

THE UNITED REPUBLIC OF TANZANIA
IN THE HIGH COURT OF TANZANIA
AT SUMBAWANGA

MISC. CR. APPLICATION NO. 13 OF 2005.
(From Mpanda District Court Criminal Case No. 211 of 2003)

Director of Public Prosecutions Applicant
Versus
Dawson Novat Katto Respondent

(Dated: 10/10/2006
And
Dated: 30/10/2006)

RULING

BEFORE MMILLA, J.;

In this application, the Director of Public Prosecutions is seeking this court's indulgence to extend time within which to file an appeal. It is supported by an affidavit sworn by Mr. Gabriel Pascal Malata, learned state attorney. The reason for the delay to file the said appeal is expressed under paragraph 5 of his affidavit. It is stated under that paragraph that it was due to shortage of state attorneys at their office. The application is being resisted by Rutabingwa & Co., Advocates on behalf of the respondent, Dawson Navat Katto. A counter affidavit was filed in which, apart from

disputing the allegation of there having been only one state attorney at the station, they are contending that the delay was unduly long and therefore unreasonable.

It is undisputed that the judgment which is intended to be appealed against was delivered on 30.8.2004. The prosecution filed a notice of appeal in time and requested to be supplied with copies of proceedings and judgment. The applicant admits that copies of proceedings and judgment reached them in time. To be precise, they received those documents on 1.9.2004, which was a period of only two days later. Those documents were promptly forwarded to the DPP's office at Mbeya. No appeal was filed. The application for enlargement of time was not filed until on 29.4.2005 while the amended one was filed on 27.7.2006.

It is trite law that an application for extension of time within which to file an appeal may be granted where the applicant assigns sufficient reasons for the delay. This has been stated in a number of cases including those of **DPP. v. Mussa Manase (1971) H.C.D 132**, **South India Corp (T) Ltd v. H. J. Stanley & Sons Ltd (1968) HCD 336** and **Rep. v. Yohana Kaponda & 9 Others (1985) T.L.R. 84**. It was held in the former case of **DPP. v. Mussa Manase** that:-

“It is a matter of discretion of this court whether such an application is granted or not...and the application would be granted if good cause is shown or, as it was said in the case of **Brown s/o Mpotwa v. Rex 15 EACA p.138**, a “sufficient reason” is shown for exercising the discretion vested in this court”.

In the later case of **Rep. v. Yohana Kaponda & 9 Others** (supra) the Court of Appeal held that:-

“(ii) in deciding whether or not to allow an application to appeal out of time, the court has to consider whether or not there is “sufficient reasons” not only for the delay, but also “sufficient reasons” for extending the time during which to entertain the appeal”.

I understand it to mean that the application for enlargement of time may in certain circumstances be granted where the court is satisfied that the appeal stands overwhelming chances of success.

With the above principles in mind, the immediate issue is whether in the circumstances of the present case, shortage of

state attorneys constituted sufficient reason to attract this court to exercise its discretion in favour of the applicant.

In the first place, Rutabingwa & Co.; Advocates have complained that the affidavits of Ayub Mwenda and Gabriel Malata are contradictory as regards the reason advanced for the delay. What did Mwenda's affidavit say in that regard vis a vis the ground raised in Malata's affidavit?

First to be filed was the affidavit of Ayoub Mwenda. It was filed on 29.4.2005. In paragraph 6, it was stated that the appeal was not filed in time because of **the insufficient number of state attorneys and pile up of work** at their Mbeya Office. The latter affidavit of Gabriel Pascal Malata was filed 27.7.2006. This followed a successful request to amend the affidavit which was sworn and filed by Ayoub Mwenda on 25.7.2006. In the affidavit of 27.7.2006, the deponent says in paragraph 5 that at that time they had two on going High Court Sessions at Njombe and Mbeya, adding that at that time their office had only one state attorney at the station who was fully engaged in the Court of Appeal Sessions and thus unable to prepare and file the appeal within the prescribed time. A close scrutiny of these two statements shows that they are not at all contradictory. Both of them carry the message that there was a shortage of state attorneys at the AG's office, Mbeya Branch. The latter is

elaborative that as a result of that there was a pile of work at that office. Besides, the affidavit of Ayoub Mwenda was amended and replaced by that of Gabriel Paschal Malata which as aforesaid, was filed on 27. 7.2007. In the opinion of this court, that is the affidavit which now counts. In the circumstances, I find that the complaint on this aspect is baseless.

As already pointed out, the main ground advanced by the applicant is that at that time they had two on going High Court Sessions at Njombe and Mbeya, and that then their office had only one state attorney at the station who was fully engaged in the Court of Appeal Sessions and thus unable to prepare and file the appeal in time. Surely, in a fit case this ground would constitute sufficient reason on the ground that the tasks which were being undertaken by the available small number of state attorneys, that is involvement in the two High Court sessions at Njombe and Mbeya were extremely important. However, I am not inclined to grant the application for reasons I venture to give.

As properly intimated by the respondent's learned counsel, the applicant's affidavit does not mention, nor does he do so in his written submission, when the said sessions began and ended. Even, no cause lists were annexed. Besides, it is an open and shut case that from December 15 each year, the

High Court and Court of Appeal were on Christmas Vacation until 31st January of the year that followed. Had they been desirous to file the said appeal, they would have applied for enlargement of time immediately after the said High Court Sessions, which is the period between December 15 and January 31. That was not so. As the record shows, the application was first filed 29.4.2005 which was well after 299 days (about nine months). The inordinate delay, particularly from December 15, until 29.4.2005 when the step was first taken ought to have been explained. This fact detracts this court to consider the other ground on whether the appeal has overwhelming chance of success. I am influenced by the proposition of the Court of Appeal in the case of **Alhaji Abdalla Talib v. Eshakwe Ndoto Kiweni Mushi (1990) TLR 108** in which that court said that:-

“Mr. Lobulu further contended that the appeal had overwhelming chances of success, that the appeal was already filed, that the court should not enforce the rule strictly so as to deny justice to the appellant and that if the application is granted, no prejudice would be caused to the either side. We think that these matters do not advance the appellant's case anywhere. This is a case involving an inordinate delay in lodging the appeal. The appellant has a duty to explain such inordinate

delay but he has not. We think that the matters now being put forward by counsel might have been relevant if the appellant explained the inordinate delay but since he has failed to do so, we do not think we are obliged to consider them.”

For reasons I have attempted to give, I find that the present application lacks merits and is here dismissed.

B. M. Mmilla
Judge
30.10.2006.

Date: 30.10.2006.

Coram: W. P. Dyansobera – DR

Applicant: Mr. Mwangamila & Mr. Mkizungo S/As

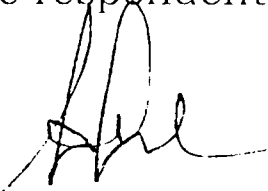
Respondent: Absent.

B/C: S. Mjelwa.

Court: Ruling has been delivered today in the presence of Mr. Mwangamila and Mr. Mkizungo, learned state attorneys for the applicant Republic. The respondent is absent with

notice




Sgd: W. P. Dyansobera
District Registrar
30.10.2006.