

IN THE COURT OF APPEAL OF TANZANIA

AT MTWARA

CRIMINAL APPLICATION NO. 84/07 OF 2019

AZIZI MOHAMED APPLICANT

VERSUS

THE REPUBLIC.....RESPONDENT

**(Application for extension of time to lodge review from the decision of the
Court of Appeal of Tanzania at Mtwara**

(Mbarouk, Bwana And Massati, JJA.)

dated the 4th day of October, 2010

in

Criminal Appeal No. 15 of 2006

RULING OF THE COURT

18th & 25th February, 2020

MWANDAMBO, J.A.:

Azizi Mohamed serves a thirty years sentence he earned upon conviction on the offence of armed robbery. Both the High Court and this Court dismissed his appeals challenging conviction and sentence. The applicant's application for review also hit a snag. He has now moved the Court for an order extending the time for lodging a fresh application for review.

To appreciate the merits or otherwise of the application, a tale on the back ground will be necessary. The District Court of Mtwara convicted the appellant on the offence of armed robbery earning him a custodial sentence of thirty years. His attempt to protest his innocence

both at the High Court and the Court were unsuccessful. Due to a patent defect in the notice of motion founding the applicant's application for review, on 4th June 2016, the Court struck out that application. However, that order did not bar the applicant from filing a fresh application provided he sought and obtained leave to do so out of time. It was not until 16th January 2019 when the applicant filed the instant application citing two grounds in the notice of motion. **One**, failure to obtain timely legal advice on how to prepare a proper legal document for filing in Court and **two**, his intended application stands great chances of success of because the decision of the Court was based on manifest error on the face of the record resulting in miscarriage of justice. The applicant avers in his affidavit that he filed the instant application after obtaining legal advice on 30th November, 2018.

Not amused, the respondent has filed an affidavit in reply affirmed by Mr. Abdulrahman Msham, learned Senior State Attorney contesting the application. Paragraphs 4 and 5 of the affidavit in reply are of particular relevance whereby the deponent avers that the applicant did not need any legal advice on how to prepare documents. This is because he is capable of doing so given the fact that the documents he filed were prepared by him neither is he presently represented by any legal aid organisation.

On the applicant's election, I heard Mr. Msham first on the date the application was called on for hearing. Essentially, Mr. Msham argued that the applicant's claim on the failure to obtain a legal assistance on how to prepare legal documents was not a sufficient reason for extending the time. Mr. Msham submitted further that the applicant has not offered any explanation for the delay running up to more than five years from 4th June 2013 on which the Court struck out the first application for review. Relying on **Ally Mohamed Mkupa v. R**, Criminal Application No. 93/07 of 2019 (unreported), Mr. Msham submitted that public interest demands that litigation must come to an end. He also made reference to **R v. Yona Kaponda & 9 Others** [1985] TLR 84 for the proposition that the Court can only extend time upon being satisfied that there are sufficient reasons for the delay. As the applicant has failed to meet any of the conditions for extending time, Mr. Msham argued, the Court should refuse to grant the application.

In his reply, the applicant reiterated his stance expressed in his affidavit that he delayed filing the application because he had no access to legal advice. He also claimed that he has been attending medical treatment at Muhimbili National Hospital and so the Court should grant his application.

The central issue in applications for extension of time is always whether the applicant has advanced good cause for the delay as required by rule 10 of the Tanzania Court of Appeal Rules, GN No. 368 of 2009 (the Rules). That rule gives power to the Court to extend the time for doing any act fixed by the Rules or any decision of the Court upon the applicant showing good cause for not doing such act within the prescribed time. Factors to be taken into account in determining whether or not to exercise the Court's discretion have been outlined in various decisions of this Court. Admittedly, such factors are not necessarily exhaustive but at the moment, they include; cause of the delay, length of the delay, whether or not the applicant has accounted for the delay, and degree of prejudice to the respondent and whether there is illegality or any issue of law of sufficient public importance in the decision sought to be challenged. See for instance: **Lyamuya Construction Co. Ltd v. Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010, **Sebastian Ndaula vs. Grace Rwamafa**, Civil Application No. 4 of 2014, **Saidi Ambunda v. Tanzania Harbours Authority**, Civil Application No. 177 of 2004 and **Abood Soap Industries Ltd v. Soda Arabian Alkali Limited**, Civil Application No. 154 of 2008 and **Joel**

Silomba v. Republic, Criminal Application No. 5 of 2012 (all unreported). I will subject the authorities to the facts in the instant application and see whether the applicant has placed himself within the established parameter of the established factors.

There is no dispute that the applicant made his first application for review in Consolidated Criminal Application No. 10&13 of 2011. That application was struck on 4th June 2013 on account of incompetence. Had the applicant made his application immediately thereafter, his reason for the delay could have been attributed to the striking out of his application. In my view, the filing of an application on 16th January 2019, more than nine years from the date of the impugned decision was an inordinate delay not proximately connected with the striking out of the first application for review. Apparently, the applicant attributes his delay to lack of access to legal assistance on how to prepare proper legal documents to be filed in Court which he only obtained as late as 30th November, 2018. Mr. Msham has argued, and I think rightly so that failure to obtain a legal assistance has never been considered by the Court to be a valid cause for the delay. But if one was to accept it as a valid reason, the applicant has not provided any particulars of the person or organization which assisted him in preparing the documents he filed on 16th January, 2019

In my view, had the applicant wanted the Court to lend credence to such a claim, he should have provided an affidavit from the person who offered him the said assistance with particulars of the date on which such assistance was sought and obtained. All what we have is the applicant's word claiming as he does, that he obtained the assistance on 30th November, 2018 without more.

Moreover, there is no indication whatsoever that the documents which the applicant filed in Court were prepared by any legal service provider. Mr. Msham cannot be right that the reason is factually flawed in that the notice of motion and affidavit indicate that they were drawn and filed by the applicant. I would thus hold that the reason advanced by the applicant for his delay is far from being valid and I reject it.

Assuming there was any valid reason for the delay, has the applicant accounted for each day of delay? I have already held that the delay was, by any standard inordinate but that that does not necessarily preclude the Court from exercising its discretion if the applicant succeeds in accounting for each day of the delay. I agree with Mr. Msham that the applicant has not met this important test in determining applications for extension of time. There is no dearth of authorities on this point that one may need not cite them but for illustration,

Lyamuya Construction Co. Ltd, Sebastian Ndaula vs. Grace Rwamafa, and Saidi Ambunda V Tanzania Harbours Authority, (supra) will suffice. In **Ally Mohamed Mkupa v. R**, Criminal Application No. 93/07 of 2019 (unreported) this Court refused to extend an application for extension of time in an application whereby the applicant had failed to explain away a delay of four and half years. I will do alike in this application because the applicant has not offered any explanation why it took more than five years to file an application for extension of time following the order which had struck out his earlier application for review on account of incompetence.

If I was to accept that the applicant had a valid reason for the delay, that will only be relevant up to 30th November, 2018 the date on which he claims to have obtained legal assistance. He has not offered any explanation regarding the period between 30th November, 2018 and 16th January, 2019 when he filed the application. This is more so because by 30th November, 2018, he was already too late to file the application. Once again, I would find merit in Mr. Msham's argument premised on the well-known principle that public policy demands that litigation must come to an end. Certainly, a delay of more than five years militates against that principle. By any standard, the length of the delay cannot be said to be without prejudice to the respondent.

Regarding illegality, there is only a claim that the impugned decision was based on manifest error on the face of it. The applicant has not said anything beyond that claim and so, on the authority of **Lyamuya Construction Co. Ltd** case (supra), I cannot consider it as good cause for extending the time. In my view, the applicant made the claim with a view to complying with the Court's decisions in applications for extension of time to apply for review rather than a distinct ground in itself.

During the hearing, the applicant claimed that he has been ill attending treatment at Muhimbili National Hospital and that explains why he delayed in lodging the application. However, he has not included that claim in the notice of motion or the supporting affidavit as one of the grounds for his delay. To succeed on that, the applicant should have furnished proof of the illness in relation to the period of the delay. None has been placed before the Court and so that claim remains to be a wild assertion incapable of persuading the Court to consider it in exercising its discretion under rule 10 of the Rules.

Lastly, I need to dispose the applicant's contention that the intended application stands great chances of success because it will be predicated on the ground that the decision was based on a manifest

error on the face of the record. Mr. Msham took an issue with the applicant on this assertion and argued that in the absence of a copy of the impugned decision, it will be difficult to gauge the merit of the argument. On my part, I think the merits of the intended application are outside the purview of the application under consideration. It has been held that chance of success is not a relevant factor by itself because the Court in an application for extension of time is not concerned with the merits of the intended application or appeal rather on whether the applicant has shown good cause for the order sought. Discussing chances will not only be beyond the power of the Court in such applications, but also premature on the authority of this Court's previous decision in **The Regional Manager Tanroads Lindi v. DB Shapriya and Company Ltd**, Civil Application No. 29 of 2012 (unreported).

Otherwise, I appreciate that the applicant has indicated that his intended application will be predicated on one of the grounds under rule 66(1) of the Rules consistent with the Court's decided cases. But that is not the only consideration in granting or refusing the application. In **Eliya Anderson vs. Republic**, Criminal Application No.2 of 2013 (unreported), the Court held that an application for extension of time to apply for review should not be entertained unless the applicant has not only shown good cause for the delay, but has also established by

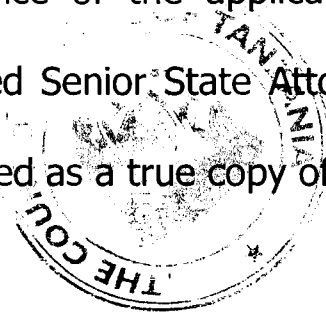
affidavit at the time of filing the application for extension of time, that if extension is granted, the review application will be predicated on one or more of the grounds specified under rule 66(1) of the Rules. In other words, both conditions must be met and not otherwise. The applicant has not met the former condition and thus the Court cannot consider the latter alone.


That said, since the applicant has failed to satisfy the Court on the reasons for his delay in lodging his application, I decline to grant the application and dismiss it.

DATED at **MTWARA** this 24th day of February, 2020.

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The Ruling delivered this 25th day of February, 2020 in the presence of the applicant in person and Mr. Kauli George Makasi, learned Senior State Attorney for the respondent / Republic, is hereby certified as a true copy of the original.




G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL