

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA**

MISC. CIVIL APPLICATION No. 44 OF 2022

(Arising from the Matrimonial Appeal No. 05 of 2022 of Bariadi District court, originated from Matrimonial Cause No. 98 of 2022 of Somanda Primary Court.)

HELLENA WILLIAM JAMES.....APPLICANT

VERSUS

PAUL MASANJA EMMANUEL.....RESPONDENT

RULING.

*Last order: 14th February, 2023
Date of Ruling: 06th March, 2023*

MASSAM, J:

The applicant **Hellena William James** moving this court under the provisions of Rule 3 of the Civil Procedure (Appeals in Proceedings originating in Primary Court) Rules G.N No. 312 of 1964 so that this court may extend time to lodge his Appeal out of time. The applicant's

application has been supported by affidavit sworn on 9th November, 2022 by the applicant.

The background leading to this application as gathered in the affidavit and counter affidavit are that, applicant petitioned Matrimonial cause No. 98 of 2022 at Somanda Primary Court which determined the matrimonial dispute between the applicant and the respondent, in the end of the matter was dissolved the marriage, distributed the properties and set the children to be under custody of the applicant.

The applicant was unsatisfied with decision of the Primary Court she preferred appeal to the Bariadi District Court in Matrimonial Appeal No. 05 of 2022, which upon assessment the district upheld the trial court's decision but the same adjusted the distribution of the matrimonial asserts as follows;

- 1. Appellant is given custody of the four children, and respondent is given a right of access and visitation to the children during vacations and with the communication with appellant without affecting the welfare of the children.*

- 2. Respondent to provide accommodation to his children as well as school fees and medical expenses.*
- 3. Appellant to remain in matrimonial house of plot No. 285 Block N (the House no. 516 Block 6) and in that plot, there are two houses, the other houses have to be hired and the house rent paid by tenant to be spent for food and clothes of the children, a motorcycle with registration no MC 135 Clacks Crus and a Plot located at Izunya Somanda. All the domestic items/properties to remain with appellant.*
- 4. Respondent is given plot No. 350 Block C Maperani and Plot No 256 Block C Maperani, hardware shop, three plots located near Lake oil Patrol Station mentioned as Plot No. 70,80 and 81 Block C Salunda, the unfinished house of Plot no. 159 Block B Salunda to remain a property of respondent.*

It seems the adjustment division was unpleasantly to the applicant she intended to appeal but with reasons advanced in affidavit, she failed to

lodge an appeal within time, she therefore applied this court to extend time to lodge an appeal out of time.

At the hearing, both applicant and the respondent appeared in persons unrepresented. In her submission, applicant prayed the court to extend time for three reasons that;

She submitted the first reason on point of law that of Illegality that the Bariadi District court erred in law for failure to divided matrimonial properties and ordered the applicant to stay in the matrimonial house, and the court did not give her the said house while the respondent was divided all matrimonial properties.

In second reason for the extension of time she submitted that on 10/09/2022 she felt sick and admitted as she was attacked by hypertension and ulcers, she was admitted for 7 days from 10/09/2022 to 16/09/2022 while the judgment was delivered on 8/09/2022. She failed to lodge her appeal basing on the reason of sickness. She said from there she was attending hospital checkups, on 18/10/2022 to 23/10/2022 she was again admitted for the same problem of sickness.

The third reason was the sickness of her child. On this reason she said that on 25/10/2022 her child got sick suffering from stomach, she took her to hospital at Mbaga dispensary after she was investigated, she was found with typhoid she got treatment from 25/10/2022 and continued to be sick on several days. She ended to say that those were the reasons failed her to file an appeal on time, that's why she prayed the court to extend time.

In reply, the respondent opposed the application by submitting the first reason for the court to dismiss the prayer as the Bariadi District court was not erred by ordering the applicant to remain in the matrimonial house because the applicant was living in that house. He said it was not true the trial court gave the respondent the all properties, he argued that the trial court divided that property basing on the contribution among the two. He said the district court ordered the applicant to remain in the said house.

Replying to the reasons of sickness, he responded that applicant failed to prove that she was sick as no report suggested that applicant was sick, he said the letter which attached as annexure P1, he could not believe as it was prepared by human being.

In the last issue of a child sickness, respondent replied that he was not told if the said child was sick and there is no proof that the said child was sick. With that reasons he prayed the court to dismiss the application.

In rejoinder, applicant reiterated to the effect that issue of illegality, by stating that the court failed to put into consideration of each party's contribution of matrimonial assets, but the court ordered the applicant to remain in the house and not to be divided to her.

On issue of sickness, she said it is confidential between the doctor and his patient and the exhibit she annexed said to be enough to prove that she was sick.

On issue of child sickness, she reacted that respondent is not responsible as he was not taking care of their children, he is not paying school fees, and he blocked her phone numbers, they cannot communicate him through phone she got helped for treatment of her child by his father.

Being consider the grounds of this application and the submissions of both parties, basing on the fact that this matter is originated from Primary court, my discussion will be confined with provision of the Rule 3 of the Civil Procedure (Appeals in Proceedings Originating in Primary Courts)

Rules, G. N No. 312 of 1964 as requires that, *every application for leave to appeal out of time for all matters originating in Primary Courts shall be accompanied by the petition of appeal or grounds of objection to the decision or order.*

In subscribing the provision above, the law is very clear that applicant in pursuing appeal he/she is supposed to appeal within 30 days after the impugned judgment or order of the Primary Court as per rule 3 of the Civil Procedure (Appeals in Proceedings Originating in Primary Courts) Rules G.N No. 312 of 1964. Failure to comply with the above rule, one has to obtain extension of time from the court and extension of time is upon judicial discretion, but applicant is mandatory duty to furnished good cause for the delay to appeal within prescribed time to lodge an appeal. In other hand the under the provisions **section 14 of the Law of Limitation Act Cap 89 RE 2019** which provides that;

*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.

Before I consider the provision above, I have read and noted the affidavit in support of the application which sworn by the applicant on paragraph 5 of the affidavit together with **annexure P2** which contained a letter from Dr. Mbaga Dispensary and a judgment Decree of the Bariadi District court. the said decree shows that the decision of the district court was on 08/09/2022 which means from the date of decision to the date which the applicant was supposed to appeal, was on 8/10/2022, but applicant failed to comply with as per **section 25 (1) (b) of the Magistrate Court Act Cap 11**. Which require that;

*In any other proceedings any party, if aggrieved by the decision or order of a district court in the exercise of its appellate or revisional jurisdiction may, **within thirty days after the date of the decision or order**, appeal there from to the High Court; and the High Court may extend time for filing an appeal either before or after such period of thirty days has expired.*

The applicant praying the court leave to extend time to appeal out of time, she furnished three reasons as expounded in the affidavit, in her submission. In her first reason she stated on issue of illegality by complaining that the district court erred in law for failure to divide matrimonial properties as it ordered to stay on the matrimonial house and not to be divided to her the Matrimonial assests.

In his response, respondent faulted the 1st reason by saying that the court was right to order the applicant to remain in the material house she was living as the respondent was already moved out and the court was proper to order to applicant the remain therein basing on the fact that he had a huge contribution.

I have read the decree of the Matrimonial Appeal No. 5 of 2022 which the orders on page 1 paragraph 1 order 3 it was ordered that;

3-Appellant to remain in matrimonial house of plot No. 285 Block N (the House no. 516 Block 6) and in that plot, there are two houses, the other houses have to be hired and the house rent paid by tenant to be spent for food and clothes of the children, a motorcycle with registration no MC 135 Clax Crux and a

Plot located at Izunya Somanda. All the domestic items/properties to remain with appellant.

The issue for my consideration is whether the issue that applicant to remain in the matrimonial property as ordered by the district court was the division of matrimonial assets. It is clear from the record that the marriage between the applicant and the respondent is resolved and the trial court granted the decree of divorce of which everyone will be moving with his or her life. Upon marriage resolved, the issue of division of matrimonial assets required to put on clear terms. In my scrutiny the order that applicant to remain in the house is not clear, is not clearly stated which matrimonial asset shall divided to the applicant. The order to remain in the matrimonial asset is vague, it is not division or remain in the status a division of matrimonial asset. Issues of division of matrimonial asset is a matter of law guided under the provision of section **114 of the Law of Marriage Act Cap 29**, the provision clearly state that

*The court shall have power, when granting or subsequent to the grant of a decree of separation or divorce, **to order the division between the parties of any assets acquired by them during the marriage by their joint efforts or***

to order the sale of any such asset and the division between the parties of the proceeds of sale.

In the light of the above provision in reference to the quoted order of the district court that applicant to remain in the matrimonial house without dividing it or without giving reason for so doing, the order is not clear and is unexecutable for parties, therefore is illegality. The Court of Appeal in the case of **Bi Hawa Mohamed Ys. Ally Sefu**, 1983 TLR32 (CA), court had to say'

Court has power to divide matrimonial or family assets under section 114-(1) of the Law of Marriage Act is invoked only when the following conditions exist:

- (i) When the court has granted or is granting a decree of divorce or separation; and*
- (ii) (ii) When there are matrimonial or family assets which were acquired by the parties during the marriage; and*
- (iii) (iii) When the acquisition of such assets was brought about by the joint efforts of the parties*

Basing on the applicant first reason that it was illegality for the district court to order the applicant to remain in the matrimonial asset without putting the order in a clear term that the said house is divided to her or the respondent this is illegality and the court of appeal in number of cases directed that illegality is sufficient cause for the court to grant extension of time. The Court of Appeal reiterated its stance in **Oswald Masatu Mwizarabu V. Tanzania Fish Processors Ltd**, Civil. Appl. No. 13 of 2010 (CAT Unreported) in that case the Court stated that-

"The term good cause is a relative one and is dependent upon the circumstances of each individual case. It is upon the party seeking extension of time to provide the relevant material in order to move the court to exercise its discretion. See, Ratman vs. Cumarasamy and Another [1964] 3 AU ER 933 and Reginal Manager Tramroads Kagera vs. Ruaha Concrete Company Limited; Civil Application No. 96 of 2007 CAT

More also, **VIP Engineering and Marketing Ltd, Tanzania Authority and the liquidator of Tri - Telecommunication (1) Vs Cit**

bank Tanzania Ltd Consolidated References No. 6, 7 and 8 of 2006(unreported). The Court of Appeal stated that-

"It is a settled law that, a claim of illegality of the challenged decision, constitutes sufficient reason for extension of time under rule 8 (now rule 10) regardless of whether or not a reasonable explanation has been given by the applicant under the Rule to account for delay."

As far as the applicant managed to convince the court that the judgment and the decree containing illegality, it is enough for this court to find the 1st reason sufficient.

Now to the 2nd reason that applicant failed to lodge her appeal on the statutory time, in this reason applicant averred that on 10/09/2022 she felt sick and admitted for hypotension and ulcers and she continued to attend check up at the hospital, and on 18/10/2023 to 23/10/2022 she was again admitted. Though the respondent disputed this ground by saying that applicant failed to prove that she was sick. In affidavit applicant proved that she was sick on paragraph 6 of her sworn affidavit applicant averred that on 10/09/2022 she was admitted at Bariadi Town Council Hospital

suffering from hypertension and peptic ulcers disease. She proved by a letter annexed as P1 a letter from Halmashauri ya Mji wa Bariadi. The letter of 23rd October, 2022 informed that applicant was admitted on 10th to 16th September, 2022 with a file No. 01-96-10 then re admitted on 18th -23 October, 2022 with Hypertension and Peptic Ulcers. The letter signed by Dr. Adam Bahati for Medical Officer In charge Bariadi Town council. With fact that applicant was held with sickness situation which pulled back her to lodge the intended appeal as a human being and as of her age she wouldn't have powers to control the health situation in her body. I am convinced with the reasoning stated incase of **Emanuel R. Maira vs The District Executive Director of Bunda**, Civil Application No. 66 of 2010 (unreported), the Court held that:

"Health matters in most cases are not the choice of a human being; cannot be shelved and nor can anyone be held to blame when they strike."

It is my consideration view that applicant as from 10/09/2022 was sick and admitted, and again on 18 to 23/10/2022 was re admitted, a little bit I have pulled back with principle that as applicant was discharged on 23/10/2022 while the district court delivered its appeal on 8/09/2022, she

filed this application on 11/11/2022 she failed to account for delay from 23/10/2022 to 11/11/2022 on the filing date. The applicant was required to account for the delay on 17 days, but I steal travel in humanitarian factors that matter of sickness width two times admissions need time for recovery in both physically, mentally and psychotically. I find this ground hold water.


Now the last reason that she failed to lodge appeal because her child fall sick from 25/10/2022 suffering from stomach. She took her to hospital at Mbagu Dispensary where the doctor investigated her to find she had typhoid, the patient went on getting treatment until 4/11/2022, I do agree with the applicant that her child's sickness, is a sufficient cause upon which an application for extension of time can be granted as in this case the applicant has proved that her child fell sick and she had to attend her. Evidence to that effect has been attached in her affidavit as annexure "P2", I find as per above authorities and the fact that extension of time is judicial discretion, I hold that issue of sickness no one is capable to control it, and the same in this reason that applicant's child was sick it is enough to find that she couldn't be able to concentrate on filing an appeal while her child had sick.

With those reasons, I proceed to agree that all reasons are merited, I hereby grant the leave for the applicant to lodge appeal within 30 days from the date of this order. No order for costs.

Order accordingly.

DATED at **SHINYANGA** this 06th day of March, 2023




R.B. Massam
JUDGE
6/03/2023

COURT: Right of appeal explained