

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**MWANZA SUB-REGISTRY**

**AT MWANZA**

**MISC. CIVIL APPLICATION No. 30 OF 2023**

*(Arising from the Decision of Ilemela District Court in Matrimonial Cause No. 2 of 2022)*

**JOSEPHAT BUGALIMA----- APPLICANT**

**VERSUS**

**VERONICA MAGOLI----- RESPONDENT**

**RULING**

*Last order: 27.04.2023*

*Ruling date: 05.05.2023*

**M. MNYUKWA, J.**

The applicant filed this application by way of chamber summons supported by an affidavit deposed by Josephat Bukalima, the applicant. The applicant moved this Court to grant an extension of time within which to file an appeal against the decision of Ilemela District Court in Matrimonial Cause No. 2 of 2022 which was delivered on 14<sup>th</sup> June 2022. In that case, the respondent filed a divorce petition and prayed the court to issue a decree of divorce and to give an order on the custody of the children.



During the hearing of the petition, the Ilemela District Court framed four issues which are (i) Whether there was a valid marriage between the parties (ii) Whether the marriage between the parties is broken down beyond repair (iii) Who is entitled to be granted the custody of children and (iv) To what relief(s) are the parties entitled to.

After hearing both parties he petition, the District Court granted the decree of divorce after satisfying that the marriage between the parties is broken down beyond repair and gives an order on the custody of children to the respondent.

Later on, sometime on 11<sup>th</sup> July 2022, the applicant herein filed Civil Case No 11 of 2022 before Ilemela District Court praying the Court to give an order of the equal division of the matrimonial assets acquired during the subsistence of their marriage. The above case was not determined on merit as it was struck out since the case was wrongly filed as the applicant filed a normal Civil Case and not the Civil Case originated from the Matrimonial Cause No. 02 of 2020. The District Court ruled out that, even though both cases are civil cases, but they differ in their registration and even the applicable law. The Court went on to direct the applicant if wishes, to institute the case in the proper registry.



After the above decision, the applicant approached this Court with an application to grant an extension of time so as to file appeal against the decision of Ilemela District Court in Civil Case No 02 of 2022. Grounds advanced by the applicant to grant extension of time are shown in the applicant's affidavit under paragraph 9 as illegality on the decision in Civil Case No. 02 of 2022 since the Court issue a decree of divorce without giving an order for division of the matrimonial assets acquired during the subsistence of their marriage. The other ground is the technical delay since after the decision in Civil Case No. 02 of 2022 to be delivered, he filed Civil Case No. 11 of 2022 whereby its decision was delivered on 12<sup>th</sup> December 2022.

During the hearing of the application, the respondent did not enter appearance and the application was argued ex-parte. In his submission, the applicant's counsel prays to adopt the affidavit sworn in by the applicant to form part of his submissions. He quickly pointed out the reasons for the extension of time as provided for under paragraph 9 of the applicant's affidavit is illegality on the decision of Civil Case No. 02 of 2022 for the failure of the trial Magistrate to order division of matrimonial assets acquired by the parties during the subsistence of their marriage which is contrary to section 114 of the Law of Marriage Act, Cap. 29 R.E

2019 which require the Court when granting the decree of divorce to order for other relief(s).

He added that, since the decision does not give an order for the division of matrimonial assets as one of the reliefs after granting the decree of divorce, he was of the view that the said decision is illegal and cannot be left to stand in the eyes of the law.

On the second ground, the applicant's counsel avers that, there was a technical delay since after the decision in Civil Case No. 02 of 2022, the applicant filed Civil Case No. 11 of 2022 which was struck out for the reason that it was improperly filed. The counsel avers that, the applicant was supposed to file the appeal against Civil Case No. 02 of 2022 within 45 days from 14<sup>th</sup> June 2022 when the decision was delivered, instead, he filed the Civil Case on 11<sup>th</sup> July 2022 which was filed within the period of 45 days and its decision was delivered on 12<sup>th</sup> December 2022. He remarked that, during all that period the applicant was within the Court's corridor finding justice that's why he failed to file appeal within the time prescribed by the law.

The counsel further submitted that, he knows the requirement of the applicant to account for each day of delay on the application for extension of time but he was of the view that, if illegality is the reason for



extension of time, the applicant is not required to account for each day of delay as it was held by the Court of Appeal in the case of **Mary Rwabizi t/a Amuga Enterprises vs National Microfinance Bank**, Civil Application No. 378/01 of 2019.

Before the wind-up, the counsel for the applicant submitted that, he challenged paragraphs 6, 7, 8 and 9 of the respondent's affidavit as they contained legal argument. He refers to the case of **Francis Eugen Polycare vs Ms. Panone & Company Limited**, Misc. Civil Application No 2 of 2021 that the affidavit should not contain legal argument and therefore, prays the respondent's affidavit to be struck out from the record.

After the submissions of the applicant's counsel and as I went through the applicant's application and the impugned Judgment sought to be challenged, the main issue for consideration and determination before me is whether the application is merited.

Before I determine the application on merit, I have to decide on the issue raised by the applicant's counsel that some paragraphs of the respondent's counter affidavit contained arguments and the same should be struck out from the court record. The applicant's counsel put forward the above allegation without clarifying more on the so-called legal



argument. Upon revisiting the paragraphs alleged to have contained the legal argument, I am not convinced that the same contained legal argument as I didn't see those legal arguments as alleged for the same to be struck out from the record. For that reason, the respondent's counter-affidavit will be considered as part of the record in this application.

Coming now to the application at hand, as I have earlier on indicated, the application before me is for an extension of time and it is the settled position of the law that when it comes to granting an order for an extension of time to appeal out of time, the court has the discretion to grant it. However, the discretion has to be exercised judiciously. The applicant has to show good cause in the sense that he must establish that the delay was with a sufficient cause. Depending on the circumstances of each case, the applicant also is required to account for each day of delay or else must have shown that, there was a point of illegality that impedes justice.

As it stands in the records, after the decision of Civil Case No. 02 of 2022 to be delivered, the applicant prosecute Civil Case No. 11 of 2022 which was struck out for being improperly filed. Before this court, the applicant avers that from the time when the impugned decision was



delivered, he filed the Civil Case within 45 days to find justice on the issue of division of matrimonial assets and the same was struck out. He avers that, the act of the trial court to grant the decree of divorce without ordering the division of matrimonial properties is illegality and cannot be left to stand. Again, he avers that, as he was prosecuting Civil Case No. 11 of 2022, the same is considered as a technical delay for his failure to appeal within time.

The respondent opposed the applicant's application by the affidavit sworn in by Veronica Magoli. She avers that, the applicant delayed for 8 months and he fails to account for those days. She also avers that, the applicant did not state in his affidavit as to why he did not appeal when the decision in Civil Case No 1 of 2022 was delivered and also he did not state as to when he discovered the alleged illegality.

As highlighted above, it is a settled position of law that in the application for extension of time, the applicant is duty-bound to advance sufficient cause which prevented him to make the application within the prescribed time provided by the law. There is no hard and fast rule as to what amount to a sufficient cause as it differs depending on the circumstances of each and every case. The principle of advancing sufficient cause for extension of time to be granted has been repeatedly



emphasized in a plethora of authorities including the cases of **Tanzania Coffee Board vs Rombo Millers Ltd**, Civil Application No 13 of 2015 and **Yazid Kassim Mbakileki vs CRDB (1996) Ltd Bukoba Branch & Another**, Civil Application No 12/04 of 2018.

It is also settled that in the application for extension of time, the applicant must account for each day of delay and even if it is a single day of delay the same must be accounted for. The requirement to account for each day of delay has been emphasized in a number of decision including the case of **Bashiri Hassan v Latifa Lukio Mashayo**, Application No 3 of 2007.

Having in mind that one of the grounds advanced by the applicant for extension of time is illegality, which when proved, is a sufficient ground for this court to extend the time and does not require to account for each day of delay as illegality cannot be left to stand. In **Ngao Godwin Losero v Julius Mwarabu**, Civil Application No 10 of 2015, the Court of Appeal observed 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 record straight."*

However, for the illegality to stand as a ground for extension of time, the applicant must successfully demonstrate the existence of the said illegality on the face of the record and the same should not be discovered through a long-drawn process. In **Lyamuya Construction Company Limited vs Board of Trustee of Young Womens Christian Association of Tanzania**, Civil Application No 2 of 2010, it was held that:

*"Since every party intending to appeal seeks to challenge a decision either on points of law or facts it cannot in my view be said that in valambia's case, the Court meant to draw a general rule that every applicant who demonstrates that his intended appeal raises points of law should, as of right be granted extension of time he applies for one. The Court there emphasized that such point of law must be 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 will be discovered by a long-drawn argument or process."*

Going to the records, I revisited the impugned decision with an eye of caution to find the alleged point of illegality sought to be challenged by the applicant, with due respect from the learned counsel of the applicant,



I have to openly state that, there was no illegality seen apparent on the face of the record. While the general rule is that when granting the decree of divorce the court should also order the other reliefs like the custody of children and the division of the matrimonial assets, the question is whether, what was petitioned before the trial court, the issues framed before it and the evidence adduced by the parties before it automatically entitled the trial court to make such order. In other words, whether in the impugned decision, that was the case. That however, is not the task of this Court to decide, since the duty of this Court is to state if that is an illegality, and if so whether such illegality met the threshold as stated in **Lyamuya Construction Company Limited vs Board of Trustee of Young Womens Christian Association of Tanzania**, (supra).

In my considered view, there is no illegality in the impugned decision apparent in the face of the record for this Court to grant extension of time. Thus, it is my conviction that the the alleged point of illegality claimed by the applicant does not pass the threshold put by the law for this Court to grant extension of time.

On the second ground, the applicant alleged that, there was technical delay as he was prosecuting the Civil Case No. 11 of 2022 which was instituted within time in 45 days time where the applicant was required to file the intended appeal and therefore, it was the technical



delay. Upon going into the records, I formed an opinion that this issue should not detain me much. It is settled that technical delay is applicable if one proves to prosecute the proper case before the court. In our case at hand, the applicant did not state if he prosecute the proper appeal which subsequently was struck out for being incompetent or for any other reason. The issue of prosecuting a wrong case cannot be a ground for this Court to extend the time to file an appeal out of time as it is presumed that everyone knows the law and that ignorance of the law is not an excuse. In the case of **Fortunatus Mosha vs William Shija and Another**, (1997) TLR 154 it was held that:

*"A distinction has to be drawn between cases involving real or actual delays and those such as the present one which clearly involved a technical delay in the sense that the original appeal was lodged in time but had been found to be incompetent for one or another reason and a fresh appeal had to be instituted..."*

In our case at hand, the act of the applicant to prosecute another case instead of filing an appeal cannot be regarded as a technical delay for this Court to exercise its discretion to grant an extension of time.

As the applicant failed to show sufficient cause which prevented him to file an appeal within the prescribed period provided by the law and to



account for each day of delay, this Court will not exercise its unfettered discretionary power to grant the extension of time as sought.

Consequently, the application is hereby dismissed with no order as to costs.

It is so ordered.



  
**M.MNYUKWA**

**JUDGE**

**05/05/2023**

**Court:** Ruling delivered on 5<sup>th</sup> May 2023 in the presence of the applicant and the respondent's counsel.

  
**M.MNYUKWA**

**JUDGE**

**05/05/2023**