IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF MWANZA)

AT MWANZA

MISC. CRIMINAL APPLICATION NO. 37 OF 2020

PETER JAMES ..... APPLICANT

VERSUS

THE REPUBLIC ..... RESPONDENT

RULING

30th September, & 5th October, 2020

ISMAIL, J.

This is an application for extension of time within which to file a notice of appeal and the appeal out of time. The application is preferred under the provisions of section 359 (1) and 361 (1) (a) (b) (c) of the Criminal Procedure Act, Cap. 20 R.E. 2020. Accompanying the application is the applicant's own affidavit in which grounds for the prayers sought are set out. In the said affidavit, the applicant has stated that his first attempt to appeal against the trial court's decision fell through, when his appeal was adjudged time barred.

The reason for the delay is averred in paragraph 4 of the affidavit. The contention is that the applicant was looking after his ailing mother who was confined to the traditional healer's home in some village away from his place of residence, and that when he came back after the decision had been delivered. Believing that the decision had been made in his favour, he took no steps until 18 months later i.e. 15th April, 2020, when he was arrested and consigned to court where he was committed to prison to serve his sentence.

At the hearing of the matter, the applicant was unrepresented while the respondent was represented by Ms. Ghati Mathayo, learned State Attorney. Submitting in support of the application, the applicant highlighted what he stated in the affidavit. He stated further that, when he returned from the traditional healer, he realized that all his co-accused had gone missing and he was informed that they had all been convicted of the charges he was also involved in, and that they were serving their prison term. Responding to the Court's probing, the applicant conceded that he was aware that he had also been convicted and sentenced in *abstentia* and that he took no steps to challenge the decision until his arrest, 18 months later. He submitted that granting of this application will enable him file his

appeal, exuding confidence that his appeal would be allowed just like the rest of his co-accused whose appeal was allowed by the Court.

Ms. Mathayo opposed the application. She contended that the ground for extension does not constitute good cause as the applicant ought to have made a follow-up of his case when he came back from the traditional healer. Ms. Mathayo argued that the applicant who was out on bail should have used the sureties to follow up on the matter. She submitted that even when the applicant learnt that his colleagues had been imprisoned he took no action, meaning that the applicant was not vigilant. The learned attorney held the view that the applicant forfeited his right to appeal within time. She prayed that the application be dismissed.

In rejoinder, the applicant did not have anything useful to rejoin. He reiterated his call and urged the Court to accede to his prayer.

From these rival and brief submissions, the Court's task is to pronounce itself on whether a case has been made out to warrant exercise of its discretion and grant an extension of time.

The established principle of the law is that extension of time is only grantable where a party asking for it demonstrates that he has a credible

case warranting such extension, and that he has acted in an equitable manner. This position takes into consideration the fact that extension of time is a discretionary remedy, granted to a party who acts equitably. Thus, in ***Nicholas Kiptoo Arap Korir Salat v. IEBC & 7 Others***, Sup. Ct. Application 16 of 2014, the Supreme Court of Kenya propounded the following persuasive position:

> *"Extension of time being a creature of equity, one can only enjoy it if [one] acts equitably: he who seeks equity must do equity. Hence, one has to lay a basis that [one] was not at fault so as to let time lapse. Extension of time is not a right of a litigant against a Court, but a discretionary power of courts which litigants* ***have to lay a basis [for], where they seek [grant of it].***"

Acting equitably entails a party demonstrating that reasons which prevented him from acting timely constitute a sufficient reason. This requires meeting some key conditions. In the landmark decision of ***Lyamuya Construction Company Ltd v. Board of Registered Trustees of Young Women's Christian Association of Tanzania***, CAT-Civil Application No. 2 of 2010 (unreported), the Court of Appeal laid down such conditions as follows:

"(a) The applicant must account for all the period of delay.

(b) The delay should not be inordinate.

(c) The applicant must show diligence and not apathy, negligence or sloppiness in the prosecution of the action he intends to take.

(d) If the Court feels that there are other sufficient reasons, such as the existence of a point of law of sufficient importance; such as illegality of the decision sought to be challenged."

As courts consider whether or not to grant applications for extension of time, they have been warned against interpreting rules conservatively. They are also warned against being led by sympathy in their decisions. In ***Dephane Parry v. Murray Alexander Carson*** [1963] EA 546, it was emphasized that:

> *"Though the court should no doubt give a liberal interpretation to the words "sufficient cause", its interpretation must be in accordance with judicial principles. If the appellant has a good case on the merits but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy, and the appeal should be dismissed as*

time-barred, even at the risk of injustice and hardship to the appellant."

In the instant application, the applicant's sole reason for seeking this Court's indulgence is his assumption that the criminal proceedings were terminated in his favour. This contention was contradicted by the applicant's own oral account during the hearing, when he admitted that he was aware of his conviction but he chose to adopt a 'wait and see' attitude. Can this be said to be a reason sufficient to constitute a sufficient cause? In my considered view, this reason is too deficient to constitute a sufficient cause. It is a reason which demonstrates nothing but the applicant's lethargic conduct that exposes him as a person who is at fault, and is all out to benefit from his own inaction. The applicant's own concession that he knew that his colleagues' absence was because they were serving a jail term arising from the same case, means that he knew he had also been convicted and was due to serve his sentence. This was a sufficient alert that would trigger action by the applicant. His dawdling behavour can not be allowed to be the basis for calling this Court's discretion into action. On this, the Court is mindful of the wisdom ushered in the holding in ***KIG Bar Grocery & Restaurant Ltd v. Gabaraki & Another*** (1972) E.A. 503, in

which it was held that ***"... no court will aid a man to drive from his own wrong."***

It is my considered view that circumstances of this case are such that no material has been placed before the Court to enable it trigger its discretion and grant the extension of time. I hold that the application is lacking in merit and, accordingly, I dismiss it.

Order accordingly.

Right of appeal explained.

DATED at **MWANZA** this 5th of October, 2020.

M.K. ISMAIL

JUDGE

Date: 05/10/2020

Coram: Hon. M. K. Ismail, J

Applicant: Present in person

Respondent: Ms. Bilishanga Ajuaye, Senior State Attorney

B/C: P. Alphonce

Court:

Ruling delivered in chamber, in the presence of the applicant in person and in the presence of Ms. Bilishanga, Senior State Attorney, this 05th day of October, 2020.

M. K. Ismail

JUDGE

At Mwanza

05th October, 2020