

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

MISC. CRIMINAL APPLICATION NO. 49 OF 2020

(Originating from Criminal Appeal No. 157 of 2016 before Hon. E.J Mkasimongwa J dated 22nd of August, 2016)

DIRECTOR OF PUBLIC PROSECUTIONS APPLICANT

VERSUS

LILIAN CHENGULA RESPONDENT

RULING

Date of Last Order: 1st June 2020

Date of Ruling: 26th June 2020.

E. E. Kakolaki, J

This is an application for extension of time within which to lodge a notice of appeal from the decision of this Court in Criminal Appeal No. 157 of 2016 before *E.J Mkasimongwa J dated 22nd of August, 2016*. It has been brought under section 11(1) of the Appellate Jurisdiction Act, [Cap. 141 R.E 2019] at the instance of the Director of Public Prosecutions and is supported by the affidavit sworn by **Nassoro Juma Katuga**, Senior State Attorney. The same has been contested by the respondent who filed the counter affidavit vehemently challenging the merits of the application.

Briefly the applicant who is the Chief Prosecutor and in-charge of all criminal prosecutions in the country had charged the respondent in the

Resident magistrate Court of Dar es salaam at Kisutu in Economic Crime Case No. 12 of 2015. The respondent was convicted of the offences she was charged with and sentence to five (5) years imprisonment and ordered to pay back the amount of money she was accused to have stolen. Disgruntled the respondent successfully appealed to this court via Criminal Appeal No. 157 of 2016 in which on the 22/08/2016 this court quashed her conviction and set aside the sentence and orders meted to her. Discontented the applicant filed an appeal to the Court of Appeal registered as Criminal Appeal No. 207 of 2017 after issuing the Notice of Appeal dated 15/09/2016. When the matter was called for hearing before the Court of Appeal on the 19/02/2020 the said appeal was struck out for being incompetent as the notice of appeal was fatally defective. It is from that cause the applicant has filed this application seeking an extension of time within which to file a notice of appeal.

On the 24/04/2020 when the matter was called for hearing both parties were represented. For the applicant was Mr. Nassoro Katuga, learned Senior State Attorney and Mr. Alex Mushumbusi learned advocate appeared for the respondent. Both parties prayed the court to argue the application by way of written submission the prayer which was granted and filling schedule orders complied with. However, the respondent's reply submission seem to have been prepared and filed by one Alex Mgongolwa learned advocate assumingly from the same law firm with Mr. Mushumbusi.

In applications for extension of time this court is vested with discretion to extend time even where the prescribed time has expired upon "good cause" shown by the applicant. However, what amounts to "good cause" the Court of Appeal in the case of **Jumanne Hassan Bilingi Versus The**

Republic, Civil Application No. 23 of 2013 (Unreported) cited in the case of **Ms. Henry Leonard Maeda and Another Versus Ms. John Anael Mongi and Another**, Civil Application No. 31 of 2013 had this to say:-

*"In essence, what amount to good cause is upon the discretion of the Court and it differs from case to case. But, basically various judicial pronouncements **defined good cause to mean reasonable cause which prevented the applicant from pursuing his action within the prescribed time**". (emphasis supplied).*

It behooves the applicant therefore to establish reasonable cause that prevented her from pursuing the appeal within the prescribed time hence this application. It is submitted by Mr. Katuga for the applicant that, the applicant's appeal to the Court of Appeal was filed in time. However, on the date of hearing it was noted that the notice of appeal was defective for mixing up the criminal case number referred in the notice of appeal which was a typographical error as a result the said appeal was struck out. That since it is a notice of appeal that institutes the appeal it is the humble submission of the applicant that extension of time in this matter is inevitable as good cause has been established. He referred the court to the cases of **Tusekile Duncun Vs. R**, Criminal Appeal No. 202 of 2009 (CAT-unreported) and **Aidan Chale Vs. R**, Criminal Appeal No. 130 2003 where the Court of Appeal had this to say on what amounts to good cause:

"Good cause as will usually consist of some good reasons why that extension which is sought should be granted. It does not have to be something exceptional "To amount to good cause there must be some good reason for what is sought."

On the other hand Mr. Alex Mgogolwa learned advocate for the respondent is resisting the grant of this application with several reasons. The first one is that under section 11(1) of the Appellate Jurisdiction Act, [Cap. 141 R.E 2002] which the proper citation is [Cap. 141 R.E 2019] the applicant was supposed to give factual information in his affidavit showing that the case is fit case for appeal for this court to grant the application.

The second reason is that no good reasons have been advanced by the applicant to warrant this court exercise its discretion whether to grant the application or not as per the requirements stipulated in the case of **Yusuph Same and Hawa Dada Vs. Hadija Yusuph**, Civil Appeal No. 1 of 2002 which provides that:

*"It is trite law that an application for extension of time is entirely in the discretion of the court to grant or refuse it. This discretion however has to be exercised judiciously and the overriding consideration is that **there must be sufficient cause for so doing.**"*

Mr. Mgongolwa added that the case of **Tusekile Duncun** (supra) cited by the applicant says nothing in connection with the reasons that the court is supposed to consider as good cause to warrant extension of time. And that in this application the applicant's affidavit discloses no reason in support of his application and the said referred case.

The third and last reason by the respondent is that the reason raised by the applicant of mixing up case numbers in the notice of appeal in his interpretation amounted to negligence and lack of diligence on the part of the applicant which could not amount to good cause. He cited the case of **Umoja Garage Vs. National Bank of Commerce** (1997) T.L.R 109 where the Court of Appeal had the following to say:

"it seems plain to me that in the instant case lack of diligence and negligence on the part of the Counsel, As Mr. Lukwaro calls it, would be even more devoid of merit as a plea for extension of time."

He added that even in the case of **Transport Equipment Ltd Vs. DP Valambia** (1993) T.L.R 91 it was strongly held by the Court of Appeal that:

"what is glaring to the eye here is sheer negligence of the advocate, which has often times been held not to be sufficient reason to extend time. For these reasons, it was impressed upon that no sufficient reasons have been advanced by applicants."

Mr. Mgongolwa went on to cite the case of **Deodat Dominik Kahanda and Edith Abdallah Kahanda Versus Tropical Fisheries (T) Limited and 2 Others**, Misc. Commercial Application No. 200 of 2017 (unreported) stating the situation where the Court dismissed the application for extension of time on the reasons advanced in the case of **Umoja Garage** (supra) the case which was not annexed to the submission, therefore I will not consider it. It was his humble prayer that this court feels bound by the Court of Appeal decisions cited by the respondent regarding negligence of the party and therefore be pleased to find that the applicant has failed to show good cause/reasonable cause to move the court to grant the application. In the upshot he prayed for dismissal of the application.

To start with the first reason advanced by the respondent to challenge the application Mr. Mgongolwa puts it that under section 11(1) of the Appellate Jurisdiction Act, [Cap. 141 R.E 2019] the applicant ought to have

stated in his affidavit in support of the chamber summons that the case is fit for appeal as one of the condition for this Court to grant the extension. With due respect to the learned counsel I don't think that is a requirement of the law for an application like the one at hand. To bring this point to light I find it appropriate to quote the provision:

*"11.-(1) Subject to subsection (2), the High Court or, where an appeal lies from a subordinate court exercising extended powers, the subordinate court concerned, may extend the time for giving notice of intention to appeal from a judgment of the High Court or of the subordinate court concerned, for making an application for leave to appeal or **for a certificate that the case is a fit case for appeal**, notwithstanding that the time for giving the notice or making the application has already expired."* (emphasis supplied)

Its patent clear from the provision that the requirement of proving whether the case sought to be appealed against is a fit case for appeal lies to applications for certificate only. This is for appeals that requires certificate to be obtained first before the same is filed and not the intended appeal like the one at hand which does not require certificate. That reason has no merit and I dismissed it.

With regard to the second reason I am in agreement with both parties that grant of extension of time being discretion of this court has to be exercised judiciously and there must be sufficient cause for so doing. See the case of **Yusuph Same and Hawa Dada** (Supra). However, what amounts to good or sufficient cause is based on the discretion of the Court and it differs from case to case. Basically, good cause can be defined to mean reasonable cause which prevented the applicant from pursuing his action within the prescribed time. See the case of **Jumanne Hassan**

Bilingi (supra). Similarly in the case of **Yusufu Same and Hawa Dada** (supra) the court had this to say:

*“what amounts to “sufficient cause” has not been defined. From decided cases a number of factors have to be taken into account, including whether or not the application has been brought promptly; the absence of any or valid explanation for the delay; lack of diligence on the part of the applicant (See **Dar es salaam City Council V. Jayantial P. Rajan** –CAT Civil Application No. 27 of 1987 (unreported) and **Tanga Cement Company Limited V. Jumanne D. Masangwa and Amos A. Mwalwanda** – Civil Application No. 6 of 2001 (unreported).”*

From the above cited case it is clear to me that there is no definition of what amounts to reasonable or good cause as that depends on the circumstances of each case. In this case the appellant has stated that the cause of her appeal being struck out was due to typographical error of the case number which the respondent submits in his third reason that it was due to negligence or lack of diligence as the advocate’s negligence has never been good cause for extension of time as per the case of **Transport Equipment Ltd** (supra). It is true and I take the cited case to be a binding authority that advocate’s negligence or his lack of diligence is not sufficient cause for extension of time. However, I wish to add that, it is not always the case as the circumstances of each case differs and consideration has to be paid on case by case. This was the position in the case of **Yusufu Same and Hawa Dada** (supra) where the Court of said:

Generally speaking, an error made by an advocate through negligence or lack of diligence is not sufficient cause for

*extension of time. This has been held in numerous decisions of the Court and other similar jurisdictions. Some were cited by the appellant's advocate in his oral submission. **But there are times, depending on the overall circumstances surrounding the case, where extension of time may be granted even where there is some element of negligence by the applicant's advocate as was held by the Single Judge of the Court (Mfalila JA as he then was) in Felix Tumbo Kisima V. TTC Limited and Another – CAT Civil Application No. 1 of 1997 (unreported).** (emphasis supplied)*

In this application, apart from the applicant's notice of appeal containing typographical error, the error which I find to be unintentional as it could be made by any reasonable man, upon striking out the said appeal in the Court of Appeal the applicant promptly filed this application seeking to remedy the situation. It was held in the case of **Yusufu Same and Hawa Dada** (supra) that in order to determine what amounts to "good cause" a number of factors has to be considered including whether or not the application has been brought promptly. The order of the Court of Appeal in Criminal Appeal No.217 of 2017 striking out the appeal was made on the 19/02/2020 and the applicant immediately thereafter on the 5/03/2020 filed this application. This is a sign of seriousness on the part of the applicant in prosecuting his intended appeal which to me amounts to good cause.

All circumstances of the case considered, I am satisfied that the applicant has shown good cause as to what prevented her from pursuing the appeal within prescribed time to warrant this court exercise its jurisdiction

judiciously to grant the application. I would therefore grant the application as I hereby do by extending the time within which to file notice of appeal. The applicant is to file the notice of appeal within 21 days from the date of this ruling.

It is so ordered.

DATED at DAR ES SALAAM this 26th day of June, 2020.




E. E. KAKOLAKI

JUDGE

26/05/2020

Ruling delivered today 26th day of June, 2020 in the presence of Mr. Kalaghe Rashid learned advocate for the Respondent and Ms. Monica Msuya, court clerk and in the absence of the applicant (DPP).

Right of appeal explained.




E. E. KAKOLAKI

JUDGE

26/06/2020