

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

**SONGEA SUB - REGISTRY
AT SONGEA**

MISC. CRIMINAL APPLICATION NO. 12 OF 2023

(Originating from Namtumbo District Court in Criminal Case No. 15 of 2022)

ZUBERY FATEA @ MBAWALA APPLICANT

VERSUS

THE REPUBLIC RESPONDENT

RULING

Date of last Order: 29/08/2023

Date of Ruling: 07/09/2023

U.E. Madeha, J.

To begin with, this is an application filed by the above-named Applicant seeking for extension of time within which he can filed notice of intention to appeal and petition of appeal out of time. The application is made by way of chamber summons under section 361 (2) of the *Criminal Procedure Act* (Cap. 20, R. E. 2022) and it is supported by an affidavit deponed by the Applicant.

The reason advanced by the Applicant for the late filing of the notice of appeal and petition of appeal is on the fact that the trial Court delivered its judgment in his absence on the 17th day of October, 2022. On 9th May, 2023 he was arrested and sentenced to serve two years in jail. He filed his notice of intention to appeal but it was struck out for the reason that it was out of time and he filed this application. The Respondent through the counter affidavit deposed by Ms. Ester Mfanyakazi, the learned State's Attorney denied all the allegations made by the Applicant in his affidavit.

It is worth considering the fact that, when this application was called on for hearing, the Applicant appeared in person fending his application whereas Ms. Ester Mfanyakazi, the learned State's Attorney represented the Respondent.

Arguing in support of the application the Applicant submitted that when the judgment was delivered, he was not in Court and in that judgment, he was convicted and sentenced to serve two (02) years in jail. In fact, when he was arrested and sent to prison, he was told that the time for filing an appeal had already expired.

The Applicant averred further that he was supplied with the copy of judgment and proceedings too late that is why he failed to file this application immediately after being aware of the decision of the Court. Lastly, he prayed for this Court to extend time for him to file his notice of appeal and petition of appeal.

On the contrary, Ms. Ester Mfanyakazi adopted the Respondent's counter-affidavit which was filed earlier in this Court and stated that under section 361 (2) of the *Criminal Procedure Act* (supra), this Court has given discretionary power to grant extension of time although that power must be exercised judiciously. She added that in this application the Applicant has failed to adduce sufficient reasons to enable this Court to exercise its discretion power of granting an order for the extension of time for the Applicant to file his notice of intention to appeal and petition of appeal. Expounding this stance, she invited this Court to be guided by the decision of the Court of Appeal in the case of **Jumanne Hussein Bilingi v. The Republic**, Criminal Appeal No. 20 of 2014, in which the Court stated that in granting prayers for extension of time, the Applicant must show good and genuine cause.

She further submitted that the Applicant was required to demonstrate as to what prevented him to file the notice of intention to appeal and the petition of appeal on time and he was to account for each day of delay. She added that in his affidavit the Applicant deponed that the trial Court delivered its judgment on 17th day of October, 2022 in his absence and he was arrested and started serving his sentence on 9th day of May, 2023 and this application was filed on 18th August, 2023 after a period of more than three months.

Ms. Mfanyakazi argued further that the Applicant has failed to explained why he didn't file this application immediately after starting serving his sentence when he was aware of the judgment against him. For that reason, she argued that the Applicant has to account for each and every day of delay from the date he was sent into the prison but he has failed to meet that legal requirement. She further contended that copies of judgment and proceedings are not necessary in filing notice of intention to appeal. Lastly, she argued that the Applicant failed to demonstrate a good reason for this Court to use its discretionary power to grant an order for enlargement of time and she prayed for this application to be dismissed.

Rejoining to the submissions made by the Respondent's learned State's Attorney, the Applicant reiterated to what he has submitted in his submission in chief and he prayed for this application to be granted.

As much as I am concerned and having gone through the affidavit, the counter affidavit and the submissions made by both parties in this application, I find the main issue which needs to be determined by this Court is whether the Applicant has advanced good cause to convince this Court to extend time within which he can lodge the notice of appeal and petition of appeal out of time.

As a matter of fact, it is a settled legal principle that a party who seeks for an extension of time must advance good cause for the Court to exercise its discretionary power in extending time or otherwise. Reference is made to the case of **Republic v. Yona Kakonda & 9 Others** (1985) T. L. R. 84, it was held that:

"In deciding whether or not to allow an application to appeal out of time, the Court has to consider whether there are sufficient reasons not only for the delay but also sufficient reasons for extending time during which to entertain the appeal."

For this reason, the factors to be taken into account as succinctly stated by the Court of Appeal of Tanzania in the in 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), that: *One*, the Applicant must account for all the period for the delay. *Two*, the delay should not be inordinate. *Three*, the Applicant must show diligence, and not apathy, negligence, or sloppiness in the prosecution of the action that he intends to take; *Four*, if the Court feels that there are other sufficient reasons, such as the illegality of the decision sought to be challenged.

It is important to note that, the reason advanced by the Applicant in this application is on the fact that the judgment was delivered in his absence and he became aware of the decision when he was arrested and sent into prison on 9th May, 2023 and obviously the time for appeal had expired. This application was filed before this Court on 18th August, 2023, which was after the period of more than three months from the date the Applicant became aware of the impugned decision. The application has been resisted by the learned State's Attorney for the reason that the

Applicant has failed to account for each day of delay from the date he was aware of the decision sought to be challenged.

As stated by the learned State's Attorney for the Respondent, extension of time is the discretionary power of the Court which must be exercised judiciously. See the decision in the case of **Blue Line Enterprises Ltd. v. East African Development Bank**, Misc. Civil Cause No. 135 of 1995, in which Katiti J, held that:

"It is trite law that extension of time must be for the sufficient cause and that extension of time cannot be claimed as of rights, that the power to grant this concession is discretionary, which discretion is to be exercised judiciously, upon sufficient cause being shown which has to be objectively asserted by Court."

Among other factors to be considered by the Court in granting extension of time is for the Applicant to account for each day of delay. The Court of Appeal of Tanzania in the case of **Tanzania Coffee Board v. Rombo Millers Limited**, Civil Application No. 13 of 2015 (unreported), held that:

"Extension of time should be considered in two grounds; that every day of delay must be accounted, and the reason for the delay must be sufficient ...".

Generally speaking, the requirement of accounting for each day of delay has been discussed in other several decisions of the Court of Appeal of Tanzania such as; **Kombe Charles Richard Kombe v. Kinondoni Municipal Council**, Civil Application No. 379 of 2018 (unreported), **Tanzania Fish Processors Limited v. Eusto K. Ntagalinda**, Civil Application No. 41 of 2018 and **Crispian Juma Mkude v. R**, Criminal Application No. 34 of 2012 (unreported).

In the present application, the Applicant has failed to advance a good reason for the delay in filing his notice of intention to appeal and petition of appeal. There is no doubt that the decision was delivered in his absence and this application was filed after the period of more than three (03) months from the date he was aware of the decision sought to be challenged.

In the circumstance and for the foregoing reason, I find the Applicant has no sufficient and genuine reason to convince this Court to grant an

order for enlargement of time. Therefore, I dismiss this application for lack of merit. It is so ordered.

DATED and DELIVERED at **SONGEA** this 07th day of September, 2023.



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U. E. MADEHA

JUDGE

07/09/2023

COURT: Ruling is read over in the presence of the Applicant and Ms. Ester Mfanyakazi, the learned State Attorney for the Respondent. Right of appeal is explained.



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U. E. MADEHA

JUDGE

07/09/2023