

TANZANIA / JUDGMENT

pendo emmanuel ntandu v upendo william masinjisa 2023 tzhc 18686 20 june 2023

COURT
TZHCDECIDED
20 June 2023

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (DODOMA DISTRICT
REGISTRY) AT DODOMA MISC. CIVIL APPLICATION NO. 55 OF 2022 (Originating from
Matrimonial Cause No. 37 of 2021 of Mpwapwa Urban Primary Court and Matrimonial Appeal No.
10 of 2021 of the District Court of Mpwapwa at Mpwapwa) PENDO EMMANUEL
NTANDU..... APPLICANT VERSUS UPENDO WILLIAM
MASINJISA..... RESPONDENT

RULING

18/4/2023 & 20/6/2023 KHALFAN, J The applicant, PENDO EMMANUEL NTANDU is before this Court applying for extension of time to file her appeal to challenge the decision of the District Court of Mpwapwa at Mpwapwa ('first appellate court) in Matrimonial Appeal No. 10 of 2021. The application is made by way of chamber summons under section 25 (1) (b) of the Magistrate Courts Act, [CAP. 11 R.E 2019] is supported by the affidavit sworn by THOMAS EDWARD NCHIMBI, the learned advocate dully instructed by the applicant to depone the same. The applicant also prays that costs of the application to be in course together with any relief this court shall deem fit and just to grant. i The respondent, UPENDO WILLIAM MASINJISA has filed a counter affidavit sworn by himself to contest the applicant's application. On the date when this matter came for hearing, Mr. Thomas Nchimbi appeared for the applicant while the respondent appeared by himself without representation. During hearing, Mr. Nchimbi adopted the supporting affidavit which among other things, stated that the applicant was the appellant in Civil Appeal No. 10 of 2021 in the first appellate court which was delivered on 29/7/2022 in the favour of the respondent, the decision which she intends to challenge by way of appeal before this court. It is further stated in order to lodge her appeal that, the applicant made several requests to the first appellate court to be supplied with a copy of the impugned judgment but her requests were fruitless. For that reason, on 25/08/2022, she wrote a letter to the first appellate court seeking for such copy which later, on 15/9/2022 was availed to her. A copy of the alleged letter and a dispatch form of procuring copy of judgment are attached as annexure NAA-2. 2 Therefore, the applicant is of the opinion that her delay to lodge her appeal to this court was not caused by negligence but

it was caused by the first appellate court. To supplement on what has been stated in the affidavit, Mr. Nchimbi referred the court to the case of Elius Mwakalinga vs Domina Kagaruki and 5 Others, Civil Application No. 120/17 of 2018, CAT, Dar es Salaam, where the Court of Appeal set conditions to consider for a grant of an application for extension of time as the matter in hand, which include:- the length of delay; reasons for delay; irregularity before the court which entertained the matter and how the respondent will be prejudiced if the application is granted. He also referred to section 19(2) of the Law of Limitation Act, [CAP. 89 R.E 2019] which provides for exclusion of time used for obtaining copy of judgment. For that case, he urged the court to exclude such time of waiting for the copy of judgment to the first appellate court. Mr. Nchimbi further submitted that the respondent had not stated through his counter affidavit if his interest would be prejudiced in case the application will be granted. Thus, it is his opinion that this court should grant the application to enable the applicant to enjoy his constitutional right of appeal. The respondent, despite contesting the applicant's application through his counter affidavit, during hearing, he had no objection to the applicant save that he left the matter to the court to decide. It is trite law that for the court to grant extension of time, it must satisfy itself if sufficient cause has been adduced as illustrated by the Court of Appeal in several occasions. See the case of Lyamuya Construction Co. Ltd vs. Board of Registered Trustee of Young Women's Christian Association of Tanzania, Civil Application No. 2 of 2010 CAT, Arusha; Mpoki Lutengano Mwakabuta & Another vs. Jane Jonathan (As a Legal Representative of the late Simon Mperasoka, deceased), Civil Application No. 566/01 of 2018, CAT, Dar es Salaam; Principal Secretary, Ministry of Defence; National Service vs. Devram Valambhia [1992] TLR 185; TANESCO vs. Mufungo Leonard Majura & 15 Others, Civil Application No. 94 of 2016, CAT, Dar es Salaam and the case of Elius Mwakalinga (supra). Therefore, this Court has to ascertain if the applicant has adduced sufficient cause for her application to be granted. 4 For the court to determine this application, it is necessary to ascertain the time of limitation that the applicant had in order to lodge her appeal. Considering the background of this matter, it is very clear that the nature of this dispute is matrimonial and therefore, the law applicable is the Law of Marriage Act, [CAP. 29 R.E 2019] as rectified by GN No. 487 of 2022 which under section 80(2) of the Act provides for forty-five (45) days to lodge an appeal: 80 (2) An appeal to the District Court or to the High Court shall be filed, respectively, in the Primary Court or in the District Court within forty-five days of the decision or order against which the appeal is brought.' Basing on the above provision of the law, the applicant was supposed to lodge her appeal by 12/9/2022 considering that the impugned judgment of the first appellate court was delivered on 29/7/2022 whereas this application was filed on 28/10/2022. Nevertheless, it is evident as contended by the applicant that she was supplied with a copy of the impugned decision on 15/9/2022 as per annexure NAA-2 of the supporting affidavit. This infers that the applicant procured a copy of the impugned judgment after the expiry of time of limitation of lodging the appeal. 5 It is the position of the law under section 19(2) and (3) of the Law of Limitation Act, [CAP. 89 R.E 2019] that there is an automatic exclusion of the period of time spent for obtaining a copy of judgment, ruling, decree or order sought to be challenged as rightly submitted by Mr. Nchimbi. See the case of Bukoba Municipal Council vs. New Metro Merchandise, Civil Appeal No. 374 of 2021, CAT, Bukoba which recited its decision in the case of Alex Senkoro and 3 Others vs. Eliambuya Lymo (As Administrator of the Estate of Fredrick

Lyimo, Deceased), Civil Appeal No. 16 of 2017 CAT (unreported) where it was held that: 'We entertain no doubt that the above subsections expressly allow automatic exclusion of the period of time requisite for obtaining a copy of the decree or judgment appealed from [in computing] the prescribed limitation period. Such an exclusion need not be made upon an order of the court in a formal application for extension of time.' [Emphasis added] It further held that: '...the exclusion is automatic as long as there is proof on the record of the dates of the critical events for the reckoning of the prescribed limitation period. For the purpose of section 19 (2) and (3) of the LLA, these dates are the date of the impugned decision, the date on which a copy of the decree or judgment was requested and the date of the supply of the requested document.' Basing on the above illustrated position of the law, it is clear to my mind that the whole period for waiting for the copy of judgment shall be excluded. And the computation of time shall start to run from 15/9/2022, the date when the applicant was availed with copies of judgment of the first appellate court. This means counting forty-five days from 15/9/2022, the applicant had to lodge her appeal by 31/10/2022 while the application at hand was filed on 28/10/2022 meaning it was in fact and in law not time barred. For that reason, I find the applicant has adduced sufficient cause for her delay to lodge the appeal. In this respect, the applicants application for extension of time is granted and she is given thirty (30) days to lodge her appeal. No order as to costs. It is so ordered. Dated at Dodoma this 20th day of June, 2023. F. R. KHALFAN JUDGE 7

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