IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[ARUSHA DISTRICT REGISTRY]
AT ARUSHA

MISC. CRIMINAL APPLICATION NO. 82 OF 2020
(C/f the High Court of Tanzania at Arusha, Criminal Appeal No. 19 of 2020, Originating from the Resident Magistrates' Court of Manyara, Economic Case No. 13 of 2016)

PARICULIS SINJOLE TONGOLI
MAKAOLI @ TONGOLI SINJOLE MELAA ..... 1st APPLICANT
YOHANA KAPURWA KILIMO ..... 2nd APPLICANT
ISAYA LEMIKWETI MAKALYA @
LAMBAIWA LEMBRIS ..... 3rd APPLICANT

Versus

REPUBLIC ..... RESPONDENT

RULING

14th December, 2021 & 25th February, 2022

Masara, J.

In this Application, the Applicants have invoked the provisions of Sections 361(2) and 371(3) of the Criminal Procedure Act, Cap. 20 [R.E 2019] (hereinafter the CPA), urging the Court to set aside its order dated 06/11/2020 which dismissed Criminal Appeal No. 19 of 2020 for want of prosecution. The application is supported by a joint affidavit of the Applicants. The Respondent contested the application in a counter affidavit deponed by Ms. Akisa Mhando, learned State Attorney.

Before delving into the substance of the application, I find it imperative to recount facts leading to the application, albeit briefly. In the Resident

Magistrates' Court of Manyara, sitting at Babati, the Applicants, along with others; namely, Ikwayo Lemikweti and Lazaro Lembris Makalya (who are not parties in this application), were jointly charged with the offence of Unlawful Possession of Government Trophy contrary to paragraph 14 of the 1st Schedule to and Section 57(1) and 60(2) of the Economic and Organised Crimes Control Act, Cap. 200. They were convicted and sentenced to serve a custodial sentence of twenty (20) years imprisonment. The Applicants were aggrieved by both conviction and sentence. They preferred Criminal Appeal No. 69 of 2018 in this Court. The said appeal was withdrawn with leave to refile on 11/02/2018. Thereafter, the Applicants filed Criminal Appeal No. 78 of 2018. The appeal was discovered to have been filed beyond the days originally granted to the Applicants. On 24/10/2018, the Applicants prayed to withdraw the same with leave to refile. This Court (Maige, J.) acceded to the prayer, but advised them to seek for extension of time. The Applicants filed Misc. Criminal Application No. 92 of 2018, seeking for extension of time to file their appeal out of time. The application was granted. The Applicants filed Criminal Appeal No. 19 of 2020. At the hearing of the said appeal, the Applicants were represented by Mr. Thadey Lister, learned Advocate. It was agreed that the appeal be disposed of by way of written submissions. The Applicants were to file their submission in chief on

17/09/2020, but they defaulted. On 06/11/2020, the appeal was dismissed for want of prosecution. It is against that decision that the Applicants have brought this Application seeking to set aside the dismissal order.

At the hearing of the Application, the Applicants were represented by Mr. John Shirima, learned advocate, while the Respondent was represented by Ms Akisa Mhando, learned State Attorney. The application was heard *viva voce*.

Submitting in support of the application, Mr. Shirima contended that the reason for dismissal of Criminal Appeal No. 19 of 2020 was failure to file written submission by the Applicants' advocate. He maintained that it was their advocate who requested that the appeal be heard through written submissions. That it was not the fault of the Applicants that the said advocate failed to adhere to the schedule. Mr. Shirima further argued that the Applicants had trusted their advocate and since they are prisoners, they were not in a position to know what transpired in Court. Mr. Shirima contended that the appeal was dismissed without the Applicants' knowledge. He therefore implored the Court to set aside the dismissal order and allow the appeal to be heard on merits.

In rebuttal, Ms Mhando submitted that the Applicants were duly represented by an advocate. Further, the Court was sitting as an Appellate Court whose decision cannot change at this stage. She maintained that had the Applicants' advocate complied with Court orders, this Court, under the provisions of section 366 of the CPA, could proceed with determination of the appeal on merits. The learned State Attorney strenuously submitted that this Court cannot set aside its decision made on 06/11/2020. She was of the view that the Applicants' available avenue was to file an appeal before the Court of Appeal. She, thus, prayed that the application be struck out.

In rejoinder submissions, Mr. Shirima differed with the submissions made by Ms Mhando. He submitted that the provision cited by the learned State Attorney mandates this Court to set aside its decision once it is satisfied that there are sufficient grounds to do so. He maintained that the decision of this Court did not deal with the merits of the appeal but it based its decision on non-appearance of the Appellants therein.

I have given deserving weight to the affidavits of the parties and the submissions made by the respective counsel. The issue for determination

is whether the Applicants have demonstrated sufficient cause to warrant setting aside the dismissal order dated 06/11/2020.

In the ordinary cause of things, failure of a party to comply with the order of the Court is punishable on that person, irrespective of whether that failure is directly of his own making or of his duly recognised representative. In this case, the order was for the Appellants (Applicants herein) to file written submissions. They were represented by an Advocate, who, undoubtedly, was acting under their instructions. The submissions were not filed as directed. Such failure prompted this Court to dismiss the Appeal. The Court cannot, in such circumstances, absolve the Applicants for such failure, unless it is proved to the satisfaction of the Court that such failure was for a good cause.

Ms Mhando contested the Application and was short of stating that this Court is functus officio. I should state that I do not agree with her that this Court cannot set aside the dismissal order made with respect of the Appeal and that the only remedy available to the Applicants is an appeal to the Court of Appeal. Section 383 of the CPA, which deals with non-appearance of parties at the hearing of the appeal, provides that a party aggrieved by a decision of this Court dismissing an appeal, has to apply

in the same Court to set aside that order. Section 383(3) provides that where the Appellant fails to enter appearance on the hearing day, and the case is dismissed for want of prosecution, the appellant or his advocate may apply for re-admission of the appeal. The relevant provision provides:

> *"(3) Where an appeal is dismissed under subsection (1) the appellant or his advocate, as the case may be, may apply to the court for re-admission of the appeal and, where he satisfies the court that he was prevented by any sufficient cause from appearing when the appeal was called on for hearing, the court may re-admit the appeal."*

Criminal Appeal No. 19 of 2020 was dismissed for failure to file written submissions by the Applicants. In law, that failure is tantamount to failure to enter appearance by the Applicants on the hearing date. Therefore, the cause taken by the Applicants is justifiable in law.

Next for consideration is whether the reasons advanced by the Applicants demonstrate sufficient cause to warrant setting aside of the dismissal order. The main reason put forth is that the Applicants had an advocate that they believed would comply with the Court orders. It is deplorable for an officer of the Court in the status of an advocate not to adhere to a Court order, especially considering that the Applicants had in a number of times failed to have their appeal heard on merits. Putting myself in the shoes the Applicants, I agree with them that they, being lay people and

languishing in jail, had no reasons to doubt that their advocate was going to abide with the schedule of hearing set by this Court. They must have believed that their advocate, who is an officer of the Court and conversant with court processes, will not default. He did quite the opposite of their expectations.

It is unfortunate that the said advocate did not file any affidavit to show grounds that impeded him from filing the written submissions as directed. We are only left with the affidavit of the Applicants in that regard. Denying the Applicants the right to have their appeal heard on merits would be punishing them for a fault that may not be of their own making. Doing so would be defying all tenets of justice. Looking at the circumstances surrounding this case, particularly considering that the Applicants have been vigorously pursuing their intended appeal since 2018 but failed in a number of times on technical reasons, I have no doubts that the Applicants have been diligent in pursuing their rights.

Courts have at times exonerated parties from mistakes committed by their advocates in the course of prosecuting cases. In **Tanga Cement Limited vs. Yahaya Athumani Mruma & 4 Others**, Civil Application No. 1 of 2017 (unreported), the Court of Appeal had the following to say:

*"I find the decision of the Court of Appeal for East Africa in **Shah H. Bharmal vs. Santesh Kamuri** [1961] E.A. 679 instructive at this point. In that case, the Court, after considering **Gatti vs. Shoosmith** (1939) 3 ALL E.R. 916, expressed the view that mistakes of an advocate may amount to 'sufficient cause' under its rules in certain circumstances. What is most important in any circumstances is, therefore, the distinction between delay arising from an excusable mistake and inordinate delay springing up from negligence, forgetfulness or default of the advocate. More or less the same stance was taken by this Court in **Institute of Finance Management vs. Simon Manyaki,** CAT at Dar Es Salaam, Civil Application No. 13 of 1987 (unreported) thus:*

'The point to stress here is that counsel's mistake may amount to sufficient reason only where the mistake involves a minor or slight lapse but not where it involves a lapse of a fundamental nature.'"

Circumstances of the instant application compels me to take the stance adopted by the Court of Appeal in the above cited case. The Applicants cannot be blamed for the inaction of Mr. Lister as it is exclusively attributed to the said advocate. For the above reasons, the reasons advanced by the Applicants that they were not to blame for failure to file the written submissions as directed by the Court, in my view, amounts to sufficient cause for this Court to set aside the dismissal order.

In the upshot, the present application has merits. It is accordingly allowed. The dismissal order dated 06/11/2020 is hereby set aside. Criminal Case No. 19 of 2020 shall be restored to the register for

continuation from where it ended on 06/11/2020 when it was dismissed for want of prosecution.

Order accordingly.

Y. B. Masara

JUDGE

25th February, 2022