

IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

CRIMINAL APPLICATION NO. 78/03 OF 2023

IBENDU HASHIMUAPPLICANT

VERSUS

THE REPUBLIC..... RESPONDENT

(Application for extension of time within which to lodge the application for a
Review from the judgment of the Court of Appeal of Tanzania at Dodoma)

(Mugasha, Levira and Fikirini, JJA.)

dated the 2nd day of May, 2022

in

criminal Appeal No. 546 of 2020

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RULING

4th & 8th December, 2023

MURUKE, J. A:

Before me, is an application for extension of time within which to file an application for review of the Court's Judgment in Criminal Appeal No. 546/2020 dated 2nd May, 2022. The application is by Notice of Motion under Rule 10 and 66 (3) of the Tanzania Court of Appeal Rules, 2009 (the Rules). It is supported by an affidavit duly deposed by the applicant. The respondent filed affidavit in reply sworn by Neema John Taji, learned State Attorney dully authorized to deal with the application. The applicant has advanced four grounds in the Notice of Motion, the basis of his application, namely: -

- (a) The applicant has failed to file the application for a review within prescribed period because he was supplied with a copy of the impugned judgment after the expiry of sixty (60) days from the day of delivery of the judgment.*
- (b) That, since the law requires annexing the certified copies of the Judgment with the application for a review, the applicant could not do otherwise in the absence of the said judgment.*
- (c) That, the applicant was supplied with the copy of the judgment on 18th the day of November, 2022 at Ukonga Central Prison at Dar es Salaam after being transferred from Isanga Central Prison at Dodoma.*
- (d) That, if granted leave to lodge an application for a review out of time, the applicant intends to raise grounds of review set forth under Rule 66 (1) (a) and (b) of the Tanzania Court of Appeal Rules, 2009 as amended.*

The background facts leading to the present application are that, the applicant, Ibendu Hashimu, was charged with an offence of Murder Contrary to section 196 and 197 of the Penal Code [Cap 16 R.E. 2002, now R.E. 2022]. It was alleged by the Prosecution before the High Court that, on 7th day of October, 2014 at about 11:00 hours, at Kinkima Village, Kondoa District in Dodoma Region, the applicant murdered Adina Juma. He denied the charge, thus the trial commenced before the High Court sitting at Kondoa District, in Dodoma Region in Criminal Sessions Case No. 102 of 2016. After the trial,

the applicant was found guilty, convicted and sentenced to suffer death by hanging, on 21st day of October, 2020.

Dissatisfied with the trial court conviction and sentence, he filed before the Court, Criminal Appeal No. 546/2020. However, the Court on 2nd day of May 2022, upon being satisfied that the evidence against the applicant was overwhelming, dismissed the appeal. Being the dismissal of appeal from the highest Court of Land, the applicant had no right to further appeal. The only option he had is to file an application for Review, but he was out of time. He has filed the present application for extension of time to file review.

At the hearing of the application the applicant appeared in person not represented, whereas, the respondent/Republic was represented by Neema Taji and Rachel Tulli both learned State Attorneys. The applicant who indicated to be ready for hearing, requested the Court to adopt his Notice of Motion and the supporting affidavit to be his submission in chief with right to make a rejoinder if need be.

Neema Taji for the respondent was the first to address the Court. She quickly, pointed out that they are objecting the application in terms of replying affidavit filed on the following reasons: **One**, the applicant has failed to explain the reasons for delay to file review. **Two**, Rule 10 of the Court of

Appeal Rules require the applicant to adduce sufficient cause, however the applicant's affidavit just says the Judgment of the Court contains irregularities without showing the alleged irregularities for the Court to see to it that can review the decision. More so, she added that the complained irregularities must be the one outlined under Rule 66 (1) (a) – (e) of the Rules. Not only to mention them but the applicant ought to have explained to the Court and show how the Court erred, for the Court to determine review.

Ms. Rachel Tulli, insisted on requirement of Rule 66 (3) of the Rules, that, Review has to be filed within 60 days from the date of Judgment/Ruling sought to be reviewed. The application was filed almost six months from the date of the decision sought to be challenged by review. The applicant did not account for each day passed beyond the prescribed period. Learned State Attorney, requested the Court to be guided by the cases in the list of authorities filed by the respondent and dismiss the application.

In rejoinder, the applicant had no much to say, while admitting that, he delayed for almost six months, he insisted being a convict of Capital Offence, was a person of unlimited means. It was until when supplied with a copy of the Judgment while at Ukonga Prison after being transferred from Isanga Central Prison, when he filed present application for extension of time.

Having examined the notice of motion, the supporting affidavit as well as the affidavit in reply and submissions by both parties; the issue for determination is whether the applicant has sufficiently advanced good cause for the Court to extend time to apply for review.

The Court's power to enlarge time for taking any action authorized by the Rules is provided under Rule 10 of the Rules that:

"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 authorized or required by these Rules, 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 the time as so extended".

More so, Rule 66 (3) of the Rules mandatorily requires the Notice of Motion for review to be filed within sixty days from the date of the Judgment or order sought to be reviewed. The applicant failed to meet the requirement, hence this application.

It is undisputed that though the Court's powers to extend time under rule 10 of the Rules are discretionary, such powers can only be exercised where good cause is shown. It is a settled position of the law that, for the

Court to exercise its discretion to extend time, there must be a "*good cause*" shown by an applicant that upon becoming aware that he is out of time, and there being circumstances beyond his control that prevented him to act in time prescribed he promptly acted to persuade the Court to exercise its discretion in granting an extension of time. What constitutes good cause has not been laid down by any hard and fast rules, it depends upon the party seeking extension of time to provide the relevant material in order to move the Court to exercise its discretion. There are number of factors which have to be considered in determination if good cause has been shown. Some was discussed in the decision of the Court in the case of **Lyamuya Cosntruction Company Ltd v. Board of Registered Trustees of Young Wemen's Christian Association of Tanzania**, Civil Application No. 2 of 2010 [2021] TZCA 4; [03 October, 2021, TANZILII] as follows; **one**, an applicant must account for all the period of delay; **two**, the delay should not be inordinate; **three**, an applicant must show diligence and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take; **four**, if the Court feels that there are other sufficient reasons, such as the existence of the point of law of sufficient importance; such as the illegality of the decision sought to be challenged.

In the present application the applicant has advanced two reasons: **One**, that after the decision of the Court dismissing his appeal on 02nd May, 2022, he was transferred from Dodoma Isanga Central Prison to Ukonga Prison in Dar es Salaam, thus unable to make follow-ups of the necessary copy of Judgment. He was supplied with a copy of Judgment late after expiry of 60 days on 18th November, 2022. **Two**, he being a Prisoner, serving sentence of capital offence that is, death by hanging, he was of limited means, mainly he depended on Prisoner Officers to make a follow up of his application.

The applicant is relying on his affidavit and Notice of Motion to move the Court to ground prayers sought. In the affidavit in support of the Notice of Motion, the Court is not told when the applicant was transferred from Isanga Central Prison to Ukonga Prison in Dar es Salaam. Equally so, this Court is not told what happened from 22nd May, 2022 when the Judgment of the Court pronounced to 18th November, 2022 when he was supplied with the copies of the Judgment. There is no counting of each day passed beyond prescribed time for the Court to digest and see if it amounts to sufficient cause.

It is worth insisting that in an application for extension of time each day passed beyond prescribed period **counts** and it has to be **accounted** for. The same was discussed in the case of **Bushiri v. Tatifa Lukio Mashayo**, Civil Application No. 3 of 2007 (unreported), where the Court emphasized the need of accounting for each day of delay within which certain steps could be taken. It stated:

"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".

Clearly, the applicant did not give any explanation as to why there was such delay from when the Judgment delivered 2nd May, 2022, to the date of being supplied with a copy of Judgment on 18th November, 2022. Worse enough, even after being supplied with a copy of Judgment, there is no accounting of days from 18th November, 2022 to 29th November, 2022 when the application was filed. Accounting of days of delay is so important to prove that, there was no laxity or inaction by the applicant.

The applicant raised issue of being a prisoner, a person of unlimited means, that is not disputed, however, an affidavit of relevant prisoner officer

who received the copy and gave the applicant could have been evidence to corroborate the applicant averments to that effect, but there is none.

It is worth insisting that in determining whether good cause for extension of time was shown by the applicant in filing this application regard had to be given to promptness and diligence of the applicant in filing the said application for extension of time. Even after being supplied with a copy of Judgment on 18th November, 2022, yet the application was filed on 29th November, 2022. Apart from there being no explanation as to what took place from 18th November, 2022 when the copies of judgment was supplied to 29th November when the application was filed, there is also no promptness. As alluded above, the applicant has delayed for more than six (6) months in filing the application, and no accounting of delay of each of the six (6) months' time.

In the case of **Justin Joel K. Moshi v. CMC Land Rover (T) Ltd**, Civil Reference No. 27 of 2019 Court at page 14 held that:

"As we have alluded to above, for no reasons, the applicant delayed for 21 days in filing the application. It is also trite that the applicant was required to account for the delay of each of the said 21 days, which he did not".

In the case of **Republic v. Yona Kaponda and 9 Others (1985)**

T.L.R 84 the Court set a yardstick of the circumstances under which extension of time can be granted as follows: -

"It is settled that in an application for extension of time the applicant is required to show sufficient cause for delay. Sufficient cause would be shown for the delay in taking the necessary steps in instituting an appeal or filing the application as is the time prescribed under the specific law. However, it is to be observed that the Court can only exercise its powers under the law, to extend time if sufficient cause is shown to explain the delay".

In determining good cause in the application for review, apart from considering the reason for the delay, I am as well obliged to consider under which provision the applicant intends to peg his application for review among those which are identified under Rule 66 (1)(a)-(e). For easy of reference the said Rule provides:

"The Court may review its judgment or order, but no application for review shall be entertained except on the following grounds:

- (a) The decision was based on a manifest error on the face of the record resulting in the miscarriage of justice; or*
- (b) A part was wrongly deprived of an opportunity to be heard;*

- (c) the court's decision is a nullity; or*
- (d) the court had no jurisdiction to entertain the case; or*
- (e) the judgment was procured illegally, or by fraud or perjury".*

The applicant herein states under the fourth ground of the motion that, his intended review will base on Rule 66(1) (a) and (b). However, the applicant did not state in his affidavit or in his oral submission the following issues; **one**, what are the error(s) intended to be cured, **two**, how the said error(s) resulted into miscarriage of justice, **three**, how judgment sought to be challenged denied him the right to be heard. In my view, without such information it becomes impossible to determine and hold that the applicant has a good cause.

It is a settled principle of law in our jurisdiction that the Court should be very reluctant to grant extension of time to file review if conditions set under Rule 66 (1) (a) - (e) have not been complied with. On the same principle the Court in the case of **Marcky Mhango (on half of 684 Others v. Tanzania Shoe Co. Ltd and Tanzania Leather Associated Industries**, Civil Application No. 37 of 2003 (unreported) held that:-

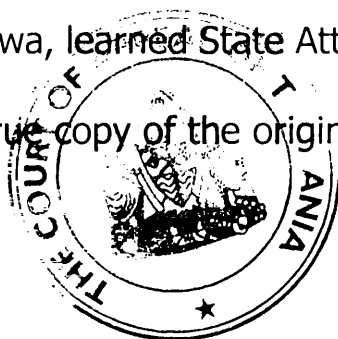
"It is the duty of the Court to desist from delayed applications such as this the effect of which is to re-open a matter which was otherwise lawfully determined".

Taking into account that each case has to be decided on its own facts, and for the above stated reasons, I am not satisfied that "*good cause*" has been shown by the applicant. As correctly submitted by the two learned State Attorneys, Neema Taji and Rachel Tulli the applicant is required to advance good cause for the Court to grant him extension of time which is the spirit of rule 10 of the Rules. Given the circumstances, that the applicant has failed to account for delay before and after being supplied with a copy of Judgment sought to be challenged, I find no basis upon which to exercise the discretionary power of the Court to grant the sought extension of time. This application is devoid of any merit, and it is thus dismissed.

DATED at **DODOMA** this 8th day of December, 2023.

Z. G. MURUKE
JUSTICE OF APPEAL

The ruling delivered this 8th day of December, 2023 in the presence of Mr. Ibendu Hashimu, unrepresented, present in person and Ms. Bertha Kulwa, learned State Attorney for Respondent/Republic is hereby certified as a true copy of the original.




D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL