

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

**IN THE DISTRICT REGISTRY OF ARUSHA**

**AT ARUSHA**

**CRIMINAL APPLICATION NO.77 OF 2021**

*(C/f criminal case No. 188 of 2018 at the District Court of Babati at Babati)*

**EVARIST ELIAS @ BASORO ..... APPLICANT**

**Vs**

**THE REPUBLIC.....RESPONDENT**

**RULING**

*Date of last order: 22-11-2021*

*Date of ruling: 24-1-2022*

**B. K. PHILLIP, J**

On 21<sup>st</sup> November 2019, the applicant herein was convicted of cattle theft by the District Court of Babati at Babati and sentenced to five years imprisonment. He was aggrieved by the aforesaid judgment of the District Court of Babati. However, he failed to file his appeal in Court within the time prescribed by the law. Thus, he lodged this application under the provisions of section 361 (2) of the Criminal Procedure Act, (Henceforth "the CPA") seeking for an order for extension of time for filing his appeal. The application is supported by an affidavit sworn by the applicant. The learned State Attorney Diaz Makule filed a counter affidavit in opposition

to the application and at the hearing of this application he appeared for the respondent. The applicant was unrepresented. He appeared in person. The application was heard viva voce. The applicant's submission was as follows; That upon being convicted, he was imprisoned at Babati Prison. He lodged his notice of intention to appeal on 23<sup>rd</sup> November 2019 and engaged advocate Michael to handle his appeal. Thereafter, he was transferred from Babati Prison to Katesh Prison. Unfortunately, while he was at Katesh Prison, he was injured. He has been sick for eight (8) months. He expected his relatives to assist him to follow up the filing of his appeal, but they did not do so. He was taken back to Babati Prison in June 2021 and that is when he requested the prisons officers to assist him to prepare this application. He implored this Court to grant the order sought in this application.

In rebuttal, Mr Makule submitted that the applicant has not adduced any sufficient reasons for failure to lodge his appeal in time. He contended that there is no any document attached to the affidavit in support of this application at least to show that the applicant was sick and was transferred from Babati Prison to Katesh Prison. Moreover, Mr Makule argued that in his affidavit in support of this application, the applicant has deponed that he engaged an advocate namely Michael. He failed to state

the second name of that advocate. Mentioning only one name of the advocate removes the possibility of verifying whether the advocate alleged to have been engaged by the applicant is registered in the roll of advocates, contended Mr Makule. He invited this Court to dismiss this application.

In rejoinder the applicant told this Court that he obtained treatment in the Prison and was not issued with any medical card for the treatment he obtained. He has no anyway of getting any document in respect of the treatment he obtained in Prison. Also, he maintained that he engaged advocate Michael to assist him in filing his appeal, but he cannot remember his second name .He beseeched this Court to grant this application.

I have dispassionately analyzed the arguments made by both sides. It is a common ground that the provision of section 361(2) of the CPA confers powers to this Court to grant extension of time for filling an appeal if the applicant adduces good cause for the failure to file the appeal within the time prescribed by the law. Granting extension of time is within the Courts discretionary powers. However, the Court has to exercise its discretion judiciously.

From the foregoing, the pertinent question that arises here is; what is "good cause". Unfortunately, the law does not stipulate the "good cause." Our Courts have set up some guiding factors which are normally looked into in determination of applications of this nature. For instance in the case of **Lyamuya Construction Company Ltd Vs Board of Registered Trustee of Young Women's Christian Association of Tanzania, Civil Application No.2 of 2010** (unreported ), His Lordship Massati J. A as he then was said the following;

*".. As a matter of general principle, it is in the discretion of the Court to grant extension of time. But that discretion is judicial, and so it must be exercised according to the rules of reason and justice, and not according to private opinion or arbitrarily. On the authorities, however, the following guidelines may be formulated;*

- a) The applicant must account for all period of delay*
- b) Delay should not be inordinate*
- c) The applicant must show diligence, and not apathy, negligence or sloppiness in the prosecution of the action that 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 the illegality of the decision to be challenged."*

However, it has to be noted that good causes for delay are not exhaustive and each case is normally decided on its own merits. [see the case of

**Yusufu Same and Hawa Dada Vs Hadija Yusufu, Civil Appeal No. 1 of 2002** (unreported).

In the instant application, the applicant lodged his notice of appeal in time. This shows that he acted diligently in pursuing his appeal. Mr Makule disputed the applicant's allegation that he was sick and was transferred to Katesh Prison, on the reason that he has not attached any document to prove the same. With due respect to the learned State Attorney, I do not see any strong evidence that has been brought in Court by the respondent to challenge what is deponed by the applicant in his affidavit that he was sick and was transferred to Katesh Prison. In my opinion the counter affidavit sworn by Mr Makule has not provided any information which can move this Court to doubt the applicant's assertions. Affidavit is evidence. It is not enough for the opponent who wants to dispute the contents of an affidavit to just state that the applicant is put to strict proof of what he has deponed. I wish to associate myself with the observations made by this Court (Hon Mruma, J) in the case of **East African Cables ( T) Limited Vs Spencon Services Limited, Misc. Application No. 61 of 2016**, while discussing the status of an affidavit and /or Counter affidavit in an application, to wit;

*"In law affidavit and /or counter –Affidavit (as the case may be) is evidence. It is a Voluntary declaration of the facts written down and /or sworn to by the declarant before an officer authorized to administer oaths. Unlike pleadings (Plaint and written statement of defence and other pleadings) affidavit and counter affidavit are prima facie evidence of the facts stated therein. When a fact is stated on oath , it has to be controverted on oath and this gives the court an opportunity to weigh which fact is probably true than the other. When the fact sworn to or affirmed is not controverted, then it is deemed to be admitted. When a person swears or makes a sworn declaration of a fact, the best way to challenge him /her is to swear a fact which tends to show that what he sworn to was false. Putting him to strict proof of the fact without giving your side of the story which you want to be believed, amounts to admission of that fact. A requirement of strict proof of the fact applies to pleadings in the suit (i.e., Plaint and written statement of defence, reply etc.) not to affidavit and counter affidavit ....."*

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From the foregoing, it is the finding of this Court that the applicant has adduced good cause for the delay in filing his appeal. Thus, I hereby grant him extension of time for filing his appeal. The same has to be filed within thirty (30) days from the date of this order.



Dated this 24<sup>th</sup> day of January 2022

  
**B. K. PHILLIP**

**JUDGE**