

TANZANIA / JUDGMENT

IGNATUS VS FREDRICK PATRICK

COURT
TANZLIIDECIDED
30 October 2024

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THE JUDICIARY OF TANZANIA IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
SHINYANGA SUB REGISTRY AT SHINYANGA MISC. CIVIL APPLICATION NO.202408071000019150
(Arising from Misc. Civil Application No.10/2023 before Shinyanga District Court) IGNATUS
NDILANHAAPPLICANT VERSUS FREDIRICK PATRICK
SAMANI.....RESPONDENT

RULING

23rd September & 30th October 2024 F.H. MAHIMBALI, J The respondent filed an application for custodianship of a Child namely Alvin Fredrick Samani aged four years old. It is alleged that the appellant's daughter by name of Elizabeth Ignatius Ndilanha was living with the respondent as husband and wife and blessed with one issue who is a center of discussion in this matter. Worse of the matter, the appellant's daughter passed away and after burial ceremony the child was taken by the applicant. The respondent asked for his child but he was 1 denied by the appellant on the grounds that he had never paid bride for the appellant's daughter and thus has no right over him. The trial court after a thorough digest decided the matter in favour of the respondent, by placing the child under his custodianship. The applicant is said to have been dissatisfied with such decision but did not appeal within the prescribed time, hence the instant application for extension of time to file his appeal. When the matter came for hearing, the applicant appeared in person and unrepresented while Mr. Chrisantus Chengula learned advocate appeared on behalf of the respondent. Arguing for the application, the applicant prayed for the reasons contained into his affidavit be adopted to form part of his submission. He also added that the said child Alvin is his grandson as he is the son of her deceased daughter. She never knew if the respondent is his father and there is no any documentation establishing parentage of the respondent to the said Alvin child. Thus, the order by the trial court did not take into consideration of the best interest of the child. He thus, prayed for his application to be allowed. 2 On his part Mr. Chengula firstly prayed for the contents in the counter affidavit be adopted by the court to form part of his submission. Mr. Chengula also submitted that upon digest to the application at hand, the applicant admits that he has delayed the application for over 212 days on the date of filing this application. For such an application to be considered, the applicant must have accounted for each day of delay to establish what had befell him to justify the filing of the current application. That reading his affidavit in detail, it is clear that there has not been such an accounting as ought to be. It is more speculative. On his failure to account for each day of delay, the applicant has

failed to discharge that duty. Since also there is no any illegality stated by the applicant, it is unjustifiable for the applicant to be granted such an application, argued Mr. Chengula. On the paternity and maternity issue of the child, Mr. Chengula submitted that the parental name of the child was not at dispute as per trial court's verdict. For the purposes of this application, Mr. Chengula was of the view that the applicant's application is an afterthought against the trial court's decision. That said, this application be dismissed with costs, concluded Mr. Chengula. 3 The applicant in resting his submission, maintained his submission in chief. He further pleaded this Court to be guided by its good wisdom that this application be granted. In consideration of the fact that the said child is still of under age, let him remain with the applicant until the issue of paternity is sorted, the applicant argued. Having keenly followed the submissions of both parties, it is trite law that that for one to be granted with an application of extension to file a cause out of time, must be accompanied with good cause. Flimsy reasons have not been accepted by the Court. As what is good cause, there is no one acceptable definition. However, in *Shanti v. Hindochie and Another* [1973] E.A. 207, the Erstwhile Court of Appeal for East Africa considered similar course for extension of time on "Sufficient cause" and defined it to mean the cause which is convincingly beyond the applicant's control, that is to say; " . . the more persuasive reason . . . that he can show is that the delay has not been caused or contributed by dilatory conduct on his part. But that is not the only reason." Some of the factors which may be taken into account in considering whether or not the applicant has shown good cause were stated by the Court in the case of *Lyamuya Construction Company Limited v. Board of the Registered Trustees of Young Women's Christian 4 Association of Tanzania*, Civil application No. 2 of 2010 (unreported). They are: "(1) That the applicant must account for all the period of delay;

- (2) The delay should not be inordinate;
- (3) The applicant must show diligence and not apathy negligence or sloppiness of the action that he intends to take;
- (4) If the Court feels that there are other sufficient reasons, such as existence of a point of law of sufficient importance such as illegality of the decision sought to be challenged." According to the facts of this case, the applicant sought for enlargement of time for him to file his appeal before this Court. Reading his affidavit in support of his application, the applicant alleges that after he had been supplied with a copy of the proceedings and a copy of ruling, he was aided by Legal Committee of the University of Dare es salaam to prepare him a petition of appeal and filed it before the judiciary digital case filing system. Later, upon follow up, he was informed that they failed to file his appeal because they encountered network problem and other 5 issues which were beyond their control. Thus, he found himself being out of time for about 212 days. In other words, the delay by the applicant was occasioned by reasons out of his control and he was not aware with it. The proposition which was strongly opposed by Mr. Chengula for a complete failure to account for each day of delay. All in all, I have given a due consideration of the applicant's submission. As a matter of principle, it is exclusively in the discretion of the court whether to grant or refuse an application for extension of time (see *Mbogo Vs. Shah* (1968) EA the defunct Court of

Appeal for Eastern Africa that all relevant factors must be taken into account in deciding how to exercise the discretion to extend time). In the current case, the applicant is applying for the extension of time so that he may challenge the trial court's ruling granting the custody and parentage of the subject child to the respondent whether it was proper. I have keenly followed the proceedings' records before the trial court and its resulting ruling. I am of the considered view that there is a serious question of law to be determined by this court as it skipped the 6 mind of the trial court. I say so on the basis that an application for custody and parentage of a child is serious legal application in which the juvenile court with territorial jurisdiction must accordingly consider after a deep digest of the law and evidence in place. According to law, the persons with legal mandate to apply to a court for an order to confirm the parentage of a child are: (a) the child; (b) the parent of a child; (c) the guardian of a child; (d) a social welfare officer; (e) with a special leave of the court, any other interested person. The application to the court may be made to a juvenile court either before the child is born; after the death of the father or mother of a child; before a child reaches eighteen years of age or with special leave of the court, after the child has attained eighteen years (see section 34(1) and (2) of the Law of the Child Act, 2009. Another issue for consideration by the trial court ought to have been whether there was any proof of parentage given by the respondent to justify the grant of the application. It is trite law that any marriage performed in accordance with the Law of Marriage Act; the name of the parent entered in the Register of Births kept by the Registrar-General; performance of customary ceremony by the father of the child; public acknowledgment of parentage; or DNA results are essential proof of the 7 parentage of any child before the court (see section 35 of the Law of the Child Act, 2009). In this matter, my quick perusal to the trial court's record, has not been rich enough to provide with such necessary materials warranting the grant of the application. To me that amounts to an illegality on the trial court's findings and verdict. Should the law not be strictly complied with or adhered to, I am afraid that there would be chaos in our societies for anyone to claim parentage of any child. The legal thresholds must therefore be met with strictly before such an application is considered. In the case of Joseph Gerald @ Mdomvi V. Republic, Criminal Appeal No. 680 of 2021, CAT at Arusha at page 9; it was held amongst others that paternity of a child is a strict issue. It is neither established by plain words nor is it inferred. All this said and considered, though the issue of accounting for each day of delay was not vividly accounted for by the applicant, but in consideration of the peculiar facts of this case, and for the vast interests of justice I would discretionary allow this application but on point of law – illegality as reasoned above. This is because the issue of paternity in this matter is a serious one. Therefore, it is a more persuasive and convincing reason to grant it despite the fact that the delay has not been fully accounted for on each day of delay. 8 The applicant is hereby given 30 days from today to file his appeal against the decision of the trial court. In the circumstances of this case, I make no order as to costs. DATED at SHINYANGA this 30th day of October, 2024. F.H. Mahimbali Judge. 9

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