

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(MOROGORO SUB REGISTRY)

AT MOROGORO

MISCELLANEOUS ~~FILE~~ CASE APPLICATION NO. 08 OF 2021

(Arising from Civil Case No. 10 of 2020 at the District Court of Morogoro at
Morogoro)

CATHERINE ABDUL HEMED APPLICANT

VERSUS

BENARD WILSON MASAKA RESPONDENT

RULING

Date of Last Order: 07/02/2022 &
Date of Ruling: 11/03/2022

S.M. KALUNDE, J.:

The applicant, CATHERINE ABDUL HEMED, have, by way of Chamber Summons, lodged the present application under the provisions of section 14 of **the Law of Limitation Act, Cap. 89 R.E. 2019** ("henceforth the LLA") seeking the indulgence of this court in extending time within which to file an appeal against the judgment and decree of the District Court of Morogoro at Morogoro (**Hon. Elia Mrema (RM)**) ("henceforth the trial court") pronounced on 10th November, 2020 in Civil Case No. 10 of 2020. The application is supported by an affidavit duly sworn by CATHERINE ABDUL HEMED. The



application is being resisted by the counter affidavit sworn by BENARD WILSON MASAKA, the respondent.

In the present proceedings, **Mr. Samwel Alphonse Banzi**, learned advocate appeared for the applicant.; whereas learned counsel **Mr. Christopher Mgala** appeared for the respondent.

Arguing in support of the application, Mr. Banzi sought to adopt the affidavit filed in support of the application as part of his submissions. The counsel went on to argue that the main ground for extension of time in the present application was that there was illegality in the decision of the trial court. In support of that contention the counsel submitted that the subject matter at the trial court was distribution of the matrimonial property between the parties. He added that the one of the properties forming part of the matrimonial property was not included in the division of the matrimonial property. In his reasoning, this was a sufficient illegality which suffices this court to condone the delay. To support his argument, he cited the case of **Barclays Bank T. Ltd vs Tanzania Pharmaceutical Industries & Others** (Civil Application 62 of 2018) [2019] TZCA 159 (27 April 2019 TANZLII)



Responding, Mr. Mgala was also quick to adopt the resisting counter affidavit, he informed the Court that the counsel for the applicant has failed to convince the court that there was any point of law worth of consideration by this Court an illegality sufficient to condone the delay. Mr. Mgala was of the view that the counsel for the applicant has failed to even establish whether the alleged property was part of the proceedings for it to be considered in the division of the matrimonial property. Whilst acknowledging that illegality may constitute a good cause, the counsel reasoned that the applicant has failed to establish that there was illegality. The counsel added that the applicant has failed to account for the delay in lodging the appeal. To support his case, he cited the case of **Joseph Raphael Kimaro & Another vs Republic** (Criminal Application 54 of 2019) [2020] TZCA 174 (26 March 2020) and **Dr Ally Shabhay vs Tanga Bohora Jamaat** [1997] TLR 305 TZCA.

In rejoining, the counsel for the applicant was brief, referring to the affidavit filed in support of the application, he insisted that there was illegality in the proceedings and decision of trial court. He thus insisted that the application be granted with costs.

I have given due considerations of the submissions for and against the application. Before delving into considering the merits or otherwise of the application, I propose to state, albeit briefly the law governing applications of the present nature.

This application was brought under the provisions of section 14(1) of the LLA. 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."*

[Emphasis is mine]

It is apparent from the above provision that extension of time may only be granted upon the applicant showing reasonable and sufficient cause. It is common ground that courts have the discretion to grant or refuse the application for extension of time. However, it is also settled that the discretion of the court is not absolute as it must be exercised judiciously according to the rules of reasoning and justice, and not

according to private opinion. Whether or not to grant the application is dependent upon circumstances of each particular case. However, in considering whether there is reasonable and sufficient cause, courts have developed principles to be considered. These principles include:

- "(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 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 above principles were laid down in the now famous case of **Lyamuya Construction Company Ltd. vs. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported) and have been considered and affirmed in several subsequent decision of the Court of Appeal.

Reverting to the present application, as may be gleaned from the chamber summons and the flanking affidavit as well as oral submissions made by the counsel for the applicant

before this Court, the main reason for the present application is that there is illegality in the decision of the trial court. According to the applicant, one of the properties alleged to form part of the matrimonial property was not considered, and therefore divided in the distribution of the matrimonial properties.

However, as rightly pointed out by the counsel for the respondent, the counsel for the applicant failed to demonstrate that the property was in any way part of the properties in the proceedings before the trial court. I think if the applicant intended to rely on this ground, it was her duty and obligation to supply the court with the relevant materials or information to ascertain the fact and provide sufficient explanation and not leave the Court to second guess whether the alleged property was or was not part of the proceedings and risk going into determining the appeal itself.

There is no dispute that illegality may constitute a good ground for extension of time even when the applicant has failed to account for each day of the delay. However, for illegality to stand the illegality of the assailed decision must clearly be visible on the face of the record and must be of sufficient importance such as a point of law. See **Mekefason Mandal & Others vs The Registered Trustees of the**

Archdiocese of Dar es Salaam (Civil Appl. No.397/17 of 2019) [2019] TZCA 450; (30 October 2019 TANZLII).

In the case of **FINCA (T) Limited & Kipondogoro Auction Mart vs. Boniface Mwalukisa**, Civil Application No. 589/12 of 2018, Court of Appeal at Iringa (unreported) the respondent filed Civil Case No. 24 of 2014 against the applicants at the District Court of Njombe, seeking for special and general damages jointly and severally against the applicants, alleging that they attached and sold some of his property properties which were not part of the secured loan security. The judgment and decree were issued in favour of the respondent. Dissatisfied by the decision, the applicant's unsuccessfully appealed to the High Court through Civil Appeal No. 8 of 2016. The High Court decision was in favour of the respondent upholding the decision of the trial court. Being aggrieved by the High Court decision, the applicants lodged a Notice of Appeal to the Court of Appeal and thereafter received Judgment and Decree on 05th October, 2016 and a certificate of delay. They did not file for leave to appeal within time and filed an application for extension of time around September 2017.

The applicant was dismissed by the High Court on 20th July 2018 hence an application before the Court of Appeal. In



his affidavit the applicant alleged that delay in filing the application was because the applicant was going through restructuring and overhauling without explaining how the same led to their failure to proceed with an appeal. They also contended that the decision of the High Court was tainted with illegalities which the Court of Appeal ought to look into. The applicants alleged that the High Court failed to consider various factors required by law leading to granting of reliefs not commensurate to evidence before it, and that the High Court failed to properly re-evaluate evidence leading to injustice on the applicants' part.

Having cited its decisions in **VIP Engineering and Marketing Limited and Three Others vs. Citibank Tanzania Limited**, Consolidated Civil Reference No. 6, 7 and 8 of 2006-CA (Unreported); **TANESCO vs. Mufugo Leonard Majura and 15 Others**, Civil Application No. 94 of 2016, (unreported); **Principal Secretary Ministry of Defence and National Service vs Duram P. Valambhia** [1992] TLR 182; [[1992] TZCA 29; (03 July 1992); 1992 TLR 185 (TZCA)] and **Lyamuya Construction Company Ltd. vs. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010, CAT (unreported), the Court (**Korosso, J.A**) stated thus:



*"It is however, significant to note that the issue of consideration of illegality when determining whether or not to extend time is well settled and should borne in mind that, in those cases where extension of time was granted upon being satisfied that there was illegality, the illegalities were explained. For instance, in **Principal Secretary Ministry of Defence and National Service vs Duram P. Valambhia** [1992] TLR 182 the illegality alleged related to the applicant being denied an opportunity to be heard contrary to the rules of natural justice."*

Having made the above proposition, the Court went on to conclude that:

"Applying the above mentioned statement of principle to the application under consideration, I have not been persuaded by what is before the Court, on the alleged illegality in the trial court decision, to lead me to state that it is apparent on the face of it and thus can be discerned as a good cause for the Court to grant the prayers sought in this application."

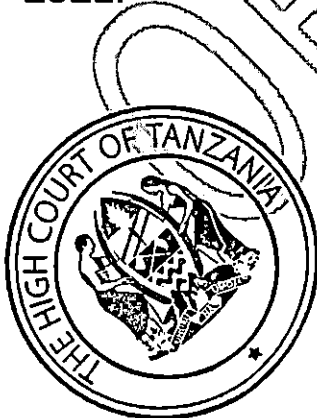
In the result the Court went on to dismiss the application with costs to be taxed thereon. I am also aware that not every point of law will necessarily carry the day in an application for extension of time. The position is that the point of law must be of such significance as to warrant the attention of the Court.

In the instant case, I am satisfied that the applicant has failed to establish that the illegality is apparent on the face of records nor that the illegality is of any significance. For the foregoing reasons I find that the alleged illegality does not meet the settled threshold expounded in the above authorities. Therefore, the point of illegality raised by the applicant in the present application do not constitute reasonable and sufficient cause within the meaning of section 14(1) of the LLA warranting extension of time.

The application is destitute in merits; and stands dismissed with costs.

Order accordingly.

DATED at DAR ES SALAAM this 11th day of MARCH, 2021.




S.M. KALUNDE

JUDGE