

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

AT ARUSHA

MISCELLANEOUS CRIMINAL APPLICATION NO. 104 OF 2021

(Arising from the District Court of Arumeru in Criminal Appeal No. 14 of 2021 Originating
from Maji ya Chai Primary Court on Criminal Case No. 262 of 2019)

MOSES NDEWARIO.....1ST APPLICANT

ELIREHEMA NDEWARIO.....2ND APPLICANT

SIFAEEL NNKO3RD APPLICANT

VERSUS

ESTER ANATE RESPONDENT

RULING

10/04/2022 & 27/05/2022

GWAE, J

Apparently, the applicants herein above were not pleased with the decision of the District Court of Arumeru at Arumeru exercising its appellate jurisdiction (the 1st appellate court). The 1st appellate court's decision was delivered on the 24th September 2021 upholding the decision of Maji ya Chai Primary Court (trial court).

The applicants could not challenge the concurrent decisions of both the trial court and the 1st appellate court where they were convicted and sentenced to pay a fine of Tshs. 450,000/= each or serve the term of six (6)

years imprisonment as they were out of the prescribed period of thirty (30) days in default thereto. Hence, this application brought under section 25 (1) (a) and (b) of the Magistrates Courts' Act, Cap 11 Revised Edition, 2019 (MCA) for extension of time within which to file an appeal to this court out of time.

On the 22nd November 2021, this application was duly filed and it is accompanied by an affidavit of the 1st applicant one Moses Ndewario. The sworn affidavit which is essence that cause for the delay is a supply of a copy of judgment by the 1st appellate court as it availed the applicants with the same on the 26th October 2021 when 32 days had already lapsed.

On the other hand, the respondent, Ester Anate seriously resisted this application through her sworn counter affidavit by stating that the copies of judgment were timely prepared and were ready for collection and that the applicants have failed to account each and every day of delay.

On the 10th day of April 2022 when this application was called on for hearing, the applicants and respondent had legal services from the learned advocates namely; Miss Frida Magessa and F. Muhalila respectively.

Vigorously seeking an order of the court granting this application, Ms. Frida reiterated that the reason of the applicants' delay of 16 days is

pertained with late supply of a copy of judgment by the District Court as they initially filed the application of this nature on the 28th October 2021 through electronic filing however the applicants' former application was not admitted and that is as pursuant to the DR's information made to her on the 7th November 2021 and that on the 11th November 2021, the applicants filed this application and the same was physically filed on the 22th November 2021.

Praying for dismissal of this application, Mr. Muhalila argued that the applicant has not accounted each day of delay (26 days) as required by the law since the judgment was delivered on the 24th September 2021 and the applicants received the copy of the judgment on 26.10.2021 while this application was filed on the 22nd November 2021. He also added that the applicants' reason must be contained in their affidavit, it was therefore his opinion, that the contentions by the applicants' counsel that, she received information from Deputy Registrar of the court is baseless since the same is nowhere to be found in the applicants' affidavit. He bolstered his argument by the case of **Vedastos vs. Mwanza City Council and two others**, Civil Application No. 594 /08 of 2021 (unreported-CAT).

Mr. Muhalila further submitted that, in his best opinion, there is no requirement of attaching a copy of judgment to the petition of appeal for a matter originating from primary court.

In her rejoinder, Ms. Magessa stated that, it is not true that the applicants filed their application on the 22nd day of December 2021 as the same was electronically filed the same on the 28th October 2021 for the first time though no affidavit to that effect. She further argued that the applicants had been able to account each day of their delay via affidavit and oral submission.

Having briefly outlined about the parties' evidence and what parties' advocates argued during hearing of this application, it is now duty of the court to ascertain if, the applicants have demonstrated good cause justifying this court to extend time in favour of the applicants so that they can be able to challenge the concurrent decisions of the courts below.

As **to the applicants' reason of late supply** of the copy of the judgment. It is the contention by the applicants that, they were availed with the copy of the judgment on the 26th October day of 2021 as vividly depicted in the copy appended in this application. Nevertheless, it is the respondent's position that, the same was timely collectable. I am not persuaded by the

respondent's argument that, the copies of judgment of the District Court were collectable timely since she had not been able to prove his assertion by tendering tangible evidence to that effect like the applicants who have annexed the copy of judgment certified on 26.10.2021

However, I am absolutely not convinced if certified copies of decrees and judgments are necessary for appeals to the court in relation to matters emanating from primary courts. The Magistrates Courts' Act (supra) is silent on such requirement as opposed to appeals originating from District Court or Resident Magistrate's Court where Memorandum of Appeals are required to be accompanied with certified copies of decree and judgments appealed from (See Order xxxix Rule 1 (1) of the Civil Procedure Coded Cap 33, Revised Edition, 2019).

More so, appeals to the court for the matters arising from primary courts are filed in the District Courts whose decisions or orders are appealed when exercising their appellate or revisional jurisdiction (See section 25 of the MCA). This legal position has been consistently emphasized in a chain of judicial decisions for example in **Abdallah Mkumba vs. Mohammed Lilame** (2001) TLR 326 it was held;

Appeals to the High Court in relation to matters originating from Primary Courts are governed by the provisions of section 25 (3)

of the Magistrates' Courts Act 1984 and are by way of a petition of appeal;

(ii) There is no legal requirement that a petition of appeal must be accompanied by a copy of the decree in appeals originating in Primary Courts"

In the light of the above decision and the wording of section 25 (3) of MCA, the assertion or reason purporting to justify the delay is baseless. This reason for delay is therefore unwarrantable.

In the **2nd reason** given by the applicants with effect that, this application was electronically filed since 28th October 2021 however the same was not admitted, it was rejected as per the DR's information given to the applicants' counsel. First and foremost, I am of the increasing view that, the applicants were required to include that reason in their affidavit otherwise the same is considered to be an afterthought. An affidavit being a substitute of oral evidence, in my firm view, ought to include all material facts since submission is not evidence but a mere guidance. I subscribe my holding by the decision of the Court of Appeal of Tanzania in the case of **The Registered Trustees of the Archdiocese of Dar es salaam vs. The Chairman Bunju Village Government**, Civil Appeal No 147 of 2006 (unreported) and had the following to say;

"To start with, it is not in dispute that no reasons for the failure to appeal in time were given in the affidavit in support of the application before the High Court. Since, as correctly submitted by Mr. Mhango, an affidavit is evidence we think it was expected that reasons for the delay would be reflected in the affidavit. In the absence of reasons, it occurs to us that there was no material evidence upon which the judge could determine on merit the application before him. We appreciate Mr. El Maamry's point that a political settlement out of Court was given in the written submissions as a reason for the delay. With respect however, submissions are not evidence. Submissions are generally meant to reflect the general features of a party's case. They are elaborations or explanations on evidence already tendered. They are expected to contain arguments on the applicable law. They are not intended to be a substitute for evidence."

Examining the applicants' affidavit nothing like the evidence that this application was electronically filed on the 28th October 2021 save during oral submission by their advocate. Hence the assertion that this application was electronically filed since 28th October 2021 in a strict sense is nothing but an afterthought or negligence on the part of the applicants or their advocate or both unless seriously proved.

Presumptuously, as asserted by the applicants that this application was submitted since 28th October 2021 for its admission yet according to the Electronic filing Rule 10 of the GN. 148 of 2018 (the Judicature and Application of Laws (Electronic Filing) Rules, 2018), a document is deemed to have been filed when it is submitted and admitted. In our case there is

no proof of the submission by either applicants or their advocate and its admission on either 28th October 2021 or 11th November 2021 by the Deputy Registrar of the court. In accounting each day of delay, exclusion of the dates from which it is alleged that the applicants filed this application electronically (28th October 2021 or 11th day of November 2021) to the date it was physically filed (22.11.2021) ought have been sufficiently proved by attaching a retrieved document (s) as per Rule 25 and 27 of the Electronic filing, Rules in the applicants' replying affidavit.

Nevertheless, I personally made efforts to have a copy of a retrieved document from JSDS/eCase Registration and managed to secure the same evidencing that the applicants' application was submitted for admission on the 11th day of November 2021 and the same was admitted and accordingly registered. Hence, making a total day of delay being fourteen (14) instead of **26** days purportedly argued by Mr. Muhalila since lapse of the prescribed period of 30 days would start on the 24th October 2021 within which to file a petition of appeal.

Therefore, I am of the view that, if the former application presented for filing electronically was truly rejected yet there ought to be evidence contained in the applicants' replying affidavit or an affidavit of the Deputy

Registrar to support their assertion (See **John Chuwa vs. Antony Chiza** (1992) TLR 223)

Nevertheless, I have considered the fact that, the electronic filing system is a new system of filing cases in our courts. Thus, very few people who are familiar with it including the advocates who might have no sufficient knowledge and experience of dealing with unforeseen matters or facts that were not contained in the affidavit accompanying an application which may be rejected or not timely admitted such as rejection order or admission made by DRs in respect of a submitted application or plaint


As a result of my findings and conclusions above, I therefore make the following orders:

1. The applicants' application for extension of time is granted
2. The applicants are to file their appeal within **fourteen (14)** days from the date of this order
3. Taking into account of the nature of the case, criminal application, I refrain from making an order as to costs

Ordered accordingly

Dated at **ARUSHA** this **27th day of May, 2022**




M. R. GWAE
JUDGE
27/05/2022