IN THE HIGH COURT OF TANZANIA

TEMEKE SUB-REGISTRY

ONE STOP JUDICIAL CENTRE AT TEMEKE

MISC. CIVIL APPLICATION N0.63 OF 2022

(Arising from Matrimonial Cause No. 38 of 2017 at the District Court of Kinondoni)

GYAVIRA NGONGA MUTAKYAHWA ..... APPLICANT

VERSUS

ANNETE MUTAKYAHWA ..... RESPONDENT

RULING

Date of last order: - 17/03/2023
Date of Ruling: - 19/06/2023

OMARI, J.:

This is an Application for enlargement of time to file an Appeal in this court. The Applicant, one Gyavira Ngonga Mutakyahwa is seeking to appeal against the decision of the District Court in Matrimonial Cause No. 38 of 2017 which was delivered on 27 March, 2018. The said Application is brought under section 14 of the Law of Limitation Act, Cap 89 RE 2019 (the LLA) and it is supported by an Affidavit of the Applicant.

When the Application was called for hearing Prof. C. Binamungu learned advocate represented the Applicant while the Respondent had the services of Mr. H. Mwakalasya also learned advocate.

As he commenced his submission on behalf of the Applicant the learned counsel prayed to adopt the Applicant's Affidavit as part of his submission. He further submitted that section 14 (1) of the LLA requires the Applicant to advance sufficient cause in order to be granted leave to appeal out of time. He went on to state that the reasons that the Applicant was advancing are stated in paragraph 6 and 11 of the Affidavit and include that there is an illegality in the District Court's decision; which is in fact that the judgment does not dissolve the marriage but occasions the division of matrimonial properties in violation of section 114 of the Law of Marriage Act, Cap 29 RE 2019 (the LMA). The learned counsel continued to argue that illegality can be raised at any stage even execution. He then cited the case of **Transport Equipment Ltd v. Valambhia** [1993] TLR 91 and that of **Munawar M Pardan v. Jubilee Insurance Co. of Tanzania LTD,** Commercial Case No. 36 of 2007 to cement his argument.

He concluded his submission by stating that the Respondent's Counter Affidavit on paragraph 6 and 7 admits there is an error in the said judgment. The learned advocate argued that, the Respondent in his view is only proposing a different way of addressing the issues but they acknowledge that it is there. However, in his view the only way of addressing it is by

getting orders from this court, that is why the Applicant is seeking to file the intended Appeal. He then prayed for an order for extension of time so that the Appeal is filed.

In reply, Mr. Mwakalasya also commenced by seeking to have the Respondent's Counter Affidavit adopted as part of his submission. He outrightly stated that he objects the Application for it lacks reasons to influence the discretion of this court to grant the extension of time. He went on to vehemently argue that the said Application is wrongly initiated in this court thus, it (this court) lacks the jurisdiction to entertain it. The learned advocate further argued that while his learned brother stated their reasons are in paragraph 6 of the Applicant's Affidavit and seek to rely on the ground of illegality; in his opinion there is no illegality, since the decree declared that the marriage had irreparably broken down and the only omission was granting the divorce decree and it could not be subjected to an appeal provided both parties accepted and no one was contesting the divorce.

Mr. Mwakalaysa continued to vehemently state that this court has no orders to give, in his view the Applicant should have addressed the matter at the trail court for it to correct the judgment and decree. He went on to aver that under section 96 of the Civil Procedure Code Cap 33 RE 2019 (the CPC) a

court can correct clerical errors and ommissions on its own or upon application by the parties. The learned advocate stated that the Applicant could have resorted to making an application for correction. He added that section 73 of the CPC is also relevant for it speaks of errors not affecting merit or jurisdiction of the court. In his view the reasons advanced by the Applicant being the missing "grant of divorce decree" this does not affect the merit since the same was not contested at all. The learned advocate relied on the case of **Naima Suleiman (suing as next friend of Zakaria Omary Salumu Shighela (minor)) v. Idu Busanya Mugeta (Administrator of the late Lazaro Busanya) and 5 Others,** Civil Application No. 538/8 of 2019 where the Court of Appeal spoke of alternative remedies, and is akin to the present Application, the alternative remedy is in section 96 of the CPC therefore the Applicant should have sought the same by applying to the court for corrections.

In objecting the Application further, the learned counsel addressed the fact that the Applicant opted for Review instead of Appeal after he was aggrieved with the trial court's decision. The Review was successfully appealed against in this court, then the Applicant had utilized his opportunity and it not proper for him to come back and appeal. He went on to say that since the matter

was dealt with by the High Court then the remaining proper forum is the Court of Appeal. The learned counsel concluded his submission by praying that the Application be found unmeritorious and be struck out with costs.

In rejoinder the learned counsel for the Applicant chose to start by taking on the prayer for costs and he stated that in matrimonial proceedings the person praying for costs is supposed to show reasons for such prayer as is provided under section 90 of the LMA. He went on to distinguish the **Naima Suleiman (suing as next friend of Zakaria Omary Salumu Shighela (minor)) v. Idu Busanya Mugeta (Administrator of the late Lazaro Busanya) and 5 Others** (supra) case for being one that involves the remedy of revision while their Application is seeking for extension of time within which to file an appeal. The learned counsel also stated that it was the duty of a court when handling a matrimonial matter to enquire as provided in section 108 of the LMA; there is no dissolution of marriage by mutual consent, the court inquires and finally decrees the marriage as dissolved. He argued that the Respondent's counsel's assertion that the illegality is just an error that is correctable by invoking section 96 of the CPC is something that has to be declared by the this court when the appeal is filed; since the lower court is *functus officio*. He went on to argue that

execution proceeding without an order dissolving the marriage cannot be cured by a stroke of a pen. As his last point of rejoinder, the learned advocate challenged the Respondent's counsel's argument that the Applicant is barred from making this Application after Review was successfully challenged in the High Court for being bare statements not supported by law. He then prayed for the Application to be granted.

Having heard the submissions by both counsel and aptly considered the parties' Affidavits there is only one issue for this court to determine; that is whether the Application to enlarge the time for the Applicant to file an appeal out of time is meritorious.

In doing so, it is my considered opinion and on record that neither of the parties contest the fact that they were married and in 2017 the Respondent instituted Matrimonial Cause No. 38 of 2017 at the District Court of Kinondoni. The matter was then determined and judgment delivered on 28 March, 2018. The said judgment granted four reliefs including that the marriage between the parties has irreparably broken down. In his Affidavit the Applicant deponed that the said judgment and decree of the district court did not grant orders for divorce as prayed for by the parties. Likewise, no order for separation has been granted.

The Respondent who was the Petitioner did not appeal against the decree therefore the marriage between the two; that is the Applicant and Respondent still exists. The Respondent does not contest the fact that the judgment of the trial court did not grant a divorce decree. However, she is of the view that the court declared the marriage as irreparably broken down and that the omission to grant the divorce decree is curable; as it does not affect the merit of the case and proceedings.

Something else I find worthy of mention is that the Applicant had successfully applied for Review vide Civil Review No. 70 of 2018 against the judgment and decree at the District Court. However, the Respondent successfully challenged the same vide Civil Appeal No. 102 of 2019 and the same was allowed on 24 April, 2020. This, the Respondent's counsel argued was their choice to pursue that route as opposed to an appropriate one thus, the Applicant cannot now seek other remedies.

Upon perusing the record and reading the decision in Civil Appeal No. 102 of 2019 which is attached to the Applicant's Affidavit, I find that the Review was applied to reverse the trial courts order on the distribution of matrimonial assets between the parties. The Application before me is related to the Applicant's desire to appeal but he is out of time and is averring that

the trial courts judgment contains an illegality thus, he should be allowed to prefer the said appeal out of time.

A look at the trial court's judgment and decree depicts what is stated by the Applicant, neither of the two state that a divorce decree has been granted as prayed for by the parties albeit the marriage being declared irreparably broken down. The question that has extraneously exercised my mind is whether the omission occasions an illegality as averred by the Applicant. That is, is it an issue that can be brushed away or one that needs a courts intervention.

To answer this question, I reflect on the provisions of sections 108(d) and 110 (1) (a) of the LMA. Accordingly, if a court is satisfied that a marriage is irreparably broken down as per the provisions of sections 107 and 108 of the LMA a decree of divorce has to be issued. Furthermore, as argued by the Applicant's advocate, all ancillary reliefs have to be granted when granting or subsequent to the grant of a decree of divorce. In the present Application, the judgment and decree do not dissolve the marriage, they just state the same is irreparably broken down.

Having discussed the circumstances that gave rise to the Application it is now appropriate to segue into the question of enlargement of time. In

Tanga Cement Company v. Jumanne D. Masangwa and Another, Civil Application no. 6 of 2001, the Court of Appeal held that:

> *'An application for extension of time is entirety in the discretion of the Court to grant or refuse it. This unfettered discretion of the Court however has to be exercised judicially, and overriding consideration is that there must be sufficient cause for doing so. What amount to sufficient cause has not been defined. From decided cases a number of factors has been taken into account, including whether or not the application was brought promptly; the absence of any valid explanation for the delay; lack of diligence on the part of the applicant.'*

The Applicant herein did not find it necessary to account for the delay, other than perhaps expecting that this court would take heed on the fact that there was the Review and subsequent Appeal that were filed. Nonetheless, as they have only relied on the ground of illegality I will determine the Application on that basis, as it is a settled principle of law that, an extension of time can be granted on the sole ground of illegality as was held in the case of **Transport Equipment Ltd. v. D.P. Valambhia** [1993] TLR 91 where the Court of Appeal made reference to its earlier case of **Permanent Secretary, Ministry of Defence and National Service v. D.P. Valambhia** [1992] TLR 185 where it held:

> *'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 purposes to ascertain the point and, if the alleged illegality be established, to take appropriate measures and put the matter and record right.'*

In a later case of **Lyamuya Construction Company Limited v. The Board of Registered Trustees of Young Women's Christian Association of Tanzania,** Civil Application No. 2 of 2010 (unreported), the Court of Appeal expounded on its holding in **Permanent Secretary, Ministry of Defence and National Service v. D.P. Valambhia** (supra) and held that for an illegality to amount to sufficient cause it must be apparent on the face of record. The court stated:

> *'The Court there emphasized that such point of law must be that 'of sufficient importance' and, I would add that it must be apparent on the face of the record, such as the question of jurisdiction; not one that would be discovered by long drawn argument or process.'*

From the explanation above it is clear that what the Applicant is stating to be their reason for seeking the Application for enlargement of time is illegality. The said illegality is occasioned by there being no dissolution of parties' marriage yet there are ancillary orders that can only be occasioned

subsequent to the dissolution of a marriage. This is clear and apparent in the record. It is for the foregoing reasons that I shall, as I hereby do, grant the Application. As a result, extension of time within which to lodge an appeal against the decision of the District Court in Matrimonial Cause No. 38 of 2017 which was delivered on 27 March, 2018 is hereby granted. The appeal should be lodged within 30 days from the date hereof. This being a matrimonial matter I make no orders as to costs.

Order accordingly.

A.A. OMARI

JUDGE

19/06/2023

Judgment delivered and dated 19th day of June, 2023.

A.A. OMARI

JUDGE

19/06/2023