

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**BUKOBWA DISTRICT REGISTRY**

**AT BUKOBWA**

**CRIMINAL APPLICATION NO. 67 OF 2021**

*(Arising from Criminal Case No.63 of Karagwe District Court at Kayunga )*

**DIRECTOR OF PUBLIC PROSECUTIONS.....APPLICANT**

**VERSUS**

**DENIS S/O MORIS ..... RESPONDENT**

**RULING**

**29/07/2021& 30/07/2021**

**NGIGWANA, J.**

This court is called upon to enlarge time within which to lodge an appeal out of time against the decision of Karagwe District Court. The application is by way of Chamber summons made under the provisions of Section 379 (2) and 392A (1) and (2) of the Criminal Procedure Act, Cap 20 R: E 2002 (Now Cap. 20 R;E 2019). The chamber summons is supported by an affidavit duly sworn by Mr. Chema Maswi, learned State Attorney.

A brief background of this matter is to the effect that, the respondent was charged and finally acquitted for Offence of Trespass contrary to section 299 (a) of the Penal Code Cap 16 R: E 2019. It was alleged that on 19<sup>th</sup> day February, 2019 at Kitengule Ranch within Karagwe District in Kagera Region with intent to commit an offence the appellant did unlawfully enter into the said Ranch, registered and reserved for livestock purpose, the property of Karagwe Sugar Company Ltd.

The respondent denied the allegation but after full trial, the court was satisfied that the charge against him was not proved beyond reasonable doubt, therefore he was acquitted on 11/11/2019.

Aggrieved, the applicant, on 15/11/2019 lodged the notice of intention to appeal, but later on discovered that the notice which was filed within the time prescribed by the law, was defective for being wrongly Titled.

Upon being served with the chamber summons and affidavit in support of the application, the respondent who stood unrepresented filed a counter affidavit stating the reasons why the prayer in the chamber summons should not be granted. Simultaneously, he raised preliminary objections on point of law to the effect that; **One**, the Application offended section 392A (3) (a) of the Criminal Procedure Act, Cap 20 R: E 2019 since the copy of the application was not availed to him within 30 days from the date of filing the application. **Two**, the application is incompetent since the notice of intention to appeal was filed out of time.

When the application was called on for hearing of the Preliminary objections, the respondent discovered that the decision of Karagwe District Court was delivered on 11/11/2019, and on 15/11/2019 the notice of intention to appeal was filed, thus was filed within the prescribed time hence prayed to withdraw the 2<sup>nd</sup> point of preliminary objection. As regards the 1<sup>st</sup> point of preliminary objection, respondent was alive of the Principle of Overriding Objectives thus prayed to withdraw the same, the prayer which was duly granted, hence hearing of the application commenced.

Ms. Veronica Moshi, learned State Attorney who represented the Republic adopted an affidavit of Chema Maswi, learned State Attorney as part of her submission. She submitted that the Notice of intention to appeal was filed within the required time but it was titled in the trial Court instead of the High Court of Tanzania, Bukoba District Registry. She further argued that there is overwhelming chance of succeeding the appeal.

The respondent under paragraph five of his counter affidavit conceded that the notice was defective. He argued that the applicant has not shown the illegality committed by the trial court or and that the reasons given by the applicant are not reasons for delay, wherefore prays that this application be dismissed.

Conversely, it is also well settled that the sufficient cause depends on deliberation of various factors, some of which revolve around the nature of actions taken by the applicant immediately before or after becoming aware that the delay is imminent or might occur. See decisions in the case of **Regional Manager Tan roads Kagera versus Rinaha Concrete Co. Ltd; Civil Application No. 96 of 2007 CAT, unreported and Godwin Ndeweri and Karoli Ishengoma versus Tanzania Indil Corporation (1995) TLR 200 and Republic versus Yona Kaponda and 9 others (1985) TLR 84.**

The applicant through his averment in paragraph 6 of the affidavit has advanced the reason that the **notice of intention to appeal was filed within time but the same was defective for being wrongly titled.**

As correctly pointed out by the learned State Attorney, the Notice of intention to appeal was filed within time, since the trial court pronounced its decision on 11<sup>th</sup> day of November, 2019, and the notice was filed on 15<sup>th</sup> day of November, 2019, only that the same was defective. This honorable court is in agreement with the learned State Attorney that, the Applicant filed the notice of intention to appeal titled "**IN THE DISTRICT COURT OF KARAGWE AT KAYANGA**" instead of being titled "**IN THE HIGH COURT OF TANZANIA AT BUKOBA**" as clearly settled in the case of **DPP V. SENDI WAMBURA AND THREE OTHERS** Criminal Appeal No. 480 of 2016 CAT (Unreported) and **FARIJALA SHABAN HUSSEIN AND ANOTHER V.R**, Criminal Appeal No. 274 of 2012 CAT (Unreported)

In the case of **DPP V. SENDI WAMBURA** (Supra) the Court of Appeal of Tanzania extensively discussed how the Notice of Intention appeal from a subordinate court to the High Court should be titled and formatted. The Court having heard the contenting arguments from either side and, drawing inspiration from Rule 68 of the Court of Appeal Rules, 2009 (the Rules) observed that,

*"Therefore, we propose to the relevant authority that the Notice of Intention to Appeal from subordinate courts to the High Court should have a specific format and title " In the High Court of Tanzania" although it should be filed in the District Court as per section 379 (1) (a) of the CPA. This should also be the case for the Notice of Appeal lodged under section 361 of the CPA other appellants"*

In the final event, the court of appeal invoked its revisional jurisdiction and nullified the decision of the High Court on account of the impugned notice of intention to appeal from the District Court to the High Court which was adjudged defective.

In the case of **FARIJALA** (Supra) the hot discussion emerged over the issue, whereas the Court agreed with Defense side that the observation in **DPP V. SENDI WAMBURA** to the effect that the prescribed format applies to Section 361(1) (a) of the Criminal Procedure Act Cap 20 R: E 2002 as well was, at best, *obiter dictum*.

However, for the purpose s of enhancing consistency and certainty in the procedural requirements, the Court of Appeal adopted the format which was prescribed therein, meaning, a written Notice of Intention to Appeal under section 361 (1) (a) of the Criminal Procedure Act, Cap 20 R:E 2002 must be titled " **In the High Court of Tanzania;** Being aware of the realities on the ground all over the country, **the Court of Appeal ordered that the prescribed title should become operative six months from date of the delivery the ruling in the case of Farijala to wit; 25th day October, 2018.**The grace period therefore, ended in April, 2019.

It follows therefore that, a party that intends to appeal against the decision of the district court or Court of Resident Magistrate must file **a competent Notice of Intention to Appeal**. This is a procedural way of invoking the jurisdiction of the High Court, and the same must be filed in the court from which a party is appealing from. This again is a procedural requirement

and it is logical in the sense that, the party wishing to appeal is giving notice to the court that its decision will be challenged. An appeal is therefore brought when the Notice of Appeal is properly filed in the registry of lower court.

The court of Appeal of Tanzania being the highest Court in the hierarchy of courts in our country, all other courts are bound by its decisions. The case of **DPP V. SENDI WAMBURA and FARIJALA SHABAN HUSSEIN AND ANOTHER V. R** as pointed out earlier are now Land Mark cases in this area.

Now the issue **the sole issue which need to be resolved is whether the applicant has displayed before this court sufficient reasons warranting grant of the application.**

It is well settled that for the grant of extension of time;

- (a) The applicant must account for all the period of delay.
- (b) The delay should not be inordinate.
- (c) The applicant must show diligence and not apathy negligence or sloppiness in the prosecution of the action that he intended to take.
- (d) If the court feels that there are sufficient reasons/such as the existence of a point law of sufficient importance such as the illegality of the decisions ought to be challenged. See **Lyamuya Construction versus Board of Registered Trustees**, Civil

Application No.2 of 2010 (Unreported) and LEO **SILA MUTISO**  
**VERSUS HELLEN WANGARI MWANGI [1999]2EA 231**

Generally, the law does not set any minimum or maximum period of delay. What is needed is a plausible and satisfactory explanation for the delay. The applicant must give valid and clear reasons upon which the discretion can be favorably exercised.

In the present case, as already pointed out the applicant filed a defective notice of intention to appeal. It is as good as no notice was filed as required by the law. The applicant was expected to give valid and clear reasons upon which the discretion of the court can be favorably exercised but has miserably failed to do so. It is again surprising because the applicant was aware that there was no notice of intention to appeal in the eye of law but instead of seeking extension of time within which to file the notice of intention to appeal out of time, the applicant sought extension of time within which to file appeal out of time. This again shows nothing but lack of seriousness on the applicant's side.

This honorable court is alive of the introduction of the Principle Overriding Objectives aimed at delivery of substantive justice without undue regard to procedural technicalities, but also is alive that the same cannot be applied blindly against the mandatory procedure which goes to the foundation of the case.

In the upshot, I am the decided view that the applicant has miserably failed to adduce sufficient reasons warranting grant of the application. Consequently, I dismiss the application.



30/07/2021

Date: 30/7/2021

Coram: Hon. E. Ngigwana, J.

Applicant: Veronica Moshi (SA)

Respondent: Present

B/C: Gosbert Rugaika

**State Attoreney:**

My Lord, this matter is coming for ruling. We are ready to receive it.

**Respondent:**

I am ready too.

**Order:** Ruling delivered this 30<sup>th</sup> day of July, 2021 in the presence of Ms. Veronica Moshi, learned State Attorney for the Applicant /Republic, and the respondent in person.

Right of appeal explained.

