

**IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA**

CRIMINAL APPLICATION NO. 3 OF 2016

(CORAM: MUSSA, J.A., LILA, J.A., And WAMBALI, J.A.)

MUSTAFA SONGAMBELE APPLICANT

VERSUS

THE REPUBLIC RESPONDENT

**(Application for Review out of time from the Judgment of the
Court of Appeal of Tanzania at Iringa)**

(Kimaro, Luanda, Oriyo, JJA.)

**Dated the 16th day of Sept, 2009
in
Criminal Appeal No. 176/2007**

RULING OF THE COURT

29th April & 6th May 2019

LILA, JA.:

This is the third time the applicant has featured before the Court. His appeal to the Court in Criminal Appeal No. 176 of 2007 was unsuccessful as it was dismissed for want of merit on 15/9/2009. Still aggrieved, the applicant wished to move the Court to review its judgment but was late. He unsuccessfully filed in the Court an

application for extension of time as the same was struck out for being predicated under a wrong provision of the Rules. The applicant has, in the present matter, moved the Court by way of a notice of motion predicated under Rule 47, 48(2)A, 62(2), 66(1)(A)(C)(E), 10, 4(1) of the Tanzania Court of Appeal Rules (The Rules).

For reasons soon to follow, we find it apposite to state, albeit briefly, the historical background leading to the present matter before us. As alluded to above, the applicant was unsuccessful in his appeal before the Court (Kimaro, Luanda, Oriyo, JJA) in Criminal Appeal No. 176 of 2007. Aggrieved he sought to move the Court to review its judgment but he was late hence he had to, first, seek for extension of time within which to apply for review. In that accord, he filed Criminal Application No. 16 of 2014. It was heard by a single justice and, as it were, it was struck out for being predicated under a wrong provision of the Rules. In striking out the application the Court stated:-

"It follows therefore, that since the applicant in our present matter wrongly relied on rule 47 of the Rules in moving the Court to extend

*time in which to file for review, **the application is incompetent for wrong citation, the consequence of which is to, and I hereby strike out the application. The Court's advice to him however, is that if he still wishes to pursue the intended application for review, he should, subject to the law of limitation, reinitiate the process.***" (Emphasis added)

As the matter now stands, it is obvious that although the applicant is still determined to pursue his intended appeal, he did not heed to the Court's advice of reinitiating the process for, he, instead, straight away accessed the Court by way of a notice of motion predicated under Rules 47, 48(2)A, 62(2), 66(1)(A)(C)(E), 10, 4(1) of the Rules, to say the least, it is incomprehensible what exactly the application is for.

For the foregoing reasons, we, at the outset, wished to satisfy ourselves whether or not the application before us is competent. We accordingly invited the parties to address us on that issue.

When the application was called on for hearing, the applicant appeared in person unrepresented, whereas the respondent Republic was represented by Ms. Tumaini Ngiluka assisted by Mr. Emanuel Medalakini, both learned State Attorneys.

Addressing us on the issue we raised *suo motu*, Ms. Ngiluka contended that since the applicant's application for extension of time to lodge an application for review was struck out by the Court for citing a wrong provision of the Rules, then he ought to have moved the Court by way of a reference. She accordingly said the application before us is incompetent liable to be struck out.

For his part, the applicant had no meaningful contribution bearing in mind the issue being a legal one for which he is a layman. He simply complained that he has been behind the bars for so long now and he has all along been struggling to be freed. He urged the Court to consider the issue and do justice to him.

As we have endeavoured to demonstrate above, the applicant's application for extension of time to lodge an application for review was struck out by the Court for want of proper provision of

the Rules with which the Court was moved. That application for extension of time was, therefore, not heard and determined on merit. The distinction between dismissal and striking out was lucidly elaborated in the erstwhile East African Court of Appeal decision in the case of **Ngoni Matengo co-operative Marketing Union Ltd V Ahmahomed Osman** [1959] E. A. 577 at page 580 where the court clarified that an order of dismissal implies that a competent appeal has been disposed of while an order for striking out an appeal implies that there was no proper appeal capable of being disposed of. Applying that principle in the present case, the order of the Court striking out Criminal Application No. 16 of 2014 meant that there was no proper application for determination by the Court. Consequently, the struck out application can be reinstated upon the disclosed shortcomings being rectified. That position was restated by the Court in the case of **Joseph Mahona @ Joseph Mboje @ Maghembe Mboje and Another V Republic**, Criminal Appeal No.215 Of 2008 (Unreported) in which the Court categorically stated that:-

"In the instant case, the matter before the High Court was not dismissed but struck out.

*That implies according to **Ngoni-Matengo** (supra) the matter was incompetent which means there was no proper application capable of being disposed of. **The established practice is that the applicant in an application which has been struck out is at liberty to file another competent application before the same court before opting to appeal as it has appeared in this appeal.**" (Emphasis added)*

Since the applicant's application for extension of time was struck out by the Court for moving the Court under a wrong provision of the Rules, the applicant is at liberty to file the same application after correcting the shortcoming noted by the Court. We take note that to be the intention of the Court when it stated that the applicant could reinitiate the process. Simply stated, the applicant has to lodge a proper application for extension of time to file an application for review before the Court.

That said, the matter before us which seems to be an application for review has been lodged prematurely. We are, accordingly, constrained to, as we hereby do, strike it out.

DATED at **IRINGA** this 3rd day of May, 2019.

K. M. MUSSA
JUSTICE OF APPEAL

S. A. LILA
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

I certify that this is a true copy of the original.



A.H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL

