

**IN THE HIGH COURT OF TANZANIA**

**(DAR ES SALAAM REGISTRY)**

**AT DAR ES SALAAM**

**MISC. CRIMINAL APPLICATION NO. 217 OF 2019**

**MOHAMED MSHAURI ..... APPLICANT**

**VERSUS**

**CHARLES MORISE ..... RESPONDENT**

**RULING**

7<sup>th</sup> Sept & 2<sup>nd</sup> Oct, 2020.

**E. E. KAKOLAKI J**

This is an application for extension of time within which to file an appeal to this Court against the decision of Morogoro District Court in Criminal Appeal No. 44 of 2018. It is preferred under Section 25(1)(b) of the Magistrates Courts Act, [Cap. 11 R.E 2002] supported by affidavit of the applicant one Mohamed Mshauri. On the other side the application has been strongly resisted by the respondent who filed his counter affidavit challenging its merits.

Briefly the applicant was charged of Malicious Damage to Property; Contrary to section 326 of the Penal Code before Mvomero Primary Court in Criminal Case No. 79 of 2018, thereby found guilty, convicted and sentenced to pay fine of Tshs. 200,000/= or serve three months jail in default for maliciously

destroying respondent's paddy seedlings. He was further ordered to pay the Respondent Tshs. 234,000/= as compensation for the destroyed property. Disgruntled unsuccessfully appealed to the District Court vide Criminal Appeal No. 44 of 2018 the result of which prompted him to appeal to this court through PC Criminal Appeal No. 19 of 2018 which was struck out on account of being time barred. Subsequent to that, the applicant filed in this Court an application for extension of time within which to appeal out of time in Misc. Criminal Application No. 107 of 2019 which again was struck out on the strength of being defective for improper citation of enabling provision of the law in support of the application on the 25<sup>th</sup> September 2019. Undauntedly, the applicant on the 12<sup>th</sup> of December 2019 filed this application once again seeking extension of time within which to file the appeal canvassed with the reasons stated in his affidavit.

When the application came for hearing parties prayed and were ordered to dispose it by way of written submission and complied with the filing schedule orders. This Court under section 25(1)(b) of the Magistrates Courts Act, [Cap. 11 R.E 2019] herein referred to as MCA, has discretion to extend time upon good cause supplied by the applicant. This position of the law was advanced by the applicant in his submission when cited the case of **Cyrilo Mapunda Vs. Alice Nombo**, Miscellaneous Criminal Application No. 151 of 2019 (HC –Unreported) where this court said:

*"...the High Court has discretion to extend time for filing an appeal whether the statutory time has expired or not. In exercising this discretion the court has to consider whether there*

*is good cause for extending the time within which to file an appeal.”*

The court when considering whether good causes have been advanced by the applicant has a duty to satisfy itself that the applicant has shown good cause that prevented him from lodging the application/appeal within the prescribed time and in doing so he has to account for every day of delay caused by him in his affidavit. See the case of **Jumane Bilingi Vs Republic**, Criminal Application No. 20 of 2014 when quoting the case of **Aluminium Africa Ltd Vs. Abdallah Dhilljali**, Civil Appeal No. 6 of 1990 (Unreported).

In discharging this important duty and in a bid to account for each and every day of his delay through his affidavit and submission the applicant advanced reasons for his delay in filing the appeal. He said, soon after delivery of the District Court decision sought to be challenged, being advised by the District Court clerk one Lucy Mganga to file his petition of appeal to this court through the District Court registry and in consonance with section 25(3) of the MCA complied with. However the said petition was forwarded to this court very late as a result PC Criminal Appeal No. 19 of 2018 was struck out for being time barred. And that, promptly and subsequent to that, he filed Misc. Criminal Application No. 107 of 2019 which again was struck out on 25<sup>th</sup> September, 2019, on account of technicalities for carrying improper citation or non-citation of the law. All these reasons submitted on are supported by his affidavit in paragraphs 4, 5, 6, 7, 8 and 9.

The applicant went on to submit that, following that act of striking out his application once again, promptly prepared another application accompanied with the affidavit signed on the 17<sup>th</sup> October, 2019 but could not file it timely since he was awaiting for supply of the proceedings and ruling of the District Court in order to attach it to this application. That, the same were furnished to him mid December 2019 as a result he managed to file this application on the 12<sup>th</sup> of December, 2019. Relying on the case of **Adriano Chanja Vs. Ranatha Kateki Mwakasola**, Land Division, Misc. Land Application No. 727 Of 2018 (HC –unreported) invited this court to find the applicant has advanced good cause and accounted for each and every day of his delay to file the appeal, thus proceed to grant the application.

On his part the respondent opposing the application submitted that, the applicant has failed to account for each and every day of his delay as no good cause has been shown to entitle this court exercise its discretionary power to grant him extension of time. In his rejoinder submission the applicant insisted that good causes have been shown and he managed to account for his delay to file the appeal. He otherwise reiterated his prayers advanced earlier in his submission in chief.

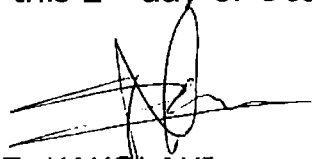
I have examined the applicant's reasons as evidenced in paragraphs 4, 5, 6, 7, 8 and 9 of his affidavit and well argued in his submission. I am left with no doubt that he has advanced good cause and accounted for his delay from the time when the appeal was filed out time in PC Criminal Appeal No. 19 of 2018 which was struck out for being time barred until when Misc. Criminal Application No. 107 of 2019 was filed and struck out on the 25<sup>th</sup> September, 2019. However, there is nothing averred in the applicant's affidavit to

account for each and every day of delay for 78 days from 25<sup>th</sup> September, 2019 to the time of filing this application on the 12<sup>th</sup> December, 2019, as per the requirement in **Jumane Bilingi** (supra). Trying to account for this inordinate delay the only reason advanced by the applicant through his written submission is that he had to wait for the supply of the copies of proceedings and ruling of Misc. Criminal Application No. 107 of 2019, so as to attach them to this application. There is no evidence advanced by the applicant to prove as to when the said copies of proceedings and ruling were supplied to him apart from merely asserting in his written submission that the same were supplied to him in mid-December, 2019. It is now settled law that submission is a summary of arguments. It is not evidence and cannot be used to introduce evidence. See the case of **Tanzania Union of Industrial and Commercial Workers (TUICO) at Mbeya Cement Company Ltd Vs. Mbeya Cement Company Ltd and National Insurance Corporation (T) Limited** (2005) TLR 41. Since in this application the applicant used the written submission to introduce that important evidence accounting for the delay of 78 days which as per the above cited law cannot form part of evidence, I would agree with the respondent and therefore hold that the applicant has failed to advance good cause and account for the inordinate delay of all those 78 days.

For the foregoing reasons and considering the circumstances of this application, it is the findings of this Court that, the applicant has failed to establish good cause that would entitle him extension of time as sought. This application is consequently dismissed.

It is so ordered.

DATED at DAR ES SALAAM this 2<sup>nd</sup> day of October, 2020.

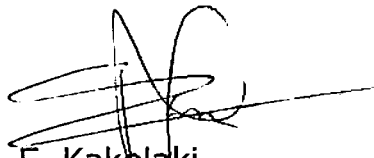


E. E. KAKOLAKI

**JUDGE**

02/10/2020

Delivered at Dar es Salaam this 2<sup>nd</sup> day of October, 2020 in the presence of Applicant, the Respondent and Ms. Monica Msuya, Court clerk.



E. E. Kakolaki

**JUDGE**

**02/10/2020**