

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB- REGISTRY OF MWANZA
AT MWANZA**

MISC. CIVIL APPLICATION NO.84 OF 2023

*[From Matrimonial Appeal No. 49 of 2022 of District Court of Ilemela;
originating from Buswelu Primary Court, Matrimonial Cause No.16 of 2022]*

KULWA SADICK MWECHHE-----APPLICANT

VERSUS

OMARY NYANZA MABULA -----RESPONDENT

RULING

Sept. 18th & 22nd, 2023

Morris, J

The Court is, at the instance of the applicant above, being moved to determine the application for extension of time. Subject to such extension, the applicant intends to appeal against the decision of the District Court of Ilemela in Matrimonial Appeal No. 49 of 2022. This application is supported by affidavit of the applicant. The respondent was served with the summons through *Mwananchi Newspaper* of 11/9/2023 following his refusal to physical service. He, nevertheless, did not enter appearance. I proceeded to hear the application in his absence.



Briefly accounted, the applicant initiated Matrimonial Cause No. 16 of 2022 at Buswelu Primary Court. She petitioned against the respondent for divorce; division of matrimonial assets; custody and maintenance of two issues of marriage. The trial court found the marriage broken down irreparably. Consequently, it divided the matrimonial assets. Among them, the parties matrimonial home located at Buswelu, Mwanza was divided at 20% and 80% to the applicant and respondent respectively. Also, the applicant won against the respondent, custody of and children's maintenance fee of Tshs. 150,000/= per month.

The applicant became dissatisfied with the foregoing decision. She appealed to the District Court of Ilemela (first appellate court). By its judgment dated 16/03/2023, the District Court dismissed her appeal. The applicant wishes to escalate the appeal-race at this Court. She is, however, still having a time-bar hurdle to cross before filing the envisaged appeal; following her failure to observe the timeline. Hence, this application.

During hearing the applicant was unrepresented. She prayed to adopt her affidavit. Submitting for her delay, the applicant stated that she was denied copies of the first appellate court's proceedings, judgement and



decree. That is, the court clerk kept telling her the documents were not ready for collection. However, she asserted that the same were supplied to her on 16/5/3023. Finally, she prayed for the application to be granted. From the affidavit and submissions by the applicant, the Court will determine the application by answering one question: *whether or not grounds advanced by the applicant (delay in supply of court records, economic constraints and illegality) suffice in making this court to allow the application*. I will analyze each of the grounds at a time.

From the outset, I reiterate the sound position of the law. It requires that the applicant should demonstrate sufficient reason(s) as to why he/she did not take the necessary step(s) in time. In so doing, he/she will discharge the obligation of proving how each day of delay justifiably passed by at no applicant's fault. Accordingly, the subject applicant will deserve a favorable Court's discretionary advantage as it was held in ***Hamis Babu Bally v The Judicial Officers Ethics Committee and 3 Others***, CoA Civil Application No. 130/01 of 2020 (unreported). The essence of setting the time limits in law is, among other objectives, to promote the expeditious dispatch of litigation [***Costellow v Somerset County Council*** (1993) IWLR 256]; and

to provide certainty of time tables for the conduct of litigation [***Ratman v Cumara Samy*** (1965) IWLR 8].

The first ground of the applicant is encapsulated in paragraph 3 of the affidavit. She deposes that she was late to be supplied with the copy judgement for her eventual appeal. Further, it is deposed that the same was supplied to her on 16/5/2023. The obvious interrogation here would be if the judgment was necessary for her given circumstances of this matter. It has been pronounced, in a number of authorities, that lack of copy of impugned judgement/decreed can only be reason for extension of time if attaching the same is required by the law. See, for instance, ***Gregory Raphael v Pastory Rwehabula*** (2005] TLR 99; ***Sophia Mdee v Andrew Mdee and 3 Others***, CoA Civil Appeal No. 5 of 2015 (unreported).

In law, appeals from matrimonial proceedings in the magistrates' courts are governed by section 80 of ***the Law of Marriage Act***, Cap 29 R.E. 2019 (elsewhere, ***the Act***) and ***the Law of Marriage (Matrimonial Proceedings) Rules***, GN. No. 136 of 1971 (the ***Rules***). According to section 80 (2) of ***the Act***, an appeal to High Court from the magistrates' courts should be filed within 45 days from the decision. Also, according to

rule 37 (1) of ***the Rules***, the memorandum of appeal is filed in the subordinate court which made or passed the decision, order or decree appealed against. In terms of rule 37(3) of ***the Rules***, the subordinate court has the duty to transmit the memorandum of appeal with complete records to the High Court. Therefore, there is no need to attach copy of judgment or decree in matrimonial appeals to High Court.

I also considered paragraph 4 of the affidavit. Therein, the applicant avers that her previous advocate Fatuma Kimwaga was on maternity leave. It is not clear if she wishes to convey the message that without such copy of judgement it was hard for new advocate to prepare sound grounds of appeal. However, no proof was attached to the applicant's affidavit to prove that she was given the said copy on 16/5/2023. For instance, no any correspondence and/or affidavit by another person was attached to her affidavit in the effect that she was making follow-ups howsoever. Therefore, I find the first ground devoid of merit.

The 4th paragraph of the affidavit cloths the second ground. The applicant deposes that she had no money to pursue her appeal. Financial constraints, under exceptional circumstances, may be sufficient to stand as



good reason for extension of time. For example, when the applicant falls under the category of legal aid scheme. See the cases of ***Costantine Victor John v Muhimbili National Hospital***, Civil Application No. 214/18 of 2020 and ***Yusuph Same and another v Hadija Yusuph***, Civil Appeal No. 1/2002 (both unreported).

The applicant averred that her former advocate who was helping her was on maternity leave. She thus went to TAWLA on 17/5/2023 for advice. Although no proof that Fatuma Kimwaga had commenced the maternity leave, it is undisputed that the applicant is represented by TAWLA with exemptions of court fees. I think, she falls under the category of persons who are precluded from taking actions due to financial hardship. I, therefore, find merit in this ground. However, the fate of this application awaits the remaining ground and condition of accounting everyday of delay.

On the last ground, the applicant alleges illegality of the jurisdiction of trial Court in absence of the Marriage Conciliation Board's Certificate. I will, nonetheless, address this point sparingly so that the Court does not delve into the merits of the envisaged appeal. It suffices for me to state that, I am in agreement with the applicant's approach hereof that illegality apparent on



the to-be impugned court's proceedings and/or outcomes therefrom presents a sufficient cause for the grant of an application for extension of time. A plethora of authorities are settled on this point. They include: ***Khalid Hussein Muccadam v Ngulo Mtiga (A legal personal representative of the estate of the late Abubakar Omar Said Mtiga) and another***, Civil Application No. 234/17 of 2019; ***Shabir Tayabali Essaji v Farida Seifuddin Tayabali Essaji***, Civil Application No. 206/06 of 2020; ***Hassan Ramadhani v R***, Crim. Appeal No. 160 of 2018; ***Eqbal Ebrahim v Alexander K. Wahyungi***, Civil Application No. 235/17 of 2020; ***Ngolo Mgagaja v R***, Criminal Application No. 331 of 2017; and ***Lyamuya Construction Co. Ltd. v Board of Trustees of Young Women's Christian Association of Tanzania***, Civil Application No. 2 of 2010 (all unreported).

However, for the applicant to benefit from the ground of illegality in an application for extension of time; various conditions must be fulfilled. Predominantly, the point of law constituting illegality must be of sufficient significance to the public. Further, it must be a point which is apparent on the face of the record; and that would be discovered without a long-drawn

argument or process. The case of ***Lyamuya Construction*** (*supra*) is of valuable authority in this regard.

Vide the envisaged appeal, the applicant wishes to, albeit belated, move this Court to nullify the judgement of the trial court and that of the first appellate court for one reason determined by the latter that, the trial court had no jurisdiction for want of the certificate from the Marriage Conciliation Board (MCB). I have read the judgement of the District Court; at page 7 it tells that the MCB certificate from Buswelu Ward accompanied the petition. Also, the applicant (SM1) testified to the effect that they attended to the MCB. Therefore, the alleged illegality is not apparent on face of record; rather it can be drawn from long arguments. Hence this ground also lacks merit.

As I have stated above herein financial difficulties may warrant this application to be granted subject to account of every day of delay. Under paragraph 3 of the affidavit, the applicant averred to have been supplied with copy of judgement on 16/5/2023. She promptly went to TAWLA for legal assistance on 17/5/2023. This application was filed on 21/6/2023,



which is 35 days thereafter. Under paragraph 6 it was deposed that she believes the days were spent preparing this application.

To me, it is so unusual or rather weird for an advocate to spend 35 days preparing a simple application unless other factors are stated. Also, this fact being deposed by the applicant who did not prepare the same leave the averment hearsay. The law requires that when the source of information is another person, an affidavit from such person is obligatory lest such averment becomes hearsay and inadmissible. The cases of ***Narcis Nestory v Geita Gold Mining Ltd***, Misc. Labour Application No. 13 of 2020; ***NBC Ltd v Superdoll Trailer Manufacture Co. Ltd.***, Civil Application. No. 13 of 2002; ***Awadh Abood (As Legal personal representative of the Estate of the Late Salehe Abood Salehe) v Tanroads and AG***, Misc. Land Application No. 53 of 2020 (all unreported) are thus followed.

Further, it is cardinal principle of law that, one applying for extension of time must account for each and every day of the delay. In the case of ***Hassan Bushiri v Latifa Mashayo***, Civil Application No. 3 of 2007 (unreported), the Court held that delay "of even a single day has to be accounted for otherwise there would be no point of having rules prescribing

periods within which certain steps have to be taken". [See, also, ***Yazidi Kassim Mbakileki v CRDB (1996) Ltd Bukoba Branch & Another***, Civil Application No. 412/04 of 2018; ***Sebastian Ndaula v Grace Rwamafa (legal personal representative of Joshua Rwamafa)***, Civil Application No. 4 of 2014; ***Dar es Salaam City Council v Group Security Co. Ltd***, Civil Application No. 234 of 2015; and ***Muse Zongori Kisere v Richard Kisika Mugendi***, Civil Application No. 244/01 of 2019, (all unreported)].

Before I pen off, I wish to comment on the fact that this application was uncontested. It is the law that the court is obliged to analyze the grounds advanced in an application for extension of time, absence of opposition notwithstanding. The objective is to resolve whether such grounds suffice for the Court to invoke its discretionary powers. Hereof, I have ***Denis T. Mkasa v Farida Hamza (administratrix of the estate of Hamza Adam) & Another***, Civil Application No. 407/08 of 2020 (unreported) in mind for reference.

For the stated reasons, I find this Court not sufficiently moved to extend time as prayed by the applicant. The application, thus, lacks merit. It is accordingly dismissed. Each party to shoulder own costs. It is so ordered.





C.K.K. Morris

Judge

September 22nd, 2023

Ruling delivered this 22nd day of September 2023 in the presence of Kulwa Sadick Mweche, the applicant herein.

C.K.K. Morris

Judge

September 22nd, 2023