

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

TEMEKE HIGH COURT SUB REGISTRY

ONE STOP JUDICIAL CENTRE

AT TEMEKE

MISC. CIVIL APPLICATION NO. 60 OF 2022

*(Arising from Matrimonial Cause No. 21 of 2021 in the District Court of Temeke at One
Judicial Centre before Hon. A.E. Mpesa- SRM)*

WILLIAM JOHN CHALLO..... APPLICANT

VERSUS

ROSE JOHN MUKONO..... RESPONDENT

RULING

Date of Last Order: 31/07/2023

Date of Ruling: 01/08/2023

M. MNYUKWA, J

This is an application for enlargement of time where the applicant prayed for this court to extend time within which he can lodge his appeal out of time against the decision of the District Court of Temeke One Stop Judicial Centre in Matrimonial Cause No 21 of 2021.

The application was supported by the applicant's affidavit. In opposing the application the respondent filed counter affidavit. When the application was called for hearing, the applicant was represented by Mr. John Robert Manyama whereas the respondent was represented by



Richard Magaiga By the Order of the Court, the application was argued orally.

In his affidavit filed in this Court in supporting the chamber application, the applicant said that, the decision in the Matrimonial Cause No 30 of 2020 was delivered on 31st August 2022, and he was supplied with a copy of Judgment on 16th September 2022. The applicant further deposed that he fell sick on 30th September 2022 and he was hospitalized at Mwananyamala hospital where he was admitted and discharged on 23rd October 2022. To support his averment, he attached a medical report dated 31st October 2022 which is marked as Annexure TRAT 2 and a copy of the discharge form marked as Annexure TRAT 3.

The applicant went on to depose that, after being discharged from hospital, he realized that nine (9) days lapsed from the statutory time within which he was supposed to file an appeal. Thereafter, he found a advocate to prepare the present application and that unfortunately, the same was not prepared on the day which he approached the lawyer because he was asked to provide the discharge form which was not availed to him on the day he was discharged. The appellant said that the same was availed to him on 31st October 2022 since on 29th and 30th October 2022 were weekend.

The applicant also deposed that, his advocate spent two days that is on 1st and 2nd November 2022 to prepare the present application that was lodged on 3rd November 2022 through *JSDS 2* for admission. He retires by praying the court to extend time because the Matrimonial Proceedings No 21 of 2021 which he seeks to challenge is tainted with illegality since Form No 3, which is a certificate from the marriage conciliation board was not admitted as part of evidence. He further stated that the appeal has overwhelming chances of success. And that, his failure to file appeal within time was neither due to negligence nor inaction but the reasons beyond his control.

Contesting, the respondent filed a counter affidavit denied the applicant's assertion that he was supplied with a copy of Judgement on 16th September 2022 as she categorically stated that a copy of Judgment was ready for collection on 31st August 2022. She further deposed that, even if the applicant was supplied with a copy of Judgment on 16th September 2022, still he would have processed his appeal within 14 days between 16th September 2022 and 30th September 2022 before he fell sick as he alleged.

On the sickness as a ground for extension of time, the respondent further contended that, even if the applicant was discharged from the

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purported bed rest on 23rd October 2022, yet he did not account the period of delay for almost 5 days from that date to 28th October 2022 whereby it was during this time that his application could have been preferred. The respondent added that, as per the nature of the application, he was able to prepare his application.

On the issue of alleged illegality, the respondent deposed that the same is a fabrication which aimed to unjustifiably asked for extension of time. She further challenged the overwhelming chances of success of appeal as a mere delaying tactics in attaining justice. She retires by deposed that the applicant was negligent and he slept over his right of appeal which was duly notified to him in Matrimonial Cause No 21 of 2022.

During the hearing of the application, the applicant's counsel, argued in supporting the application. He quickly pointed out that the applicant advanced two reasons for this court to consider his application. He submitted that the first reason was stated in paragraphs 5, 6,7,8,9 and 10 of the affidavit which is all about sickness and the second reason is stated in paragraph 12 of the affidavit which is illegality on the impugned decision sought to be challenged.



The counsel went on that, the law requires the applicant to challenge the present appeal within 45 days from the date of the impugned decision. However, after receiving a copy of Judgment and Decree he fell sick on 30th September 2022 which led to his admission at Mwananyamala hospital and he was discharged on 23rd October 2022 and that he was directed to attend monthly clinic for specialist consultation. He referred to Annexure TRAT 2 and TRAT 3 to support his argument.

He further submitted that, from the date where the applicant was discharged, he was out of time for 9 days and that he sought a legal advice so that he can be assisted on how to prepare the present application. And that on 28th October 2022, he was asked by the advocate who prepared the application to supply with a copy of medical report and other documents from Mwananyamala hospital, but he managed to get the same on 31st October 2022.

The counsel added that, after they got the medical report, they spent two days to prepare the present application as the same was filed electronically on 3rd November 2022. To support his argument he referred the case of **Lyamuya Construction Company Limited vs Board of Trustee of Young Womens Christian Association of Tanzania**, Civil Application No. 2 of 2010, to show that the applicant managed to account



for each day of delay. He remarked that, the applicant gave sufficient reason for this court to extend time. He also referred the case of **Murtaza Mohamed Raza and Another vs Mehboob Hassanali Veisi**, Civil Application No 448 of 2021 to support that sickness is a sufficient ground for extension of time.

On the point of illegality, the counsel for applicant submitted that, throughout the proceedings and judgement of the trial court there is no evidence which shows that the matter was passed in the marriage conciliation board. Therefore, according to him the matter was brought in court premature which makes the trial court to have lacked jurisdiction to entertain the same. He therefore prayed the court to extend time since the applicant advanced sufficient reasons and account for each day of delay.

Contesting, the respondent's counsel prayed to adopt the affidavit sworn by the respondent to from part of his submissions. He challenged sickness as a ground for extension of time as he averred that, from the date when the judgement of the trial court was delivered the applicant was visiting the respondent's house to ask the custody of children. He went on that, it is a settled principle of law that the applicant has to account for each day of delay. He said that, the applicant deposed that

the judgment was delivered on 31st August 2022 and that he was supplied with a copy of judgment on 16th September 2022, but the same lacks proof.

On the spirit of accounting each day of delay, the respondent's counsel averred that, the applicant failed to account a period of 14 days from 16th September 2022 to 30th September 2022. He also stated that the applicant also failed to account for each day of delay from 23rd October 2022 to 28th October 2022 as there was no proof as to what the applicant was doing on those days. He referred to the case of **Interchick Company Limited v Mwaitenda Ahobokile Michael**, Civil Application No 218 of 2018 to support that the applicant was required to account for each day of delay.

On the point of illegality, the counsel for respondent submitted that, it was the applicant who filed petition for divorce and attached a certificate from the marriage conciliation board. Therefore, there is no illegality since the law does not require the judgment to demonSTRATe that the matter was referred to the marriage conciliation board as it was not a fact in issue at the trial court. And that, it is not a requirement of the law that the same has to be featured in the proceedings and judgement since the

requirement is for the same to accompany a petition for divorce. He thus prayed the application to be dismissed.

In a short rejoinder, the applicant's counsel submitted that, since Form No 3 did not form part of the proceedings in the trial court and there is no evidence that the same was tendered and admitted as part of evidence, it is an illegality. He added that, the respondent brought facts that were not stated in his counter and therefore the same are just a mere words as they lack proof. He retires by stating that, the applicant accounted the period of delay from 23rd October 2022 to 28th October 2022 as he deposed that he was sick and he consulted his advocate to prepare the present application. He therefore prayed the application to be granted.

Having gone through the submissions and records of the application, the key issue for consideration and determination is whether the applicant has advanced sufficient cause to suffice the grant of extension of time.

It is a well-known principle that, extension of time is a discretion of the court, and for the court to exercise such power the applicant has to put forward sufficient reason(s) for the delay. Thus, sufficient cause is a pre-condition to prompt the court to exercise its discretionary power to grant extension of time. There is no hard and fast rule as to what it

amount to sufficient cause as it depend on the circumstances of each and particular case. (See the case of **Regional Manager Tanroads Kagera vs Ruaha Concrete Co. Ltd**, Civil Application No.96 of 2007).

Additionally, it is settled principle that, in the application of this nature, the applicant is required to account for each day of delay for the prayer to extend time to be granted and that delay of even a single day should be accounted for. In the case of **Ludger Beranrd Nyoni v Nattional Housing Corporation**, Civil Application No 372/01 of 2018 it was stated that:

" It is settled that in an application for enlargement of time, the applicant has to account for everyday of delay involved and that failure to do so should result into the dismissal of the application."

Furthermore, depending on the circumstances of each case, for the court to grant the application for extension of time, the applicant must have shown that there was a point of illegality that impedes justice as the illegality cannot be left to stand as it was stated in the case of **Principlal Secretary Ministry of Defence and National Service v Devram Valambhia**, [1992] TLR 185 in which it was held that, illegality is a reason for extension of time.



Coming now to our application at hand, the applicant gave two limbs of reasons for this court to enlarge time to file appeal out of time. The first limb is on sickness and the second limb is on illegality on the face of record of the trial court.

Starting with the first limb, it is on record that the sequence of events as far as sickness is concerned has been deposed by the applicant in paragraphs 5, 6, 7, 8, 9 and 10 of his affidavit. His averment has been supported by the medical report and the medical chit which are attached as Annexure TRAT 2 and TRAT 3 respectively. The applicant's averment was also supported by the submissions of his counsel who stated that, the applicant was sick and he was diagnosed at Mwananyamala hospital.

As it was expected, the sickness of the applicant was strongly disputed by the respondent in his counter affidavit as well in the submissions made by her counsel who strictly stated that, the applicant did not account for delay of five (5) days from 23rd October to 28th October 2023. He further submitted that, the applicant was not sick as he was visiting the respondent to ask custody of children during the time which he deposed that he was sick.

I have carefully considered the submissions of the parties in this application, I wish to firstly point out that, the applicant was supposed



to file his intended appeal within 45 days from the date of the decision. As the decision was delivered on 31st August 2022, he was supposed to file his appeal on or before 15th October 2022. However, in his affidavit, the applicant deposed that he was supplied with a copy of judgement on 16th October, 2022 that's why he delayed to file the appeal. Unfortunately, this averment was not supported with any cogent proof to substantiate that he was supplied with a copy of the judgement on that date. As it was rightly submitted by the learned counsel of the respondent, those are mere words in which this court cannot rely on it to grant an application for extension of time.

On the other side, the respondent also faulted the applicant affidavit by claiming that the period within which the applicant alleged to be sick, he was visiting her to ask custody of children. Again, I find this averment to be devoid of merit since they are mere words which are not deposed in the respondent's affidavit rather than counsels' submissions. It is a trite law that submissions are not evidence. And for that reason, I find the above words from the counsel of the respondent are mere allegation which cannot be acted upon in determining the present application.



Having now scanned through the affidavit of the applicant, the counter affidavit of the respondent as well as the submissions of the counsel for both parties, it is clear that in his affidavit the applicant deposed that he was sick and he was hospitalized at Mwananyamala hospital and discharged on 23rd October in which he found himself to have delayed to file the present application for nine (9) days. In his affidavit the applicant accounted for each day of delay as it is reflected on his affidavit starting from paragraphs 5 to 11 of the affidavit.

It is with no doubt that sickness is a sufficient ground for extension of time. (See the case of **John David Kashekya v The Attorney General**, Civil Application No 1 of 2012). What is important is for the applicant to exhibit that sickness prevented him to file an appeal within the prescribed time provided by the aw. Upon revisiting paragraph 8 of the applicant affidavit, the same shows how he accounted for the 5 days of delay which are disputed by the respondent. Let the said paragraph speak for itself as I quote:

"That while I had not recovered well, I endeavoured to seek for an advocate to assist in pursuing the available remedy and on the 28th October 2022 I instructed an advocate to prepare and lodge an application for extension of time who upon perusal of



my documentation he requested for medical report that was not availed to me during discharge."

It is the above paragraph which bailed out the applicant sickness. The applicant who was not well recovered, and still under monthly appointment to consult a specialist, made a close follow-up to get a legal advice on the appropriate remedy to be taken in order to lodge an appeal as he found himself out of time. For that reason, I find the applicant took a reasonable steps and account on those five days of delay. As it is known, sickness is an act of God which is beyond the human control. In the rules of nature, it is very rare for a patient who is hospitalized to continue with his normal schedule soon after discharge since he need to recover well before he resumed to his normal routine. Thus, it is my humble view that the applicant advanced sufficient reason for extension of time and managed to account for each day of delay including the delay of 5 days which is not inordinate.

The Court of Appeal in the case of **Finca Tanzania Limited v Hassan Lolila**, Civil Application No 165/18 of 2021 observed that:

" It is common ground that, health matters, in most cases, are not the choice of a human being, cannot be shelved and nor can anyone be held to blame when they strike..."



Guided by the above decision of the Court of Appeal and taking into consideration the applicant's affidavit, I am satisfied that, the reason of sickness is merited.

On the second reason of illegality, I don't think if the same should detain me much since the applicant managed to show sufficient reason and account for each day of delay on the reason of sickness, which is enough to dispose of the present application.

Consequently, I grant the application and order the applicant to file his appeal within 14 days from the date of delivery of this Ruling. No orders as to costs since the parties were spouses.

Ordered accordingly.




M.MNYUKWA

JUDGE

01/08/2023

Court: Ruling delivered in the presence of the parties' counsel.


M.MNYUKWA

JUDGE

01/08/2023