

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

**SONGEA SUB - REGISTRY**

**AT SONGEA**

**MISC. CRIMINAL APPLICATION NO. 5244 OF 2024**

**CASE REFERENCE NO. 202402282000005244**

*(Originating from Mbinga District Court in Criminal Case No. 03 of 2022)*

**DIRECTOR OF PUBLIC PROSECUTIONS ..... APPLICANT**

**VERSUS**

**QULINUS ROBERT KAPINGA ..... RESPONDENT**

**RULING**

Date of Last Order: 09/04/2024

Date of Ruling: 29/04/2024

**U. E. Madeha, J.**

To begin with, this is an application for extension of time to file notice of intention to appeal and petition of appeal out of time. The application is made by way of chamber summons under section 379 (2) of the *Criminal Procedure Act* (Cap. 20, R. E. 2022). The application is also supported by an affidavit sworn by Mr. Baraka Mgaya, the learned State Attorney from the office of the National Prosecution Service at Mbinga.

Before the hearing of this application, it came into my knowledge that this application was filed as criminal reference but it is Misc.

Criminal Application. In that regard, I ordered both parties to address me on that issue and we came into a conclusion that it was an error which was to be rectified by vacating the word reference and making an order for the parties to acknowledge that this application is a Misc. Criminal Application and the Case Number remain the same.

At the hearing of this application Mr. Baraka Mgaya and Ms. Esther Mfanyakazi, both learned State Attorneys appeared for the Applicant whereas the Respondent enjoyed the legal services of Mr. Eliseus Ndunguru, the learned advocate.

Arguing in support of the application, Mr. Baraka Mgaya averred that the Applicant in this application is seeking for an order for extension of time to file notice of intention to appeal and petition of appeal out of time. He added that the application is supported by an affidavit sworn by Mr. Baraka Mgaya on behalf of the Applicant and he prayed for the affidavit to be adopted to form party of the Court proceedings.

Mr. Mgaya went further submitting that, before the District Court of Mbinga, the Respondent was charged with the offence of rape and on 21<sup>st</sup> day of June, 2022, the judgement was delivered and the Respondent was acquitted. The Applicant was dissatisfied with that decision and on 21<sup>st</sup> July, 2022, the notice of intention to appeal was

filed as shown in Annexure QK1 attached in the affidavit filed in support of this application. The Applicant requested to be supplied with copies of proceedings and judgment and were supplied on 4<sup>th</sup> August, 2023, as shown in Annexure KQ2. Then, on 14<sup>th</sup> September, 2023, the Applicant filed an appeal before this Court which was registered as Criminal Appeal Number 48 of 2023, as shown in Annexure QK3. He contended that, on 25<sup>th</sup> January, 2024, when that case was scheduled for hearing, the Applicant's State Attorney realized that the notice of intention to appeal was filed out of time limit for one day and he prayed to withdraw the appeal in order to file an application for extension of time to file an appeal out of time since the notice of intention to appeal was defective for being filed out of time for one day. As a result, the appeal was struck out and the Applicant filed this application and the Court order is attached as Annexure QK4 in the Applicant's affidavit.

He stated further that the reason for filing the notice of intention to appeal out of time for one day was a human error in calculating the thirty (30) days of filing the notice of intention to appeal and was not due to negligence on party of the Applicant. He averred further that, there are several Court decisions which gives principles to guide Courts in dealing with applications of this nature. He stated that, among the

principles is for the Applicant to account for each day of the delay. To substantiate his stance, he referred this Court to the decision of the Court of Appeal of Tanzania made in the case of **Lyamuya Construction Company LTD vs. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 02 of 2010. He added that in **Lyamuya's Case**, four principle guiding Courts on whether to grant or not applications of this nature were developed which are; *One*, the Applicant must account for the whole period of delay; *Two*, the delay must not be inordinate, *three*, the Applicant must show diligence and not negligence or sloppiness in prosecuting the action that he intends to take and; *four*, if the Court finds that there are other sufficient reasons, such as the existence of a point of law of sufficient importance or the illegality of the decision sought to be challenged.

Mr. Mgaya further referred this Court to the decision made by the Court of appeal in the case of **Vodacom Tanzania Public Limited Company vs. Commission General Tanzania Revenue Authority**, Civil Application No. 101 of 2021, in which the Court of Appeal of Tanzania emphasized for the Applicant to account for each day of delay, the reason for the delay and the degree of prejudice that the Applicant

may suffer if the application is not granted. He argued that in this application, the Applicant is late for only a one day and the reason is on human error in calculating the time available for the Applicant to file notice of intention to appeal and if this application will be granted the Respondent will not be prejudiced whatsoever. He added that, if this application will be granted, it will also avoid the notion of determining cases basing on technical grounds. He concluded by praying for the orders sought in this application to be granted.

On the other hand, Mr. Eliseus Ndunguru, submitted that having gone through an affidavit sworn in support of this application and a counter-affidavit sworn by the Respondent, he is in the view that, the Applicant has no sufficient reason to convince this Court to grant the orders sought for. He went on submitting that, even though it's in the discretionary power of this Court to grant for orders for extension of time but the reason for the delay must be guanine. He argued that, at paragraph nine of the affidavit sworn in support of the application, the Applicant's learned State Attorney has averred that the reason for the delay is a human error in counting the days available for filing the notice of intention to appeal but in his view that was not actually human error rather than negligence since from the time when the case was heard

before the trial Court the applicant was represented by the learned State Attorney, who was supposed to ensure that he handled the case with due diligence. He quantified further that, negligence of the learned the Advocate or State Attorney cannot be taken to be a sufficient reason to grant an order for extension of time. He referred this Court to the decision made in the case of **Frank Leonard Sanga vs. Aneth Abdul Muhina**, Misc. Application No. 310 of the 2019, in which the High Court of Tanzania at DSM District Registry, elaborated that Courts cannot grant an extension of time for the negligence of an advocate, which is a professional misconduct. Mr. Ndunguru agued further that, the case of **Lyamuya Company Limited** (supra), which was cited by the Applicant's State Attorney which gives guidance in granting an order for extension of time, the third principle states that the Applicant must show diligence and not negligence or sloppiness in prosecuting his actions but in this application the Applicant has shown negligence which makes the application to be not in favor of the Applicant.

Mr. Ndunguru contended that the Applicant was to file the notice of intention to appeal within thirty (30) days and filing on the 31<sup>st</sup> day shows that there was negligence in prosecuting the case which is one of the reasons for the orders sought in this application to be ignored. He

also added that, Courts has discretionary power to grant leave to file notice of intention and petition of appeal out of time if there are reasons for doing so and among the reasons is illegality of the decision sought to be challenged but, in this application, neither the affidavit nor the submission made by the learned State Attorney for the applicant, has revealed that there is an illegality in the decision sought to be challenged in the intended appeal.

On the issue of the length of delay, Mr. Ndunguru averred that the decision which is intended to be challenged was delivered on 21<sup>st</sup> June, 2022, while this application was filed on 26<sup>th</sup> February, 2024, which is almost after two (02) solid years, and if the Court will grant the orders sought in this application the Respondent will be prejudiced. He further stated that, it is the intention of the public that litigation must come to an end and trying to start to prosecute afresh the case which was decided on 21<sup>st</sup> June, 2022. He contended that, the Applicant is trying to make cases not to come into an end which is against the public policy and justice.

Mr. Ndunguru submitted further that it is important for this Court to know that, when the trial Court delivered its decision, the Respondent was seventy years old and currently he is almost seventy-two years old

and continuing to prosecute a seventy-two (72) years-old man is to prejudice him, taking into account of his old age and the nature of the case that he was facing. Lastly, he prayed for this application to be dismissed.

In his rejoinder submission by Mr. Baraka Mgya contended that, the case of **Frank Leonard Sanga** (supra), which was cited by the Respondent's advocate is the decision of the High Court, which is not binding to this Court but it is only persuasive and the circumstances of this case and the cited case are different. He averred that, in the case cited by the Respondent's advocate was on the negligence of the advocate to follow the instructions given by his client, however in this application, the reason is on the human errors made in calculating the days available for filing a notice of intention to appeal. On the length of delay, he argued that the Respondent's learned advocate has misdirected himself since the delay was only for a single day and not two years since the notice of intention to appeal was filed on 21<sup>st</sup> July, 2022 and the decision was delivered on 21<sup>st</sup> June, 2022.

He further submitted that the Respondent's learned advocate stated that there was no diligence in this application but on paragraphs six, seven and eight of the affidavit filed in support of the application



and annexure QK4, which is the order of this Court, shows clear that the Applicant dealt with this matter diligently. Lastly, he contended that, the Respondent will not be prejudiced due to his old age but if this application will not be granted, the general public will be prejudiced. On the issue that the Applicant has failed to point out the illegality found in the decision to be challenged, he argued that, in his submission he has not gone so far since doing so would be arguing the appeal. He contended further that, even in **Lyamuya's Case** (supra) it was stated clear that the developed principles are not necessarily be proved all together but even one will be sufficient for the application of this nature to be granted. Lastly, he argued that it will be for the interest of justice if this application will be granted.

As much as I am concerned, having gone through the affidavit, the counter affidavit and the submissions made by the learned counsel from 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 exercise its discretion power to extend time within which the Applicant can lodge an appeal out of time. The reason adduced by the Applicant for the delay is human error in calculating the days for lodging the notice of appeal.

It is my considered view that, in application of this nature, human errors in calculation of calendar dates may be one among the reasons for the application to be granted with the extension of time to file notice of intention to appeal and petition of appeal depending on the reasonableness of the number of days in which the Applicant has delayed. In this application, it is undisputed fact that, the trial Court delivered its judgement on 21<sup>st</sup> June, 2022 and the Applicant filed the notice of intention to appeal on 21<sup>st</sup> July, 2022 which was only one day after the expiry of the thirty statutory days of filing notice of intention to appeal.

This application is vehemently disputed by the Respondent. Though having heard the submissions made by the Respondent's advocate, I have noticed that the Applicant filed his notice of intention to appeal one day after the expiry of the statutory days of filing the notice. Also, it is not in disputed that, the Applicant after being supplied with the copy of judgment and proceedings, an appeal was filed before this Court within time but it was struck out on the ground that the notice of intention to appeal was filed out of time for one day. The Applicant has also annexed the Court order which struck out the appeal.

The Court of Appeal of Tanzania, the Apex Court in our land, in the case of **Lyamuya Construction Company Limited vs. Board of the Registered Trustees of the Young Women's Christian Association of Tanzania** (supra), the famous case, which has also been referred by the parties in this application, the Court stated that following guidelines in dealing with applications of this nature. **One**, the Applicant must account for each day of delay; **Two**, the delay should not be inordinate; and **three**, the Applicant must not show negligence in prosecuting the action that he intends to take.

From what has been expounded above, the Applicant has been out of the statutory period for only one day and the reason has stated to be human error in calculating the calendar days. Thus, it is my findings that, the delay was not inordinate, and the single day of delay has been accounted for since the reason stated by the Applicant has convinced this Court to use its discretion power. Also, from all has been stated by the learned State Attorney that, the Applicant filed his appeal which was struck out for the reason that it was filed basing on the notice of intention to appeal which was filed out of time, I find the Applicant dealt with this case diligently and not negligently.

The Respondent's learned advocate has stated that, if this application will be granted, the Respondent will be prejudiced due to his old age. But I find there is no prejudice to either party if the application will be allowed.

Consequently, in the circumstances of what has been stated above and in the exercise of the Court's discretion, the orders sought by the Applicant in this application are granted. The Applicant is hereby given twenty-one (21) days from the date of this ruling to file notice of intention to appeal and petition of appeal. It is so ordered.

**DATED** and DELIVERED at **SONGEA** this 29<sup>th</sup> day of April, 2024.



A handwritten signature in blue ink, appearing to read "Madeha", with a long horizontal line extending to the right.

**U. E. MADEHA**

**JUDGE**

**29/04/2024**

**COURT:** Ruling is read over in the presence the Respondent in person and in the absence of the Applicant. The Applicant to be notified. Right of appeal is explained.



A handwritten signature in blue ink, appearing to read "Madeha", with a long horizontal line extending to the right.

**U. E. MADEHA**

**JUDGE**

**29/04/2024**