

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR-ES-SALAAM DISTRICT REGISTRY)

AT DAR-ES-SALAAM

MISCELLANEOUS CRIMINAL APPLICATION NO. 158 OF 2022

(Originating from Misc. Criminal Application No. 24 of 2021 of the Resident Magistrate's
Court of Dar-es-Salaam at Kisutu)

BASHIRI FENAL ABDI ALI AWALE APPLICANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS RESPONDENT

RULING

Date: 07 & 14/12/2022

NKWABI, J.:

The applicant has brought this application under the provisions of section 361(2) of the Criminal Procedure Act, Cap. 20 R.E. 2019 and section 14 (1) of the Law of Limitation Act, Cap. 89 R.E. 2019. It is supported by an affidavit, duly sworn by Mr. Michael Joachim Tumaini Ngalo, learned counsel for the applicant.

According to the record of the trial court, the applicant, together with another person, was charged with several counts including forgery. That was in Criminal Case No. 478 of 2016. Then, in the year 2021, the respondent lodged in the trial court, Misc. Criminal Application No. 24 of 2021 for forfeiture of some money the property of the applicant in this application.

The application was granted in the absence of the applicant herein. His application in this Court to revise the ruling of the trial court failed as the matter was struck out for being incompetent, hence this application.

The applicant, in this application is praying for the following orders:

1. An order extending time to the Applicant to issue a notice of intention to appeal and lodge a petition of appeal to the High Court against the proceedings of, ruling and drawn order given in Miscellaneous Criminal Application No. 24 of 2021 by the Resident Magistrate's Court of Dar-es-Salaam at Kisutu dated 20th June 2022.
2. Subject to prayer 1 above being granted, an order specifying the period within which the applicant should file both the notice of intention to appeal and the Petition of Appeal.
3. An order that the costs of this application shall be in the cause; and
4. Any other relief(s) that the Hon. Court may deem just, fit and proper to grant to the Applicant in the circumstances.

The application is resisted by the respondent who filed a counter-affidavit duly sworn by Tully James Helela, learned State Attorney. The application was disposed of by way of oral submissions. Mr. Jovison Kagilwa, learned

counsel appeared for the applicant while the respondent was duly represented by Messrs. Shadrack Kimaro, and Moses Mafuru, learned Principal State Attorney and learned State Attorney respectively.

It appears that the learned State Attorney for the respondent raised a preliminary objection that the affidavit in support of the application contains hearsay evidence. On my evaluation of the evidence on the affidavit, the preliminary objection crumbles on the authority of the case of **Phantom Morden Transport (1985) Limited v. D.T. Dobie (Tanzania) Limited**, Civil Reference No. 15 of 2001 and No. 3 of 2002 CAT (unreported):

"Where the offensive paragraphs are inconsequential, they can be expunged leaving the substantive parts of the affidavit remaining intact so that the Court can proceed to act on it."

Since the illegality ground seems to dispose of the application, I will deal with the same only. The alleged illegality is found in paragraph 8 and 23 of the affidavit. Paragraph 8 states that:

8. My perusal of the record of the application at Kisutu Court revealed that:-

- (a) The chamber summons and supporting affidavit which initiated the application do not show the date they were either admitted or filed thereat;
- (b) There is no any court order that the Respondent be served with either a copy of the application or summons to attend the Hon. Court;
- (c) Although the chamber summons does not indicate that the application was ex-parte one, it was so proceeded with and determined;
- (d) Although there was no prayer of hearing to that effect, the Court ordered the application be heard by way of written submissions by the respondent which was indeed done; and
- (e) Much as a ruling on the application was set for delivery on two different dates, there is no any order on the record that the Applicant herein be notified.

Then paragraph 23 goes:

"That the Applicant's major complaint in the intended appeal is that he was denied a hearing on the Application at Kisumu Court and as

result, he has been condemned unheard with an adverse order issued forfeiting his property rights in the monies in the accounts.”

He thus stated in paragraph 24 that that is an illegality.

In paragraph 4 of the counter-affidavit the respondent neither disputes nor notes the contents of paragraph 8 claiming that they are better known by the applicant while the same are based on the proceedings and trial court's record.

The respondent too disputes the contents of paragraphs 23 and 24 of the affidavit in support of the application on the claim that the applicant absconded and fled to Kenya while under investigation without any proof on the alleged abscondment or request for summons and the efforts to serve the applicant herein (affidavit of service).

In reply submission, Mr. Kimario argued that the applicant had absconded investigation and the trial court had power to issue forfeiture order. He added that there was no way the applicant could be served. He thus disputed the claim that the applicant was denied the right to be heard.

I think it is clear on the proceedings of the trial court that the trial court, though that application was not ex-parte application, did not issue summons to the applicant herein. The applicant was therefore neither summoned, nor is there any proof of service. In the circumstances, the failure to accord a right to a hearing seems to be not only apparent on the face of the record but also of sufficient importance and warrants this court's granting the application for extension of time within which the applicant lodges a notice of intention of appeal and files a petition of appeal in this Court. In this approach, I am guided by **Lyamuya Construction Company Limited v. Board of Registered Trustees of Young Women Christian Association of Tanzania**, Civil Application No. 2 of 2010 CAT (unreported) where it was ruled that:

"Since every party intending to appeal seeks to challenge a decision either on point of law or fact, it cannot in my view, be said that in VALAMBHIA's case, the Court meant to draw a general rule that every applicant who demonstrates that his intended appeal raises points of law should as of right be granted extension of time if he applies for one. The Court there emphasized that such point of law must be that 'of

sufficient importance' and, I would add that it must be apparent on the face of the record, such as the question of jurisdiction; not one that would be discovered by long drawn argument or process."

See also **Omary Ally Nyamalege (As the Administrator of the estate of the late Seleman Ally Nyamalege) & 2 Others v. Mwanza Engineering Works**, Civil Application NO. 94/08 of 2017 (CAT) (unreported).

In the final analysis, I find that the applicant has demonstrate sufficient cause for extension of time. I allow the application. The applicant is ordered to file the notice of intention to appeal to this Court within 30 days from the date of the delivery of this ruling. He is also ordered to file a petition of appeal within 45 days from the date of the delivery this ruling. I make no order as to costs as this is a criminal matter.

It is so ordered.

DATED at DAR-ES-SALAAM this 14th day of December, 2022.




J. F. NKWABI

JUDGE