

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

SONGEA DISTRICT REGISTRY.

AT SONGEA

MISC. CRIMINAL APPLICATION NO. 8 OF 2021

(Originating from Criminal Case No. 08 of 2019 of Songea District Court)

ATHUMANI HUSSEIN PAGWILE APPLICANT

VERSUS

THE REPUBLIC RESPONDENT

Date of hearing: 17/03/2021

Date of Ruling: 27/04/2021

RULING

I. ARUFANI, J.

This ruling is in respect of the application filed in this court under section 361 (1) and (2) of the Criminal Procedure Act, Cap 20, RE 2019 (herein after referred as the Act) whereby the applicant, Athumani Hussein Pagwile is seeking for extension of time to file notice of intention to appeal in the court out of time prescribed by the law. The application is supported by the affidavit affirmed by the applicant.

When the application was called for hearing, the applicant appeared in the court in person and the respondent was represented by Ms. Jenerosa Montano, learned State Attorney. In supporting the

application, the applicant prayed the court to receive his application and grant the same so that his appeal can be heard.

In her reply the State Attorney opposed the application and told the court that, paragraph two of the affidavit of the applicant shows the applicant deposed that, after being convicted and sentenced, he filed a notice of intention to appeal in the court within the time prescribed by the law but no copy of the alleged notice of intention to appeal is attached in his affidavit or any other evidence to support his allegation.

She went on arguing that, although the applicant stated at paragraph three of his affidavit that after filing the notice of his intention to appeal in the trial court, he made several follow up for the copy of the judgment and the proceedings of his case but he did not explain or give any evidence to show how he was making follow up of the said documents. The State Attorney said that, if he wrote a letter to the trial court he was required to attach the said letter to his affidavit so as to show when he applied for the copy of the judgment and proceedings and when he was supplied the same. At the end she prayed the application to be dismissed for lack of merit.

In his rejoinder, the applicant stated that, it is not their duty to write any document while in prison. He said their letters and documents are prepared and written by the prison admission office which filed the

same in the court and said the prison admission office is the one used to make follow up of their documents. He said their duty is only to remind and ask the prison admission office about the progress of their letters and documents. He said he was not given report from the court whether his letter of applying for the copy of the judgment was received by the trial court or not. He however said he received the copy of judgment of his case on June, 2020. He said further that, when he made follow up of his appeal he was told his appeal was not taken to the court. At the end he prayed the court to grant his application so that his appeal can be heard out of time.

After considering the submissions made to this court by both sides and going through the chamber summons and its support affidavit the court has found that, although the applicant told the court is praying his application to be granted so that his appeal can be heard out of time but as appearing in his chamber summons the clear order is seeking from the court as indicated in the first prayer is leave to lodge his notice of intention to appeal out of time. The second prayer is not clear as is not known whether is asking a question as to how to pursue an appeal with or without copy of judgment from the subordinate court or not. For clarity purpose the second prayer read as follow:-

"That, Hon. How to pursue to appeal with one a judgment copy from subordinate court."

Since even what is deposed in the affidavit supporting the chamber summons is not clear about what is sought in the second prayer the court will focus its effort to the first prayer relating to the order of lodging in the court his notice of intention to appeal out of time. Therefore the issue to determine in this application is whether the applicant has been able to convince the court there is a good cause for granting him leave to lodge in the court his notice of intention to appeal out of time

The court has found that, as rightly argued by the State Attorney the applicant deposed at paragraph 2 of his affidavit that, after being convicted he lodged his notice of intention to appeal in the court within the time prescribed by the law. He went on deposing at paragraph 3 of his affidavit that, after lodging his notice of intention to appeal in the court he began to pursue for the copy of judgment of his case for the purpose of preparing his petition of appeal. That means the cause of the applicant to delay to lodge his appeal in the court within the time prescribed by the law is because he delayed to get the copy of judgment of his case from the trial court.

The court has found that, as rightly argued by the State Attorney the applicant did not attach the copy of the notice of intention to appeal he deposed at paragraph 2 of his affidavit that he filed in the court within the time prescribed by the law to support what he deposed in the said paragraph of his affidavit. The court has also failed to see how the copy of the judgment the applicant deposed in paragraph 3 of his affidavit that he was pursuing for the same caused him to delay to file in the court the notice of his intention to appeal is now seeking for extension of time to file in the court out of time.

Sequel to that, the court has found if it is true that the applicant filed in the court the notice of his intention to appeal within the time prescribed by the law why is he now seeking for leave of the court to file another notice of intention to appeal in the court out of time. The court has been of the view that if the said notice of intention to appeal was filed in the court as deposed in paragraph 2 of the affidavit of the applicant and may be it is inoperative because of any reason, that fact has neither being deposed in the affidavit of the applicant nor said to the court by the applicant. That caused the court to find the order of extension of time the applicant is seeking from this court to lodge in the court his notice of intention to appeal out of time do not deserve to be granted as is an abuse of the court process.

The court has arrived to the above finding after seeing that, under normal circumstances and as provided under section 361 (1) (a) and (b) of the Act if a party has already filed in the court a notice of intention to appeal within the time prescribed by the law the next step is for him to file in the High Court a petition of appeal within forty five days. If he delayed to file his petition of appeal in the court within the stated period of time from the date of the decision or from the date of being supplied with the copies of the proceedings and judgment intended to be challenged, he is required to seek for extension of time to file the petition of appeal in the court out of time and not to seek for extension of time to file in the court another notice of intention to appeal out of time.

Even if it would have been said the order the applicant is seeking in his second prayer is leave to appeal to this court out of time but as provided under section 361 (2) of the Act the court is required to be satisfied there is a good cause for allowing the appeal to be filed in the court out of time. For clarity purpose the cited provision of the law states as follows:-

"The High Court may, for good cause, admit an appeal notwithstanding that, the period of limitation prescribed in this section has elapsed."

The court has found the good cause provided in the above quoted provision of the law which allows the court to admit an appeal out of the time prescribed by the law is not defined in the Act or any other law. However, the Court of Appeal and the High Court have defined it in different cases by showing what the court is required to take into consideration when determining whether it should admit an appeal out of time or not. One of the cases where the said term was defined is the case of **Bertha V. Alex Maganga**, Civil Reference No. 7 of 2016 (unreported) where the Court of Appeal of Tanzania stated as follows:-

*"Whilst it may not be possible to lay down an invariable definition of **good cause** so as to guide the exercise of the court discretion, the court is enjoined to consider, inter alia the reasons for the delay, the length of the delay, whether the applicant was diligent and the degree of prejudice to the respondent if time is extended."*[Emphasis added].

That being what the court is required to take into consideration when determining whether there is a good cause for admitting an appeal out of the time prescribed by the law the court has found it is also proper to state at this juncture that, as provided under section 361 (1) (b) of the Act the applicant was required to lodge his petition of appeal in the court within forty five days from the date of the decision

intended to appeal against or from the date of receiving the copies of the proceedings and judgment intended to be challenged.

Back to the application at hand the court has found that, when the court was hearing the application the applicant told the court that, he was supplied with the copy of the judgment of his case on June, 2020 and took the same to the admission office on the same date. If the said assertion is true the court has failed to see what caused the applicant to fail to take the required step in relation to his intended appeal from the date of being supplied with the copy of judgment up to 2nd February, 2021 when the application at hand was filed in this court.

Although the court is in agreement with the applicant that their appeals and other documents are prepared and taken to court by their admission office but there is no any explanation was given to the court to account for the period from when he was supplied with the copy of the judgment of his case to the date of filing the application at hand in this court. The law as stated in different cases including the case of **Bushiri Hassan V. Latifa Lukio Mashayo**, Civil Application No. 3 of 2007 (unreported) requires every day of the delay to be accounted for before the application for extension of time is granted. Since there is no good cause for the delay advanced to the court by the applicant for

granting him extension of time to lodge his petition of appeal in the court out of time the court has found that order cannot be granted.

In the light of what has been stated hereinabove the court has failed to see any good cause which can move it to grant any of the orders the applicant is seeking in his chamber summons. Consequently, the application of the applicant is hereby dismissed for want of merit. It is so ordered.

Dated at Songea this 27th day of April, 2021


I. ARUFANI
JUDGE
27/04/2021



COURT:

Ruling delivered today 27th day of April, 2021 in the presence of the applicant in person and in the presence of Mr. Hamimu Nkoleye, learned Senior State Attorney for the respondent. Right of Appeal is fully explained to the parties.


I. ARUFANI
JUDGE
27/04/2021

