

**THE UNITED REPUBLIC OF TANZANIA
IN THE HIGH COURT OF TANZANIA
AT DAR ES SALAAM**

CIVIL APPEAL NO. 219 OF 2016

*(Originating from Matrimonial Cause No. 1 of 2011 at Kibaha
Resident Magistrate Court)*

LIGHTNESS (AMINA) KASSIMU DUGANE-----APPELLANT

VERSUS

LANGAEL SANGITO MARX-----RESPONDENT

JUDGMENT

MUTUNGI, J.

The appellant has raised four grounds of appeal against the decision of the Kibaha Resident Magistrate Court. The grounds are as follows: -

1. *That the trial Resident Magistrate erred in law and facts in believing that the appellant was refused to receive the summons to appear while the appellant was not present when the Matrimonial*

Cause No. 1 of 2011 was filed by the respondent (petitioner).

2. That the trial Resident Magistrate erred in law and facts by failure to serve the appellant with summons to notify her on the date which was fixed for the ex parte judgment of Matrimonial Cause No. 1 of 2011, in order to enable her to file her application to set aside the ex-parte judgment on time according to the provision of the law.
3. That the trial magistrate erred in law and facts in her ruling delivered on 14/11/2012 on the last paragraph of the said ruling when she said that she cannot set aside an ex parte judgment of Matrimonial Cause No. 1 of 2011 which she delivered as the respondent (petitioner) had already married another woman and the distribution of matrimonial assets already done while she knew that the appellant's fundamental right to be heard is very important and on the mean time the appellant lost a lot of her properties acquired during their substance of marriage which

was not listed by the respondent in order to deny her rights in the division of matrimonial asset acquired during their marriage.

4. *That the trial magistrate erred in law and fact by proceeding (sic) on hearing relying on the affidavit affirmed by Salimu Mshana, the process server who lied that the appellant refused to sign the summons to appear in Matrimonial Cause no. 1 of 2011 which was very serious case without applying or using all due and reasonable diligence to make sure that the appellant was dully served in order to ensure principle of natural justice before hearing the Matrimonial Cause No. 1 of 2011.*

The facts leading to the appeal are as follows; In the Resident Magistrate Court of Kibaha (the trial court) the respondent filed a petition for divorce against the appellant. It would appear that in the course of the trial, the appellant never appeared. Consequently, the matter proceeded in the absence of the appellant as a result an ex parte judgment was delivered which was obviously in the respondent's favour.

The court record reveals further that, the appellant did file an application in the trial court for an extension of time to set aside the said ex parte judgment. On 14/11/2012 the trial court dismissed the said application on the reason that, the appellant had failed to advance sufficient reasons for the delay.

The appellant was aggrieved with the said dismissal; hence she has now preferred this appeal rooted on the grounds already listed down earlier in the judgment.

When the appeal was set for hearing, the respondent though dully notified did not make appearance and the same proceed ex-parte against him.

Mr. Mtongole learned advocate representing the appellant proceeded to argue in regards to the first ground that, it was wrong to have been concluded that the appellant had refused summons. It is in evidence that the respondent's advocate had tendered an Affidavit to this effect. The Affidavit left a lot to be desired as he did not state when, where and whom the service was effected. In that regard Mr. Mtongola submitted, there was hence no proper

service, to the contrary the appellant was attending a medical course. What would have been expected of the respondent is to serve the appellant through the medical college. The learned Counsel invited the court to go through the case of **MOHAMED NASSORO VERSUS MOHAMED [1991] T.L.R 133** to appreciate his argument.

The learned counsel further argued, they were not issued with a notice of the ex-parte judgment as was underscored in the case of **COSMAS CONSTRUCTION COMPANY LIMITED [1991] T.L.R 127**. He prayed the appellant ought to have been notified of the date of judgment as per the second ground of appeal.

Having consolidated the third and fourth grounds of appeal, Mr. Mtongela submitted the trial magistrate ought to have heard from both parties. This being a matrimonial matter it is vital that the two sides stage their case. The parties should have testified and elaborated on the part played in the contribution of each in acquiring the properties during the subsistence of their marriage. By refusing to set aside the ex-parte judgment a lot of injustice was occasioned to the appellant.

In conclusion the appellant's counsel prayed the appeal be allowed and the trial court's ruling be quashed and set aside. The same be with costs.

Having summarized as above, the issue is whether the appellant had demonstrated sufficient reasons for the delay in filing an application to set aside the ex parte judgment in the trial court.

The issue arises from the fact that, before the trial court the matter had proceeded ex-parte and an ex-parte judgement delivered thereto. Having found herself late to set aside the same, the appellant proceeded to struggle to have a day before the court to be given time to apply to set aside the same.

Going through the record, the reasons advanced by the appellant were that: -

1. *She had never been served or refused to sign any summons issued by the court requiring her to appear.*
2. *That during that period she was studying at Bombo Hospital in Tanga Region.*

Having deliberated upon these reasons, the trial court found that, the applicant was negligent in filing the same and should not be let to benefit from her negligence.

What then is the law governing such applications? As I have already hinted, it is settled in our jurisdiction that any application for extension of time, the applicant must show sufficient reasons for the delay as provided for under **section 14 (1) of the Law of Limitation Act [Cap.89 R.E 2002]**. The same states;

"Notwithstanding the provisions of this Act, the Court may for any reasonable or sufficient cause extend the period of limitation for the institution of appeal or an application other than an application for the execution of decree, and application for such extension may be made either before or after the expiry of limitation prescribed for such appeal or application".

Considering the record at hand, the appellant alleged to learn of the ex-parte judgment in November, 2011 but was seen in court on 25th February, 2012. She did not give an

explanation as to why she had found herself in such an inordinate delay (about 80 days).

In my settled opinion, the appellant was advancing reasons of setting aside the Ex-parte judgment itself not for the extension of time to file an application to set aside the ex-parte judgment. It was expected from the appellant to raise such issues as were beyond her control or proved illness. Nothing of this nature was advanced by the appellant. As provided in the case of **MARCK MHANGO (ON BEHALF OF 684 OTHERS) VERSUS TANZANIA SHOE CO. LTD AND TANZANIA LEATHER ASSOCIATE INDUSTRIES CIVIL APPLICATION NO 37 OF 2003 (CAT-UNREPORTED)** that: -

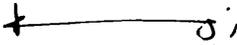
"It is elementary that extension of time where the court is properly moved can be granted where sufficient reason is shown for the delay...".

It is the duty of the court to desist from entertaining delayed application such as this, the effect of which will be to re-open a matter which was otherwise lawfully determined. This court as was the trial court is warned against entertaining delayed applications, more so where an

appellant/ applicant has not disclosed sufficient reasons at all for the delay.

Having analyzed as above I find the trial court was justified in dismissing the said application and consequently this appeal is likewise dismissed for lack of merits. Considering the relationship that existed between the conflicting parties herein, I make no order for costs. It is so ordered.

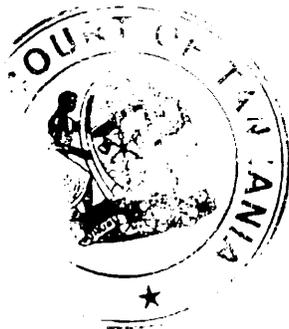



B. R. Mutungi

JUDGE

22/6/2018

Read this day of 22/6/2018 in presence of the appellant.




B. R. Mutungi

JUDGE

22/6/2018

Right of appeal explained.




B. R. Mutungi

JUDGE

22/6/2018