

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN THE SUB- REGISTRY OF MANYARA**

**AT BABATI**

**CRIMINAL APPLICATION No. 9 OF 2023**

**MATHIAS HERMAN.....1<sup>ST</sup> APPLICANT**

**ROJAS APOLINARY.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**RULING**

17/8/2023 & 5/9/2023

**BATHY, J**

The applicants preferred the instant application under section 361 (1) (2) of the Criminal Procedure Act [CAP 20 R.E. 2022], (the CPA) seeking for the following reliefs;

- 1. That, this honourable court be pleased to grant an order of extension of time within which the applicants will be able to lodge his appeal out of time.*
- 2. Any other remedies that this honourable court deems fit to grant.*

The application is supported by joint affidavit sworn by the applicants. On the other hand, the respondent lodged a counter affidavit to contest the application.



When the application was called on for hearing, the applicants appeared in person while the respondent was represented by Mr. Raphael Rwezaula, learned state attorney. The application was disposed of orally.

Submitting in favour of the applications, the first applicant argued that, there are challenges of facilities at the prison's admission office. Therefore, they could not lodge the appeal within time.

The second applicant argued that they filed their documents timely, but the prison officers did not lodge them within time.

On reply submission Mr. Rwezaula prayed to adopt respondent's counter affidavit to make part of his submission. He further contended that in terms of section 361(2) this court has discretion to grant an extension of time upon good cause shown by the applicant.

Mr. Rwezaula submitted that there are factors for consideration in order to determine whether the applicant has advanced good cause. To this argument he cited the case of **Benjamin Amon v. Republic**, Criminal Application No. 106 of 2018, Court of Appeal of Tanzania at Dar es Salaam (unreported) where the court held that, in determining whether good cause has been shown, the factors to be considered are;

- i. The applicant must account for each day of the delay.*
- ii. The delay must not be inordinate.*



- iii. *The applicant must show diligence and not apathy, negligence or sloppiness of action that he intends to take.*
- iv. *If the court feels that there are other sufficient reasons such existence of point of law of sufficient importance, such as illegality of the decision sought to be challenged.*

The learned state attorney submitted that the reason for the delay stated by the applicants is that, they could not get assistance from prison office. He argued the claim raised is baseless, since the applicants could not give a name the prison officer, they sought assistance from. He argued further that, the applicants could not even state when they asked for help from the prison office, in order for the court to gauge the extent of delay.

He argued further that, the applicants could not attach affidavit from the prison officer to substantiate their claims. To strengthen his argument, he referred to the case of **Airtel Tanzania Ltd v. Misterlight Electrical Co. Ltd and another**, Civil Application No. 37/01 of 2020 (unreported) in which the Court of Appeal observed that, failure to attach an affidavit of the person named renders the claims as mere assertions.



He went on arguing that, the applicants have failed to account for each day of the delay and they were negligent in filing the appeal within time. The strength of his argument was based in the case of **Meto Production Ltd v. Minister for Lands**, [1989] TLR 5.


Mr. Rwezaula further stated that, the applicants lodged their appeal vide Criminal Appeal No. 15 of 2023 which was struck out by this court on 23/3/2023, for being time barred.

Again, through Misc. Criminal Application No. 56 of 2022 the applicants were granted an extension of time to lodge their appeal within 21 days from 22/8/2022. The period which ended up on 13/9/2022, but the applicant did not comply with the court's order.

He argued that, counting from 22/8/2022 to 13/4/2023 there was the period of 212 days of delay. However, he was firm that the applicants did not account for each day of the delay.

Mr. Rwezaula prayed to the court to dismiss the application, since the applicants have failed to show good cause.

On rejoinder submission the applicants essentially reiterated their submission in chief.

Having gone through the parties' rival submission, the sole issue for my determination is whether the applicants have advanced sufficient reason for the court to grant them an extension of time. 

The instant application has been preferred under section 361 (1) of CPA. The said provision requires an appeal from the trial court in the exercise of its original jurisdiction be lodged within 45 days, which has to be preceded by notice to be lodged within 10 days of the decision sought to be impugned on appeal.

This court has discretion to grant an extension of time to file an appeal, as provided for under section 361 (2) of the CPA. The said provision reads;

*361 (2) The High Court may, for good cause, admit an appeal notwithstanding that the period of limitation prescribed in this section has elapsed. [Emphasis added].*

From the foregoing provision of the law, for the court to exercise its discretion to extend of time, the applicant must demonstrate good cause. However, the quoted provision of the law does not state what constitutes good cause. In the case of **Osward Masatu Mwizarubi v Tanzania Fish Processing Ltd**, Civil Application No. 13 of 2010 (unreported) the Court of Appeal stated that;

*"What constitutes good cause cannot be laid down by any hard and fast rules. The term 'good cause' is a relative one and is dependent upon the party seeking*



*extension of time to provide the relevant material in order to move the Court to exercise its discretion”*

To constitute good cause, it depends with the circumstance of each case. Certain factors can be gathered through case laws to provide guidance on whether or not the applicant has shown good cause.

These factors were pointed in the case of **Benjamin Amon v. Republic** (supra) cited by Mr. Rwezaula. See also the case of **Lyamuya Construction Company Limited v. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 (Unreported).

Following the decision of the trial court, the applicants lodged a notice of intention to appeal, but they were unable to file the appeal within time. They applied for and granted the extension of 21 days from 22/8/2022 to file their appeal. However, they lodged their appeal after the lapse of 21 days and the same was struck out.

The extension period expired on 13/9/2022 and the instant application was lodged on 13/4/2023. Therefore, the applicants were strictly required to account for each day of the delay. The need to account for each day of the delay was emphasized in the case of



**Bushiri Hassan v. Latifa Lukio Mashayo**, (supra) where the Court of Court of Appeal held that;

*"...Delay of even a single day, has to be accounted for, otherwise there would be no point of having rules prescribing period within which certain steps have to be taken."* [Emphasis added].

In this matter, the applicants cast their blame to the prison officials for filing their appeal out of time. However, the applicants could not mention when they presented their appeal for filing.

Rightly as argued by the learned state attorney, there should have been a supplementary affidavit from the prison officials to supplement the facts deposed by the applicant that, it was the prison officer who delayed to lodge the appeal within the prescribed time. As decided in the case of **Dianarose Spareparts Ltd v. Commissioner General Tanzania Revenue Authority**, Civil Application No. 245/20 of 2021 [CAT] at Dar es Salaam (unreported), on page 9 the court held that;

*"The stance of the law is that, where an affidavit mentions another person on a material point, that other person on a material point, that other person should also take an affidavit"*



In the absence of the affidavit from the prison officials to substantiate the assertion made, the applicants' claim becomes a mere assertion.

I have also noted that, while in their affidavit the applicants claim they handed their appeal to the prison officials who then filed it out of time, in their oral submissions the applicants invented different explanation, as they argued that, there was a shortage of facilities in the prison. Despite the fact that they did not specifically mention which facilities, there was no affidavit from the prison office to substantiate the applicant's claims.

Consequently, I find that the applicants have not advanced any sufficient reason for the court to exercise its discretion for extension of time. It is for that reason I proceed to dismiss this application for lacking merits.

It is so ordered.

**Dated at Babati this 5<sup>th</sup> September 2023.**



  
**G. N. BARTHY,**

**JUDGE**

Delivered in the presence of the applicants in person and Ms. Rose Kayumbo learned state attorney for the respondent.