

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

(MOROGORO SUB REGISTRY)

AT IJC MOROGORO.

MISCELLANEOUS CIVIL APPLICATION No. 36 of 2023

(Originating from Matrimonial Case No.32 of 2022 Mngeta Primary Court, Arising from Kilombero District Court in Matrimonial Appeal No.32 of 2023)

FAUSTINA KATILIGA..... APPLICANT

VERSUS

HAMISI MAWANDARESPONDENT

RULING

DATE OF RULING- 12/12/2023

LATIFA MANSOOR, J

Through the legal representation of Mr. Michael C. Mteita, the applicant's advocate from Candid Law Advocates based in Morogoro, the Applicant Faustina Katiliga, preferred the instant application by way of chamber summons made under section 25(1)(b) of the Magistrates Court Act, Cap 11 R.E 2019 and Rule 3 of the Civil Procedure (Appeals in Proceedings originating from primary Courts) GN.No.312 of 1964, seeking for extension of time within which to appeal against the decision of Kilombero District Court delivered on 09/01/2023 in Civil application No. 25 of 2013.



The application was supported by an affidavit sworn by the applicant narrating events and matters which are deemed to be the background of the dispute. I find it useful to refer to the substance of the affidavit in order to figure out the essence of both the dispute and the application.

In short, the applicant instituted divorce proceedings against the respondent before Mngeta primary court, whose decision she was aggrieved with. She unsuccessfully appealed to the District Court of Kilombero, but she was determined to appeal further to this court. For some reason which she attempted to enumerate in her affidavit, it seems she suddenly found herself out of time that is why she applied to extend time.

In turn, the respondent filed his counter affidavit disputing all the main points made in the affidavit and thus resisted the application as whole and he filed notice of preliminary objection upon which this court was bound to determine it and consequently paragraphs 5,6,7 and 8 of the applicant's affidavit were expunged. Considering the remained paragraphs, the only reason found to be advanced by the applicant in support the instant application is the great chances of success of the intended appeal in view of the misdirection by the trial magistrate.

With the leave of the Court, the hearing of the application was canvassed by way of written submission by the order of this Court dated 1st of November, 2023. The applicant was represented by Mr. Michael C. Mteite the learned advocate, whereas on his part, the respondent appeared personally unrepresented.

Submitting in support of the application, Mr. Michael reiterated what the applicant deposed in her affidavit and this time he claimed illegality on the impugned decision alleging that the trial court did not give any order against the respondent in respect of status of his relationship with the respondent, division of matrimonial asset and also on the custody, maintenance and access of the wedlock children. He expounded that, the lower courts below erroneously and wrongly failed to consider the fact that, the parties cohabited for more than 11 years for them to acquire the status of husband and wife; he cited section 160(1) of the Law of Marriage Act Cap.29 (R.E 2022) to support his contention and he averred further that, the lower courts wrongly failed to consider that the applicant's and the respondent's joint effort in acquiring matrimonial properties and consequently denied the applicant her share to the matrimonial properties, to buttress his assertion he referred this court section

114(2)(b) of the Law of Marriage (supra) and the case of **Bi. Hawa Mohamed v. Ally Sefu** (1983) TLR 32.

To state further, Mr. Michael mentioned the matrimonial properties which according to him the applicant was denied her share which I find unnecessary to herein reproduce them.

He further referred this court the case of **Sophia Mgaila Vs Adolph Amian** Civil Appeal No.33 of 2005 to insist on the role of the court in determining a petition for divorce and division of Matrimonial properties and he opined that basing on the provided submissions, the applicant has great chances of winning the appeal and as for him it constitute the sufficient ground for the instant application to be granted and he rested his submission.

Responding to the applicant's submission, the respondent submitted that, the applicant's submission revolves around one major factor which is claimed to be illegality on points of law pointing out on division of matrimonial assets and custody of the issues, he however pointed out that the submission raises new facts which do not feature in the applicant affidavit nor on the 1st appellate courts or the trial courts records.

He highlighted on the principle of law that parties are bound by their pleadings and the principle that submission cannot be equated with evidence and further he attacked the applicant submission contending that they raise new facts in contravention of the established principles and insisted that the principle requires submission to elaborate only the evidence which was already tendered in court. He found assistance to support his assertion in the case of **Registered Trustees of the Archdiocese of Dar es Salaam v. The Chairman Bunju Village Government**, Civil Appeal No.147 of 2006 CA at Dar es Salaam (Unreported at page 7).

Mr. Hamis insisted further that, the applicant submission reveal substitution of submission with evidence already tendered in court and he urged this court to disregard the new facts raised.

Reverting back to the claim of illegality as raised by Mr. Michael the respondent finds it to be below the required threshold, according to him the trial court decision in respect to division of matrimonial properties and custody of the children do not suffice to be termed as illegality. To support his contention, he referred this court to the case of **The Attorney**

General v. Micco's International Ltd and another, Civil Application

No. 495/16 of 2022 where it was insisted that mere decisional errors however plausible and obvious they may be, or matters touching on improper evaluation of evidence would not fall on the realm of illegality.

The respondent was of the view that the said ground of illegality has been misconceived by the applicant and at the end he prayed this court to dismiss the instant application with cost.

I have objectively considered and weighed the rival arguments from both parties along with the affidavit deposed by the applicant. The sole question for my determination is whether or not the applicant has disclosed sufficient cause for delay to warrant this Court exercise its discretionary power.

At the onset, I wish to state as rightly argued by the respondent that, it is the established principle of law that parties are bound by their pleadings and as far as the instant application is concerned the pleadings were the application and the counter affidavit, I say so because parties to the instant application were expected to file their submission in relation to what is stated in the application and the counter affidavit and not otherwise.

Deducing from the documents filed by the applicant and the submission made by the Counsel for the applicant, Mr. Michael C. Mteite one does not need a crystal ball to see and rule out that the applicant submission walk astray with what is contained in the affidavit of the applicant as the affidavit disclose chances of success of the intended appeal as a ground to grant the instant application while in his submission he disclose the ground of illegality, So I find it prudent at this stage to say that, these are different grounds and they cannot be used interchangeably.

That being said, I join my hands with the respondent that the applicant did not comply with the principle which require the parties to be bound by their pleadings. As far as the instant application is concerned, I will deal with the affidavit as I am aware with the position of law that, the grounds upon which the relief for extension of time is sought must be stated in the supporting affidavit. This has been a standpoint of law in numerous Courts decisions. For instance, upon being faced with akin situation in **Farida F. Mbarak & Another Vs. Domina Kagaruki & Others** (Civil Reference 14 of 2019)[2021] TZCA 600(20 October 2021)(Extracted from www.Tanzlii.org),the CAT had the following to state:

"Further, we find that the explanations of the delay given by the applicants in their written submission before the single Justice and also the explanations by Messrs, Mbwambo and Nyika in their respective submissions before us that the 5 days were spent in preparing and, filing the application, to be statements from the bar which cannot be acted upon. As correctly held by the single Justice, the explanations needed to be given in the notice of motion or the supporting affidavit".

I wish to put it clear that, on scrutiny of the affidavit deposed by the applicant which supports this application, the ground worthy of determination by this Court is found in paragraph 10. On ground 10, the Counsel for the applicant averred that, the intended appeal has a great chance of succeeding as far as misdirection of the trial magistrate is concerned.

As such, in my observation, what is contained in the applicant's affidavit in particular paragraphs 1, 2, 3 and 4, are merely the historical background of the matter at hand. However, on close scrutiny of paragraph 10 which is grounded on a great chance of success, I found it as merely statement from the bar having no evidential value and the same cannot be determined. I say so because, this Court and the CAT on numerous occasions has taken the view that, great chances of success of an intended appeal though a relevant factor in certain situations, it can

only meaningfully be assessed later on appeal after hearing arguments from both sides. See: **Tanzania Posts & Telecommunications Corporation Vs. M/s H.S. Henritta Supplies** (1997) TLR 141 at page 144 and **Dominic Ishengoma Vs. Geita Gold Mining Ltd**, Civil Application 146 of 2020 (Both unreported).

Based on the above precedents which I fully subscribe to, it is my holding that, the question whether the intended appeal has great chances of success or not, cannot be determined at this stage as it may pre-empt the merits of the intended appeal.

Based on the reasons stated above, I hereby find no good reason advanced by the applicant to warrant this court extend time to file an appeal. I dismiss the application with no costs as parties were once in an affectionate relationship. Order accordingly.

DATED AND DELIVERED at **MOROGORO** this 12th day of December, 2023


MANSOOR, L
JUDGE
12/12/2023

