

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRY OF MOSHI
AT MOSHI**

MISC. CIVIL APPLICATION NO. 26 OF 2023

BETWEEN

SUZAN WILLIAM KICHAO.....APPLICANT

Versus

FLAVIAN MICHAEL MARANDU.....RESPONDENT

RULING

7th December 2023 & 19th February, 2024

A.P.KILIMI, J.:

The applicant sometime in 2011 petitioned for three orders at Moshi District Court praying for dissolution of her marriage, division of matrimonial properties and custody of three issues of marriage plus maintenance to them. She succumbed with objection from the respondent that the said petition was premature for non-reference to the marriage conciliation board. The district court having heard this objection, sustained it and consequently dismissed the said petition.

The applicant later in the year 2023 decided to seek legal consequences by knocking the door of this court, but now being delayed,

she opted first to file this application for extension of time pursuant to section 14 (1) of the **Law of Limitation Act, Cap.89 R.E. 2019**. The application is supported by an affidavit sworn by herself. In the affidavit, she averred that the main reason prompting to this application for extension of time is illegality on the face of record of which she wants to apply for revision of the same. In paragraph 3 of the affidavit, the deponent stated that the matter had been wrongly dismissed instead of being struck out following the fact that the ruling was on preliminary objection and the matter had not been heard on merit and or conclusively determined.

Challenging the application, the respondent Flavian Michael Marandu filed a counter affidavit where he stated that the applicant has no sufficient reason for delay since she remained mute for 7 years after the ruling was delivered by the trial court.

When the application came for hearing, both parties enjoyed legal representation from learned advocates. The applicant was represented by Mr. Duncan Joel Ohola while Mr. Julius Semali represented the respondent.

Submitting in support of the application, Mr. Oola reiterated the reasons advanced in the affidavit sworn by the applicant. Expounding further

on the grounds for the application, Mr. Oola submitted that the gist of the applicant's application is centered on the issue of illegality. Explaining the illegality, the learned counsel submitted that while parties were having a case at the district court of Moshi, the matter was dismissed following a preliminary objection which was raised by the respondent. He argued that the dismissal order in that case was erroneously given instead of an order of striking out since the applicant in that case had not exhausted all the requirements of filing matrimonial petition.

The counsel for Applicant further contended that, in normal circumstances the court was required to strike out instead of dismissing the case because parties were not heard on merit. It was his view that the error was apparent on the face of record which is illegality. Arguing further Mr. Oola said that where illegality is pleaded as a ground for extension this court has been granting extension of time without considering the extent of delay. He thus prayed that the ground of illegality be considered as a major reason for granting extension of time because the case was not heard on merit.

It was also Mr. Oola's submission that the court should also consider the fact that the applicant sought for the order but the court only delivered it on 25/08/2023. During that time, the learned counsel submitted that the

applicant in this matter was laboring without knowing where to go. He said this is exhibited by several applications which she filed such as Matrimonial Case No. 2 of 2019 in the district court of Rombo which was dismissed for incompetency. Another application he said was the one which the applicant filed before this court for extension of time vide Misc. Application. No. 2 of 2020 whereas the same was withdrawn with liberty to re-file. The learned counsel further argued that without the court order which was issued on 25 August 2023, the applicant could not have proceeded with any case. That being the position he submitted that it was not the applicant's fault that illegality was caused hence the learned counsel prayed this court to refer the decision of the court in **Mary Rwabizi t/a Amuga Enterprises vs. National Microfinance Plc** [2020] TZCA 355 (TANZLII).

Responding to the above, Mr. Semali contended that the applicant has totally failed to account for each day of delay. He further contended that the applicant has failed to account why she delayed 11 years since the decision was made. Mr. Semali was of the view that the reasons advanced in respect of illegality for this court only to look at it without considering other things are wrong. He argued that this court is guided by the law and that the purpose of law of limitation is not to help lazy person rather to safeguard.

Contending further it was Mr. Semali's submission that the applicant went to the district court seven years later to seek for a drawn order as evidenced by the later dated 5/12/2019. Therefore, the applicant was supposed to tell the court where she was by giving reasons for her delay.

Disputing on the issue that the applicant was not aware of what to do, Mr. Semali argued that the applicant had engaged an advocate when she filed a case at Rombo and even when she filed an application in this court, therefore it was his view that pleading ignorance in such circumstances is to mislead the court.

Furthering his submission Mr. Semali submitted that this application was brought in this court on 18/9/2023 while the drawn order was issued 25/8/2023, this is a total of 23 days delay which was unaccounted for. Thus, Mr. Semali strongly insisted that illegality should not be the only ground to be considered, the applicant must state where she was, hence, the learned counsel concluded that the application should not be granted because the applicant has failed to account for each day of delay.

In his brief rejoinder Mr. Oola submitted that the respondent's counsel did not understand the ground of illegality which was complained of because

he did not comment about it. He insisted that the trial court dismissed the matter instead of struck out is an error apparent on the face of record leading to illegality. In that regard he prayed that this court to concede with the application because the delay was caused by illegality.

This being an application for extension, I am mindful, It is trite law that an application for extension of time is entirely in the discretion of the Court to grant or refuse it, and that extension of time may only be granted where it has been sufficiently established that the delay was with sufficient cause. (See **M.B Business Limited v Amos David Kassanda & 2 others**, Civil Application No.48/17/2018 and the case of **Benedict Mumelo vs. Bank of Tanzania** [2006] 1 EA 227).

Even the provision the applicant opted to move this court explain amenably, and for ease of reference I reproduce section 14(1) of the **Law of Limitation Act, Cap 89 R.E. 2019** hereunder;

14.-(1) 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.*

[Emphasis added]

Nevertheless, the law has not defined what sufficient cause entails so the court has a duty to examine the grounds advanced by the applicant to see if they are reasonable or sufficient. In the case of **Lyamuya Construction Company Ltd vs The Board of Registered Trustees of Young Womens Christian Association of Tanzania**, [2011] TZCA 4 (TANZLII) the Court of Appeal spelt out factors or rather indicators which can assist in arriving at the conclusion as to whether the applicant has advanced sufficient reasons or not warranting the grant of the application before it. And those indicators are: (i) the delay should not be inordinate; (ii) there must be account of each delayed day; (iii) diligence, and not apathy, negligence or sloppiness in the prosecution of the action the applicant intends to take; and (iv) existence of point of law of sufficient importance, such as illegality of the decision challenged.

Having laid down the governing principles above, the point for determination in this matter is whether the applicant has advanced sufficient reasons for this application to be granted.

The applicant in this application has alleged illegality of the impugned decision as the main reason for this application. Explaining the illegality Mr. Oola stated that the trial court erred by giving a dismissal order instead of an order striking out the matter since the case had not been determined on its merit. I have examined records of the trial court particularly the decision and the order therefrom and I am of the considered opinion that the learned counsel is absolutely right. The case at the district court dismissed following a ruling on a preliminary objection where the court found that the case had been prematurely instituted before the matter was referred to the conciliatory board.

In my considered opinion, where the court finds merit in the preliminary objection the proper order to be issued is striking out the case instead of dismissing the same. The effect of dismissing a case, closes it and can't be re-opened. This means the applicant can't bring the case again. A case that has been struck out on the other hand may be re-opened in some circumstances. The court of appeal of Tanzania has given a lengthy

explanation on the distinction of the two orders. (See the case of **Yahya Khamis vs. Hamida Haji Idd & Two Others**, [2019] TZCA 116 (TANZLII).

The court in **Yahya Khamis vs. Hamida Haji Idd & Two Others**, (supra) referred its earlier decision of **Emmanuel Luoga vs. Republic**, Criminal Appeal No. 281 of 2013 (unreported) where the Court had an occasion of dealing with the issue whether it was proper for the first appellate court to dismiss the appeal which was incompetent, the court stated as follows:

"We are of the view that upon being satisfied that the appeal was incompetent for reason it had assigned, it ought to struck out the appeal instead of dismissing it. The reason is clear that by dismissing the appeal it implies that there was a competent appeal before it which was heard and determined on merit which is not the case."

The above circumstances are not far from the facts of this matter where the petition was incompetent for failure of the applicant to pass to the marriage conciliation board. As said above this order denies the applicant a right to justice, taking regard the dispute was not settled or heard on merit,

I may say the circumstances of issuing the dismissal order for the matter not heard on merit is denying fundamental rights of right to be heard which is unconstitutional.

Moreover, it is a trite law when the point at issue is one alleging Illegality of the decision being challenged, the Court has a duty even if to extend the time for the purposes of ascertaining the point, and if the alleged illegality is established, to take appropriate measures to put the matter and the record right. (See **Transport Equipment Ltd vs. D.P Valambia** [1993] T.L.R 91)

In respect for allegation by the respondent that the applicant has failed to account for delay therefore the application should not be granted. I agree that accounting for delay is a reasonable ground for extension of time, but it is settled law that a claim of illegality of the decision is also a sufficient ground warranting extension of time regardless of whether or not the applicant has accounted for the delay. See the case of **Attorney General vs Tanzania Ports Authority & Another** [2016] TZCA 897 (TANZLII), **VIP Engineering and Marketing Ltd and 2 Others vs. CitiBank Tanzania** Ltd Consolidated Civil Reference 6 of 2006 (unreported) and **Ministry of Defence, National Service vs. Devram** (1992) TLR 185.

Therefore, in the premises I am settled the above amount to illegality on the face of record, I thus find it suffice as a sufficient or reasonable ground warranting grant of the application for extension of time.

Consequently, the applicant is hereby granted. Subsequently I proceed to order that the requisite matter should be lodged within 45 days from the date of the delivery of this ruling. In the circumstances of this application, I order each party to bear his/her respective costs.

It is so ordered

DATED at MOSHI this day of 19th February, 2024.



X

Signed by: A. P. KILIMI

Court: - Ruling delivered today on 19th day of February, 2024 in the presence of Mr. Duncun Joel Oola Muyingi, Advocate for Applicant. Mr. Willence Shayo, Advocate for respondent. Applicant and Respondent also present.

Sgd: A. P. KILIMI

JUDGE

19/02/2024

Court: - Right of Appeal duly explained.

Sgd: A. P. KILIMI

JUDGE

19/02/2024