

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

MISC. CRIMINAL APPLICATION NO 177 OF 2019

**(Originating from Criminal Case No. 5 of 2018 in the District
Court of Kisarawe and Miscl. Criminal Application No. 10 of
2019 in the High Court of Tanzania at Dar es Salaam)**

SALUM MBEGU KIMBURU APPLICANT

VERSUS

REPUBLIC RESPONDENT

RULING

12nd December, 2019 & 20th December, 2019

KISANYA, J:

This application for extension of time to appeal is made under Section 361(2) of the Criminal Procedure Act, (Cap. 20 R.E. 2002) (hereinafter referred to as “the Act”). The applicant is praying for extension of time to appeal against ruling delivered by this Court (Miscellaneous Criminal Application No. 10 of 2019) where his application for bail pending trial was dismissed on **21st March 2019**. The chamber application is taken at the instance of **Rumanyika & Co Chambers** and is supported by an affidavit of Leonce Rwebangira Kente, who is the legal counsel for the Applicant.

During the hearing of this application, Mr. Leonce Rwebangira Kente, learned advocate appeared for the Applicant who was also present. The

Republic was on the other side represented by Mr. Kandid Nasua and Miss Mono Upendo, learned State Attorneys.

Before proceeding with hearing of the application, I asked the parties to address me on the following two issues:

- (a) Whether this Court was properly moved; and
- (b) Whether affidavit in support of application was not defective.

Mr Leonce Rwebangira Kante, learned was the first to address this Court. He submitted ^{that} he was advised to file the present application under section 361(2) of the Act when similar application made under rule of 10 of the Court of Appeal Rules was struck out by this Court for want of enabling provision. As to the affidavit, he conceded that the same was defective because its *jurat* does not show the place where the affidavit was taken or made. At first, the learned advocate requested for the time to substitute the affidavit but upon reflection and after hearing the Respondent's submissions, he withdrew that request and urged me to consider the overriding objective principle and grant the application.

When Mr. Kandid Nasua, learned State Attorney took the floor, he was in agreement the learned advocate that similar application was stuck out for want of enabling provision. He was of the view that section 361(2) of the Act cited in the Chamber Summons is proper. As to the affidavit, the learned State Attorney submitted that the same is defective for want of place where it was taken or made. However, he argued that this Court may disregard the defect on the basis overriding objective principle enshrined

under section 3A of the Appellant Jurisdiction Act (Cap. 141 R.E. 2002) as amended by the Written laws (Miscellaneous Amendment) (No.3), 2018.

After hearing both parties, I reserved the ruling on the two issues and proceeded to hear the main application. Since the said issues relate to point of law, I will start to address them before considering whether the matter should proceed on merits.

Starting with the first issue on whether this Court was properly moved. It is not disputed that the applicant intends to file appeal against ruling issued by this Court (Hon. Galeba, J.) in Miscellaneous Criminal Application No. 10 of 2019. The Chamber Summons is made under section 361(2) of the Act which reads as follows:

*“The High Court may, for good cause, admit an appeal notwithstanding that **the period of limitation prescribed in this section has elapsed** (emphasize is mine).*

To my understanding, the words “prescribed in this section” appearing in the above section suggest that section 361(2) of the Act cited in the Chamber Summons applies to extension of time limitation prescribed in that section and not otherwise. The said time limitation is specified in section 361(1) of the Act as ten days for filing notice of appeal and forty five day for filing petition of appeal.

Upon reading opening clause of section 361(1) of the Act, it is clear to me that the time limitation prescribed in that section relates to “appeals from any finding, sentence or order referred to in section 359” of the Act which relates to “Appeals to the High Court” against the decision made by the District Courts or Resident Magistrate’s Courts. Therefore, since the

Applicant in the matter at hand requests for extension of time to file appeal against the ruling issued by the High Court and whereas an appeal from the High Court is lodged in the Court of Appeal of Tanzania, it is my considered view that the provision cited in the Chamber Summons is not applicable.

An application made under wrong provision is incompetent before the Court. This position was held by the Court of Appeal in the case of **Hussein Mgonja vs The Trustees Tanzania Episcopal Conference**, CAT, Arusha, Civil Revision No. 2 of 2002 (unreported) when it stated:

“If a party cites the wrong provisions of the law the matter becomes incompetent as the Court will not have been properly moved.”

I now move to the second issue on the legality affidavit. Both the parties are in agreement that the affidavit in support of the application does not show the place where it was taken or made. Such defect contravenes section 8 of the Notary Public and Commissioner for Oaths Act (Cap. 12 R.E. 2002) as amended which provides:

*“Every notary public and Commissioner for oaths before whom any oath or affidavit is taken or made under this Act **shall** insert his name and state truly in the jurat of attestation at **what place** and on what date the oath or affidavit is taken or made (emphasize is mine).”*

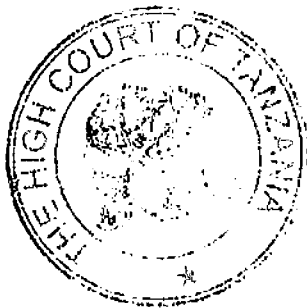
An affidavit which fails to observe that requirement is incurable defective and renders the application before the Court incompetent as held in the case of **Darusi Gidabosi vs R**, Criminal Application No 1 of 2011, CAT (unreported). I understand that this Court is duty bound to consider

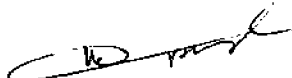
and take into account the overriding objective principle as argued by both parties. However, since the defect has impact on competency of the application, I am of the considered view that this Court cannot act on it unless the same is corrected.

Therefore, since this application is made under wrong provisions, it is incompetent before this Court. Also, it is incompetent because it is accompanied with an affidavit which is defective. For the aforesaid reasons, I find no need of considering the application on merit. I accordingly stuck out this application for being incompetent before this Court.

Order accordingly.

Dated at Dar es Salaam this 20th day of December, 2019




E. S. Kisanya
JUDGE