

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

**THE SUB - REGISTRY OF MWANZA**

**AT MWANZA**

**MISC. CRIMINAL APPLICATION NO. 58 OF 2022**

**SAGUDA NDEGE GAGAJA -----APPELLANT**

**VERSUS**

**REPUBLIC-----RESPONDENT**

**RULING**

*June 12<sup>th</sup> & 27<sup>th</sup>, 2023*

**Morris, J**

Through his omnibus application, Saguda Ndege Gagaja seeks the Court order to extend time within which he shall file both the notice and petition of appeal. Prospectively, he wants to appeal against the judgement of Magu District Court in Criminal Case No. 22 of 2022. The application is supported by the affidavit of the applicant. The respondent, however, did not file a counter affidavit.

In the above criminal case, the applicant was charged and convicted for corrupt transaction contrary to section 15 (1) (b) of ***the Prevention and Combating of Corruption Act*** No. 11 of 2007. He, consequently, was sentenced to pay fine of Tshs. 1,000,000/- or to serve 3 years

imprisonment in failure thereof. That was on 27/10/2022. He became aggrieved. Nonetheless, he did not take necessary steps to challenge the trial court's decision; hence this application.

From the affidavit of the appellant in support of the application, it is evident that he delayed filing notice of appeal and intended appeal on time on allegation that he was in jail. It is deposed further that, upon being released, he made follow-up to be supplied with copy of judgement only to get it on 17/11/2022.

When the matter came up for hearing, the applicant was unrepresented. The respondent, however, enjoyed representation from Ms. Dorcas Akyoo and Sileo Mazulla; learned State Attorneys. In support of the application, it was submitted that after the judgement was delivered in his presence, the applicant had no money to pay fine. So, he was taken in custody after. He claims further that, he was released after payment of fine a week later but he had other criminal proceedings against him pending before Maswa District Court.

So, he was transferred to latter court. Accordingly, on being bailed out about three weeks of his conviction by the District Court of Magu, he claims



to had made follow-up of the copy of judgement until 17/11/2022. To him, only 10 days were pending for filling the appeal. He argued further that, he was advised by his lawyer of the time-bar and the recourse to take, including the present application.

In reply it was submitted that the applicant was supposed; under section 361 (1) (a) of ***the Criminal Procedure Act***, Cap 20 R. E 2022 to file notice of intention to appeal within 10 days otherwise sufficient reason be stated. The State Attorney implored the Court to consider length of delay; accounting of each day of delay; and availability of illegality. The respondent made reference to the case of ***Damas Assay and Another v Raymond Mgonda and Others***, Civil Application No. 32/17 of 2018 (unreported).

He argued further that, the applicant had not account for each day of delay. To him, the latter should have taken necessary action while in custody. He reinforced his argument by stating that filing the notice of intention to appeal does not require judgement to attach. Furthermore, he challenged the applicant's attempt to introduce additional factors concerning the case before Maswa District Court in the course of submitting. Reference was made to the cases of ***Bushiri Hassan v Latifa L. Mashao***, Civil Appeal

No. 3 of 2007; and ***Bonifas Alistides v R***, Criminal Application No. 06/08 of 2019 (both unreported).

In rejoinder, the applicant submitted that whatever had been filed in this Court, was according to the analysis and persuasion of his lawyer who drafted the application.

Having considered the rival submissions of both parties; I am inclined towards resolving the question whether or not the ground advanced by the applicant (late supply of judgement) suffices for this court to allow the application. See, ***Denis T. Mkasa vs Farida Hamza & others***, Civil Application No. 407 of 2020 (unreported). In addition, it is a cardinal principle of law that the powers to extend the time is discretionary. This discretion must, though, be exercised judiciously as opposed to personal whims, sympathy or sentiment. The Court seeks guidance from ***Bakari Abdallah Masudi v. Republic***, CAT Criminal Application No. 123/07 of 2018 and ***Bank of Tanzania v Lucas Masiga***, Civil Appeal No. 323/02 of 2017 (both unreported).

Further, the law requires that the applicant should demonstrate sufficient reason(s) as to why he/she did not take the necessary step(s) in



time in so doing, he/she will discharge the obligation of proving how each day of delay justifiably passed by at no applicant's fault. Accordingly, the subject applicant deserves a favorable Court's discretionary advantage as it was held in ***Hamis Babu Bally v The Judicial Officers Ethics Committee and 3 Others***, CoA Civil Application No. 130/01 of 2020 (unreported).

The essence of setting the time limits in law is, among other objectives, to promote the expeditious dispatch of litigation [***Costellow v Somerset County Council*** (1993) IWLR 256]; and to provide certainty of time tables for the conduct of litigation [***Ratman v Cumara Samy*** (1965) IWLR 8].

The Court now considers the reason that the applicant was lately supplied with copy of judgement. It has been pronounced, in a number of authorities, that lack of copy of impugned judgement/decreed can only be reason for extension of time if attaching the same is required by the law. See, for instance, ***Gregory Raphael v Pastoty Rwehabula*** (2005] TLR 99; ***Sophia Mdee v Andrew Mdee and 3 others***, CAT Civil Appeal No. 5 of 2015 (unreported).

In this application, the applicant is seeking extension to file notice of appeal and an appeal itself. Section 361 of ***the Civil Procedure Act*** (CPA) reads that: -

*"361 (1) Subject to subsection (2), an appeal from any finding, sentence or order referred to in section 359 shall not be entertained unless the appellant-*

*(a) has given notice of his intention to appeal within ten days from the date of the finding, sentence or order or, in the case of a sentence of corporal punishment only, within three days of the date of such sentence; and*

*(b) has lodged his petition of appeal within forty-five days from the date of the finding, sentence or order,*

***save that in computing the period of forty-five days the time required for obtaining a copy of the proceedings, judgment or order appealed against shall be excluded***

*"(emphasis added).*

Therefore, the law is so clear that the copy of judgement is only a requirement on filling the appeal. However, considering the fact that he was in prison the law is merciful when a prisoner delayed on lodging matters in court because while at prison, he was not free agents. See the cases of ***Maulid Swedi v R*** Criminal Application No. 66/11 of 2017; ***Otieno Obute***

**v R**, Criminal Application No. 1 of 2011; **Joseph Sweet v R**, Criminal Appeal No. 11 of 2017; and **Fabian Chumila v R**; Criminal Application No. 6/10 of 2019 (all unreported).

The affidavit of the applicant is silent as to when he became free upon paying the fine. In his submissions, he averred that he was released a week after upon payment of fine but he was facing other charges before Maswa District Court which was finalized in 3 weeks. As correctly submitted for the respondent; submissions are not evidence. Reference is made to **Registered Trustees of Archdiocese of Dar es Salaam v The Chairman, Bunju village Government**, Civil Appeal No.147 of 2006; and **Ison BPO Tanzania Limited v Mohamed Aslant**, CoA Civil Application No. 367/18 of 2021 (both unreported). That is, a matter of facts cannot be proved in the course of making submissions in court.

In this matter, the judgement was delivered on 27/10/2022. The applicant allegedly was supplied with a copy of the judgement on 17/11/2022. This application was filed 02/12/2022. Even if one was to assume that the applicant was released soon before or on the date when he



was given copy of judgement; the affidavit is still silent on how 15 days from 17/11/2022 to 02/12/2022 were spent.

I reiterate that the respondent did not file a counter affidavit. In law, affidavits are generally filed on matters of fact. The applicant herein alleged in the affidavit that upon being released from jail, he followed-up the copy of judgement. Matters not controverted on oath, are deemed to be admitted. That position is reinforced in ***Martin D. Kumaliya and 117 others v Iron and Steel Ltd***, Civil Application No. 20/18 of 2018; ***East African Cables (T) Ltd v Spencon Services Limited***, Misc. Application No. 61 of 2016; and ***Editor Msanii Africa Newspaper v Zacharia Kabengwe***, Civil Application No. 2 of 2009 (all unreported).

Another cardinal principle of law is that, one applying for extension of time must account for each and every day of the delay. The case at hand is caught up in this arithmetic-web. While expounding paragraph 3 of his affidavit, the applicant submitted that after his conviction and sentence in the above case, he was imprisoned at Magu where he stayed for about a week. Meanwhile, his relatives were mobilizing themselves to, and they did pay the fine for him to be released. Ironically, when he was still in the prison

that is found in similar geographical jurisdiction with the trial court, the applicant did not make any attempt to give the requisite notice or application for extension of time. Further, his relatives did not bother to assist him in seeking the then envisaged legal assistance, if at all it was so wished.

In the case of ***Hassan Bushiri v. Latifa Mashayo***, Civil Application No. 3 of 2007 (unreported), the Court held that: “**Delay, of even a single day has to be accounted for** otherwise there would be no point of having rules prescribing periods within which certain steps have to be taken”.

The foregoing position is also in the holdings of ***Yazid Kassim Mbakileki v CRDB (1996) Ltd. Bukoba Branch & another***, Civil Application No. 412/04 of 2018; ***Sebastian Ndaula v Grace Rwamafa (legal personal representative of Joshua Rwamafa)*** Civil Application No. 4 of 2014; ***Dar es Salaam City Council v Group Security Co. Ltd***, Civil Application No. 234 of 2015; ***Muse Zongori Kisere v Richard Kisika Mugendi***, Civil Application No. 244/01 of 2019; ***Ally Mohamed Makupa v Republic***, Criminal Application No. 93/07 of 2019; and ***Lyamuya Construction Company Ltd. v Board of Registered Trustee of Young***

***Women's Christian Association Of Tanzania***, Civil Application No. 2 of 2010 (all unreported).

As demonstrated above, the applicant has failed to account for 15 days of the delay. On the basis that the appeal to this court should be preceded by the requisite notice; I find no justifiable reason to consider the applicant's second prayer for extension of time to lodge the appeal. The two prayers are not supported by the sufficient cause of the delay. It fails for want of accounting the days of tardiness.

I consequently hold this application to lack merit. It stands dismissed. Right of appeal fully explained to parties.



**C.K.K. Morris**

**Judge**

**June 27<sup>th</sup>, 2023**

Ruling delivered this 27<sup>th</sup> day of June 2023 in the presence of Saguda Ndege Gagaja, the applicant and Ms. Monica Mweri, learned State Attorney for the respondent.



**C.K.K. Morris**

**Judge**

**June 27<sup>th</sup>, 2023**

