

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

LINKED TO MBEYA REGISTRY VIDE VIDEO

CONFERENCE FACILITY.

CRIMINAL APPLICATION NO. 3 OF 2018

ALEN ALEXANDAR MWAKYUSA ----- APPLICANT

VERSUS

THE REPUBLIC ----- RESPONDENT

**(Application for extension of time within which to lodge A Notice of Appeal
and an appeal out of time to challenge the decision of the High Court of
Tanzania at Mbeya)**

(Lyamuya, SRM Ext. Jurisdiction)

dated the 9th day of March, 2015

in

Criminal Appeal No. 34 of 2014

RULING

16thOct. & 6th December, 2019

MWANGESI, J.A.:

In Criminal Appeal No. 34 of 2014 in the High Court of Tanzania at Mbeya, the applicant's appeal to challenge the decision of the trial court was dismissed. Dissatisfied by the said decision, the applicant challenged it in this Court vide Criminal Appeal No. 599 of 2015. His appeal, was however not decided on merit for the reason that, the Notice of appeal

initiating the appeal, was defective for citing a wrong number of the case. The said appeal, was therefore struck out in a ruling that was delivered by the Court on the 5th day of October, 2017.

In the instant application, which has been preferred under Rules 10 and 48 (1) of the Tanzania Court of Appeal Rules, 2009 (**the Rules**), the applicant, is seeking for extension of time within which he can lodge a Notice of Appeal and an appeal out of time, to challenge the decision of the Resident Magistrates' Court with extended jurisdiction. The application is supported by a sworn affidavit of the applicant.

On the other hand, the respondent has lodged an affidavit in reply, which has been deponed by Ms. Rosemary Alexander Mgenyi, a learned State Attorney. In essence, the learned State Attorney, has not resisted the averments of the applicant in his affidavit. She however, urged the Court to dismiss the application for the reason that, the applicant has failed to demonstrate as to why he failed to lodge his application within time from when it got struck out by this Court.

When the application was placed before me for hearing, the applicant entered appearance in person, legally unrepresented, whereas the

respondent, had the services of Ms. Rosemary Alexander Mgenyi, learned State Attorney. In amplification of his Notice of Motion, the applicant prayed to adopt the affidavit which deponed to support the appeal, and had nothing more. The paragraphs which in my view are relevant to the application, are paragraphs 2 to 6 which read thus:

(2) That being dissatisfied by the decision of the Resident Magistrates' Court of Mbeya, I appealed to the High Court of Tanzania at Mbeya where my appeal was registered as Appeal No. 34 of 2014 and was heard by Hon. A. M. Lyamuya SRM with Extended Jurisdiction, and my appeal was dismissed.

(3) That, after that I appealed to the Court of Appeal of Tanzania, and my appeal was registered as Appeal No. 599 of 2015.

(4) That when my appeal was set for hearing on the 5th day of October, 2017 before K. M. Mussa, J.A., R. E. S. Mziray, J.A., and G. A. M. Ndika, J.A., the Court discovered that the notice of appeal, was defective because it cited a wrong number of High Court that is, instead of appeal No. 34 of 2014, it was

cited as appeal No. 4 of 2014 which was incompetent and the Court struck it out for the said reason.

(5) That I am the applicant of this application seeking extension of time to lodge a notice of appeal and appeal out of time to this honourable Court.

(6) That the said error which was done on the notice of appeal was not done by me who being a prisoner, I depended everything on the Prison authority.

Even though on the other hand, it had been indicated by Ms. Mgenyi in her affidavit in reply that, she was resisting the application, when called upon by the Court to respond to the submissions of the applicant, she had a change of mind in that, she did not resist the application.

On my part, I am in agreement with the stance which was taken by learned State Attorney, in her oral submission that there are sound grounds to grant extension of time to the applicant, so that he can exercise his right of challenging the decision of the first appellate court. This is so for the reason that, the error leading to his appeal not being determined by the Court in the first instance, was not occasioned by his own making.

Regard being had to the fact that, the appeal by the applicant was struck out by this Court on the 6th day of October, 2017 and that, the current application was lodged by the applicant on the 8th December, 2017, I am convinced that the grounds for the delay as contained in his affidavit, warrant the grant of the sought extension of time. See: **The Regional Manager, Tanroads Kagera Versus Ruaha Concrete Company Limited**, Civil Application No. 96 of 2007 as well as **Joseph Paul Kyauka Njau Versus Emanuel Paul Kyauka and Another**, Civil Application No 7/5 of 2017 (both unreported).

Ordinarily, in terms of Rule 47 of **the Rules**, the applicant ought to have presented his application for extension of time at the High Court first, before coming to this Court. Nonetheless, this being a Criminal Application, the law under the same provision, has given a leeway to the Court, where it deems appropriate, to go ahead and grant the extension of time even if it was not made to the High Court first, and refused.

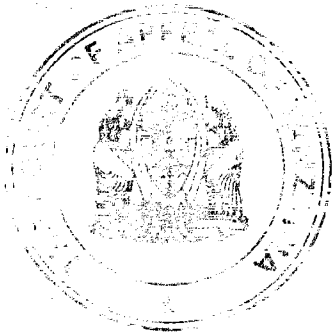
That said, the application by the applicant for enlargement of time to lodge a notice of appeal and appeal out of time, is hereby granted. The applicant is to lodge his notice of appeal and the appeal, within a period of thirty days from the delivery of this ruling.

Order accordingly.

DATED at **DAR ES SALAAM** this 13th day of November, 2019.

S. S. MWANGESI
JUSTICE OF APPEAL

The Ruling delivered this 6th day of December, 2019 in the presence of the Applicant appeared in person and Mr. Ofmedy Mtenga learned State Attorney for the respondent is hereby certified as a true copy of the original.




E. F. Fussi
DEPUTY REGISTRAR
COURT OF APPEAL