

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

AT DAR ES SALAAM

MISC. CRIMINAL APPLICATION NO. 132 OF 2019

(Originating from the Ruling of the Kisarawe District Court in Misc. Criminal Application No. 03 of 2017, dated on 13/03/2019, by Hon. D. Kisoka, RM)

GEORGE DANIEL 1ST APPLICANT

JOSEPH KAZARE 2ND APPLICANT

VERSUS

RAPHAEL PASCHALRESPONDENT

RULING

22nd June & 24th July, 2020.

E. E. KAKOLAKI J

Before this court is an application for extension of time to file a petition of appeal out of time. The application has been preferred under section 25(1)(a) and (b) of the Magistrates Courts Act [Cap. 22 R.E 2002] and section 393A (2) of the Criminal Procedure Act, [Cap. 20 R.E 2002], supported by joint affidavit of the applicants **George Daniel** and **Joseph Kazare**. The respondent on his side through the counter affidavit sworn by **Raphael Paschal**, vehemently opposed the application.

Briefly the facts that gave rise to this application can be tabled as hereunder. The applicants were jointly and together charged of Criminal Trespass into landed property before Kisarawe Primary Court, convicted and sentenced accordingly. Aggrieved with the conviction and sentence preferred an appeal to Kisarawe District Court vide Criminal Appeal No. 02 of 2016 which was dismissed on the 13/12/2016 for want of prosecution. Tirelessly and in a bid to set aside dismissal order and restore the appeal applicants filed another application, the application which was found incompetent hence struck out. Undauntedly, applicants filed Misc. Criminal Application No. 3 of 2017 in the same District Court seeking an extension of time within which to file an application for restoration of the appeal which again was found unmeritorious hence dismissed with costs on the 13/03/2019. It is from that ruling of the court applicants are before the Court seeking for extension of time to appeal against that dismissal order of their application.

The applicants in this application are represented by Mr. Joseph Manzi learned advocate whereas the respondent is fending himself. It was agreed that the application be disposed by written submission and both parties filed their submissions accordingly.

As stated earlier this application has been preferred under section 25(1)(a) and (b) of the Magistrates Courts Act [Cap. 22 R.E 2002] and section 393A (2) of the Criminal Procedure Act, [Cap. 20 R.E 2002]. Before going into merits of the application I feel obliged to comment on the provisions used by the applicants to move this Court to entertain their application. To start with the Magistrates Courts Act, whereas the provisions cited are correct

the chapter of the laws cited is incorrect as it ought to be Chapter 11 and not chapter 22 as cited by the applicants. With regard to the application of the Criminal Procedure Act, Chapter 20 of the Revised Edition which now is cited [Cap. 20 R.E 2019], the same is not applicable to the applications on criminal matters originating from the Primary Court. The restriction is imposed by the provisions of section 3(1) of the Criminal Procedure Act, [Cap. 20 R.E 2019] which provides:

*3.-(1) Subject to subsection (2), nothing in this Act shall apply to any primary court or primary court magistrate or to the High Court, a district court or a resident magistrate in the exercise of their respective appellate, revisional, supervisory, or **other jurisdiction and powers under Part III of the Magistrates' Courts Act.** (emphasis supplied)*

Powers of this Court to extend time to criminal matters originating for the Primary Court are provided under section 25(1)(a) and (b) of the Magistrates Courts Act, which is under part III of the Act. It follows therefore that the provisions of the Criminal Procedure Act (CPA), cannot apply to move the court to entertain and grant any criminal applications originating from the Primary Court such as the one at hand, as the provisions of CPA are applicable only to criminal matters originating from the District Court, Resident Magistrate Court and High Court. However, when perusing the chamber summons I have noted that the same was prepared by the applicants themselves who are lay persons before engaging the advocate at the level of hearing. I am alive to the fact that ignorance of law is not an excuse, but I have considered the fact that the

applicants apart from citing the provisions of CPA to move this Court to grant the orders sought they cited proper provisions under the Magistrates Courts Act that empowers this court to entertain their application. I will therefore proceed to determine it on merits.

The time set for appealing from the decision of the District Court or Resident Magistrate Court to the this Court under section 25(1)(b) of the Magistrates Courts Act, is thirty (30) days from the date of the decision sought to be challenged. However, under the same provision this court may extend time for filing an appeal either before or after such period of thirty days has expired and I would add upon "*good cause*" shown. However, what amounts to "*good cause*" the Court of Appeal in the case of **Jumane 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 stated that:-

"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".

Basing on the above cited decision it behoves the applicants to tell this court what made them to delay in filing the intended appeal timely hence this application. The decision of the District Court Misc. Criminal Application No. 03 of 2017 sought to be appealed against was entered on 13/03/2019,

the copy certified on the 25/05/2019 and this application filed on the 02/07/2019. The appeal was therefore supposed to be filed on or before 12/04/2019, thus this application was filed in court 80 days passed.

In an attempt to justify the reasons for delay to file the appeal for 80 days before lodging this application in this Court, Mr. Manzi learned advocate for the applicants in his submission narrated the story of what happened from the time when the applicants were charged and convicted at Kisarawe Primary Court, the appeal preferred and all subsequent applications made following dismissal of said appeal for want of prosecution. Further to that as the reason for the delay, the learned counsel referred this court to the application to set aside the dismissal and restoration of the said appeal which was struck out as deponed in paragraph 4 of the applicants' joint affidavit to be caused by negligence of the advocate and not by the applicants. His story ended when the application in Misc. Criminal Application No. 03 of 2017 before Kisarawe District Court was dismissed on 13/03/2019, whose decision the applicants are seeking extension of time to challenge by way of appeal. Mr. Manzi submitted further that the applicants have tried to their level best to have their appeal heard but their efforts proved futile. He therefore pleaded the court to grant the application by extending time so that the applicants can challenge the decision as there are great chances of winning.

On the other hand the respondent is challenging the merits of the application submitting that the appellants have failed to account for such inordinate delay of 80 days. That they have not only failed to demonstrate reasonable or sufficient cause for the delay but also to account for each

day of delay. He said the requirement of giving account on each day of delay is reiterated in a number of cases including the case of **Lyamuya Construction Company Limited Vs. Board of Registered Trustees of Young Women Christian Association of Tanzania, Civil Application No. 2 of 2010.**

The respondent submitted further that, the applicant cause of delay hinges on negligence or lack of diligence on the part of their advocate. He was of the submission that negligence or lack of diligence on the part of advocate is not sufficient ground for extending of time. He relied on the cases of **Tumsifu Elia Sawe Vs. Tommy Spades Limited**, Civil Appeal No. 362 of 1996 (unreported) which was cited in the case of **Deodat Dominic Kahanda & Another Vs. Tropical Fisheries (T) Limited**, Misc. Commercial Application No. 200 of 2017 (Unreported) copy not attached, **Umoja Garage Vs. Nationa Bank of Commerce** (1997) TLR 9 and **Transport Equipment Vs. DP Valambhia** (1993) TLR 91. The respondent was of the prayer that this application be dismissed with costs. In rejoinder submission to the respondent's submission Mr. Manzi almost reiterated what he had submitted in his submission in chief and prayers thereto.

Having visited both parties' submission as well as the joint affidavit by the applicants and counter affidavit by the respondent, I have noted and I am in agreement with the respondent that no reasons have been assigned by the applicants leave alone sufficient one to account for the inordinate delay of 80 days. It is trite law as also rightly submitted by the respondent that in establishing good cause for the delay, the applicant is not only required

to account for the delay of the period passed generally but also go further to account on each day of delay as it was held in the case of **Lyamuya Construction Company Limited**. In this case the Court reiterated factors to be looked unto when considering what amount to good cause. It said the factors are:

- 1. The applicant must account for all the period of delay.*
- 2. The delay should not be inordinate.*
- 3. The applicant must show diligence, and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take.*
- 4. If the Court feels that there are other reasons, such as the existence of point of law of sufficient importance, such as the illegality of the decision sought to be challenged.*

The only reason which the applicants have tried to advance in their affidavit is negligence or lack of diligence on the part of the advocate in prosecution of the application for setting aside dismissal order and restoration of the Criminal Appeal No. 02 of 2016 which the respondent is challenging submitting that, it cannot form sufficient reason for extension of time. I am at one with the respondent submission that negligence or lack of diligence on the part of the advocate cannot be sufficient reason to extend time as it was held in the case of **Transport Equipment** (Supra) where the Court said:

"...what is glaring to the eyes here is the sheer negligence of the advocate, which has often times been held not to be sufficient reason to extend time."

Even if we are to believe that the advocate acted negligently and consider it as the reason for delay still the same could not account for the delay of 80 days as the said negligence was caused before the institution, hearing and determination of Misc. Criminal Application No. 03 of 2017 which decision is sought to be challenged. It follows therefore that, that reason does not favour the applicants either. In the upshot, this court is of the finding that the applicants have failed not only to assign any reason for the inordinate delay of 80 days but also to account for each day passed before filing this application.

In the event, I am compelled to conclude that, under the circumstances the applicants has failed to demonstrate good cause that would entitle them extension of time as sought. The application is consequently dismissed.

It is so ordered.

DATED at DAR ES SALAAM this 24th day of July, 2020.




E. E. KAKOLAKI

JUDGE

24/07/2020

Delivered Dar es Salaam today on 24th day of July 2020 in the absence of both Applicants and respondent and in the presence of Ms. Monica Msuya, Court clerk.




E. E. Kakolaki

JUDGE

24/07/2020