IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF MWANZA)

AT MWANZA

CIVIL APPEAL NO. 32 OF 2020

(Appeal from the judgment of the District Court of Sengerema at Sengerema (Kyamba, RM) in Civil Application No. 23 of 2019 dated 30th of October, 2019)

MAGDALENA ROBERT ..... APPELLANT

VERSUS

FABIAN GERVAS ..... RESPONDENT

JUDGMENT

3rd December, 2020 & 27th January, 2021

ISMAIL, J.

This is an appeal that arises from the decision of the District Court of Sengerema, in respect of an application for extension of time to institute an appeal against the decision of the Primary Court of Sengerema Urban. The latter dismissed the appellant's quest for nullification of the sale of a house in execution of a decree passed against the appellant's husband.

In the District Court, the appellant's efforts fell through, when the court held the view that sufficient cause for triggering the court's discretion to grant extension of time had not been given. The court took the view

that delays arising from awaiting service of a copy of the trial court's decision does not constitute sufficient cause for extension of time. Feeling hard done, the appellant has preferred the instant appeal. The petition of appeal has two grounds of appeal, quoted in verbatim as follows:

1. *The trial court erred in both fact and law by not considering the importance of extending the time of appeal as the decision of Primary Court of Sengerema (urban) is full of unprocedural (sic), illegality and irregularities.*

2. *That the trial court erred both in law and fact by ignoring the facts adduced and justified by the appellant praying the extension of time to file an appeal.*

Before I delve into the heart of the matter, it is apposite that the background of the matter be given, albeit in brief. The appellant is married to a Mr. Deogratias Charles who had business dealings with the respondent. It was alleged that on 3rd July, 2017, Mr. Charles took, on credit, 83 bags of maize worth TZS. 7,000,000/- The promise was that the said sum would be paid after sometime. Things went awry on the business front, necessitating that the said sum be paid in bits and parts. This left the sum of TZS. 2,000,000/- owing and unsatisfied, and the respondents efforts to have the sum paid fell to a naughty. It is at this point in time, that the respondent enlisted the court's intervention by instituting Civil

Case No. 186 of 2017. The Urban Primary Court of Sengerema before which the matter was instituted held in the respondent's favour. The judgment debtor's efforts to reverse the decision fell through as did the appellant's efforts to object to the attachment and sale of the house, on the contention that the same was a matrimonial house. It is then, that the appellant filed Civil Application No. 23 of 2019. Yet again, this application fell flat. The court was unconvinced that time had been accounted for as the basis for the extension of time. Undaunted, the appellant has preferred the instant appeal.

The appellant chose to argue the appeal in a combined fashion. She submitted that she was married to the judgment debtor in 1999 and were blessed with four children. The appellant further contended that she was oblivious to the judgment debtor's business arrangement with the respondent, until around mid-2019, when she noticed that her husband was indebted to the respondent. Arguing that the said loan did not obtain a spousal consent, the appellant submitted that, following the disposition of the house, the appellant and the entire family are without a shelter. She termed the action of alienating the house illegal and void.

Recalling the steps taken, the appellant argued that her delay in preferring the appeal was caused by her long wait for a copy of the

judgment of the Primary Court which would constitute a vital part in the appeal process. She prayed that this Court should, among other things, declare that the suit property is not liable to any sale it being a matrimonial home.

The respondent's submission began by poking holes into the appellant's submission. He contended that the submissions made by her do not support the grounds of appeal. He made a prayer that, in consequence, the appeal be dismissed with costs. The respondent submitted that the house in question was sold in execution of the decree in Civil Case No. 186 of 2017.

With respect to the application for extension of time, the respondent contended that such extension is granted as a matter of discretion, and that, upon refusal to grant such extension, no law allows an appeal against such decision. To buttress his contention, the appellant cited two decisions. **One**, ***Attorney General v. Shah*** [1971] EA 50, in which it was held that there is no such thing as inherent appellate jurisdiction, as such jurisdiction springs from a statute. The other one was ***Hamisi Mwinyijuma & Another v. MIC Tanzania Limited***, HC-Misc. Application No 374 of 2019 (unreported).

The respondent contended that since no enabling provision exists on applications for extension of time, the appeal is bad in law since the order is un-appealable. He prayed that the appeal be dismissed with costs.

From the parties' brief rival arguments, the singular question is whether the District Court strayed into error in its decision to refuse to grant extension of time to appeal against the decision of the trial court. To be able to provide an answer to this question, a small question would require to be resolved. This is, if the appellant's application embodied any sufficient reason to allow such extension.

This question takes into consideration the fact that the law is settled in this country, that extension of time, which is an equitable discretion, is a remedy that is exercised judiciously and on a proper analysis of the facts, and application of law to facts. This means, therefore, that the grant of extension is done upon the applicant satisfying the court by presenting a credible case upon which such discretion may be exercised (See: Supreme Court of Kenya's decision in ***Nicholas Kiptoo Arap Korir Salat v. IEBC & 7 Others***, Sup. Ct. Application 16 of 2014).

Worth of a note, is the fact that this requirement stems from more than half a century's reasoning of the East African Court of Appeal in ***Mbogo v. Shah*** [1968] EA, in which factors for consideration in deciding

whether to grant or refuse extension of time were laid down. It was held thus:

> *"All relevant factors must be taken into account in deciding how to exercise the discretion to extend time. These factors include the length of the delay, the reason for the delay, whether there is an arguable case on the appeal and the degree of prejudice to the defendant if time is extended."*

The decision in ***Nicholas Kiptoo Arap Korir Salat*** was encapsulated by the Court of Appeal of Tanzania in ***Ngao Godwin Losero v. Julius Mwarabu***, CAT-Civil Application No. 10 of 2015 (ARS-unreported) in the following words:

> *"To begin with, I feel it is instructive to reiterate, as a matter of general principle that whether to grant or refuse an application like the one at hand is entirely in the discretion of the Court. But, that discretion is judicial and so it must be exercised according to the rules of reason and justice."*

The Kenyan Supreme Court widened the scope of application of factors constituting sufficient cause by laying down key principles which should guide a court that sits to consider an application for extension of time. This was in the case of ***Aviation & Allied Workers Union of***

Kenya v. Kenya Airways Ltd, Minister for Transport, Minister for Labour & Human Resource Development, Attorney General, Application No. 50 of 2014, it was soundly held as follows:

> *"... We derive the following as the underlying principles that a court should consider in exercise of such discretion"*
>
> 1. *extension of time is not a right of a party; it is an equitable remedy that is only available to a deserving party at the discretion of the court;*
> 2. *a party who seeks extension of time has the burden of laying a basis, to the satisfaction of the Court;*
> 3. *whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis;*
> 4. *where there is [good] reason for the delay, the delay should be explained to the satisfaction of the Court;*
> 5. *whether there will be any prejudice suffered by the respondents if extension is granted;*
> 6. *whether the application has been brought without undue delay; and;*
> 7. *whether in certain cases, like election petitions, the public interest should be a consideration for extension."*

See also: ***Lyamuya Construction Company Ltd v. Board of Registered Trustees of Young Women's Christian Association of Tanzania***, CAT-Civil Application No. 2 of 2010 (unreported).

Deducing from the cited decisions, one thing comes out clearly. That, while these principles are intended to ensure grant of extension of time is not a mere walkover that can be dished out indiscriminately and subjectively, the applicant of the enlargement of time should not be denied the right of appeal, unless circumstances of his delay in taking action are inexcusable and his or her opponent was prejudiced by it (see ***Isadru v. Aroma & Others***, Civil Appeal No. 0033 of 2014 [2018] UGHCLD 3.

The contention by the applicant is that the delay in taking the appeal process was caused by the delay in obtaining a copy of the decision. The District Court considered this to be an insufficient ground for extension of time, and I cannot agree more with it. The trite position is that annexing of a copy of the judgment, decree or order sought to be appealed against, or even the proceedings, does not constitute a prerequisite for filing an appeal from the primary court. To fortify my view, it behooves me to quote the provisions of section 25 (3) and (4) of the Magistrate's Courts Act (MCA), Cap. 11 R.E. 2019 which states as follows:

> *"(3) Every appeal to the High Court shall be by way of petition and shall be filed in the district court from the decision or order in respect of which the appeal is brought:"*

(4) Upon receipt of a petition under this section the district court shall forthwith dispatch the record of proceedings in the primary court and the district court to the High Court."

This position has been underscored by numerous decisions of this Court. In ***Gregory Raphael v. Pastory Rwehabula***, [2005] TLR 99 (HC), it was held as follows:

"But the position is different in instituting appeals in this Court on matters originating from Primary Courts. ***Attachment of copies of decree or judgment along with petition of appeal is not a legal requirement. The filing process is complete when petition of appeal is instituted upon payment of requisite fees.*** *If attachment with copies of judgment, as said by Mr. Rweyemamu, is a condition sine qua non in filing PC civil appeal in this Court, I think the rules i.e. The Civil Procedure (Appeals in Proceedings originating in primary Courts) 1964, G.N. 312/1964 would have stated so and in very clear words.* ***The rules do not impose that requirement****. So it is not proper to impose a condition which has no legal backing."* [Emphasis supplied]

See also: ***Abdallah S. Mkumba v. Mohamed Lilame*** [2001] TLR 326 at p. 329.

In view of the foregoing position, it is quite certain that the appellant's alleged wait for the documents which bore no decisive significance in the preference of the intended appeal was too insufficient a reason to constitute the basis for the extension of time. In that respect, I see nothing faulty in the decision from which this appeal arises. I vindicate the learned magistrate's reasoning and hold that he exercised his discretion appropriately when he refused to grant the application.

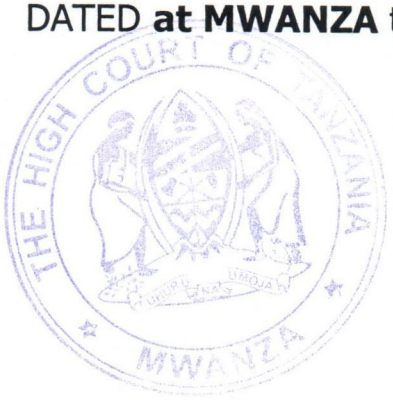
The appellant has, rather casually, introduced an issue of illegality in the decision that she seeks to impugn. No particulars of such illegality were given. Let me re-state the known principle. This is to the effect that illegality, once pleaded, constitutes the basis for extension of time. The condition precedent, however, is that such illegality must bear sufficient importance (See. ***Lyamuya's case***). In our case, the affidavit that supported the dismissed application did not have any semblance of particulars of illegality from which their importance would be gauged. It follows, therefore, that illegality in this case was not apparent and there is no way the same would constitute a ground for consideration.

Consequently, I find the appeal misconceived and lacking in merit. Accordingly, the same is dismissed with costs.

It is so ordered.

Right of appeal duly explained.

DATED **at MWANZA** this 27th day of January, 2021.



M.K. ISMAIL

JUDGE

Date: 27/01/2021

Coram: Hon. M. K. Ismail, J

Appellant: Present

Respondent: Absent

B/C: B. France

Court:

Judgment delivered in chamber, in the presence of the appellant but in the absence of the respondent, this 27th day of January, 2021.

M. K. Ismail

JUDGE

At Mwanza

27th January, 2021