

**IN THE COURT OF APPEAL OF TANZANIA**

**AT MWANZA**

**CRIMINAL APPLICATION NO. 68/08 OF 2019**

**MASALU S/O KACHUNGWA @ LUDUGULILA ..... APPLICANT**

**VERSUS**

**THE REPUBLIC ..... RESPONDENT**

**(Application for extension of time to appeal from the Judgment  
of the High Court of Tanzania at Mwanza)**

**(Mchome, J.)**

**dated the 13<sup>th</sup> day of July, 2004**

**in**

**Criminal Appeal No. 12 of 2004**

**.....**

**RULING**

27<sup>th</sup> & 31<sup>st</sup> March, 2020

**NDIKA, J.A.:**

Proceeding by a notice of motion lodged under Rule 10 of the Tanzania Court of Appeal Rules, 2009 ("the Rules") on a second bite so to speak, the applicant, Masalu s/o Kachungwa @ Ludugulila, beseeches the Court to order as follows: one, that time be enlarged to enable him to institute an appeal; two, that he be supplied by the Registrar of the High Court with the record of appeal for him to draw up and file a Memorandum of Appeal; and finally, that he be acquitted

should the Registrar fail to supply him the record of appeal. The application is premised on two affidavits, one deposed to by the applicant and the other one sworn to by Cpl. David T. Elizeus, an officer of Butimba Central Prison where the applicant stayed.

I should hasten to say that the Court's power under Rule 10 cited as an enabling provision for this application is explicitly circumscribed to enlarging time for the doing of any act authorized or required by the Rules. For ease of reference, I reproduce the said rule thus:

*"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."*

I have extracted the above provisions to lay it bare that the second and third prayers enumerated above do not fall within the ambit of Rule 10. They are patently misconceived. I will ignore them.

Insofar as the first prayer is concerned, the applicant avers in his accompanying affidavit as follows: on 21<sup>st</sup> October, 2001 he was convicted by the District Court of Geita on two counts of robbery with violence and rape and that he was sentenced to fifteen years' imprisonment on each count, both sentences being ordered to run concurrently. On appeal vide Criminal Appeal No. 12 of 2004, the High Court (Mchome, J.) upheld the convictions as well as the sentence on the first count. Furthermore, the court enhanced the sentence on the second count to life imprisonment. Resenting the outcome of the appeal, he duly lodged a notice of intention to appeal to this Court. By that notice, Criminal Appeal No. 263 of 2006 was instituted.

The applicant bewails that since the institution of the appeal he has not been served with the record of appeal thereof and, as a result, the appeal is yet to be heard. That he submitted several letters to the Registrar of the High Court requesting to be supplied with copies of

the proceedings of the High Court and the judgment handed down by Mchome, J. but to no avail. And that he filed Miscellaneous Criminal Application No. 37 of 2018 in the High Court seeking extension of time to appeal to this Court but the court (Rumanyika, J.) dismissed the matter on the reason that it was frivolous and vexatious.

At the hearing of this matter, the applicant appeared in person, fending for himself. He recounted the contents of the notice of motion and the accompanying affidavit. When probed by the Court if he was aware that Criminal Appeal No. 263 of 2006 was withdrawn on 20<sup>th</sup> July, 2012 vide an order of the Court, he denied that fact and insisted that the said appeal was still pending.

Ms. Lilian Meli, learned State Attorney, who accompanied Ms. Revina Tibilengwa, learned Senior State Attorney, replied on behalf of the respondent. Having adopted the contents of the affidavit in reply she had filed in response to the application, Ms. Meli opposed the application, contending that it discloses no good cause as elaborated in many decisions of the Court including **Samwel Philemon v. Republic**, Criminal Application No. 1/08/2016 (unreported). She

argued that the applicant should have annexed a copy of the notice of appeal allegedly filed so that the Court could have determined its validity. Reacting to the information that the applicant's Criminal Appeal No. 263 of 2006 was withdrawn on 20<sup>th</sup> July, 2012 in terms of Rule 77 (1) of the Rules, the learned State Attorney submitted that the said appeal must be deemed to have been dismissed in consonance with the said provisions and that the applicant's present pursuit for extension of time is, therefore, utterly misconceived. All the same, she urged that the matter be dismissed for want of good cause.

Rejoining, the applicant insisted that his appeal remained unattended; that it has never been withdrawn. He reiterated his prayer that the matter be granted.

Having heard the arguments of the parties, I think it is necessary to put the applicant's averments in the proper perspective. It is clear that he is seeking extension of time to lodge a notice of appeal, which, in terms of Rule 68 (1) of the Rules, institutes an appeal. The justification for that course is that despite instituting an appeal after he lodged his notice of appeal in time, no appeal or record thereof has

been forthcoming. Does this constitute a good cause for extending time?

I am of the view that this matter is clearly misconceived. To start with, I accept the applicant's assertion that he duly lodged a notice of appeal to manifest his intention to challenge the judgment handed down by Mchome, J. That being the case, by dint of section 61 (1) of the Tanzania Court of Appeal Rules, 1979 (now Rule 68 (1) of the Rules) his appeal against the said judgment was duly instituted. He seems aware of this position and he has indicated so in his supporting affidavit, saying that the appeal was registered as Criminal Appeal No. 263 of 2006.

Admittedly, in terms of Rule 64 (1) read together with Rule 69 (1) of the 1979 Rules, the Registrar of the High Court was enjoined, as soon as practicable after the notice of appeal was lodged, to prepare the record of appeal and cause a copy thereof to be served on the appellant and on the respondent. According to the applicant, no appeal or record thereof has been forthcoming. It is my firm view that the alleged failure by the Registrar to fulfil his duty to prepare and

serve a record of appeal cannot constitute a ground for enlarging time for the applicant to lodge another notice of appeal. The proper approach should have been reminding the Registrar to do his part, if, indeed, it is true that he is yet to comply with the provisions of the rules cited above.

Apart from the foregoing, I indicated earlier that the applicant's Criminal Appeal No. 263 of 2006 was withdrawn on 20<sup>th</sup> July, 2012 vide an order of the Court. The applicant disputes this fact, but I take judicial notice of the order concerned in terms of section 59 (1) (a) of the Evidence Act, Cap. 6 RE 2002 as proof of the appeal's withdrawal. I agree with Ms. Meli that the withdrawal of the appeal under Rule 77 (1) of the Rules renders the appeal deemed to have been dismissed. In this sense, the difficulty facing the applicant's quest for having his day in this Court on a second appeal appears to be more compounded. At any rate, the provisions of Rule 10 do not provide an avenue for resuscitating an appeal that is deemed dismissed as explained.

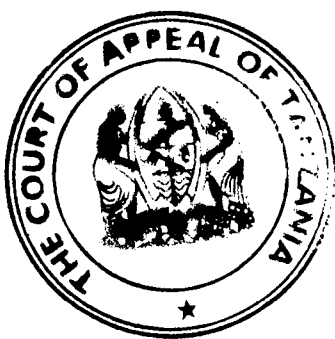
I might have extreme sympathy for the applicant but, for the reasons I have expounded above, I cannot accede to his prayer for extension of time. In the upshot, this application is misconceived. It is thus struck out.

It is so ordered.

**DATED** at **MWANZA** this 30<sup>th</sup> day of March, 2020.

G. A. M. NDIKA  
**JUSTICE OF APPEAL**

The ruling delivered this 31<sup>st</sup> day of March, 2020 in the presence of the Applicant in person and Paschal Marungu, learned Senior State Attorney for the respondent is hereby certified as a true copy of the original.



*S. J. Kainda*  
S. J. KAINDA  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**