

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF MANYARA

AT BABATI

MISCELLANEOUS CRIMINAL APPLICATION NO. 7 OF 2023

(Arising from the Criminal Appeal No. 6 of 2022 High Court of (T) Manyara sub-registry and original Criminal Case No 36 of 2022 before the District Court of Simanjiro at Orkement)

RASHID ALLYAPPLICANT

VERSUS

THE REPUBLIC RESPONDENT

RULING

15th August & 5th September, 2023

Kahyoza, J.:

After his conviction and sentence, **Rashid Ally**, (the applicant) lodged a notice of appeal timely but defaulted to file his appeal within the prescribed time. He applied for extension of time to lodge the notice of appeal contending that after he obtained a copy of the judgment he lodged his appeal which was struck out for being time barred. He added that he got

assistance from the prison's officer to institute the appeal, who caused a two days' delay.

The Respondent's state attorney, Mr. Johnson Ndibalema, opposed the application by filing a counter affidavit and submitted that the applicant was negligent. During the hearing the learned state attorney vehemently opposed the application contending that, the applicant did not disclose sufficient reason for delay. He argued that the applicant did not account for 3 months and 86 days' delay. To support her contention, he cited the case of ^{Yohana} ~~R. K.~~ **na Kapondo**, [1985] TLR. 84.

The respondent state attorney added that the applicant was required to file an application for extension of time within 45 days as stated in the case of **Mawazo Saliboko @ Shagi and 15 others v. DPP**, Criminal appeal No. 384 of 2017(unreported). He concluded that the applicant did not adduce sufficient reason for delay and prayed the application to be dismissed. He referred to the case of **Benjamin Amon v. R.** Criminal application No. 106/11 of 2018 (CAT-Unreported) to support his contention.

In his short rejoinder, the applicant, submitted that the delay happened because he was in prison.

Briefly the record shows that after the court convicted and sentenced the applicant, he timely lodged a notice of appeal. It took long before he obtained a copy of judgment and proceedings. After he obtained a copy of the judgement and proceedings, the applicant lodged his appeal. Unlucky, this Court found that the applicant's appeal time barred. It found that the applicant delayed for two days. It struck out the applicant's appeal on 13th December, 2022.

After the applicant's appeal was struck out, he filed the instant application on 17th March, 2023. The record depicts further that, the applicant signed the affidavit on 14.2.2023 before the Commissioner for Oaths but it was filed online on 17th March, 2023.

It is settled as submitted by the respondent state attorney that a person applying for extension of time should adduce sufficient reason for delay and that he must account for period of delay. I wish to rely on holding of the Court of Appeal in **Benjamin Amon v. R.** (supra) and **Mumello v. Bank of Tanzania** [2006] E.A. 227. In the latter case, the court observed as follows:

"It is trite law that an application for extension of time is entirely in the discretion of court to grant or refuse and that extension of time

may only be granted where it has been sufficiently established that the delay was due to sufficient cause.

I reviewed the applicant's affidavit to find out if he accounted for his delay. There is no dispute that the applicant's appeal was lodged two days after the expiry of 45 days. The applicant's ground for delay was that the prison officers caused the delay. The record bails out the applicant. The record does not indicate the date the applicant filed the petition of appeal to the High Court -Arusha sub- registry. In addition, the date the applicant signed the petition of appeal is not indicated, what is indicated is the date when the High Court -Manyara sub- registry received applicant's petition from the High Court -Arusha sub- registry. This Court found the prison officer lodged the appeal two days out of time, counting from the date of receipt of the petition of appeal from the High Court -Arusha sub- registry.

I found the applicant's ground for delay sufficient reason. The applicant was in prison; thus, unable to submit the petition of appeal to the court. The applicant's duty was to submit the petition of appeal together with supporting documents to the prison officers. The delay to submit the appeal to the Court for two days was caused by prison officer and not the applicant.

I am of the firm view that the applicant should not be called upon to account for two days' delay. The law is clear that the person in prison has to present the documents to the officer in charge of prison, once he does that he is home and dry. I wish to refer to section 363 of the **Criminal Procedure Act**, [Cap. 20 R.E. 2022] (the **CPA**), which states that-

"Where the appellant is in prison, he may present his petition of appeal and the copies accompanying the same to the officer in charge of the prison, who shall thereupon forward the petition and copies to the Registrar of the High Court."

I find that the applicant adduced sufficient reason for delay. The law requires the appellant, who is prison, to present a petition of appeal to the prison officer. There is no hard and fast rule as to what amounts to sufficient reason. Taking into account the length of delay and a fact that the applicant submitted the petition of appeal timely, it is my decided view that the applicant has accounted for delay. The Court of Appeal in **Tanga Cement Company Limited v. Jumanne D. Masangwa and Amos A. Mwalwanda**, Civil Application NO. 6 of 2001 (unreported) where it was held that-

"It is trite law that an application for extension of time is entirely in the discretion of the court to grant or refuse it. This discretion

however has to be exercised judicially and the overriding consideration is that there must be sufficient cause for so doing. What amounts to "sufficient cause" has not been defined. From decided cases a number of factors have to be taken into account, including whether or not the application has been brought promptly; the absence of any or valid explanation for the delay; lack of diligence on the part of the applicant."

The respondent's state attorney submitted that the applicant delayed to institute an application for 86 days which he did not account for. He was emphatic that the court cannot extend time out of sympathy but upon the applicant adducing sufficient reason. The applicant's reply was that all that happened because he was in prison.

Indisputably, the applicant delayed to lodge an application after the Court dismissed the appeal. The Court dismissed the applicant's appeal on 13.12.2022 whereas the applicant lodged the instant application on 17.3.2023. The applicant did not account in his affidavit for the period from 13.12.2022 to 17.3.2023. The only explanation from the applicant during the hearing was that delay happened because he was in prison. I agree that an application for extension of time should not be granted out of sympathy. The Court of Appeal insisted that an application for extension of time should be granted on sufficient reasons and not on account of

sympathy. The Court sounded the caution in **the Registered Trustees of the Archdiocese of Dar es salaam v The Chairman Bunju Village Government & 4 Others** Civil Appeal No. 147/2006 CAT (unreported).

The Court of Appeal quoted with approval the following holding in the case of **Daphne Parry v Murray Alexander Carson**, (1963) EA 546-

"Though the court should no doubt give liberal interpretation to the words "sufficient cause," its interpretation must be in accordance with judicial principles. If the appellant has good case on the merits but is out of time and he has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy, and the appeal must be dismissed as time-barred, even at the risk of injustice and hardship to the appellant."

I have no doubt in my mind that the applicant had a duty to file an application for extension of time promptly after the Court struck out the appeal. The applicant, upon his failure to promptly apply for extension of time on time, had to account for period of his delay. However, I am not in agreement that the applicant was required to apply for extension of time with 45 days following the dismissal of the appeal.

It is trite law that a person applying for extension of time, to succeed, he must have acted expeditiously from the date he became aware of the delay. See the case of **Royal Insurance Tanzania Limited**

vs. Kiwengwa Strand Hotel Limited, Civil Application No. 116 of 2008 (unreported) while considering an application for extension of time under Rule 8 of the Court of Appeal Rules, 1979 (old Rules) where an applicant therein was required to show "sufficient reason" The Court had stated:

"It is trite law that an applicant before the Court must satisfy the Court that since becoming aware of the fact that he is out of time, acted very expeditiously and that the application has been brought in good faith."

No doubt, the applicant did not act expeditiously to institute an application for extension of time after the Court struck out his appeal. The respondent submitted that it took the applicant 86 days to apply for extension of time from the date of striking out the appeal. I not in common with the respondent's state attorney, that the applicant delayed to apply for extension of time for 86 days. The applicant signed the affidavit on 13.2.2023 and the Commissioner for Oaths administered oath on the same day. He discharged his duty on 13.2.2023. He had no control to what happened after he submitted his application to the prison officer in charge of the prison. He delayed for 62 days.

I am aware and I respect the settled principle of law that even a delay one day must be accounted for. {See **Hassan Bushiri v. Latifa Iukio**

Mashayo, CAT Civil Application No. 3 of 2007 (unreported)}. Given the fact the applicant was a prisoner with limited resources and movement coupled with the fact that his appeal was struck out for he delayed to appeal two days, I find that the applicant's explanation that he delayed because he was held in custody, a sufficient reason.

Eventually, I allow the application, grant the applicant twenty (20) days to institute his appeal.

I order accordingly.

Dated at **Babati** this **5th** day of **September**, 2023.



John R. Kahyoza,
Judge

Court: Ruling delivered in virtual presence of the appellant and Mr. Nelson Ndimbalema, the respondent's state attorney. B/C Ms. Ombeni present virtually.

John R. Kahyoza, J.

5. 09.2023