

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

MISC. CRIMINAL APPLICATION NO. 206 and 222 OF 2019

(Originating from the decision of the Resident Magistrates' Court of Dar es Salaam at
Kisutu in Criminal Case No. 21 of 2014).

SALIVIOUS FRANCCIS MATEMBO.....1ST APPLICANT
MANASE JULIUS PHILEMON.....2ND APPLICANT
YANG FENG GLAN.....3RD APPLICANT
VERSUS
THE REPUBLIC.....RESPONDENT

RULING

Date of Last Order: 13.12.2018

Date of Ruling: 20.12.2018

KALUNDE, J.

This ruling emanates from an application for extension of time within which to file a Notice of Appeal and Petition of Appeal against the decision of the Resident Magistrates' Court of Dar es Salaam at Kisutu before **Hon. Shaidi (PRM)** dated 19th day of February, 2019.

The applicants, aggrieved by the decision of the Resident Magistrates' Court of Dar es Salaam in Economic Case No.21 of 2014 filed a notice of intention to appeal in accordance with S.361(1)(a) of the Criminal Procedure Act [Cap.20 R.E. 2002] (CPA). After filing the notice the applicant received a copy of Judgment & proceedings and consequently, within the time prescribed by law, they filed an appeal at the High Court of Tanzania, Dar es Salaam District Registry which was recorded as Criminal Appeal No. 5 of 2019. The appeal was argued by way of written submissions. However the appeal was struck out by **Hon. Demello, J** on 16th October, 2019 for being improperly submitted before the Court.

The applicants then filed the present application. The first and third applicants submitted joint application which was registered as **Criminal Application No. 206 of 2019**. Another application was filed by the second applicant and registered as **Criminal Application No. 222 of 2019**. The two applications were subsequently consolidated leading up to the present application. Both applications were supported by chamber summons made under section 361(2) of CPA and affidavits of respective applicants.

When the application was called for hearing the first and third applicants enjoyed the services of the Mr. Majura Magafu, learned advocate, the second applicant was unrepresented but appeared in person whereas the Respondent/Republic was represented by Mr. Salim Msomi, Miss. Elizabeth Mkunde and Candid Nasua learned State Attorney.

In support of the application, Mr. Magafu learned counsel for the first and third applicants submitted that granting the extension of time to file a petition and notice of appeal was a discretion of the Court. He argued that the Court is supposed to consider whether there is **"good cause"** prior to exercise its discretion and that the considerations of what may constitute a good cause included the reasons for the delay. He also stated that, the applicants intends to appeal because they believe the intended appeal has overwhelming chances of success.

On the cause of delay the applicants submitted that when their appeal was struck out they were left with one option of filing an application for extension of time to file a petition and notice of appeal. Highlighting that they acted diligently the applicants submitted that the appeal was struck out on 16th October, 2019 and within a week on 23rd October, 2019 the present application was made.

The applicants argued that, the counter affidavit of the respondents did not controvert the contents of paragraphs 1st – 12th of the 1st and 3rd applicants, which, chronologically stipulates the course of events leading up to the present application. Commenting on the contents of the respondents affidavit, the applicants argued that, para 5 of the same did not disclose or has failed to disclose reasons as to why the applicants should not be granted the orders sought.

Responding to the contents of paragraph 5 of the respondents counter affidavit which controverted paragraphs 12, 13, 14 and 15, the applicants' submitted that, the respondents have not demonstrated why they

contradict para 12 which talks of the applicants intention to pursue the appeal. That under paragraph 13 the applicants depone that they cannot pursue their appeal unless there is extension of time. Mr. Magafu argued that, this is a legal fact, the respondent's view that this is not a sufficient ground is out of track. He added that para 14 demonstrates that the application was filed within a reasonable time, that is, seven days, in respect thereof the applicants acted diligently. And lastly that, para 15 which is also controverted states that the application sought are reasonable, he submitted that the cause leading to the appeal being struck out were well explained and the applicants acted diligently.

Mr. Magafu, futher, submitted that, the applicants' have demonstrated sufficient cause within the meaning of section 361(2) as they acted diligently in submitting their application, this also demonstrated the applicants belief in their appeal case. He referred **Bundala Abdallah & Another vs. Republic, Criminal Appeal No 43 of 2016 (CAT – Tabora) (unreported)**. He also submitted that the respondents have not demonstrated that they are going to be prejudiced by the grant of orders. Referring to the case of **Herry Mnyaga Vs. TTCL, Civil Application No. 8 of 2011 (unreported)** which is cited in **Fabian Chumila Vs. Republic, Criminal Application No 6/10 of 2019 (CAT at Iringa) (unreported)**.

Mr. Magafu, learned counsel, concluded by submitting that, the grounds submitted are sufficient to move the court to exercise its discretion under S.361 (2) of the CPA and grant the application.

On his part the 2nd applicant urged the Court to consider the grounds as set out in his affidavit and the fact that he was a prisoner who could not afford legal representation. He submitted that, the initial appeal was filed in time but was struck out for failure of his advocate to properly file the submission. He prayed that, the application be allowed.

Submitting for the respondents, Miss. Mkunde, learned State Attorney sought to have the counter affidavit adopted to from part the respondents submission. She made a joint submission for all applicants, submitting the applicants affidavits have failed to demonstrate sufficient cause for the delay for the whole period of delay from when the judgement against them was delivered. She referred the case of **Fabian Chamila Vs. Republic** (supra) which quoted **Lyamuya construction Ltd Vs Board of Registered Trustees of Young Women Christian Association of Tanzania, Civil Application No. 2 of 2010 (Unreported)**.

Moreover, the respondents submitted that, the authorities cited, by the applicants should not be considered as they included unrepresented applicants as distinguished from the present case. She added that, the applicants were failed to account for the delays and instead they submitted on overwhelming chances of success of their appeal and whether the Respondent would be prejudiced if the orders sought were granted. She submitted the two grounds should not be considered as they were not included in their pleadings.

Closing submissions by the respondents, she alluded that the court has a discretion to grant the application but the same has to be exercised

judiciously in consideration of the applicable law. She prayed that the application be refused since the applicant have failed to demonstrate good cause.

On rejoinder Mr. Magafu submitted that, it was a legal requirement that the respondent demonstrate they will be prejudiced by the orders sought to be granted, citing **Herry Myaga vs. TTCL** (Supra). On accounting for the delay, he reiterated that the reasons have been clearly set out from paragraph 3 – 11 which set out the cause of events and the fact since the respondents have not controverted the said paragraphs it demonstrated they conceded on their contents. He prayed that the orders sought be granted as the applicants have shown good cause.

In his rejoinder the 2nd applicant urged the Court to consider that he was a prisoner and that any delay should be construed in consideration of the circumstances prevailing to inmates.

I have carefully considered the submissions before the Court and the cases cited by the applicants and the respondents in support of their positions in this matter. I shall, straight away, address the question on whether the applicants have demonstrated good cause within the meaning of section 361(2) of the CPA. For avoidance of doubts the entire section 361(2) reads: -

"361-(2) The High Court may, for good cause, admit an appeal notwithstanding that the period of limitation prescribed in this section has elapsed." [emphasis mine]

This section vests discretion on this Court to extend time. However, as rightly pointed out by both counsels, the discretion is to be exercised judiciously upon the applicant establishing good cause. In present case the applicants, in their affidavits and submissions, have clearly demonstrated that, aggrieved by the decision of RM's Court of Dar es Salaam dated 19th day of February, 2019. They filed their appeal, at the High Court of Tanzania, Dar es Salaam District Registry, well within the time limits set out in accordance with S.361(1)(a) of the CPA and subsequently the appeal was recorded as Criminal Appeal No. 5 of 2019. The appeal was argued and subsequently struck out by **Hon. Demello, J** on 16th October, 2019 for being improperly submitted before the Court. Between April, 2019 and October, 2019 when the appeal was filed, determined by the Court and subsequently struck out, this period is accounted for.

When their appeal was struck out on 16th October, 2019 the 1st and 3rd applicants, filed the present application on 23rd October, 2019, within seven days of the appeal being struck out. The second applicant signed and filed his application on 28th October, 2019 and the same was received by the Court on 08th November, 2019. He is a prisoner, with no legal representation, there is no inordinate delay, especially given the fact that his process is not complete until it passes through a prison officer in-charge under section 363 of CPA, he was, was so to speak under the mercy of the prison officer as was held in **Buchumi Oscar v Republic, Cr. Appeal No. 295"B" of 2011 (CCAT at Tabora) (unreported)**. As to the question of what amounts to good cause or sufficient cause, **Hon. Nsekela, JA** in **Tanga Cement Company Limited v Jumanne D.**

Masangwa and Amos Mwalwanda, Civil Application No. 6 of 2001 (unreported), had this to say: -

*"What amounts to sufficient cause has not been defined in decided cases **a number of factors have to be taken into account, including whether or not the application has been brought promptly**" [emphasis mine]*

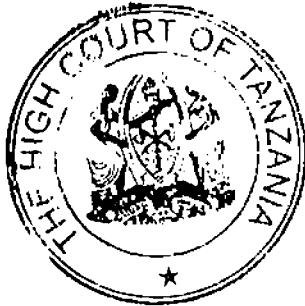
I am of the considered view that the applicants were able to demonstrate that, the delay if any, was not inordinate and that the applicants have demonstrated diligence in the prosecution of the action they intend to pursue. See **Lyamuya construction Ltd Vs Board of Registered Trustees of Young Women Christian Association of Tanzania** (supra).

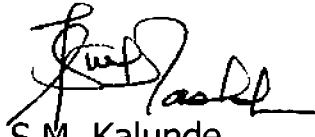
Whether the intended appeal has any prospects of success could not be entertained at this stage of entertaining an application for extension of time. It was so held in **Angumbike Kamwambe v Republic, Cr. Appeal No. 10 of 2015 (CAT at Mbeya) (unreported)**. I will, therefore, not indulge myself in this misplaced argument.

In the upshot, I hold that the applicants have demonstrated **"good cause"** to warrant the grant of the orders sought.

The application is hereby allowed. The applicants is to file Notice of Appeal within ten days of the date of this ruling. Needless to say, their petition of appeal in that regards should also be filed within the period of forty five days of the date of this ruling.

Order accordingly.

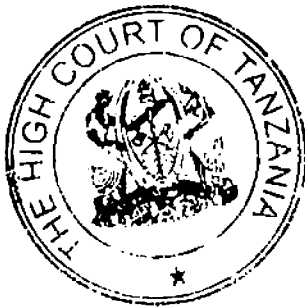



S.M. Kalunde

JUDGE

20/12/2018

Court: Ruling delivered in chambers in the presence of applicant in person and in the presence of Candid Nasua, State Attorney for respondent.




S.M. Kalunde

JUDGE

20/12/2018