

IN THE HIGH COURT OF TANZANIA

DODOMA SUB REGISTRY

AT DODOMA

MISCELLANEOUS CRIMINAL APPLICATION NO. 41 OF 2022

(Originating from Criminal Case No.164 of 2019 in the District Court of Singida)

SALUM FONDA FELIX.....APPLICANT

VERSUS

THE REPUBLICRESPONDENT

RULING

*Date of last order:***22/02/2024**

*Date of the Ruling:***07/03/2024**

LONGOPA, J.:

The applicant was convicted and sentenced to serve two (2) years conditional discharge and to compensate the complainant/victim Tshs 4,000,000/= by the District Court of Singida for the offence of malicious damage to property C/S 326(1) of the Penal Code, Cap 16 R.E. 2019. The applicant was dissatisfied with that decision hence he intends to challenge it by way of an appeal. However, notice of intention to appeal and filing of the petition of appeal have not been taken timely thus this application under Section 361(2) of the Criminal Procedure Act, Cap 20 R.E. 2022. In his chamber application, the appellant prayed for:-

1) That, the Honorable Court be pleased to grant the Applicant an extension of time within which to file an appeal out of time against the judgment of the District Court of Singida dated 11/08/2020.

2) Any other order(s) that this Honourable Court may deem fit and just to grant.

The application is supported by an affidavit of the applicant Mr. Salum Fonda Felix. It avers as follows:-

1. That, I am the applicant herein hence conversant with the facts I am about to depose hereunder;

2. That, the applicant herein was charged before the District Court of Singida with the offence of Malicious Damage to Property contrary to Section 326 (1) and he was convicted and sentenced to a conditional discharge for the period of two (2) years and to compensate the victim Tshs Four Million (Tshs 4,000,000/=) (copy of judgment is attached herewith and marked SFF1);

3. That, being aggrieved with the whole sentence he intends to appeal where he prepared, and he filed Notice of Appeal at the Resident Magistrate Court of Singida on 12th August 2020 (copy of notice of intention to appeal is attached herewith and marked SFF2);

4. That, after being served with the copy of judgment on 09th September 2020, the applicant prepared the grounds of appeal and submit it at Resident Magistrate Court of Singida and was received by the court clerk one Abdul Juma who said he would assist him to take his ground of appeal to the High court of Dodoma where it can be filed. (copy of Memorandum of Appeal and affidavit of Mr. Abdul Juma are attached herein collectively as SFF3);

5. That, the said court clerk Mr. Abdul Juma assured the Applicant that his Memorandum of Appeal has been sent to

the High Court of Dodoma and the filing process are on process.

6. That, the Applicant has been following up frequently in court and asking Mr. Abdul Juma without getting clear answers and after a long follows up it appear that Memorandum of Appeal was not filed and not registered at the High Court of Dodoma.

7. That, the Applicant did not want to sit on his right to appeal as he took action of appeal on time, but he fails to accomplish due to the Court's mistakes and he has been aware after the time has expired and it was not his fault.

8. That, for the reasons stated herein above the Applicants delay in filling appeal at the High Court is neither deliberate nor due to negligence on the point of the Applicant and he prays before this Honorable Court to extend time so as he can file an appeal out of time as he has overwhelming chances of success if this application be granted.

This affidavit was challenged by a counter affidavit of State Attorney in Charge at Singida of one Juma Hassan Sarige for the Republic as follows: -

- 1. That, I am a State Attorney in charge at Singida in the National Prosecution's Service Office, duly authorized to represent the Republic, the above-named Respondent.*
- 2. That, I have read the Affidavit affirmed by SALUM FONDA FELIX thus conversant with the facts deposed to hereunder.*
- 3. That, the contents of paragraphs 1 and 2 are hereby noted.*

4. That, the contents of paragraphs 3 and 4 are vehemently disputed and the Applicant are put to strict proof.

5. That, the contents of paragraphs 5, 6, 7 and 8 of the affidavits are vehemently disputed and the Applicant are put to strict proof. The Respondent herein further states that the reasons stated are not genuine, insufficient, and frivolous to convince this Honorable Court.

On 22nd February 2024 when this application came for hearing, the applicant appeared in person and the Republic was represented by Ms. Neema Taji, learned State Attorney. The applicant adopted the affidavit in support of the application to form part of his submission. He stated that on the material date the judgment was delivered he prepared notice of appeal way back in August 2020 and filed the same to the Resident Magistrate Court at Singida. It was received by the Court Clerk, and he remained with the copy, the appeal was not forthcoming. He had to make follow ups on the progress.

Later, it was found the appeal documents were not found at the High Court of Tanzania at Dodoma Sub Registry where the Resident Magistrate Court at Singida stated to have sent it.

It is at this juncture that he approached the High Court of Tanzania and after follow-ups it was discovered that the appeal had not been initiated as the records he had prepared were not found. Thereafter, the applicant decided to prepare this application for extension of time to appeal to the High Court out of time.

It was argued that it is not his negligent act or omission that caused him fail to appeal thus application to appeal out of time save that he had filed at Resident Magistrate Court at Singida but the same did not reach the High Court of Tanzania Dodoma Sub Registry. The applicant further stated that he acted diligently and made

all necessary efforts to follow up regularly at the Resident Magistrates Court with no avail.

On the other hand, the respondent argued that the application is made under section 361(2) of the Criminal Procedure Act, Cap 20 R.E. 2022 that allows this Court to grant extension of time where a good cause exists. The Court is empowered to so act if it is satisfied that there is a good cause.

It was argued that the grounds are solid as he preferred the appeal timely as he filed the documents but the same were lost. The applicant had demonstrated diligence to follow ups the same. They pray that the court be pleased to allow the prayer for extension of time as there are solid grounds for the same.

In a short rejoinder, the applicant had nothing to add except stated that he was puzzled that his documents for appeal went missing at the Resident Magistrates Court at Singida or High Court of Tanzania Dodoma Sub Registry without trace while he was assured that they have been sent to initiate the appeal proceedings.

I have considered the affidavit supporting the application and submissions from both applicant and respondent. The respondent is not objecting to the grant of this application for extension of time to file an appeal out of time.

The decision of the District Court was delivered on 11/08/2020 and the applicant being aggrieved by such decision on 12th August 2020 has filed notice of appeal at the Resident Magistrates Court of Singida; and after being served with the copy of judgment on 09th September 2020 the applicant prepared grounds of appeal and submit it at Resident Magistrates at Singida so that it can be filed at High Court at Dodoma but the applicant discovered that it was not filed when he was time barred. It is on that account that applicant herein by this application seeking this Court's intervention to extend time.

It is a true position of law that this court is empowered to extend time once there is a good cause for it to enlarge time and admit an appeal eventhough it is out

of time. The Court does so on proof of sufficient or good cause to warrant it to so act.

For the Court to extend time, the applicant must have good cause which made him to delay. In the case of **Barclays Bank Tanzania Limited vs Phylisian Hussein Mcheni (Civil Application 176 of 2015) [2015] TZCA 255 (30 December 2015)**, the Court of Appeal stated that:

Under rule 10 of the Rules the Court has wide discretionary powers to extend the time for the doing of any act provided good cause has been shown. A good cause for doing so differs from case to case and there are factors to be considered in an application for extension of time under rule 10 of the Rules are: (a) The length of the delay, (b) The reason for the delay- whether the delay was caused or contributed by the dilatory conduct of the applicant? (c) Whether there is an arguable case, such as, whether there is a point of law or the illegality or otherwise of the decision sought to be challenged.

It is the duty of the applicant to demonstrate to the court that there are sufficient grounds or good cause exists for extension of time. The applicant must be able to account and give an explanation before the Court regarding every day of his delay.

This was the decision in the case of **Dar es Salaam City Council vs S. Group Security Co. Ltd (Civil Application 234 of 2015) [2016] TZCA 641 (11 May 2016)**, the Court of Appeal stated that:

As a matter of general principle, it is always in the discretion of this Court to grant extension of time under Rule 10 of the Rules. But the stance which this Court has consistently taken is that in an application for extension of time, the applicant has to account for every day of the delay. According to the decision of the Court, extension of time is a matter of discretion of a court. For a court to properly exercise such powers, it is upon the applicant to

satisfy to the court that sufficient cause exists by providing an explanation for every day of delay.

Also, it has been stated in the case of **Tanga Cement Co. Ltd vs Jumanne D. Masangwa & Another (Civil Application 6 of 2001) [2004] TZCA 45 (8 April 2004)**, where the Court of Appeal at p. 5 stated that:

It is trite law that in terms of Rule 8 of the Court Rules, an application for extension of time is entirely in the discretion of the Court to grant or refuse it. This means that in determining an application for extension of time, the court must consider if the applicant has established sufficient cause or good cause as to why the application should be granted.

The affidavit of the applicant and other records shows that the applicant made some efforts in appealing except the Resident Magistrates Court of Singida did not file and register his petition of appeal at the High Court of Tanzania Dodoma Sub Registry. This is shown on paragraphs 3, 4, 5 and 6 of the applicant's affidavit and it is a sufficient cause for the court to consider.

In the case of **Moroga Mwita Moroga vs Republic** (Criminal Appeal 181 of 2020) [2022] TZCA 340 (14 June 2022), the Court of Appeal of Tanzania emphasized that:

Section 361(2) of CPA grants jurisdiction to the High Court to grant application for extension of time where good cause is expounded heedless of the competence of the intended appeal.

The applicant pegs his application on ground of genuinely pursuit of the right at the court where he filed the notice of appeal and petition of appeal. It is unfortunate that his attempt to challenge the decision could not materialize as the documents were nowhere to be seen.

It is on record that one Abdul Juma, Court Clerk at the Resident Magistrates Court of Singida affirmed an affidavit in support of this application. He reveals that: First, it is true that he received the documentations on appeal from Salum Felix Fonda to help him to send them to High Court of Tanzania Dodoma Sub-Registry. Second, that on 10th September 2020 he received the Memorandum of Appeal and sent the same to Dodoma Sub Registry of the High Court of Tanzania. Third, he confirms that applicant has been making follow ups at the Resident Magistrates Court of Singida since then on the updates of the appeal.

The applicant has demonstrated that he did not sleep on his right. He took all possible steps to ensure that the intended appeal is preferred except that the prepared documents were lost in hands of other persons. It was not his negligence that cause failure to appeal within time.

Though it appears that the delay is inordinate, I am inclined to hold that such delay was caused by factors beyond the control of the applicant. I have no reasons to doubt the contents of both affidavit of the applicant and that of one Abdul Juma who is a Court Clerk stating on the cause of delay. Given that the respondent also is not objecting the same, it is prudent to avail the opportunity to the applicant to be heard by the High Court of Tanzania on appeal.

It is in the interest of justice that this Court grant extension of time sought to allow the applicant to be heard on the matter he has pursued since the decision of the District Court of Singida to no avail. The respondent in oral submission did not object the application, it is certain that there will be no prejudice to any side if this application is granted.

Now since the applicant have advanced and presented sufficient reasons for delay and the extent of such delay in his application, I have no reason to refuse granting of this application. It is my considered view that this application has merit, and this court finds it proper for the applicant to be granted an extension of time to appeal out of time.

The application is granted. The applicant should file his appeal within forty-five (45) days from the date of this ruling.

It is so ordered.

DATED at DODOMA this 7th day of March 2024



Longopa
E.E. LONGOPA
JUDGE
07/03/2024.