

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

CRIMINAL APPLICATION NO. 64/01 OF 2016

WATERE WARYOBAAPPLICANT

VERSUS

THE REPUBLIC.....RESPONDENT

**(Application for extension of time to lodge review out of time against
of the Judgment of the Court of Appeal of Tanzania)**

(Nyalali CJ, Makame, And Ramadhani, JJ,A.)

**dated 16th day of June, 1990
in
Criminal Appeal No. 10 of 1990**

RULING

18th February & 16th March, 2020

MKUYE, J.A.:

The applicant Watere Waryoba has lodged this application seeking this Court to grant extension of time within which to lodge an application for review against the decision of the Court in Criminal Appeal No. 10 of 1990 dated 16/6/2090 (Nyalali C.J, Makame J.A and Ramadhani J.A). The application is brought by way of a Notice of Motion under Rule 10 of the Tanzania Court of Appeal Rules 2009 (the Rules). It is supported by an affidavit sworn by Watere Waryoba, the applicant. It is resisted by the

affidavit deposed by Mr. Adolf Lema, learned State Attorney for the respondent/Republic.

In order to appreciate the sequence of events, I feel it apt to narrate albeit briefly, the background of this matter. It goes thus:

Sometimes in June 1986, the applicant together with his co-accused not subject to this appeal, on the material day were seen drinking liquor at the house of the deceased, one Matiku Kirira. After leaving that place, the deceased was never seen alive again only for her dead body which was found lying in a trench. The applicant and his co-accused were subsequently arrested and charged with the offence of murder and were found guilty, convicted and sentenced accordingly. The applicant, being aggrieved by the High Court's decision unsuccessfully appealed to this Court and his appeal was dismissed. Still undaunted, he is now seeking the indulgence of this Court by expressing his intention to apply for review but as time for doing so has long lapsed, he has brought this application on the grounds which can be extracted as follows:

- (1) *That, there is a manifest error on the face of the record.*

(2) That, he failed to file an application for review as his defence counsel failed to inform him of such rights.

In his affidavital averments the applicant has stated in paragraphs 7 to 10 of the affidavit that he had filed Criminal Applications Nos. 9 of 2011 and 26 of 2012 for extension of time but they ended up to be dismissed for being incompetent and struck out for being an abuse of the Court process.

At the hearing date, the applicant appeared in person, unrepresented; whereas the respondent/Republic was represented by Mr. Adolf Lema assisted by Ms. Ester Chale, both learned State Attorneys.

When availed an opportunity to amplify his application the applicant first sought to adopt his notice of motion and the affidavit in its support and opted to let the State Attorneys respond first to it.

On his part, Mr. Lema prefaced by imploring the Court to find that the applicant has failed to show good cause for the delay be it in the notice of motion or the affidavit in its support. He contended that though the applicant averred in paragraphs 7 to 10 that his Criminal Applications Nos. 9 of 2011 and 26 of 2012 he had filed earlier on were dismissed for being incompetent and struck out on the ground of abuse of the Court process

respectively, there are no attachment of such applications to the affidavit. He was of the view that, even filing of the application at hand is in furtherance of the abuse of the Court process.

The learned State Attorney added that the averment in para 4 of the affidavit that the applicant was not informed of his right to apply for review is not a good cause because it amounts to pleading ignorance of the law. In this regard, he prayed to the Court to dismiss the application in its entirety.

In rejoinder, the applicant in his endeavor to account for the delay, argued that, he was still waiting for the Ruling (Rutakangwa,JA) and urged the Court to observe the provisions of Article 107 A (1) and (2) (e) of the Constitution of the United Republic of Tanzania, Cap 2 RE 2002 (the Constitution). He thus prayed that time be extended to enable him apply for review.

The applicant has predicted his application under Rule 10 of the Rules which empowers the Court in its discretion to extend the time to the applicant to do something so long as the applicant shows good cause to justify the delay. Rule 10 of the Rules reads as follows:

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

This Court has in times without number categorically emphasized that under the above cited provisions (Rule 10 of the Rules) time can be granted if the applicant has shown good cause for the delay. Just to mention a few, they include, **Kalunga & Company Advocates Ltd v National Bank of Commerce Ltd**, [2006] TLR 235; **Lyamuya Construction Company Ltd v. Board of Registered Trustees of Young women's Christian Association of Tanzania**, Civil Application No. 2 of 2010; and **Rutagatina CL v The Advocates Committee and Clavery Mtindo Ngalapa** Civil No 98 of 2010 (both unreported).

Likewise, the law requires that in the application for extension of time the applicant is to account for each day of delay. In the case of

Bushfire Hassan v. Latina Lucia Masaya, Civil application No. 3 of 2007 (unreported), the Court underscored this position in that:

“Delay, of even a single day, has to be accounted for otherwise there would be no point of having rules prescribing periods within which certain steps have to be taken.”

The issue for consideration by this Court is whether the applicant has been able to advance good cause for this Court to grant the application.

In the first place, it is discernible that the judgment sought to be impugned was delivered on 16/6/1990. The application at hand was lodged on 14/11/2016 which means it was lodged 26 years after the decision was made. This delay is, obviously, inordinate.

The main reason as can be gleaned from the record is that he was not aware of the right to seek review as he was not so advised by the learned counsel who represented him at the High Court. He said he became aware of such right in 2010 when the Copy of the Tanzania Court of Appeal Rules 2009, was supplied to the Prison. He is in away pleading ignorance of the law. However, as was rightly argued by Mr. Lemà, ignorance of the law has never been a sufficient ground for extending the

time. This stance was stated in the case of **Hadija Adamu V. Godbless Tumba**, Civil Application No. 14 of 2013 (unreported) as follows:

*"As regards the applicant's apparent ignorance of the law and its attendant rules of procedure I wish to **briefly observe that such ignorance has never been accepted as a sufficient reason or good cause for extension of time.**"* [Emphasis added].

Thus, the reason advanced by the applicant for the delay that advocate who represented him at the High Court did not inform him of his right to seek for review does not in any way constitute a good cause for the delay, thus, he has failed to account for the delay.

As regards the issue that he had filed other applications for extension of time which ended up to be dismissed for being incompetent and struck out for an abuse of the Court process, I think position of the law is very clear that the applicant ought to demonstrate such averment by attaching such applications to the affidavit to prove their existence or to show the manner he was struggling to knock the doors of the Court. Failure to do so rendered such averment to be mere assertions without substantiation. As

a result, such assertion, with respect, does not and cannot amount to a good cause for the delay.

The applicant also urged me to observe the provisions of Article 107A (1) and (2) of the Constitution. I am aware that the provisions of that Article require courts to administer substantive justice without undue regard to technicalities. In the case of In **Ami (Tanzania) Limited v. Ottu on behalf of P.L. Assenga and Others**, Civil Application No. 76 of 2002 (unreported) this Court had an opportunity to discuss this Article and observed as follows:-

"...Article 107 A (2) (e) of the Constitution does not in any way command that procedural rules should be done away with in order to advance substantial justice. Each case will be considered on its own peculiar facts and circumstances..."

[Emphasis added.]

Also in the case of **Uledi Hassani Abdallah v. Murji Hasnein Mohamed and two Others**, Civil Appeal No. 2 of 2012 (unreported), in relation to a similar scenario, this Court stated as hereunder:-

"In our considered view therefore, Art, 107A (2) (e) or Rule 2 of the Rules do not in any way, command that procedural rules be done away with in order to advance substantive justice. Not at all. Each case must be considered on its own merits..."

In the same case, the Court further observed that:

*"...It should, therefore, be noted that better interests or "substantive justice" and the like, **cannot be met by violating the very laws and rules that are the maidens of the rule of law."***

[Emphasis added]

In this case, the applicant was required to file application for review within 60 days from the date of decision sought to be reviewed. Since he was late to do so he filed this application in order to seek extension of time to do so as per rule 10 of the Rules. One of the prerequisite for extending time is for the applicant to advance good cause. It means that in bringing the application of this nature the applicant was prepared to show such good cause for delay. If he feels that he has not been able to do that he cannot now implore the Court to ignore or do away with procedural law so as to advance substantive justice. This is so because,

as we observed in the case of **Uledi Hassani Abdallah** (supra) better interests or substantive justice cannot be achieved by violating the procedural laws and rules which are the maidens of the rule of law.

Having considered the application in its totality, I am satisfied that the applicant has failed to establish good cause to warrant this Court to extend the time sought. Thus, the application is hereby dismissed.

DATED at **DAR ES SALAAM** this 11th day of March, 2020.

R. K. MKUYE
JUSTICE OF APPEAL

The Ruling delivered this 16th day of March, 2020 in the presence of the applicant in person and Ms. Anna Chimpaye, State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.


G. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL