

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DODOMA DISTRICT REGISTRY)

AT DODOMA

MISC. CIVIL APPLICATION NO. 25 OF 2022

(Originating from Matrimonial Appeal No. 4 /2021 District Court of Mpwapwa at Mpwapwa)

PROTAS KIRIA APPLICANT

VERSUS

GRACE GREYSONRESPONDENT

RULING

07/02/2023 & 30/05/2023

KHALFAN, J

The Applicant, PROTAS KIRIA, before this Court, is applying for extension of time to file an appeal out of time against the decision of the District Court of Mpwapwa in Matrimonial Appeal no. 4 of 2021. The Applicant also prays for costs and any other remedy that this honourable Court deems fit and just to grant.

The application is made under section 14 (1) of the Law of Limitation Act [CAP. 89 R.E 2019] and is supported by the Applicant's affidavit. The respondent, GRACE GREYSON, has filed a counter affidavit to oppose the application.

The Applicant, through his affidavit, has averred that the respondent filed a Matrimonial Cause No. 08 of 2021 in the Primary Court of Mpwapwa whereas the Primary Court dissolved their marriage and ordered division of matrimonial properties as per annexure PK 1 which is the judgment of the Primary Court. As such, he filed the appeal to the District Court of Mpwapwa vide Matrimonial Appeal No. 4 of 2021 where the District Court held that there was no marriage and went on to quash the order for divorce granted by the Primary Court and affirmed the order for division of the matrimonial properties as per annexure PK 2-the judgment of the District Court.

The Applicant has averred further that the purported decision of the District Court is premised on illegality having ruled that there was no marriage between him and the respondent went on to confirm the division of matrimonial properties.

The Respondent, on her part through counter affidavit, has countered all the Applicant's averments and averred that the District Court was right to confirm the order for division of Matrimonial properties since they lived under presumption of marriage.

The Court ordered the matter to be disposed by way of written submission. Both parties filed their submission in accordance with the Court's scheduling order.

The Applicant's submission in support of the application is premised on the contention that the decision of the District Court of Mpwapa on entertaining Matrimonial Appeal No. 4 of 2021 is based on illegality. It is contended that the point of illegality is prima facie on the face of judgment and therefore it is important that the same be addressed by way of an appeal to this Court.

The Applicant has argued that since the District Court held that there was no marriage between him and the respondent and quashed the order for divorce, it was wrong to confirm division of matrimonial properties because the division should follow after grant of divorce.

The case of **BrazAfric Enterprises Limited vs Kaderes Peasants Development Plc**, Civil Application No. 421/08 of 2021, Court of Appeal of Tanzania at Dar es Salaam (Unreported) is referred to support the application where the Court of Appeal among other things, said:

'It is noteworthy that there is no universal definition of the term "Good cause". Therefore, good cause may mean among

*other things, satisfactory reasons of delay or other important factors which needs attention of the Court, once advanced may be considered to extend the time within which a certain act may be done. **Good cause may include, but not limited to allegation of illegality committed by the lower Court see for instance Principal Secretary, Ministry of Defence, National Services v Devram Vallambhia [1992] T.L.R 185....'***

The Respondent, in reply, contended that there was no illegality as alleged by the Applicant. She submitted that it was right for the District Court to correct the error made by the Primary Court because the parties lived under presumption of marriage as per section 160(1) of the Law of Marriage Act, [CAP. 29 R.E 2019]. As such, it was wrong to grant divorce. Similarly, it was right to grant reliefs sought under section 160 (2) of the Law of Marriage Act.

She cited the case of **Finca (T) Ltd & Another vs Boniphace Mwlukisa**, Civil Application No. 589/12 of 2018, Court of Appeal of Tanzania at Iringa where the case **of Lyamuya Construction Company Ltd vs Board of Registered Trustees of Young Women's Christian Association of Tanzania** which 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 if he applies for one. The Court emphasized that such point of law must be that of sufficient importance and, I would add that it must also be apparent on the face of record, such as the question of jurisdiction; not one that would be discovered by a long-drawn argument or process.'

The Respondent further argued that this application is clearly an afterthought since the Applicant has waited for expiry of one year to plead illegality and when the respondent has made steps to execute the impugned decision of the District Court. She also added that this application is an act of uttermost negligence of the Applicant as neither a sufficient cause has been adduced nor the length of delay has been accounted for.

The law under section 25 (1) (b) of the Magistrates Act, [CAP. 11 R.E 2019] provides for time limitation for filing an appeal of this nature to be thirty (30) days and in the circumstance, since the decision of Mpwapwa District Court was delivered on 18/8/2021, the Applicant was to file his

appeal by 17/9/2021 and this application which has been filed on 15/7/2021 makes a delay of about ten (10) months.

The provision of section 25 (1) (b) of the Magistrates Act, [CAP. 11 R.E 2019] also gives the Court a discretion to extend the time of limitation set. That being the case, in the circumstance, section 14 of the Law of Limitation Act, [CAP. 89 R.E 2019] as applied by the Applicant, is not applicable. However, this Court in applying the overriding objective principle, shall disregard such omission since it does not affect the jurisdiction of the Court and proceed to determine the application under section 25 (1) (b) of the Magistrates Act, [CAP. 11 R.E 2019].

In determining this application, I would like to be guided with the case of **Lyamuya Construction Co. Limited vs. Boards of Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 CAT, Arusha; where the Court of Appeal listed the following factors to consider in granting extension:

- i. The Applicant must account for all the period of delay.
- ii. The delay should not be inordinate.
- iii. The Applicant must show diligence, and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take.

- iv. 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 that is sought to be challenged.

Turning to the application at hand, the Applicant's reason for extension of time is based on the illegality on the decision of the District Court. The Applicant has contended that the District Court was wrong to confirm the division of matrimonial properties while in the first place, it declared that there was no marriage between the parties and quashed the divorce granted by the Primary Court.

As afore stated, a claim of illegality in the impugned decision is among the sufficient causes for grant of extension of time to enable the Court to determine and rectify the said point of illegality. This has been also stated in various decisions of the Court of Appeal. See the case of **Principal Secretary Ministry of Defence and National Services v. Devram Valambhia** (1992) TLR 185 thus:

'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 right.'

See also the Case of **Ezrom Magesa Maryogo V. Kassim Mohamed Said and Another**, Civil Application No. 227 of 2015, the Court of Appeal held as follows:

'...a claim of illegality of the challenged decision, constitutes a sufficient reason for extension of time under rule 8 regardless of whether or not a reasonable explanation has been given by the applicant under the rule to account for the delay.'

However, the Court of Appeal further extended that in considering the point of illegality alleged, it should be mindful that the alleged points should not be merely alleged considering that not every illegality would vitiate proceedings. See the case of **Shabir Tayabal Essaji V. Farida Seifuddin Tayabal Essaji**, Civil Application No. 206/06 of 2020, Court of Appeal of Tanzania at Dar es Salaam, where it was held that:

*'Applying the rule in the case of Ezrom Magesa Maryogo. (Supra), I shall discuss the alleged four points of illegality each in turn. I am also mindful of the legal principle that not every illegality vitiates the proceedings and the subsequent instant decision.... **However, if mere allegations of illegality sufficiently constituted a good cause for (sic) extension of time, then chances of hopeless notices and hopeless appeals being admitted were there to stay**.'*
[Emphasis added].

Basing on the stated principle of the law, I have ascertained the point of illegality adduced by the Applicant and I have found that it is apparent that the District Court, while entertaining the appeal, made an order to set aside the dissolution of marriage and quashed the order of divorce made by the Primary Court after finding that there was no marriage between the parties. Nevertheless, the District Court confirmed the division of properties.

It is my considered view that this is a point of illegality which needs to be brought to the attention of this Court for determination and rectification if any, considering that it is not clear in the impugned judgment as to where the confirmed division of matrimonial property finds its basis after setting aside the dissolution of marriage between parties.


Therefore, I find that the point of illegality alleged by the Applicant has constituted a sufficient cause to move this Court to grant the application. For that reason, I find no reason to ascertain other factors for the grant of extension of time as listed above.

In the upshot, the Applicant's application for extension of time is hereby granted and he is given thirty (30) days from the date of this ruling to file his appeal. Costs to follow events.

It is so ordered.

Dated at **Dodoma** this 30th day of May, 2023.




F. R. KHALFAN
JUDGE