

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF SONGEA

AT SONGEA

MISC. CRIMINAL APPLICATION NO. 7 OF 2023

RAJABU RASHID HALIFA APPLICANT

VERSUS

THE REPUBLIC RESPONDENT

**(Arising from the decision of the District Court of Tunduru at Tunduru in
Criminal Case No. 145 of 2021)**

RULING

9th and 15th August, 2023

KISANYA, J.:

This is an application in which the applicant seeks the order for extension of time within which to lodge an appeal out of time. It has been preferred under section 361(2) of the Criminal Procedure Act, Cap. 20, R.E. 2022 (the CPA) and supported by an affidavit affirmed by the applicant, Rajabu Rashid Halifa.

The supporting affidavit is to the effect that, the District Court of Tunduru at Tunduru (henceforth "the District Court") convicted the applicant with the offence of cattle theft and sentenced him to serve five years imprisonment. That decision aggrieved the appellant. He gave a notice of intention and filed an appeal to this Court. However, his appeal was struck out for being defective. Thereafter, the applicant filed

another appeal which was struck out by this Court for being time barred. Still determined to challenge the decision of the District Court, the applicant has lodged the present application.

The respondent contested the application by filing a counter-affidavit which was deposed by Ms Generosa Montana, a State Attorney employed in the office of the Director of Public Prosecutions. In addition, the respondent lodged a notice of preliminary objection to the effect that the supporting affidavit bears a defective verification clause.

When the application came for hearing, the respondent failed to appear without notice. Consequently, the notice of preliminary objection was dismissed. The Court went on to order for the hearing to proceed *ex-parte* and thus, this ruling.

Submitting in support of the application, the applicant stated to have filed two appeals which were struck out for being incompetent before this Court. He also contended that, being a prisoner, he depends much on the prison's authority to process his appeal. It was his further contention that, he was not the source of the defect which were detected in his previous appeals. Therefore, the applicant prayed for this application to be granted.

At the outset, I wish to state that, in an application of this nature, the applicant is required to show good cause. This is pursuant to section 361(2) of the CPA which stipulates:-

"The High Court may, for good cause, admit an appeal notwithstanding that the period of limitation prescribed in this section has elapsed."

From the above quoted provision, the applicant is required to satisfy this Court that he has good cause for delay in filing the appeal. The law is settled that, in exercising its discretion to grant extension of time, this court considers several factors, which include; cause of the delay, length of the delay, whether or not the applicant has accounted for the delay and degree of prejudice that the respondent may suffer if the application is granted and whether there is illegality or any issue of law of sufficient public importance in the decision sought to be challenged. There is a plethora of authorities on that position, including the case of **Lyamuya Construction Co. Ltd vs. Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported).

That being the position of law, the issue is whether the applicant has provided good cause for this Court to exercise its discretion.

Reading from the supporting affidavit, it is my considered view that the applicant has raised a ground of technical delay. The law is settled that technical delays are excusable. See for instance the decision of the Court of Appeal in the case of **William Shija and Another vs Fortunatus Masha**[1997] T.L.R.213 where it was stated that:

“A distinction had to be drawn between cases involving real or actual delays and those such as the present one which clearly only involved technical delays in the sense that the original appeal was lodged in time but had been found to be incompetent for one or another reason and a fresh appeal had to be instituted. In the present case, the applicant had acted immediately after the pronouncement of the ruling of the Court striking out the first appeal. In these circumstances an extension of time ought to be granted.”

As averred in the counter affidavit of Generosa Montano, the applicant did not state the particulars of his previous appeals which were struck out by this Court for being incompetent. However, there is a ruling of this Court dated 28th June, 2018 in Criminal Appeal No. 11 of 2022, in which the applicant’s appeal against the decision subject to this application was struck out for being time barred. Before arriving at that decision, this Court considered the following facts:

"It is undisputed fact that, on 27th February, 2023, the appellant's appeal was struck out with leave to refile. However, as rightly observed by the learned State Attorney, this Court categorically stated that the fresh appeal was subject to the law of limitation. This implies that the time within which to appeal is counted from 30th November, 2022 when the appellant received the copy of judgment and proceedings, and not from 27th February, 2023 when this Court struck out the appeal with leave to refile. Now that the petition of appeal in this case was filed on 13th March, 2023, I am of the considered view that it was filed out of time for almost 90 days. As the law dictates, this Court has no mandate to entertain an appeal filed out of time specified by the law."

It is gleaned from the above excerpt part of the ruling of this Court that, on 27th February, 2023, the applicant's first appeal was struck out with leave to refile. Two weeks later, on 13th March, 2023, the applicant lodged his second appeal (Criminal Appeal No. 11 of 2023) which was also struck on 28th June, 2023 thereby leading to this application which was lodged in 17th July, 2023. On that account, the applicant spent the period between 30th November, 2022 and 28th June, 2023, in the court's corridor when he was prosecuting appeals which were struck out for being incompetent. In view of the stated position of law, that period is

excusable. Nothing to suggest that the previous appeals were filed in bad faith. To the contrary, the facts on record show that the applicant did not sleep over his right to appeal against the decision subject to this application.

I have further considered the fact that the applicant is a prisoner detained the prison. He thus, relies on the prison authority to process his appeal. In the circumstances, the applicant might have been affected by the reasons beyond his control. This stance was taken in the case of **Otieno Obute vs. R**, MZA Criminal Application No. 1 of 2011 (unreported) when the Court of Appeal held:

"We have considered the averments by both parties and come to the conclusion that this application has merit ... As a prisoner, his rights and responsibilities are restricted. Therefore, he did what he could do. He may have been let down by reasons beyond his means... Accordingly; the application is granted,"
[Emphasis added].

In the light of the above position of law, I hold the view that there is good cause for extension of time within which to appeal.

Ultimately, I hereby grant the application and extend time for the applicant to lodge his appeal. The applicant is ordered to file his petition of appeal within forty five (45) days from the date hereof. Given that the

applicant's previous appeals were struck, it is clear that his notice of intention to appeal was also affected. For the intended appeal to be heard by this Court, I find it just to extend the time within which the applicant should give a notice of intention to appeal. As a result, it is ordered that the notice of intention to appeal be given within ten (10) days from the date of this ruling.

It is so ordered.

DATED at SONGEA this 15th day of August, 2023.



S.E. KISANYA
JUDGE
15/08/2023

Ruling delivered on this 15th day of August, 2023 in the presence of the applicant and in the absence of the respondent.



S.E. KISANYA
JUDGE
15/08/2023