

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

MISC. CRIMINAL APPLICATION NO. 145 OF 2021

(Original from District Court of Kibaha at Kibaha in Criminal Case No. 120 of 2020)

LONGINO LAZARO @ KASONTA ----- APPLICANT

VERSUS

THE REPUBLIC ----- RESPONDENT

Date of last Order: 29/09/2021

Date of Ruling: 06/10/2021

R U L I N G

MGONYA, J.

This is the Application for Bail pending Appeal brought under the Certificate of Urgency. The same has been brought **section 368(1) (a) (i) of the Criminal Procedure Act, Cap. 20 [R.E 2019]**, seeking from this honorable court's orders:

1. That the Honourable Court may be pleased to grant bail to the Applicant on conditions it may deem fit pending determination of **Criminal Appeal No. 120 of 2021**, pending this Honourable Court; and
2. Any other relief this Court may deem fit and/or just to grant to the Applicant.

The Chamber Summons is brought at the instance of the **Deserve Mark Attorneys**, and it is supported by the Affidavit duly sworn by **LONGINO LAZARO @ KISONTA**, the Applicant herein.

When the matter came for hearing today, on 29th September, 2021, as the matter was under urgency, I ordered the same be disposed off by way of oral submissions, whereby the Applicant was represented by the learned Advocate **Mr. Philemon Mganga** while the Republic was represented by **Mr. Genes Tesha**, the learned Senior State Attorney.

In support of the Application, Mr. **Philemon Mganga**, the learned Counsel for the Applicant prayed the Court to adopt the Applicant's Affidavit and straight referred this court to paragraphs **9** and **10** respectively in order to support the Application.

In that respect the Counsel averred that from the Appeal that, the Applicant has before this Honourable Court, he has great chance to succeed. Elaborating on the said point, Mr. Mganga said that, the **2nd ground** to the said Appeal exposes the contradiction among the trial court's Charge Sheet and Preliminary Hearing on when the offence took place/had occurred. Explaining further, the Applicant's Counsel informed the court that, the trial court's record shows that the offence took

place in **2010** and **2015** where in the Charge Sheet the same is stated that the offence took place in **2012** and **2015** respectively. In support of this point the case of ***EMMANUEL KOTECH VS R., Criminal Appeal No. 31 of 2019*** at page 2 was referred to the court to indicate that the error is fatal in Law.

Further is the **4th ground** to the Appellant where it is their firm view that the matter at the trial court was supposed to be heard and determined as the Land Case under the Land matters mechanism and not into the normal courts as it was at the trial. The case of ***LONGINO LAZARO VS. R., Criminal Appeal No. 164 of 2015*** before Dyansobera, J. was referred to support this fact.

Concluding his submission, the Counsel prayed the Applicant's prayer to be granted with bail pending Appeal.

Responding to the Applicant's submission, the learned Senior State Attorney Mr. Tesha for the Respondent averred that, in order for the Applicant to be granted bail, he has to fulfil 3 major requirements, and that the court should consider that:

1st, that the bail is only a right before conviction and sentence. However, the bail pending Appeal is not a right neither mandatory, and that there must be the following factors, so that

the Applicant can be considered bail pending appeal. Those factors being;

- *That there must be unusual/exceptional circumstances;*
- *That there must be also overwhelming possibility for Applicant to succeed where by the burden to prove it lies to the Applicant, before the court.*

Referring to the above points, Mr. Tesha informed the court that, the facts adduced by the Applicant's Counsel do not demonstrate overwhelming chances to succeed. To support the above principles, the learned Counsel cited the case of ***INNOCENT MATEO VS. R, TLR 118 [1996]***.

On the reason that Charge Sheet had contradicted the Preliminary Hearing, Mr. Tesha informed the court that, the court records do not contain the said Charge Sheet so as to compare on what the Counsel has submitted.

On the referred issue of land ownership and related matters to the case which was at trial court, it is the Counsel's view that the same does not concern this Application as the matter was already determined. In the event therefore, the major question is that, the offences charged to the Applicant does the provide any overwhelming chances to succeed in Appeal as the Applicant was sued by people who sold them the owner's land by obtaining

money by false pretence. Further, that he was sued by different owners.

Concluding, it was Mr. Tesha's firm view that there is no any overwhelming chance for the Applicant to succeed in the pending Appeal nor in the instant Application for the reasons stated above. Hence prayed the court to determine this Application judiciously.

The issue before me for determination is **whether there is a reasonable/sufficient cause for granting bail pending appeal to the Applicant.**

I am alive of the law and conditions applicable in this kind of Application. The law on this matter is:

First, starting from the premises that while bail pending **trial** is a right to the accused person, **bail pending appeal is not.** The applicant in a bail pending appeal, it should not be forgotten, is a convict already. The onus is, therefore, on him to prove that justice demands that he be out on bail rather than inside.

Second, that Bail pending appeal should only be granted for **"exceptional and unusual reasons"**. Courts of law have not tabulated what these exceptional and unusual reasons could be; but of course, each case, therefore, would have to be

considered on its own merits and circumstances (**RAGHBIR SINGH HOMBE V R [1958] E.A. 337**);

Third, neither the complexity of the case nor the good character or social standing of the applicant nor alleged hardship of parents or dependents justifies grant of bail pending appeal;

Fourth, delay before the actual appeal is heard is not in itself a good ground for granting bail pending appeal. (**GIRDHER BHANJI NASRANI V. R. [1960] E.A 320**).

Fifth, that Bail pending appeal could be granted if there are overwhelming chances of success in the intended appeal. On this you may wish to see **CASES R. V. SAKERBAI M. A. GANGI [1967] H. G. D. N. 243 HASSANALI HALJI V. R. [1968] H. C. D. N 174; ATLILIO S/O MOSOA R V [1968] H. C.D N. 295 MIPAWA V R [1971] H. C. D N 62;**.

But, it cannot be said, where an argument on the facts of a case would need a careful analysis at the appellate level, that it would be easy to say that an appeal has overwhelming chances of success.

Sixth, there is no principle of law which says that a person released on bail pending appeal will not be sent back to prison if his appeal fails.

My considered view on the subject is that one suggested by our brother Samatta, J (as he then was) in ***ABEL MWANGENDE V. R, Misc. Criminal Cause No. 326 of 1988 - Dodoma***, when he says that:

"The task of deciding whether a person who has been convicted should be granted bail involves balancing the considerations of the liberty of the individual and proper administration of justice."

I have gone through the records of this Application including the parties Affidavits and the submissions from both learned Counsel. From the same I have gathered the following:

That indeed before this honorable court there is an Appeal in favor of the Applicant. The same is ***Criminal Appeal No. 120 of 2021 before Hon. Mruma J.***

However, in determining this Application taking into consideration the principles that governs this kind of Application as narrated above, I decided to go through the Applicant's Affidavit to see whether the exceptional reason/(s) for bail pending appeal has been demonstrated, since the same was not submitted by the Applicant's Counsel during his submission in hearing of this matter.

To my surprise as it was to the Applicant's Counsel submission before the Court, I have failed to find any tangible reason in that respect. I have noted that, the entire Affidavit is full of the paragraphs referring the original matter at the trial court and also the aspects of the appeal before the Court. The only paragraph that I have found in so far to have the reason as to why the Applicant should be considered bail pending Appeal is **paragraph 4** of the same of which states:

"4. That, the Applicant is a father doing agricultural activities with one wife and blessed with 3 young children one at age 11, second at age 8 and the last one at age 3, all depend on him and he is also the one to take care of his mother since his father already died some years ago and his wife does not work or she is just a house wife."

I have to be frank to the Applicant that, the above said reason cannot fit this Application. To grant such a serious Application under the said reason, will be to open a ***Pandora's box***. I say so since the reason under paragraph 4 as seen above is not an exceptional at all as it is a fact that almost every prisoner/inmate has similar condition of which is not exceptional

in any way. From my observation, is that the Applicant's Counsel took very simple this Application. He has to refer to the above stated qualifications to this Application to understand the weight he was to consider in this Application.

I am obliged to state that, even in a position where there is an exceptional condition which will be advanced as a measure to grant the Application, still that condition must be proved on rather must have proof so as to put weight for the Court to consider. ***Eg.*** Suppose it is said that the prisoner is sick and that he is in danger as he cannot be treated in jail, **still** there must be relevant documents to support the allegation.

On this point too, let me remind the Applicant's Counsel that **sections 110 (1) and (2), 111, 112 and 113 of the Tanzania Evidence Act, Cap. 6 [R.E 2019]** are still in existence carrying the same weight as before. For case of reference, let me quote the same:

In sections 110 (1) and (2), 111, 112 and 113 which provides:

"110. (1) Whoever desires any Court to give Judgment as to any legal rights or liability dependent on the existence of facts which he asserts must prove those facts exist.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person;

111. The burden of proof in a suit proceeding lies on that person who would fail if no evidence at all were given on either side;

112. The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person;

113. The burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence."

It is from the above, it is my firm view that, in absence of the tangible reason for this Application and proof thereto, this Application is untenable.

It is from that serious omission, there is no way this Application can be granted under the circumstances.

It is from that stance; consequently, the Application is hereby **DISMISSED** in its entirety.

It is so ordered.

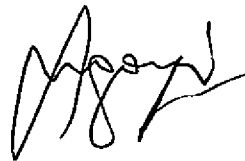


L. E. MGONYA

JUDGE

06/10/2021

Court: Ruling delivered in my chambers in presence of Mr. John James, Advocate holding brief for Advocate Philemon Mganga for the Applicant, Mr. Genes Tesha, Senior State Attorney for the Respondent and Ms. Veronica RMA.



L. E. MGONYA

JUDGE

06/10/2021