

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CRIMINAL APPLICATION NO. 26/01 OF 2019

KENEDY OWINO ONYACHI

CHARLES JOHN MWANIKA NJOKA..... APPLICANTS

VERSUS

THE REPUBLIC RESPONDENT

**(Application for Extension of time to file Review from the decision of the
Court of Appeal of Tanzania at Dar es Salaam)**

(Munuo, Nsekela, And Luanda, J.J.A.)

dated 22nd day of December, 2009

in

Criminal Appeal No. 48 of 2006

RULING

10th July & 1st August, 2019

MKUYE, J.A.:

By a notice of motion taken under Rule 10, 48(1) and 66(1) (a) and (b) of the Tanzania Court of Appeal Rules, 2009 (the Rules), the applicants Kenedy Owino Onyachi and Charles John Mwanika Njoka are seeking an extension of time within which to file an application for review of the decision of this Court dated 22/12/2009 in Criminal Appeal No. 48 of 2006.

The grounds canvassed in the notice of motion are that:-

- 1) The copy of judgment was served to the applicant on the 2nd day of November, 2011 and the prescribed period had already expired.
- 2) The applicants are laymen who are in custody and the prison authorities who are their guardians did not advise them accordingly.
- 3) The Court of Appeal Registrar who read the judgment did not inform them the process of review.
- 4) The intended Review shall strictly be launched under the provisions enumerated in Rule 66(1) (a) and (b) of the Court of Appeal Rules, 2009.
- 5) Thus, the delay was attributed by reasons that were beyond our control as we needed a copy of the judgment to peruse and come up with proper grounds of review as enumerated by Rule 66(1) of the Court of Appeal Rules, 2009

The notice of motion is supported by affidavits deposed by each applicant respectively and the respondent/Republic did not file any affidavit in reply.

When the application was called on for hearing before me, the applicants appeared in person and were unrepresented and the respondent Republic was represented by Ms. Grace Mwanga, learned State Attorney.

Arguing in support of the application, the 1st applicant who also argued on behalf of the 2nd applicant reiterated what is contained in the Notice of Motion and submitted that the judgment of this Court sought to be challenged was delivered on 22/12/2009. They received the copy of the said judgment on 2/11/2011 after the time prerequisite for filing application for review had expired. That, they had filed several applications for extension of time but they did not go through. When prompted by the Court as to whether such applications were attached to the applications, he said, they were not.

On his part, the 2nd applicant who in the first place adopted the contents of his affidavit, added that the efforts made to enable the application for review to be filed proved futile.

On her part, Ms. Mwanga resisted the application. She prefaced by arguing that rule 10 of the Rules requires good cause for the delay to be shown. She contended that the applicants have not shown such good

cause for the delay. She elaborated that the applicants' have not shown what they were doing from 2/11/2011 when they received the copy of judgment to 16/5/2019 when this application was filed which is almost a period of 8 years. She said they ought to have given explanation on that. She added that the applicants' claim that they had made several applications for extension of time, was not supported by any evidence as they ought to have attached such applications to the application. Otherwise, she said, since the applicants have failed to show good cause for the delay, the application should be dismissed in its entirety.

In rejoinder, the 1st appellant stressed that, as they were late to receive the copy of judgment, it was obvious that they would need to seek extension of time. The 2nd applicant also insisted that there were efforts which were made except that they did not attach such documents. They, therefore, urged the Court to grant the application.

Having heard the parties from either side, I think the issue for determination is whether or not the applicants have shown good cause to warrant the Court to exercise its discretion to extend time.

As was hinted by Ms. Mwanga, under Rule 10 of the Rule, an application for extension of time within which to do something, can be granted if the applicant established good cause for the delay. The said Rule provides as follows:-

"The Court may, upon good cause shown, extend the time limited by these Rules or by any decision of the High Court or tribunal, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act; and any reference in these Rules to any such time shall be construed as a reference to that time as so extend."

I also wish to underscore here that, under the above cited provisions, what the applicants are required to do is to show a good cause for delay in filing the application for review they are seeking to file. This stance has been taken in a number of decisions. Just to mention a few, they include **Kalunga & Company Advocate v. National Bank of Commerce Ltd**, (2006) TLR 235; **Wankira Benteel v. Kaiku Foya**, Civil Reference No. 4 of 2000 (unreported).

In exercising its discretion of whether or not to grant extension of time the Court is required to exercise its judicially while being guided by such factors which may not be exhaustive such as:-

- 1) The applicant must account for all the period of delay;*
- 2) The delay should not be inordinate;*
- 3) The applicant must show diligence, and not apathy, negligence or sloppiness of the action that he intends to take;*
- 4) If the court feels that there are other sufficient reasons, such as existence of a point of law of sufficient importance such as the illegality of the decision sought to be challenged."*

(See **Lyamuya Construction Company Ltd v. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported).

In this application the reason for the delay that has been adduced by both applicants is that they were furnished with the judgment sought to be impugned while the time to file an application for review had lapsed.

In paragraphs 12 and 17 of their respective affidavits the applicants have deposed that the Registrar who delivered the judgment did not inform them of the process of review and that they had filed several applications for extension of time to file review but were struck out for lack of grounds for review.

My perusal of the court record has revealed that indeed the decision sought to be impugned was handed down on 22/12/2009 whereby the applicant's appeal was dismissed and the judgment was delivered by Hon. Chusi acting under her capacity as a Deputy Registrar.

One of the applicants claim for the delay is that they were "*not accordingly informed another chance within sixty (60) days to file Review of the judgment of the Court of Appeal of Tanzania either by the Court of Appeal Registrar who read the judgment or the prison authorities who are our [their] guardians*". However, with due respect, I find this claim to be very interesting. I say so because there is no law which requires the person pronouncing judgment on behalf of the Court to explain a right or review to the parties. It should be noted that an application for review is not an automatic right to be exercised by whoever wishes to do so. It has

been stated in times without number by this Court that review of this Court judgment is not a routine procedure but a procedure of its own kind (*sui generis*) and that it is exercised very sparingly and with great circumspection. (See **Blue line v. East African Development Bank**, Civil Application No. 21 of 2012 (unreported). And, this is so because of the settled cardinal principal which was propounded in the Indian case of **Devender Pal Sigh v. State N.C.T. and Another**, Review Petitions No. 497, 626 and 629 of 2002 which was adopted with approval in the case of **Blue line** (*supra*) that:

"a judgment of the final Court is final and a review of such judgment is an exception".

It is important to emphasize here that the above stance is very important because of other crucial reasons. One of such reason is the requirement for litigation to come to the end (finality of litigation) and the certainty of the law. (See **Tanzania Transcontinental Co. Ltd v. Design Partnership Ltd**, Civil Application No. 62 of 1996 (unreported); **Mathias Rweyemamu v. General Manager (KCU) Limited**, Civil Application No. 3 of 2014 (unreported). The other reason is that the Court cannot sit as a court of appeal on its own decision just because one of the

parties was not satisfied/or is not happy with its decision. (**see- Chandrakant Jushubhai Patel v. Republic**, [2004] TLR 218]. So in view of the above authorities the claim that the Deputy Registrar or Prison Authority did not inform them or the review process does not stand.

As regards the second reason of delay, the applicants have urged the Court to find that they had been making efforts to have the time for filing their application for review extended but in vein. They, however, admitted that they did not attach any such applications for extension of time in their application. Ms. Mwanga urged the Court to find such argument to be not tenable as the applicants failed to attach the said applications to support their argument.

Indeed, my perusal in the court record has revealed that no such copies of applications for extension of time were attached to the application as they readily conceded. I am, therefore not definite as to whether or not the applicants made such efforts. This Court has, in times without number, taken the view of not giving credence on to the arguments from the bar.

For instance, in the case of **Tanga Cement Company Limited v. Yahaya Athumani Mruma and 4 Others**, Civil Application No. 1 of 2017 (unreported) when the Court was confronted with a similar situation stated as follows:-

"...In his obviously belated effort from the Bar, Mr. Zaharan contended that he could not lodge the application earlier than... because he had to prepare the relevant papers or documents at his office in Dar e salaam and have them dispatched to this Court's sub registry in Tanga for filing. I give no credence to that argument from the Bar. It ought to have been deposed in Mr. Zaharan's affidavit for it to be cogent and plausible..."

Also in the case of **Zuberi Nassor Moh'd v. Mkurugenzi Mkuu Shirika la Bandari Zanzibar**, Civil Application No. 93/15/2018 (unreported) the Court refused to rely on mere statement from the Bar and it stated as follows:

"...I agree with Mr. Rajabu that a mere statement from the bar without substantiation that indeed the bicycle was stolen with some documents, cannot constitute sufficient reason."

On the basis of the above cited authorities, therefore, the applicant claim that they had taken efforts by filing several applications for extension of time cannot be given credence for having failed to attach them to their respective affidavits. Similarly, I find them not to constitute good cause to warrant this Court to grant extension of time.

Having so said, I agree with Ms. Mwanga that the applicants have not been able to show good cause for their delay in filing the application to warrant this Court to extend the time sought.

Hence, the application for extension of time to file an application for review is hereby accordingly dismissed.

DATED at DAR ES SALAAM this 16th day of July, 2019.

R.K. MKUYE
JUSTICE OF APPEAL

I certify that this is a true copy of the original.




B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL