

**IN THE HIGH COURT OF TANZANIA**  
**(DAR ES SALAAM DISTRICT REGISTRY)**  
**AT DAR ES SALAAM**

**MISC. CRIMINAL APPLICATION NO. 201 OF 2019**

(Originating from Economic Case No. 02 of 2016 in the District Court of Kilombero at  
Ifakara)

**EMMANUEL ALOYCE .....APPLICANT**

**VERSUS**

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

**RULLING**

Last Order: 11.12.2018

Ruling: 17.12.2018

**KALUNDE, J**

The applicant, **EMMANUEL ALOYCE**, is aggrieved by the decision of the District Court of Kilombero in Economic Case No. 02 of 2016. After failing to file a notice and petition of appeal in time, the applicant filed **Miscellaneous Criminal Application No. 148 of 2018** at the High Court, Dar es Salaam District Registry. On 11<sup>th</sup> March 2019 **Hon. Mashauri, J**, granted the applicant three days within which to file both a Notice and Petition of Appeal to the High Court. Instead of filing the same

within the days prescribed the applicant filled the notice and petition of appeal on the 27<sup>th</sup> March, 2019, sixteen days after the order granted by **Hon. Mashauri J.** When the appeal came for hearing before **Hon. J.C. Tiganga – PRM (EXT. JURISDICTION)** as he then was he struck out the appeal for being filled out of time. The applicant filed another application moving the Court for the following prayers:-

- 1. That, this Hon. Court be pleased to grant the applicant leave for extension of time to file both Notice and Petition of Appeal out of time in Economic Case No. 02 of 2016.*
- 2. Any other order (s) or relief this Hon. Court may deem fit and just to grant.*

At the hearing date on the 10<sup>th</sup> December, 2019 the Applicant was unrepresented, so he argued the application in person and Miss Imelda Mushi, learned State Attorney represented the Respondent.

In support of his application the applicant submitted that he filed an application for extension of time before **Hon. Mashauri, J** and was granted three days within which to file both a Notice and Petition of Appeal to the High Court. He further argued that he could not prepare and submit the Notice and Petition of Appeal in time because of the short period of time given and the lack of papers and a place within which to type and prepare his application.

The applicant further submitted that by the time he got the services, for the preparation of the relevant notice and petition of appeal, time had elapsed and upon submission the same was struck out by **Hon. J.C. Tiganga** then PRM (Ext. Jurisdiction) for being submitted out of time in **Extended Jurisdiction Criminal Appeal No. 03 of 2019** at the Resident Magistrate's Court of Morogoro (Extended Jurisdiction).

In reply Miss Imelda, for the respondent, sternly contested the application noting that upon review of the Applicants Affidavit in paragraphs three and

four she noted that the Applicant had already submitted an application before the Court which was heard before **Hon. Mashauri, J** and the Applicant was granted three days within which to file both a Notice and Petition of Appeal to the High Court. She further submitted that under paragraph six of the affidavit the Applicant admit that upon submission of an appeal out of time the same was struck out for being filed out of time. She argued that, legally the Applicant was not supposed to file another application since he was granted an opportunity to file out of time and failed to honor it and that in the circumstances the Applicant was supposed to file an appeal or review against the decision of **Hon. Mashauri, J**. Miss Imelda submitted further that the application lack merit for being *res judicata* before the Court and prayed that the application be struck out.

From the foregoing submissions by both parties the issue to be determined is whether this application is *res judicata*. The term ***res judicata*** is defined by Black's Law Dictionary 7<sup>th</sup> Edition (2004) by Bryan A. Garner to mean:-

***"res judicata ... 2. An affirmative defense barring the same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been — but was not — raised in the first suit. • The three essential elements are (1) an earlier decision on the issue, (2) a final judgment on the merits, and (3) the involvement of the same parties, or parties in privity with the original parties."***  
*[Emphasis Mine]*

It was Miss Imelda's view that since the High Court had already granted extension of time pursuant to the provisions of section 361 (2) of the Criminal Procedure Act, [Cap. 20 R.E. 2002] (CPA), the matter was *res judicata*; or in other words it was ***functus officio*** to hear and determine a similar application. If the applicant had failed to lodge a notice of appeal, within the allowed time, after he was granted the first extension, he ought

to have approached the Court of Appeal through an appeal or review instead of seeking a second extension in the High Court.

At this point it is essential to note that the applicant is not aggrieved by the Misc. Crim. App. No. 148 of 2018, he actually attempted to comply with the time given only to file the same after sixteen days instead of the three days granted by the Court as a result the appeal was struck out. His appeal was subsequently struck out.

In his affidavit paragraph 5 the applicant deponed that: -

*"That in the circumstances of a very short given time and the delay in receive the court order attributed to file the appeal beyond the expiration of the extended time which was registered as extended jurisdiction criminal appeal No. 03 of 2019."*

In support of his application he further submitted that he could not prepare and submit the Notice and Petition of Appeal in time because of the short period of time given and the lack of papers and a place within which to type and prepare his application by the time the Notice and Petition of Appeal was ready he was out of time, leading to the appeal being struck out. The question now is what was his remedy. Miss Imelda submitted that the matter was *res judicata*, as such, the applicant should have appealed against, or sought a review of, the decision of **Hon. Mashauri J.**

Faced with a similar scenario the Court of Appeal of Tanzania in **Tanzania Revenue Authority v Tango Transport Company Limited, Civil Application No. 5 of 2006 (CAT at Arusha) (unreported)**, in interpreting Rule 44 of the Tanzania Court of Appeal Rules, 1979, similar to Rule 47 of the current Rules said: -

***"party fails in his or her bid to obtain extension of time, then that party can try a second bite in this Court..."***

The case of **Tanzania Revenue Authority v Tango Transport Company Limited** (supra) was also cited in **Ms. Safia Ahmed Okash v**

**Ms. Sikudhani Amiri and 82 others, Civil Appeal No. 138 of 2016, (CAT at Arusha) (unreported)** where the Court of Appeal further added that: -

*"We would emphasize that a recourse to a "second bite" only arises if the application for extension is rejected by the High Court...and the successful applicant fails to utilize the time so extended by the High Court he would be barred to seek a second bite; he would have to re-approach the High Court for a further extension..."*

I am of the considered view that the Court is not, at present, being invited to revise its decision in Misc. Crim. App. No. 148 of 2018, it has, instead, been re-approached after the applicant appeal had been struck out by **Hon. J.C. Tiganga** then PRM (Ext. Jurisdiction) for being submitted out of time in Ext. Jurisd. Crim Appeal No. 03 of 2019 at the Resident Magistrate Court of Morogoro (Extended Jurisdiction). The matter is not *res judicata* and the High Court is thus not *functus officio*. In the premises, I overrule the objection raised by the Respondent.

In his affidavit paragraph 8 the applicant deponed that: -

*"That, I am still interested in pursuing the appeal and appeal can only resume upon being granted the prayers in this application."*


This is a demonstration of the applicants desire to "*re-approach the High Court for a further extension*" after his appeal was dismissed by **Hon. J.C. Tiganga**. Given the decision in in Ext. Jurisd. Crim Appeal No. 03 of 2019 was issued on 05<sup>th</sup> July, 2019 and this application was filed on 01<sup>st</sup> October, 2019. I take the view that the applicant has demonstrated "good cause" for this Court to exercise its discretion.

In the upshot, I hold that the applicant have demonstrated "**good cause**" to warrant the grant of the orders sought. The application is hereby allowed. The applicant is to file Notice of Appeal within ten days of the date

of this ruling and Petition of Appeal to be filed within forty five days of the date of this ruling.

DATED at DAR ES SALAAM this 17<sup>th</sup> December, 2019



  
**S.M. KALUNDE**  
**JUDGE**  
17/12/2008

Date: 17/12/2019

Coram: Hon. Kalunde, J

For the Applicant:

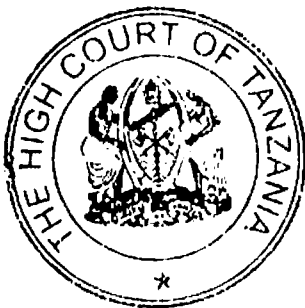
Present (in person)

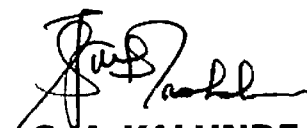
For the Respondent:

Ramadhani Kalinda, State Attorney

CC: Lakki

Court: Ruling delivered.



  
**S.M. KALUNDE**  
**JUDGE**  
17/12/2008