriage Act, Cap 29 RE 2019. Under this section the application for annulment of marriage has to be made within a year from the date of marriage based on the grounds stated therein. The section provides:-

> *96(1) The court shall have power to grant a decree of annulment in respect of any marriage which is voidable under the provisions of section 39: Provided that-*
>
> *(a) where the petition is founded on an allegation that at the time of the ... **was pregnant by a person other than the petitioner,** the court shall not grant a decree unless it is satisfied-*

(i) that the petition ***was filed within one year of the date of the marriage****; and*

(ii) that ***at the time of the marriage the petitioner was ignorant of the fact alleged;*** *and*

(iii) that ***marital intercourse has not taken place with the consent of the petitioner since discovery by the petitioner*** *of that fact; (emphasis supplied)*

The applicant imputed ignorance in terms of subsection (1)(a) (ii) above, claiming that, at the time of their marriage he was ignorance of the fact his wife had a child and was pregnant with another man until when the respondent filed petition for divorce recently, adamantly disclosing such disturbing facts to him. He all along was made to believe all children were his biological children. The marriage sought to be annulled has subsisted for more than three and half decades. The issue is, did the appellant manage to show that his ignorance subsisted all that long to deserve grant of extension of time?

Regarding the issue of extension of time, as a matter of general principle whether to grant or refuse an application for the extension of time is entirely in the discretion of the court. But that discretion is judicial and so it must be exercised according to the rules of reason and justice. As referred to by the trial magistrate on her ruling on page 5, the guidelines for granting an extension of time were laid down in **Lyamuya Construction Company Ltd v Board of Registered Trustees of Young Women's Christian Association of Tanzania, Civil**

Application No. 2 of 2010 (unreported). In this case, the court reiterated the following guidelines for the grant of extension of time: -

> *"(a) The applicant must account for all the period of delay.*
> *(b) The delay should not be inordinate.*
> *(c) The applicant must show diligence and not apathy negligence or sloppiness in the prosecution of the action that he intends to take.*
>
> *(d) If the court feels that there are other sufficient reasons, such as the existence of a point of law of sufficient importance; such as the illegality of the decision sought to be challenged."*

The appellant was supposed to sail on the above guidelines in order to succeed in his application for extension of time. The gist of appellants contention on ground 2nd to 7th is that he had proved that he did not know that the children were not his until he was served with the petition of divorce, but the trial court failed to consider his evidence to that effect leading to deny his application. The reason he put forward to shield his claimed ignorance includes presence of birth their certificates indicating his name as a father and having to take their care like his own children. The respondent disputed the above contention. She claimed that one child was born even before they stated relationship and she was pregnant with another child at the time of their cohabitation in 1985 to the best of her knowledge. That, the whole truth was put before the appellant who had agreed with the situation right from the beginning and he undertook to

accommodate it, including taking care of those children. That, based on the same understanding he opted to put his name on the birth certificates made and signed by himself. Thus, as he is the one who made the said certificates, he chose voluntarily to include his name as a father but the did not make him the biological father he knew he wasn't.

In terms of section 96(1) (a)(i) of the Law of Marriage Act (supra) lack of knowledge of the fact upon which one bases in applying for marriage annulment is a key to the application for extension of time to file such application. In my considered view the appellant did not manage to prove his ignorance of these facts up to the time the respondent filed petition for divorce by mere production of birth certificates with his name on it as a father. My basis for taking this path include the observations that, one, there is dispute as to when their relationship, which they referred to as cohabitation, started. He claimed it started in 1983 before the first child was born while respondent claims that it was in 1985 after the first child was born and she was pregnant with the second child with another man.

Second, the birth certificates were made at a later stage, not at the respective time when the alleged children were born. And as alleged by the respondent, they were made and signed by the appellant himself as the person who was in authority of making and signing birth certificates. It is difficult to tell if his name was included with the reason of believing he was a biological father or mere social father. He remains the only person who knows why his name was included therein as a father indicating a different birth date form a clinic card submitted by the mother/respondent showing the first child was born in 1983. If the

parents themselves do not agree on the time their alleged biological child was born, what should the court do to know the truth other than choosing most reliable testimony on the fact. This brings us to the third factor of existence of clinic card dating back to 1983 which to me seems more reliable proof of the birth of the first child.

Under normal circumstances, the two documents, birth certificates and clinic card of the same child usually contains same particulars as the latter is supposed to emanate from the former. In my considered view all these facts show there is one version of the story that is not true. I believe both parties know which one, but for the reasons best known to themselves, they chose it this this way, 'a big mess,' for the court to try to clear. In so doing circumstances of clinic card had to be thoroughly examined. The clinic card for the elder child was seemingly made at the time of birth, and it does not indicate the name of the appellant as a father. If it was so indicating, it would seem to have been made for the purpose of deceit that she would be estopped from denying now against the appellant. It indicates maternal grandfather as the child's father, a typical practice when a mother chooses to conceal the identity of her child father for whatever reason. If the appellant was already in her life and readily available for taking his fatherhood responsibilities as he claims, not naming him wouldn't have been the case in the clinic card. Again, if birth certificates were made by respondent referring to the same date as that in the clinic card with appellant's name as a father, that would be faintly convincing that she might have intended to deceive the appellant. My choice of clinic card over birth certificate is also guided with the fact that clinic card is the document that was made at the alleged time of birth with

no other purpose other than showing the birth of the child, rather than birth certificate that was made some years later, possibly with different purpose making it different from the former document showing the birth of the same child. Appellant claims that he was not aware of the of the clinic card, it might be true, but only for some time, as he was supposed to have used the same in producing the birth certificates, he never denied involving in their production. If not, then it is not short of inexcusable negligence for the purpose of extension of time. It is a settled law that a party applying for extension of time has to account for every day of delay (**Kasembe Tambala v The Commissioner General of Prisons & 2 Others, Civil Appl No. 383/01 of 2020, CAT, DSM)**

Therefore, in my considered view, as there is no single document that can be traced from the respondent that intended to deceive the appellant as he claims. It remains that likelihood of him knowing about the two children not being his before service of the petition for divorce is high.

Even if it can be taken that indeed he came to know the facts after being served with the petition for divorce, still there is unexplained period of delay which could still deny him extension of time. In the instant case, the appellant's affidavit on paragraph 5 states that the respondent petitioned for divorce and Matrimonial Cause No. 26 of 2020 was filed on 7th October, 2020 and his petition for extension of time was filed on 8th December, 2020, there is a gap of 60 days of delay in in filing the application that was not at all explained, by the applicant. This is not likely in revelation of the would be such a shocking news for any biological parent.

That said, it remains that, as correctly argued by trial court that the appellant had not accounted sufficiently for the period of inordinate delay of 37 years, he ought to have known the facts. Therefore, 2nd to 7th grounds are dismissed.

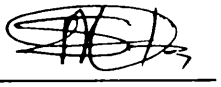
I now turn to the first ground. On the first ground, the appellant sought to prove that respondents petition for divorce had illegalities that ought to be corrected if extension of time was granted for the annulment of the marriage itself. By the virtue of **Lyamuya Construction Company Ltd** case *(supra)* on *item (d)* illegality is one of the grounds to warrant the extension of time same as in the case of **The Principal Secretary, Ministry of Defence and National Service v Valambhia (1992) TLR 185** of which the court insisted that;

> *"If the point of law at issue is illegality or otherwise of the decision being challenged, that is sufficient importance to constitute "**sufficient reason**" for extending time."*

In the case at hand, the appellant failed to show which points of law or illegality on the face of records of the impugned proceedings to warrant an extension of time for annulment of the alleged marriage. What he contemplated as respondents' admission of her misconduct by themselves are not illegalities worth correcting through annulment of marriage, they are fit argument as grounds of divorce. Therefore, this ground as well lack merit as a reason for extension of time to file annulment of marriage. I equally dismissed

Having said that, it is my considered conclusion that the applicant had not demonstrated any good cause that would entitle him to the extension of time prayed for. As a result, this appeal fails and is, accordingly, dismissed. No order to costs due to the parties' relationship.

It is so ordered.



M. P. OPIYO,

JUDGE

16/3/2022