

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

MISCELLANEOUS CRIMINAL APPLICATION NO. 40 OF 2021

*(C/F Criminal Appeal No. 9 of 2021, of Moshi District Court, Originally Criminal Case
No. 29 of 2021 of Moshi Urban Primary Court)*

RICHARD VICENT MUSHI APPLICANT

VERSUS

TUNUKIWA GODWIN MGALA.....RESPONDENT

RULING

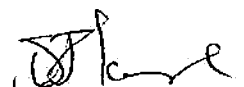
24/5/2022 & 11/7/2022

SIMFUKWE, J.

The applicant Richard Vicent Mushi, has moved this Court under **section 11(1) of the Appellate Jurisdiction Act, Cap 141 R. E 2019**, seeking for extension of time within which to file Notice of intention to appeal to the High Court of Moshi in respect of Criminal Appeal No. 9 of 2021 of Moshi District court delivered on 16/9/2021. The application was supported by the affidavit deposed by the Applicant's advocate, Mr. Gideon B. Mushi and contested by the Respondent's counter affidavit.

The parties argued the application by way of filing written submissions.

The Applicant was represented by Mr. Gideon Mushi, learned counsel, while the respondent was urepresented.



The applicant's advocate before submitting in respect of the reasons for the delay to file notice of intention to appeal on time, he referred to **section 361 (1) (a) of the Criminal Procedure Act, Cap 20 R.E 2019** and argued that it is the requirement of the law that, a person who intends to appeal to the High Court against the decision of the District Court, has to file notice of intention to appeal ten days from the date of judgment. Thus, in the instant matter, the applicant should have filed notice within ten days from 16/9/2021 when the impugned decision was delivered. Since he did not file the same then he filed this application for extension of time.

Having established this position, the applicant's advocate adopted all the contents of his affidavit to form part of his submission. He continued to argue that he filed the instant application under **section 11(1) of the Appellate Jurisdiction Act** (supra) which provides that:

*"Subject to subsection (2), the High Court or, where an appeal lies from a subordinate court exercising extended powers, the subordinate court concerned, may extend the time for giving notice of intention to appeal from a judgment of the High Court or of the subordinate court concerned, for making an application for leave to appeal or for a certificate that the case is a fit case for appeal, notwithstanding that the time for giving the notice or making the application has already expired."*Emphasize is underlined.

Mr. Mushi submitted further that, it is the cardinal principle of law that the applicant has to advance sufficient cause for the delay to file extension of time within the prescribed time. To substantiate the position, he referred

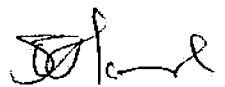
to the case of **Godwin Ndewesi and Karoli Ishengoma vs Tanzania Audit Corporation [1995] T.L.R 200** which held that:

"In order to justify a court extending the time, during which some steps in procedure requires to be taken, there must be some material on which the court can exercise its discretion." Emphasis is underlined

The first reason for the delay to file the said Notice of Intention to appeal on time as submitted by Mr. Mushi is that, after the judgment in Criminal Appeal No. 9 of 2021, the applicant's advocate faced two deaths of his brother's son namely Hans Deodatus Mushi and his uncle's son Bahati Fraterne Mushi. That, after the said deaths, he was involved in funeral arrangements as a result he came to find that time to lodge Notice of intention to appeal had elapsed, hence this application.

The Applicant's advocate also drew the attention of this Court to another reason which the court could use to extend time. That, the trial court had no jurisdiction to try the said matter and the decision made thereof shall be declared null and void. Mr. Mushi supported his point by stating that it is a settled principle of law that if there is illegality of the decision sought to be challenged, the court can extend time for the purpose of looking at what transpired before the Trial court. He cemented his argument by referring to the case of **Lyamuya Construction Co. Ltd vs Board of Registered Trustees of Young Women's Christian Association of Tanzania, Civil Application No. 2 of 2010**, CAT (Unreported) which at page 6 and 7 held that:

"As a matter of general principle, it is the discretion of the court to grant extension of time. But that discretion is judicial,



and so, it must be exercised according to the rules of reason and justice and not according to private opinion or arbitrarily. On the authorities however, the following guidelines may be formulated;

a.

b.

c.

d. If the courts feels that there are other sufficient reasons, such as the existence of a point of law of sufficient importance such as the illegality of the decision sought to be challenged." Emphasis underlined

On the strength of the advanced reasons and the cited authorities, Mr. Mushi prayed the Court to grant the application sought.

Replying to the submissions in chief, the Respondent submitted to the effect that, it is a legal requirement to lodge notice of intention to appeal within ten days from the day when the decision was delivered as per **section 361 (1) (a) of Criminal Procedure Act** (supra). Thus, in Criminal Appeal No. 9 of 2021 in the District Court of Moshi, since the judgment was delivered on 16/9/2021, the applicant had to file Notice of intention to appeal on or before 26/9/2021.

It was the respondent's further submission that in application for extension of time, the applicant has to furnish sound reasons to move the court to grant the same as it was held in the case of **Godwin Ndewesi and Karoli Ishengoma vs Tanzania Audit Corporation [1995] T.L.R 200.**

Replying the reason that the applicant's advocate was bereaved, the respondent argued that the same does not hold water since his affidavit

does not state when those deaths occurred. That, there is no evidential proof to support the assertion that those deaths occurred. There is no death certificate or burial permit to support his allegation since it is settled law that who alleges must prove.

It was further stated that the applicant had to lodge notice of intention of appeal on 26/9/2021. However, even this application for extension of time was filed on 22/12/2021 which is a delay of almost three months. Thus, the fact that the advocate faced deaths of his relatives immediately after date of judgment cannot warrant inordinate delay of three months since ordinarily funeral ceremony cannot take more than a week and there is no funeral which takes three months.

In respect of the illegality as a reason to extend time, the respondent submitted to the effect that the reason that the judgment was tainted with illegality cannot sound if at all the delay is inordinate. That, the fact that the trial court had no jurisdiction itself cannot warrant a delay of such long time.

The respondent was of the view that it is for the interest of justice that litigations must come to an end to enable the parties to engage in their daily businesses.

The respondent concluded that this application should be dismissed for being devoid of merit.

I have considered parties' submissions, the affidavit of the Applicant's advocate and the counter affidavit of the Respondent. The issue for determination is **whether there are sufficient reasons to grant extension of time to the applicant**

The parties have cited the provision of the law as well as case laws in respect of extension of time. I am grateful for such authorities.

It is trite law that granting an application for extension of time is the court's discretion. The applicant is required to avail the court with sufficient material for the delay and failure to abide with time for the court to exercise its discretion. There are a number of cases to this effect, among them were cited by the parties in their submissions. In the case of **Karibu Textile Mills Limited vs Commissioner General, Tanzania Revenue Authority, Civil Reference No. 21 of 2017**, the Court of Appeal at page 10 of its ruling had this to say: -

"It is settled that extension of time is a matter of discretion on the part of the court and such discretion must be exercised judiciously and flexibly with regard to relevant facts of the particular case. Admittedly, it has not been possible to lay down an invariable definition of good cause so as to guide the exercise of the court's discretion. Nevertheless, the Court has consistently looked at a number of factors such as the reasons for the delay, the length of the delay, whether the applicant was diligent, the degree of prejudice to the respondent if time is extended."

There are two reasons advanced by the Applicant for the Court to grant extension of time: **One**, that the advocate was bereaved and **two**, illegality.

I will deal with one reason after another having in mind the factors listed in the above cited case of **Karibu Textile** (supra). Starting with the reason that the applicant's advocate was bereaved; this reason has been

established under paragraph 7 of the affidavit of the applicant's advocate. It reads:

"That the Applicant is a lay person. When the Appellate Court pronounced its Judgment, the Applicant's Advocate faced two deaths of his near relatives i.e., a son of his brother and a son to his uncle (baba mkubwa)."

With due respect to the applicant's advocate, this is not sufficient reason to grant extension of time sought because of the following reasons: **First**, as rightly submitted by the respondent, the applicant did not establish when the said deaths occurred. **Second**, he has failed to account for each day of delay since from 16/9/2021 when the impugned decision was delivered to 22/12/2021 when the applicant filed the instant application it is more than three months which the applicant failed to account for. Also, paragraph 7 of the affidavit suggests that the applicant pleaded the reason of his ignorance. However, the same cannot be ground of extension of time since ignorance of law has no excuse. This position was stated by the Court of Appeal in the case of **Wambele Mtumwa Shahame vs Mohamed Hamis, Civil Reference No. 8 of 2016**, that:

"It is trite law that ignorance of the law is not an excuse and hence, cannot stand as good cause of delay."

Therefore, on the strength of the above argument, the first ground of extension of time as advanced by the applicant's advocate has no merit.

With regard to the second ground, the Applicant averred that the decision sought to be challenged is tainted with illegalities. In his affidavit he did not state the said illegality. However, in his submission, the applicant's

advocate averred that the trial court and the first appellate court had no jurisdiction to entertain the case.

It has been insisted in a number of authorities that the point of illegality must be on the face of the record and not one which will invite long discussion of the parties. In the case of **Fatma Hussein Shariff v Alikhan Abdallah (As Administrator of the Estate of Sauda Abdallah) & 3 Others, Civil Appeal No.536/17 of 2017**, the Court of Appeal of Tanzania at page 13 held that:

"It should be noted that, for illegality to be considered as a good cause for extending time, it has to be on point of law of sufficient importance and it must be apparent on the face of record and not one that would be discovered by a long-drawn argument or process."

In the instant matter, the raised illegality of jurisdiction is point of law which is on the face of the record. The same was raised unsuccessfully in the district court. Thus, since the same is on the face of the record, then it is prudent for the same to be addressed before the High court.

Basing on the reason of illegality, I hereby grant the application sought without costs. The Applicant herein should file Notice of Intention to appeal within ten (10) days from the date of being supplied with a copy of this ruling.

It is so ordered.




S.H. SIMFUKWE

JUDGE

11/7/2022