

IN THE HIGH COURT OF TANZANIA

TEMEKE SUB-REGISTRY

ONE STOP JUDICIAL CENTRE AT TEMEKE

MISC.CIVIL APPLICATION NO. 48 OF 2022

(Arising from Matrimonial Cause No.23 of 2015 at Ilala District Court)

LILIAN ADAM MAMBOSHO.....APPLICANT

VERSUS

STEPHEN MTUIRESPONDENT

RULING

Date of last order: 28/02/2023

Date of Judgment: 29/05/2023

OMARI, J.

The Applicant in this matter, Lilian Adam Mambosho made an Application under section 14 of the Law of Limitation Act CAP 89 RE 2019, section 95 of the Civil Procedure Code, CAP 33 RE 2019 beseeching this court to inter alia invoke and judiciously exercise its unfettered discretionary powers to grant the Applicant extension of time to lodge her Appeal out of time to this honourable court to challenge the impugned judgment entered and delivered on 12 April, 2017 in Matrimonial Cause No. 23 of 2015 in the District Court of Ilala at Samora Avenue Dar es Salaam. As is the law the Application is accompanied by an Affidavit sworn by the Applicant. In brief she stated that she instituted a Matrimonial Cause No. 23 of 2015 against the Respondent

seeking for an order of divorce, custody of the issues of marriage, equal distribution of matrimonial assets and maintenance from the date the Respondent deserted her to the end of the case and upon remarriage. She also sought for the payment of school fees and medical expenses for the issues of the marriage. She further states that the said Petition was heard and determined by the District Court, but she was dissatisfied by the decision, thus, she contemplated an appeal to challenge it. Before she could lodge the Appeal, she was taken ill and was undergoing medical treatment at the Amana Government Hospital in Dar es Salaam; to an extent that she could not contact, consult and instruct a lawyer to pursue an appeal within time. Moreover, she states that the delay to appeal in time was neither occasioned by any negligent act nor inaction on her part but was wholly and solely caused by an inevitable and valid cause of ill health. As soon as she was recuperated, she expeditiously, diligently and promptly acted to rectify the situation, by instituting an Application for extension of time. The first Application, that is Misc. Civil Application No. 575 of 2021 was filed in the High Court District Registry at Dar es Salaam and was struck out because at the time the Court with competent jurisdiction to deal with the same was the High Court Temeke Sub-Registry One Stop Judicial Centre at Temeke. Then

the Applicant lodged the current Application. Lastly, she avers that if allowed to appeal she has good chances of likelihood of success in the intended Appeal for the impugned judgment contains conspicuous errors.

On the date set for hearing of the Application, the Applicant had the services of Godfrey Francis learned Advocate while the Respondent was not present, having been conspicuously absent from the very beginning albeit being duly served on several occasions and through publication. The Applicant prayed to proceed with hearing *ex parte*, a prayer which was granted by this court.

Submitting on behalf of the Applicant, Mr. Francis, introduced the Application and the laws it has been brought under then prayed to adopt the Affidavit sworn by the Applicant as part of his submission. He went on to submit that he understands that the power to extend time or not to is discretionary power of the court. However, the Applicant has to state sufficient reasons for the delay. He submitted further that in the case of **Jehangir Aziz Abdul Rasul v. Balozi Ibrahim Abubakar and Bibi Sophia Ibrahim**, Civil Appeal No. 79 of 2016 the Court of Appeal of Tanzania spoke of a good cause being a relative term that is dependent on the circumstances of each individual case. In his view this makes it imperative for a party to supply material to enable the court to use its discretion. He went on to submit that

the decision of the District Court of Ilala was delivered on 01 April, 2017 and it was decided against the Applicant. She is now seeking extension of time to file an appeal not because she was negligent, rather she was seriously ill and attending medical treatment. She started attending hospital on 27 February, 2017 up to 22 February, 2021 which makes almost five years of attending hospital for medication. This in his submission, made it impossible to continue with the Appeal process as she was in extreme pain and could not have made the requisite follow ups, hence the lapsed time. Mr. Francis submitted further that upon his client's recovery, she lodged an Application which ended up being struck out occasioning further delay. He concluded his submission by praying that this court grant this Application.

Having heard the counsel's submissions and gone through the Applicant's Affidavit in support of this Application the only issue for my determination is whether the Application is meritorious. However, before delving into the merit of the Application let me from the outset state that I am mindful that despite the Application being unopposed, the Applicant is still duty bound to disclose sufficient cause for delay. This is what the court uses to determine whether the Application is meritorious as per the relevant laws and

established principles. The Court of Appeal of Tanzania in the case of **Okech Akomo v. Konsilata Adoyo**, Civil Application 625 of 2022 held that:

'Though the application is unopposed, the applicant's duty to account for each day of the delay remains'

Looking at the merit of this Application for an extension of time I wish to observe that it is made under section 14(1) of the Law of Limitation Act, Cap. 89 R.E. 2022. The section provides that: -

'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'

As rightly submitted by the Applicant's counsel, it is settled law that granting of extension of time is within the court's discretionary powers, which is to be exercised judiciously. In determining whether the Application is meritorious I have to consider whether the Applicant has accounted for the delay to warrant enlargement of time as she seeks this court to do. In doing so, I wish to be led by the interpretation of the Court of Appeal in the celebrated case of **Lyamuya Construction Company Ltd v. Board Registered**

Trustee of Young Women's Christian Association of Tanzania, Civil Application No. 2 of 2010 where the court formulated the guidelines for exercising the discretion to extend time judiciously. For the sake of clarity, I will reproduce the guidelines as follows:

- a. The Applicant to account for the delay.
- b. The delay not be inordinate.
- c. The Applicant must show diligence and not apathy, negligence or sloppiness in the prosecution of the action he intends to take.
- d. If the court feels there are other sufficient reasons such as the existence of a point of law of sufficient importance; such as illegality of the decision sought to be challenged.

In addition to the above guidelines; the case of **Sebastian Ndaula v. Grave Rwamafa (Legal Personal Representative of Joshua Rwamafa)**, Civil Application No. 4 of 2014, Court of Appeal of Tanzania (unreported) which was later cited by the Court in the case of **Elias Kahimba Tibanderana v. Inspector General of Police and A.G**, Civil Application No. 338/01 of 2020, Court of Appeal of Tanzania (unreported) is relevant to this Application for it stresses on the need to account for the delay.

To anchor the above guidelines to the current Application it is best to create a time line of events from the Affidavit and counsel's submission. Granted the Applicant was sick, and has appended to her Affidavit a copy of a medical outpatient report(s) as deposed in Paragraph 6 of the said Affidavit. However, going through the said medical report(s) one sees she attended Amana Regional Hospital for the first time on 20 February, 2017 following this there were four other visits in the same year; that is on 27 April, 30 April, 10 May and 10 August. Then there are two visits in 2018 that is 20 February and 22 August. These are followed by another two visits in 2019 which occurred on 24 February and 26 August. The next set of visits was for 15 February and 18 August in the year 2020. The last hospital visit was in 22 February, 2021. This court is not a medical board nor versed with medical procedures, but then again, the Applicant called the medical report(s) "axiomatic" in her Affidavit, and it is indeed axiomatic in that one, she was receiving care as an outpatient, two, other than the 2017 visits, on the following ones the author of the record has written "doing well" and or "still doing well" with 18 August, 2020 visit stating the patient is in good health. Conversely, the Applicant's counsel submitted that it was impossible for the Applicant to make follow up on the appeal because she was under medical

care and for the whole time, she was in extreme pain so she could not have made the requisite follow up of the appeal. In my considered view, this is not depicted or supported by the medical record(s) submitted by the Applicant.

This Court is aware that illness is a good cause for the delay in filing a matter within the prescribed time. This position was stated in the case of **Fredrick Mdimu vs. Cultural Heritage Ltd**, Revision No. 19 of 2011, High Court Labour, Division at Dar Es Salaam, (Unreported). However, the said illness needs to be not only explained but also it must be the actual reason which delayed the Applicant from filling the intended matter within time. In the case of **Shembilu Shefaya vs. Omari Ally** [1992] TLR 245, the Court of Appeal was of the view that the application does not give an elaboration of the sickness that occasioned the delay. The explanation needs to be thorough. The need for a thorough explanation has the legal basis in the principle that in the application for extension of time the Applicant is required to account for every day of delay.

In the cases of **Tanga Cement Company Limited v. Jumanne D. Massanga and Another**, Civil Application No. 6 of 2001 (unreported), **Vedastus Raphael v. Mwanza City Council and 2 others**, Civil

Application No. 594/08 of 2021 and **William Shija v. Fortunatus Masha** [1997] T.L.R. 213 (CA) the Court of Appeal was of the view that although what amounts to "good cause" is not defined, it is based on the discretion of the court which in most cases depends on the circumstances of the case which are to be determined judiciously. Furthermore, the reasonable or sufficient cause depends upon relevant material provided by the party seeking an extension of time to move the Court to exercise its discretion. Moreover, good cause must be determined by reference to all the circumstances of each particular case as was held in **Oswald Masatu Mwizarubi v. Tanzania Processing Ltd**, Civil Application No. 13. of 2010, Court of Appeal of Tanzania. There are also factors to be considered in determining whether there is sufficient cause or not. This can be seen in the case of **Dar Es Salaam City Council v. Jayantilal P. Rajani**, Civil Application No. 27 of 1987, Court of Appeal of Tanzania, at Dar Es Salaam, (Unreported), where it was held that:

'From decided cases, several factors have to be considered, including whether or not the application has been brought promptly. The absence of any explanation for the delay and lack of diligence on the applicant's part.'

In this application, the Applicant's reason for the delay in appealing to this Court within time is she was sick and attending to hospital between February 2017 and February 2021, a period of approximately 4 years. It is noteworthy, that using the time line of events approach that the Applicant's delay is three-fold. There is the period she was ill and attending hospital, then the period after the last hospital visit and thereafter there is the period she sought to exercise her rights by finding counsel and making an Application for extension of time by filing Misc. Civil Application No. 575 No. 2021, the first Application. It is my considered view that these three periods ought to be treated differently. Starting with the third period, which is the period after 9 November, 2021 when the first Application was instituted. The first Application was struck out on 12 August, 2022 and the current Application filed in September, 2022 which I consider reasonable time so I will not belabour on this time nor count it as part of the delay for the Applicant was in court seeking to assert her rights.

However, the second period, which is between the last hospital visit, that is 22 February, 2021 and the filing of the first Application that is 9 November, 2021 there approximately 8 months that remain unaccounted for. In her Affidavit, the Applicant states that upon her recuperating she expeditiously,

diligently and promptly acted to rectify the situation by instituting the first Application. I beg to differ with the Applicant, a matter that is filed after the lapse of 8 plus months since ceasing to attend hospital cannot be said to be expeditiously or promptly filed and more so when it concerns a matter that was decided in 2017. This time, needed to be accounted for since it does not fall within the time she was of ill health. To this end I make reference to **Dr. Ally Shabhay v. Tanga Bohara Jamaat** (1997) TLR 305, where it was observed:

'...those who come to courts of law must not show unnecessary delay in doing so, they must show great diligence.'

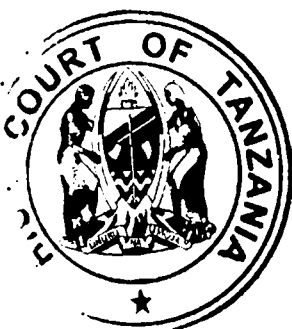
Perhaps in seeking to account for the time the Applicant's counsel submitted that his client was attending hospital and recovered end of the year 2021 when she was able to consult an advocate who in turn filed Misc. Civil Application No. 575 No. 2021.

What remains is the first period, which is the period between the first and last hospital visit. Even if this court were to believe that the whole period between February 2017 and February 2021 the Applicant was in debilitating pain to an extent of failing to contact, consult and or instruct a lawyer to

pursue the appeal as already stated above the medical report(s) do not support this assertion.

Using the guidelines set in **Lyamuya Construction Company Ltd v. Board Registered Trustee of Young Women's Christian Association of Tanzania** (supra) as a yardstick in the Application before me, I find that, in addition to the delay being inordinate, the Applicant's explanation for the delay is laden with holes. In the circumstances, there being no sufficient explanation or good cause for this Court to extend the time to file the intended appeal; I find that the Application has no merits. It is hereby dismissed. Due to the nature of the matter, I make no order as to costs.

It so ordered.




A.A. OMARI

JUDGE

29/05/2023

Judgment delivered and dated 29th day of May, 2023.


A.A. OMARI

JUDGE

29/05/2023