

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(ARUSHA DISTRICT REGISTRY)
AT ARUSHA**

MISC.CRIMINAL APPLICATION NO. 11 OF 2020

(Originating from Simanjiro District Court, Criminal Appeal No. 6 of 2017)

LOSIEKU NAMBARI APPLICANT

Versus

LEMOMO MOLLEL RESPONDENT

RULING

26th May, 2021 & 16th July, 2021

MZUNA, J.:

Mr. **Losieku Nambari**, the applicant herein, is seeking for an extension of time to file appeal against the decision of the District Court of Simanjiro in Criminal Appeal No. 6 of 2017 out of time. The application is supported by an affidavit affirmed by Losieku Nambari, the applicant. The respondent contested the application by filing counter affidavit deponed by the himself.

At the hearing of this application, the applicant was represented by Mr. Samson Rumende, learned advocate whereas, Mr. Lengai Loitha appeared for, and represented the respondent. The application was argued orally.

The background story as can be seen in the affidavit of the applicant is that the applicant was the respondent in Simanjiro District Court (hereinafter referred to as District Court), in Criminal Appeal No. 6 of 2017. He was dissatisfied with the judgment and therefore, lodged notice of intention to appeal to this court. He later on, filed his appeal in this court vide PC Criminal

Appeal No. 12 of 2018 which was struck out on 1/8/2019 for being incompetent hence, this application.

The main issue is whether there is sufficient cause for the delay? Before I delve on the merits of the application, there is a point of objection raised by Mr. Lengai in his submission that the applicant's counsel raised new facts which were not canvassed in the affidavit about Applications No. 25 of 2018 and 56 of 2019 which were neither stated in the applicant's affidavit nor were they made plausible in the record. It is his view that they cannot be entertained at this juncture, since they were new facts aiming at taking the other party by surprise. He cautioned this court as to the new facts being introduced by the applicant as they never featured in the affidavit of the applicant.

Mr. Rumende purports to say that he filed Misc. Criminal Application No. 25 of 2018 which was also struck out after another preliminary objection was raised. According to Mr. Rumende, they filed another Misc. Criminal Application No. 56 of 2019 which they withdrew with leave to refile.

I agree with Mr. Lengai because it has been the well known principle of the law as well stated in the cases of **TUICO vs. Mbeya Cement Co. LTD and Another** [2005] TLR 41 and **The Registered Trustees of the Archdiocese of Dar Es Salaam v. The Chairman Bunju Village Government and 4 Others**, Civil Appeal No 147 of 2007 (unreported) that:-

"A submission is a summary of arguments and cannot be used to introduce evidence".

For that reason, I agree that this court cannot deal with matters not otherwise raised in the affidavit instead were introduced during submissions. The record is silent as to the filing of the two applications above stated.

I revert to the substance of the application. In his affidavit, specifically paragraph 12 the applicant contended that he delayed in filing his appeal due to the striking out of PC Criminal Appeal No. 12 of 2018. The record is very clear that the appeal was struck out on 01/08/2019. This application was filed on 25/02/2020 almost after seven months.

Submitting in support of the application, Mr. Rumende premised his arguments to justify the delay on two grounds which are **one**, technical reason and **two**, illegality of the decision meted out by the District Court. The learned advocate for the applicant submitted that after the delivery of judgment on 19/03/2018 ten days later, the applicant appealed to the High Court vide PC Criminal Appeal No. 12/2018 which was filed within time but subsequently, this court sustained objections raised by the respondent, striking out the appeal, hence the present application.

Supporting his argument that there was a technical ground for the delay and not negligence, Mr. Rumende referred the court to the efforts made even after the matter was being struck out. To buttress his argument, he cited to me the case of **Lyamuya Construction Company Ltd Vs. Board of Registered**

Trustees of Young Women's Christian Association of Tanzania, Civil Application No. 2 of 2020 (unreported), where conditions to grant application for extension are stated. Regarding the issue of illegality, Mr. Rumende argued that, there is anomaly committed by the District Court because it exceeded its jurisdiction by assuming the powers of the trial court instead of those of the appellate court by substituting acquittal with conviction. Owing to those reasons, Mr. Rumende prays this court to allow the application and extend time to lodge an appeal.

Contesting the application, Mr. Lengai in his submission argued that, the main reason which has been advanced in the affidavit is the striking out of PC Criminal Appeal No. 12 of 2018 which he says is a technical delay. Mr. Lengai further submitted that, the appeal was struck out on 1/8/2018 by Hon. Maige, J. and since that day the applicant has stayed hopelessly idle for seven months before filing the present application on 25/02/2020.

Mr. Lengai contended that the fact that the applicant was present when the ruling was delivered and copies of the ruling were served on the same day therefore, failure to file the application signifies nothing but negligence. The advocate maintained that, discretion of the court to extend time must be judiciously exercised citing the case of **Samson Kishosha Gabba Vs. Charles Gabba** [1990] TLR 132 where the court held that, the court must consider the reasons for delay as well as likelihood of chances of success in the intended appeal.

To him, the delay for seven good months cannot be justifiable on the alleged reason of technical ground. Mr. Lengai also said that, the case of **Lyamuya Construction** (supra) is distinguishable to the case at hand since the applicant has not accounted for the period of the delay of seven months and therefore the delay is inordinate and the applicant proved negligent. To buttress his argument, Mr. Lengai cited the case of **Seleman Juma Masala Vs Sylvester Paulo Mosha and Another**, Civil Application No. 210 of 2017 (unreported), which emphasize on the requirement to account for each day of the delay. In his view, the applicant has failed to account for seven months delay.

On the purported illegality of the decision District Court and chances of success in the intended appeal, Mr. Lengai submitted that, the District Court has powers to uphold or revise decisions of Primary Court and in doing so, the District Court should direct itself to substantive justice than technical errors. Mr. Lengai prays this court to dismiss the application with costs.

In rejoinder submission, Mr. Rumende reiterated his earlier position praying the prayer of costs that was advanced by his colleague to be waived.

I have placed considerable weight on the affidavits of the parties and the written submissions for and against the application, the question to ask is, has the applicant advanced sufficient cause warranting the extension of time sought?

In determining the issue above raised, I have to see what section 25(1)(b) of the Magistrates' Courts Act, Cap 11 [R.E 2002] to which this application relates. It reads:-

*"...if aggrieved by the decision or order of a district court in the exercise of its appellate or revisional jurisdiction may, **within thirty days after the date of the decision or order, appeal therefrom to the High Court; and the High Court may extend the time for filing an appeal either before or after such period of thirty days has expired.**"*

(Underscoring mine).

In the circumstances, I consider that after striking out PC Criminal Appeal No. 12 of 2018, the application that followed is the present application. The question is whether after the striking out PC Criminal Appeal No. 12 of 2018 on 1/8/2019 was the applicant diligent in pursuing this application? The instant application was filed on 25/2/2020, which is almost seven months as submitted by Mr. Lengai. Mr. Rumende seeks refuge on technical delay as the ground for delay. I do not agree with him that the application at hand can be covered under the ground of technical delay considering the time of the delay, which is seven months, which in my view is inordinate in terms of **Lyamuya Construction Company Ltd** (supra) where the Court of Appeal considers the length of time as a ground to extend time. As intimated above, Mr. Rumende said nothing about the seven months, which makes me to hold him negligent. Therefore, the seven months are not accounted for.

Regarding illegality of the decision sought to be challenged, Mr. Rumende submitted that the District Court erred for failure to substitute the acquittal and in the alternative convicted the accused. On his part, Mr. Lengai contended that there is no illegality as the District Court exercised its powers as conferred to it by the law. I have also revisited the decision of the District Court, I could not grasp the illegality put forth by Mr. Rumende. Relying on illegality as ground for extending time, the alleged illegality must be apparent on the face of record and not the one drawn by a long drawn process. In this stance, I am guided by the decision of the Court of Appeal in **Finca (T) Limited and Another Vs. Boniface Mwalukisa** Civil Application No. 589/12 of 2018, where it was stated:

"Applying the foregoing statement of principle to the case at hand, I am not persuaded that the alleged illegality is clearly apparent on the face of record of the impugned decision. Certainly, it will take a long-drawn process to decipher from the impugned decision the alleged misdirection or non-directions on points of law."

Guided by the above decision, the illegality in the impugned decision as pointed out by Mr. Rumende it is not apparent on the face of record. The record does not convince me that there is apparent illegality in the impugned decision.

As well submitted by Mr. Lengai, in applications for extension of time good cause is the underlying factor. The cases of **Athumani Amiri Vs. Hamza Amiri and Adia Amiri**, Civil Application No. 133/02/2018 and **Blue line Enterprises Ltd Vs. East African Development Bank**, Misc. Civil Cause No.

135/95 (both unreported), are instructive. In addition to that, the applicant has to account for each day of the delay. The case of **Seleman Juma Masala** (supra) while quoting its previous decision in **Bushiri Hassan Vs. Latifa Mashayo**, Civil Application No. 3 of 2007 (both unreported), the Court of Appeal observed:

"Delay of even a single day has to be accounted for otherwise, there would be no point of having rules prescribing periods within which certain steps are to be taken."

In the case at hand, the applicant has miserably failed to account for each day of the delay. The allegation that the delay is due to technical delay is as well is not supported by any proof. For the above reasons, the application stands dismissed for failure to adduce sufficient cause for the delay.

Application is hereby dismissed with costs.

Order accordingly.



M. G. MZUNA,
JUDGE.
July 16, 2021.