

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DAR ES SALAAM SUB-REGISTRY)
AT DAR ES SALAAM**

CRIMINAL APPLICATION NO 129 OF 2023

CASE REF NUMBER 20230929000529844

(Originating from Economic Case No. 9 of 2015 in the Resident Magistrate Court of Dar es Salaam at Kisutu dated 21st March 2022 Shaidi PRM and HC DSM Zone Criminal Appeal No 110 of 2022 Philip J)

DIRECTOR OF PUBLIC PROSECUTION..... APPLICANT

VERSUS

MOHAMED SULEIMAN MUSA1^s RESPONDENT

MOHAMED HAJI HAJI@ UDOLE.....2nd RESPONDENT

JUMA ALI MAKAME3rdRESPONDENT

MOHAMED HUA MASHAKA.....4thRESPONDENT

OMARY HAMAD ALLY,5th RESPONDENT

RULING:

10th & 31st May 2024

KIREKIANO; J

Before the Resident Magistrate Court of Dar es Salaam at Kisutu, there was Economic Case No. 9 of 2015. In those proceedings, the respondents were charged with various economic offences, precisely; conspiracy to commit an offence contrary to section 284 of the Penal Code [CAP 16 RE 2022], Leading Organized Crime contrary to paragraph 4(1) (a) of the first schedule to and section 57 (1) and 60 (2) both of Economic and Organized

Crime Control Act [CAP 200 R.E 2019] and unlawful possession of Government trophies contrary to section 86 (1) and 2 (c) (ii) of the Wildlife Conservation Act No. 5 of 2009 read together with paragraph 14 (d) of the first schedule to and section 57 (1) both of Economic and Organized Crime Control Act [CAP 200 R E 2019].

On 21st March, 2022 the trial court acquitted the respondents.

Dissatisfied, the applicant on 28.06.2022 preferred an appeal to this court; this was criminal appeal no 110 of 2022. The same was found out of time on 28.8.2023, and this court "dismissed" the same for being time-barred. Determined to pursue the appeal, the applicant herein, on 29.9.2023, lodged this application, seeking the following orders,

- 1. This Court may be pleased to grant the applicant leave to file notice and petition of appeal out of time in Economic Case No. 9 of 2015.*
- 2. Any other order (s) this Hon. Court may deem fit and equitable to grant.*

The application is predicated under section 379 (2) of the Criminal Procedure Act Cap 20, supported by an affidavit of Miss Hellen Moshi, state attorney. The reasons supporting the application are technical delay and illegality in the trial court's decision. More significantly, the facts of

the applicant's affidavit are narrated in paragraphs 5 to 10. I will take the liberty to reproduce the same;

- 1. That, on the 21st day of September, 2021 the Director of Public Prosecutions was issued with the copy of judgment and proceedings.*
- 2. That upon receiving of the said copies the administration procedures had to be followed so as to evaluate and determine whether the appeal has merits.*
- 3. That, for that matter the delay in filing the Notice of intention to appeal was occasioned by the office procedure and technicality of the law and procedure.*
- 4. That the Respondent will not be prejudiced by an order granting an extension of time to file a Notice of Intention to Appeal and the Appeal.*
- 5. That, I have acted diligently and promptly in filing this application following "the struck out" of our Appeal by Hon. Philip J.*
- 6. That the appeal has overwhelming chances of success if an opportunity is accorded.*

The application is contested by the respondents, who also filed counter affidavits; two issues are posed according to the respondents' counter-affidavits. First, since the previous appeal was found to be time-barred and dismissed by order of this court, the order bars this application for an

extension of time. **Second**, the applicant has not accounted for each day of delay.

When the application was placed before me for hearing, the applicant had the service of Miss Bertha Kulwa, a learned state attorney. The 1st, 2nd, 3rd, and 5th respondents had the service of Miss Agnes Ndusyepo, a learned advocate, and the 4th respondent had the service of Mr Musa Kiobya, a learned advocate. I have read and appreciate the parties' submissions; however, for reasons that will appear shortly, I will not summarise them. I will refer to them as I address the contending issues in this application.

I wish to start with the aspect of competence of this application; the applicant stated in paragraph 9 of the affidavit that the first appeal before Hon Philip J., criminal appeal no 110 of 2022, was "struck out". This fact was countered by the 4th respondent, putting the applicant to strict proof of this fact. Instead, the 4th respondent stated in paragraph 2 (d) of his affidavit that the appeal before Philip J was "dismissed"; thus, this application cannot be reopened. In her affidavit, Miss Ndusyepo for the 1st, 2nd, 3rd and 5th respondents did put the applicant to prove this fact. Her affidavit shows that she represented her clients in criminal appeal no 110 of 2022. However, she did not state the court's final order in that

appeal. In reply to the counter affidavit, the applicant again disputed the 4th respondent's averment.

According to the parties' affidavits, how criminal appeal no 110 of 2022 ended is contentious and decisive in this application. Unfortunately, neither of the parties annexed the same in their affidavits. However, considering that criminal appeal no 110 of 2022 was determined by this court and has featured in the party's affidavit, this did not preclude me from looking at the same as it is available in the court decision depository website *tanzilii*. The decision was in the appeal between ***The Director of Public Prosecution vs Mohamed Suleiman & 4 others (Criminal appeal No 110 of 2022) [2023] TZHC 21040.*** <https://tanzlii.org/> my sister ***Philip J*** at page 5 held;

*"As correctly submitted by Ms. Nduyepo, counting from 5 May 2022 to 28 June 2022, the date this appeal was filed, more than 53 days lapsed. Thus, this appeal is time-barred. Consequently, I hereby **dismiss this appeal for being filed out of time without the leave of this court.** It is so ordered"*

The applicant strongly argued the issue of illegality in the trial court decision but did not address it in their submission in chief. Mr Kiobya,

for the 4th respondent, submitted that the proceeding which was dismissed by this court could not be brought around in the manner which the applicant embraced since the dismissal amounted to a conclusive determination of the matter; thus, re-determination of the intended Appeal by this Court will lead the same to be *functus officio*, unless and until the dismissal order has been freed either on review by this Court or appeal by the superior Court.

He cited **Tanzania Breweries Limited Vs Edson Barongo and 7 Others and 2 Others (Misc. Labour 3 Application No. 79 OF 2019)**, citing with approval of the Court of Appeal decision in the case of **Madongo and Two Others vs. Minister of Industry and Trade and Two Others, Civil Appeal No. 27 of 2003** that at page 10 that upon dismissal of the matter, it was not open for the appellant to go back to the high court. The only remedy available to the appellants after the dismissal of the application was to appeal to the Court of Appeal.

Miss Ndusyepo, for the first, second, third, and fifth respondents, did not address this issue in her submission. As such, the applicant did not file a rejoinder in response to the fourth respondent's address on this aspect.

I have considered what the order of this court dated 28.8.2023 (Philip J) means. Upon reflection, I agree with Mr Kiobya that the order of this court dismissing the appeal means that the matter got out of hand of this court as final and binding as far as this court is concerned. In the state of affairs in this application, the order of this court dated 28.8.2023 dismissing the appeal can not just be overlooked or, to put it differently, the same can not be corrected by this court.

If the applicant had so wished, they ought to have challenged the decision by way of appeal or otherwise.

Thus, I will end here and hold that this court is functus official in determining this application. The application is therefore, struck out.



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A. J. KIREKIANO

JUDGE

31.05.2024

COURT:

Ruling delivered in the presence of Miss Florida Wenceslaus, State attorney for the applicant, in the presence of Mr Omega Juael, Holding brief of Mr Musa Kiobya for the 4th respondent, and in the presence of the 5th respondent and the absence of the 1st, 2nd, and 3rd respondents.



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A J. KIREKIANO

JUDGE

31.05.224