

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

CRIMINAL APPLICATION NO. 54/02 OF 2019

1. JOSEPH RAPHAEL KIMARO1st APPLICANT

2. ROBERT RAPHAEL KIMARO2nd APPLICANT

VERSUS

THE REPUBLIC RESPONDENT

**(Application for extension of time to lodge an application for review of the
decision of the Court of Appeal of Tanzania
at Arusha)**

(Kileo, Juma And Mwarija, JJ.A)

dated on 12th day of October, 2015

in

Criminal Appeal No. 340 of 2015

RULING

16th & 26th March, 2020

SEHEL, J.A.:

This is an application for extension of time within which the applicants herein can lodge an application for review out of time. The application has been preferred under Rules 10 and 66 (3) of the Tanzania Court of Appeal Rules, 2009 (the Rules) through a notice of motion supported by two separate affidavits of Joseph Stephen Kimaro and Robert Raphael Kimaro, the 1st and 2nd applicants, respectively.

The grounds for an extension of time have been stated in the notice of motion thus:-

- a) After dismissal of the appeal, the applicants expressed their desire to seek for review of the decision of the Court but failed to do so because they were not supplied with the copy of judgment on time.*
- b) The applicants kept on waiting to be supplied with the judgment until 9th January, 2019 when it was handed over to them by Arusha prison Authority in process of their transfer from Arusha prison to Ukonga central prison.*
- c) Since the law requires the copy of the judgment to be annexed with the application for review, the applicants could not do otherwise in absence of the judgment.*
- d) If granted leave to lodge an application for review out of time, the applicants intend to raise grounds set forth under rule 66 (1) (a) and (b) of the Rules, in that the decision was based on a manifest error on the face of the record resulting in the miscarriage of the justice, and that the applicants were wrongly deprived of an opportunity to be heard.*

At the hearing of the application, the applicants appeared in person, unrepresented, while Mrs. Alice Mtenga, learned State Attorney, appeared for the respondent Republic.

When the applicants were called upon to submit in support of their application, they adopted their notice of motion and the two affidavits and prayed for the learned State Attorney to submit first while they reserved their right, if any, to reply thereafter.

Mrs. Mtenga, out rightly objected to the application for two main reasons. **First**, she argued that the applicants have failed to account for six months period counted from the date when they were supplied with a copy of judgment on 9th January, 2019 to the date of filing the present application on 1st July, 2019. Relying to the case of **John Lazaro v. The Republic**, Criminal Appeal No. 34 of 2017 (unreported) where it was held that the applicant has to account for each day of the delay, she urged me to find that the applicants have failed to advance good cause for the grant of an extension of time.

Secondly, she contended that although the applicants indicated in their notice of motion that they intend to challenge the decision of this Court by review under Rule 66 (1) (a) and (b) of the Rules but they failed to expound further in their affidavit the alleged manifest error on the face of the record and as to how they were denied their opportunity to be heard. In the absence of those explanations, Mrs. Mtenga submitted that the applicants have miserably failed to advance good cause for me to exercise my discretionary power in granting the

requested extension of time. She thus prayed for the application to be dismissed.

In reply to the learned State Attorney's submission, the 1st applicant explained that he is a prisoner as such he had no power and authority over the Prison's Authority for him to make sure that his documents were filed on time. He contended that he prepared his documents in time and handed them to the prison authority for onward transmission to the Court. Therefore, he said, he could not have done anything more than that.

On failure to detail the grounds for review predicated in the notice of motion, he briefly replied that that can be done after being granted an extension of time. He said, it is premature at this stage of an application for extension of time to explain in detail the grounds for review. He therefore reiterated his initial prayer that his application be granted.

The 2nd applicant adopted in full the submission made by the 1st applicant and had nothing more to add other than to pray for his application to be allowed.

I have given due consideration to the rival arguments made by the parties on whether or not good cause has been shown by the applicants to warrant the extension of time. Rule 10 of the Rules bestows upon the

Court a discretionary power for extending time which can only be exercised if a good cause has been shown by the party seeking such extension of time. That Rule provides:

"The Court may, upon good cause shown, extend the time limited by these Rules or by any decision of the High Court or tribunal, for the doing of any act authorized or required by these Rules, whether before or after the expiration of that time and whether before or after the doing of the act; and any reference in these Rules to any such time shall be construed as a reference to that time as so extended." [Emphasis is added].

Good cause depends on the circumstances of each case. As such it is relative and there are no hard or fast rules to what can constitute good cause. However, certain factors may be taken into account by the Court in determining whether the applicant had advanced good cause. The factors have been lucidly stated in the case of **Joel Silomba v. Republic**, Criminal Application No. 5 of 2012 (unreported) thus:

- i) "the length of the delay;*
- ii) the reason for the delay, was the delay caused or contributed by dilatory conduct of the applicant?;*
- iii) whether there is an arguable case, such as, whether there is point of law or the illegality or*

otherwise of the decision sought to be challenged; and/or

iv) the degree of prejudice to the opposite party if the application is granted.”

In the present application, the applicants intend to apply for review against the decision of this Court delivered on 12th October, 2015. Pursuant to Rule 66 (3) of the Rules, an application for review has to be lodged within sixty days from the date of the judgment sought to be reviewed. This means that the applicants ought to have filed their application for review on or before 11th December, 2015. Since they could not file it on time, they have now come to this Court seeking for an extension of time.

The application for extension of time was filed on 1st July, 2019, almost after a lapse of three years and six months counting from the last date they were supposed to lodge their application for review.

The ensuing question is, have the applicants managed to provide any good cause for that delay of three years and six months to warrant this Court to exercise its discretion to extend the time to file an application for review?

The applicants deposed and stated in their joint notice of motion that they were belatedly supplied with a copy of judgment which is

mandatorily required in terms of Rule 66 (3) of the Rules to be attached in an application for review. They have stated that they were supplied with a copy of the intended impugned judgment on 9th January 2019 when they were being transferred from Arusha prison to Ukonga prison. In her submission, the learned State Attorney did not dispute that assertion. She acknowledged that the applicants were supplied with the copy of judgment on 9th January, 2019. Her concern was the period of six months, counted from the date the applicants were supplied with the copy of the judgment to the date they filed the present application. In their response, the applicants shifted the blame to the prison authority alleging that after they have prepared their documents in time, it is the prison authority that was responsible for submitting the applicants' documents to the Court on time but they failed to do so.

I for once agree with the learned State Attorney that the applicants have accounted for the period counted from the date when the judgment of this Court was issued on 12th October 2015 to the date when they were supplied with the copy of the judgment on 9th January 2019. Much as the excuse given by the applicants is very tempting that the blame is on part of the prison authority as they have an obligation to transmit the documents to the Court but there is a period of about four months which was not accounted by the applicants.

I have carefully scrutinized the notice of motion and noted it was thumb-printed by the applicants on 10th April, 2019. Further, I have gone through the two separate affidavits filed by the applicants and noted that each deposed and signed his respective affidavit on 10th April 2019. Thus there is a period of four months from 9th January 2019 to 10th April 2019 not accounted for by the applicants. There is no single explanation given by the applicants as to why it took them four months to sign the notice of motion and affidavit. I say so because each deposed in his affidavit as follows:

"6. That, I and one another in this application kept on waiting to be supplied with the judgment of the court until 9th day of January, 2019 when it was handed over to us by Arusha prison authority, the day I and one another in this application were transferred from Arusha prison to Ukonga central prison.

7. That, after having been handed over with the judgment of the Court, I and one another in this application humbly pray the honourable court to be granted leave for extension of time to enable to file an application for a review out of time."

It is evident from the above Paragraphs of the affidavit that the applicants said nothing on what happened from 9th January, 2019 to the

date when they signed the affidavit on 10th April, 2019. There is no single explanation of this period.

It is settled law that, in an application for extension of time, the applicant has to account for each day of the delay. This is the position stated in the case of **John Lazaro v. The Republic** (supra) cited by the learned State Attorney.

In that regard, I concur with the learned State Attorney's submission that the applicants have failed to account for an inordinate delay of four months period.

As regards, the contention made by the learned State Attorney that the applicants were required to explain in detail the grounds for review, I shall be very brief that an elucidation of the grounds for review would not have served any purpose for me because my jurisdiction as a Single Justice in application at hand is to ascertain whether the applicants have advanced good cause for the grant of an extension of time. I have no jurisdiction to sit, hear, examine and determine the substantive grounds for review. My position is fortified with the decision of this Court in the case of **Tanzania Portland Cement Company Limited v. Khadija Kuziwa**, Civil Application No. 437/01 of 2017 (unreported) where it was stated in clear terms at page 6 of that ruling that:

"...in application for extension of time, the Court is primarily concerned with ascertaining whether or not good cause has been shown to support a grant. The Court, more so, a Single Justice, may not venture so far as to speculate the merits of the desired application for revision before granting an extension of time."

Further in the case of the **Regional Manager- TANROADS Lindi v. D.B Shapriya and Company Limited**, Civil Application No. 29 of 2012 (unreported) it was held:

"...it is now settled that a Court hearing an application should restrain from considering substantive issues that are to be dealt with by the appellate Court. This is so in order to avoid making decisions on the substantive issue before the appeal itself is heard. Further to prevent a single judge of the Court from hearing an application by sitting or examining issues which are not his/her purviews."

It follows then that the argument put forward by the learned State Attorney is misplaced as such it has no merit. Of course, I am alive that in considering an application for an extension of time for filing a review, a party seeking such extension has to indicate, either explicitly or implicitly, that the review would be predicated on one of the grounds mentioned under Rule 66 (1) of the Rules. Hence, to require the

applicant to give explanation of the grounds is to place unnecessary burden on part of the applicant.

In the present application, the applicants have explicitly indicated under Paragraph (d) of the notice of motion that the intended review would be predicated under Rule 66 (1) (a) and (b) of the Rules that indication to me suffices to show good cause.

That said, since I have found herein that the applicants have not accounted for four months period of delay which they ought to have given an explanation then the applicants have failed to advance good cause for me to exercise my discretionary powers. The application is therefore devoid of merit. I accordingly dismiss it.

DATED at ARUSHA this 25th day of March, 2020.

B. M. A. SEHEL
JUSTICE OF APPEAL

This Ruling delivered on 26th day of March, 2020 in the presence of the 1st and 2nd Appellants in persons and Mr. Hangi Chang'a assisted by Ms. Agnes Hyera learned Senior State Attorney's for the Respondent/Republic is hereby certified as a true copy of the original.




B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL (T)