

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. 38 OF 2023

*(Arising from the Judgement and decree of Resident Magistrate's Court of
Kivukoni in Matrimonial Cause No. 55 of 2020)*

EUNICE PHILEMON KISASI.....APPLICANT

VERSUS

FIKIRINI GOODLUCK MOSHI.....RESPONDENT

RULING

22/04/2024 & 22/05/2024

SARWATT, J.;

The applicant filed this application under section 14(1) of the Law of Limitation Act, seeking an extension of time to appeal against the decision of the Resident Magistrate's Court of Kivukoni in Matrimonial Cause No. 55 of 2020. The application was made by way of Chamber summons supported by the affidavit sworn by the applicant. The respondent opposed the

application and filled a counter affidavit to that effect.

According to the affidavit sworn in support of this application, the reason advanced by the applicant in support of this application is the illegality in the said decision and the failure to obtain a copy of the judgment and decree within time. The affidavit of the applicant indicates in paragraphs 3,4 and 5 that the judgment was delivered on 4th April 2023, and on 11th April 2023, she filled a letter requesting to be supplied with the judgment, decree, and proceedings, but she was not supplied with the same. On 5th May 2023, she filed a reminder, but the same went in vain. On 20th July 2023, she filed another reminder, and on that same day, she was supplied with the judgment and decree.

Upon being supplied, she noted that there were spelling errors in her name. Thus, she filed a request for correction of the said spelling errors, and on 21st July 2023, she was supplied with a copy of the corrected judgment. The applicant requested for the application to be granted since the intended appeal has an overwhelming chance of success. This is because there is illegality, as the trial Court had no jurisdiction to try a matrimonial dispute in the absence of a valid certificate from the Marriage Conciliation Board.

At the hearing of the present application, the applicant was represented by Noel Sanga, learned counsel and the respondent was represented by Advocate Mussa Kyoba. With the leave of the Court, the application hearing was through written submissions.

Taking the floor, advocate Sanga started by adopting the applicant's affidavit, a reply to counter affidavit, and the reply to counter affidavit filed on 26th September 2023 as part of his submission and went further and submitted that the respondent herein instituted a matrimonial cause no. 55 of 2020 at the Resident Magistrate's Court of Kivukoni, and upon the full trial, the Court gave its judgment on 4th April 2023. The applicant made several requests to be supplied with a copy of the judgment and decree. Upon several follow-ups, she was supplied with a copy of the judgment and decree on 21st July 2023, out of time to file an appeal, and hence filed out the present application.

According to the counsel, the applicant has demonstrated sufficient reason as there was a delay in obtaining the copy of the judgment, which is a sufficient reason for extension of time. To support his assertion, he cited the case of **Likidaro Saidi Sumail v Asia Swai**, Misc. Civil Application No. 12 of 2022. Further, he advanced that the applicant has acted promptly by

applying for an extension of time within 13 days from the date of being supplied with the judgment, which is a good ground for an extension of time.

The learned counsel further submitted that the applicant, on the 1st ground for extension of time, raised the issue of illegality. According to the counsel, there is illegality because the Law of Marriage Act, C.A.P. 29 under section 106(2) provides a mandatory requirement of attaching in the matrimonial petition a valid certificate from the Marriage Conciliation Board, which has been issued not more than six months before filing of the petition. The Court record in Matrimonial Cause no. 55 of 2020 reveals that the alleged certificate was issued on 3rd January 2019 and the matrimonial petition was filed on 2020.

On another note, the learned counsel argued that there are overwhelming chances of success in the intended appeal. He added there are illegalities as the judgment was delivered without a valid certificate from the Marriage Conciliation Board and without the named certificate being tendered and admitted as evidence before the trial court.

On his part, the respondent counsel, in his submission opposing the appeal, started by praying for the respondent's counter-affidavit and counter

affidavit sworn by Kurwa Masige Mkama to be adopted to form part of his submission and went further to submit on the ground of illegality as alleged by the applicant. The respondent counsel submitted that the applicant wants to mislead the Court by advancing that there is no valid certificate from the Marriage Conciliation Board because when the Board failed to reconcile the parties, it certified to that effect on 3rd January 2019, as annexure FGM-1 shows. He also submitted that the petition was filed after the failure of the Board to reconcile the parties. However, the trial Court did not consider it or require the parties to testify in it because the issue of validity of the certificate from the Marriage Conciliation Board was not among the framed issues.

The counsel went further and argued that it is a known principle of the law that parties are bound by their pleadings. Any evidence by the parties that does not support framed issues must be ignored, as stated in the case of **James Funke Gwagilo v Attorney General** (2004) T.L.R 161: Since the certificate was not an issue for determination, the Court was bound to compose judgment by the prayers of both parties. It was the respondent counsel's further contention that where illegality is raised as a ground for extension of time, It must be apparent on the face of the decision to be

challenged and not to be discovered by a long-drawn argument. To support he cited the case of **Bashir Ally v Andendekisye Mwamaluka and others**, Civil Appeal No. 49 of 2021. According to the counsel, the point of illegality raised is subject to a long-drawn argument and was not among the issues raised. He, therefore, failed to see any apparent illegality on its face as alleged by the applicant.

On the second ground of the application, which the applicant alleged failure to be supplied with the judgment on time, the respondent counsel submitted that it is trite law that the applicant has to account for each day of delay as stated in the case of **Bashir Ally v Anyegile Andendekisye Mwamaluka and others**, (supra) which cited with approval the case of **Juma Shomari v Kabwere Mambo**, Civil Application No. 330/7 of 2020. According to the counsel, the applicant did not account for its delay from 4th April 2023 to 11th April 2023 and further from 11th April 2023 to 5th May 2023 and from 20th July 2023 so as to enable this Court to exercise its discretion.

The counsel went further and submitted that the applicant and their advocate showed negligence on their part, as they were very much aware of the existence of the judgment. On another note, the respondent counsel attacked the applicant's allegation that she was supplied with the judgment

and decree on 20th July 2023 as it is a lie, since under paragraph 7 of the counter affidavit together with counter affidavit deposed by a court clerk Kulwa Masige Mkama shows that the applicant was supplied with the copy of judgment and decree on 23rd May 2023 through her son Isaac F. Mushi after she informed the court clerk that she is sick.

It was the counsel's contention that, despite the applicant denying having sent her son to collect the judgment, the said Isaac F. Mushi did not say anything contesting the Court clerk's disposition, as there is no affidavit to that effect. This makes the affidavit of the applicant hearsay, and to support his assertion, he cited the case of **Suzan Ng'ondo v Anna Samwel Urassa**, Civil Application No. 606/01 of 2021. According to the counsel, The applicant ought to have Sworn the affidavit refuting and contradicting the Court clerk's disposition, and in the absence of it, her averment becomes deceitful depositions.

On the allegation that there are overwhelming chances of success, the respondent counsel submitted that the basis of illegality could not stand as it requires a long-drawn argument, which is forbidden by the law.

In rejoinder, the applicant counsel reiterated what he submitted in chief and

added that the issue of jurisdiction could be raised at any time and cited the case of **Richard Julius Rukambura v Isaack Mwakajila**, Civil Appeal No. 2 of 1998, C.A.T. at Mwanza, thus he insisted the Court had no jurisdiction to hear Matrimonial dispute without a valid certificate from Marriage Conciliation Board as stated in the case of **Patrick William Magubo v Lilian Peter Kitale**, Civil Appeal No. 41 of 2019.

On the allegation that the applicant produced no evidence to show that she has not sent her son to collect the judgment and decree as there is no affidavit of the said Isaac Mushi, the learned counsel rejoined by citing the provision of section 110(1) of the Evidence Act, Cap 6 which requires who asserts the existence of facts to prove those facts and provided further that since the applicant denied to have sent him to collect the judgment and decree on her behalf in Majibu ya Kiapo Kinzani, then it was the duty of the respondent to prove those facts.

The applicant further submitted that an affidavit that mentions another person is hearsay unless that other person swears an affidavit. According to the counsel, it is the respondent who mentioned the name Isaac Mushi under paragraphs 5 and 6 of kiapo kinzani sworn by Kulwa Masige Mkama; hence, it was the duty of the respondent to file an affidavit sworn by the named

Isaac Moshi so as to prove those facts and failure to file the affidavit makes the allegations by the respondent about Isaac Moshi hearsay.

Having heard the viral submissions by the parties, the issue for determination is whether the applicant adduced sufficient reasons to warrant this Court to grant an extension of time to file her intended appeal. It is undisputed by both parties that the judgment to be appealed against was delivered on 4th April 2023. According to section 2(2) of the Laws Revision (Rectification of Printing Errors) (The Law of Marriage Act [Cap 29 R.E 2019] Notice, the applicant had 45 days of the decision to file her appeal. That is, she ought to have filed her intended appeal on or before 18th May 2023.

To begin my deliberation, it has to be emphasized that it is within the Court's discretion to extend time upon a party advancing sufficient reasons for his/her failure to file her appeal within the time prescribed by the law. However, in exercising this discretion on whether to grant an extension of time or not, the Courts are required to exercise the discretion judicially and not arbitrarily, as rightly pointed out by the Court of Appeal of Tanzania at Dar es Salaam in the case of **Omary Shabani Nyambu v Dodoma Water and Sewerage Authority**, Civil Application no 146 of 2016.

In the present application, the applicant has averred in her affidavit that the reason for her failure to file the intended appeal on time is because of the failure to obtain a copy of the judgment and decree. According to the applicant, after several follow-ups, she was able to obtain a copy of the judgment on 20th July 2023, the argument which was strongly disputed by the respondent as he submitted that the applicant was supplied with the copy of decree and judgment on 23rd May 2023 through her son one Isaac Moshi.

The sworn counter affidavit of the Court clerk Kulwa Masige Mkama reveals that she supplied the judgment and decree to Isaac Moshi after being authorized by the applicant through a phone call after advancing to her that she was sick on 23rd May 2023. Though the applicant denied having authorized Isaac Moshi to collect the copy of the judgment and decree on her Majibu ya kiapo kinzani, the fact that exhibit A, attached to the kiapo kianzi reveals that the judgment and decree were ready for collection since 23rd May 2023, shows that the applicant was negligent in collecting the same.

The applicant reveals that she wrote another reminder on 20th July 2023 and was supplied with a copy of the judgment on the same day, more than two months since her last letter to the Court on 5/5/2023. It goes without saying

that she was supplied with the copy on the same date because it was ready for collection as early as 23rd May 2023.

It is a known principle of the law the applicant is required to account for each day of delay in filing the intended appeal. The Court of Appeal of Tanzania in the case **Lyamuya Construction Co. Ltd v. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010. The Court provided the guidelines on points to be taken into consideration in determining whether or not to grant an extension. The Court provided for the following matters, and I quote;

"(a) The applicant must account for all the periods of delay.

(b) The delay should not be Inordinate.

(c) The applicant must show diligence and not apathy, negligence, or sloppiness in the prosecution of the action that he intends to take.

(d) If the Court feels that there are other sufficient reasons, such as the existence of a point of law of sufficient importance, such as the illegality of the decision sought to be challenged."

From the cited authority, the applicant was required to account for each day of delay. However, in the present application, it is shown that the copy of the judgment was ready for collection on 23rd May 2023 when one Isaac collected the same, and the fact that the applicant requested to be supplied with the copy on 20th July 2023 shows some negligence on her part. Thus, this Court sees that the applicant was negligent and failed to account for each day of delay, and in the event this Court finds that the reason advanced by the applicant has no merit.

On another ground, the appellant alleged that there was illegality, as the Court had no jurisdiction to determine the matrimonial dispute in the absence of the certificate from the marriage conciliation Board. The applicant stated the law requires, during the filing of the petition, to attach a valid certificate from the Marriage Conciliation Board which was issued not more than six months prior to the petition. According to the counsel, the alleged certificate was issued on 3rd January 2019, and the respondent petitioned in 2020 and the same was not tendered as evidence before the trial Court.

It has to be pointed out that for illegality to constitute a ground for extension of time, it must be apparent on the face of the decision to be challenged and not to be discovered by a long-drawn argument. In the present application,

Despite the respondent counsel's argument that the said ground is subject to long drawn argument, the said ground raises the issue of jurisdiction of the trial court as there are allegations that the said certificate was not valid and was not tendered as evidence before the Court.

When the issue of illegality is raised in the application for an extension of time, it is a sufficient ground even though the applicant fails to account for each day of delay, so the issue of illegality can be determined by the Court.

In the case of **Theresia Mahoza Mganga v The Administrator General (RITA)**, Civil Appeal no. 85 of 2015 in which the Court of Appeal of Tanzania at Da es sallam referred the case of **V.I.P Engineering and Marketing Ltd and Two Others v City Bank Tanzania Ltd**, Civil Reference no. 6,7 and 8 of 2008 C.A.T. where it was held;

"It is therefore settled law that a claim of the illegality of the challenged decision constitutes sufficient reason for an extension of time under rule 8 regardless of whether or not a reasonable explanation has been given by the applicant under the Rule to account for the delay."

Basing on the reasons provided above, I find that the applicant advanced

sufficient reason for this Court to extend time for the applicant. The application is hereby granted. The applicant should file his appeal within 14 days from the date of this ruling. Given the nature of this application, I award no costs thus, each party should bear its costs.

Dated at Dar es Salaam this 22th day of May, 2024.



S. S. SARWATT

JUDGE

Delivered in the presence of Noel Sanga advocate for the applicant also holding a brief for Mussa Kiobya advocate for the applicant.

Right of appeal is fully explained.