

IN THE HIGH COURT OF TANZANIA
AT DODOMA

MISC. CIVIL APPLICATION NO. 56 OF 2003
(CIVIL APPEAL NO. 13 OF 2000 OF MPWAPWA DISTRICT
COURT AT MPWAPWA- ORIGINAL HOGORO PRIMARY COURT
CIVIL CASE NO. 3 OF 1999)

MWINJE KALUNJU APPELLANT
VERSUS
STEPHANO MAFANYA RESPONDENT

08.06.2006 & 13.07.2006

RULING

MASANCHE, J.

This is an application for leave to appeal to this court - the High Court, out of time. It is made by Mr. Kuwayawaya, learned advocate.

The history of the case so far is this:

A case (Civil Case no. 3/99) had been opened in the primary court of Hogoro, by **Mwinje Kalunju**, against the respondent, **Stephen Mafanya**. It was a claim of a shamba measuring some four acres. That case never went well. The magistrate who handled

it died. Somehow, the record reached the District Court on an appeal. However, the District Court, in a ruling dated 18.04.2002, declared the decision in the primary court "**null and void.**" The District Court gave reasons, which I think, at the moment, I need not give. The District Court gave the following order or orders:

- "(i). The lower courts decision is declared null and void.*
- (ii). The parties to take themselves that they did not have any decided case over the disputed land.*
- (iii). The plaintiff to file a Civil suit for recovery of the disputed land at Hogoro Primary Court but without payment of new court fees, after that I should be notified so that I assign the same to be heard by another Primary Court Magistrate with different court assessors. This is 30 days from the date he obtains a copy of judgment.*

It is so ordered."

Now, after the matter had ended that way, Mr. Kuwayawaya went to the High Court and opened, what he called, a chamber application for a revision of the order or orders made by the District Court on 18.04.2002. He filed his papers in Miscellaneous Civil Revision No. 1/2002. The filing was made on 29.05.2002.

On 23.10.2002, the record went before Kaji, J. (as he then was) and Mr. Kuwayawaya appeared for the applicant. Before Kaji, J, this is what transpired:

"Date 23^d October, 2002

Coram S.N. Kaji, Judge.

For Applicant:- Mr. Kuwayawaya.

For Respondent:- Absent.

C/Clerk:- D.A. Milala.

COURT:- *Going through the pleadings, it would appear the applicant was aggrieved with the decision of Mpwapwa District Court, which declared the proceedings of the trial primary court null and void and ordered the matter to be heard de novo before another Magistrate and other assessors. If that is the case, he should have appealed against the same, instead of applying for revision.*

KUWAYAWAYA: *- May I be given time to think about it.*

ORDER: *Mention in Court on 28.11.2002 for necessary orders.*

Sgd. KAJI, J.

23.10.2002"

Indeed, on 04.03.2003, an order was given by our brother Kaji, J, which read:

"ORDER: - *Upon oral application by the applicant's advocate, Mr. Kuwayawaya, to withdraw this application, the same is hereby marked withdrawn.*

***Sgd. KAJI, J.
04.03.2003."***

Mr. Kuwayawaya, of course, realizing that he is or was late on appealing, now makes this application, for leave to appeal to this court out of time.

Mr. Kuwayawaya's affidavit is self explanatory. But, for what will appear apparent later, I reproduce the entire affidavit. It reads:

**"AFFIDAVIT IN SUPPORT OF A CHAMBER
APPLICATION**

I, KUWAYAWAYA S. KUWAYAWAYA, Advocate of the High Court and Courts subordinate thereto, save for the Primary Court, hereby take oath and state as follows:

1. *THAT, I am the Advocate of the Applicant dully instructed to represent him in this application. Also I was representing him in Misc. Civil Revision No. 1 of 2002, in this Court, and under such capacity conversant with the facts I am about to depone.*
2. *THAT, in representing the Applicant, in Misc. Civil Revision No. 1 of 2002, I was advised Wisdomly to withdraw the application for Revision and file an appeal in that respect.*
3. *THAT, having agreed with the Wisdom on the 4th day of March, 2003 I withdrew the Application, and, dully informed the Court that I had prepared an appeal, photocopy of the order is annexed herewith marked "A ".*
4. *THAT, On that material date I submitted the document to the Court Registry for processing and left the Court premises.*
5. *THAT, since then, I have been asking the Court Registry for the documents so that I can duly file the same but no positive answer had been coming from that end.*
6. *THAT, On the 2nd day of September, 2003, I had to intervene and demand the documents, but the documents were traced in vain, hence this application.*

7. *THAT, Since there is no fault on the part of the Applicant, the intended Appellant, but that of the Court officials, the interest of Justice dictates that time now be enlarged to allow the Appellant.*

VERIFICATION

What is stated herein above is true to the best of my own knowledge."

Let me now state the law on application for leave to appeal out of time:

The law is simple: There must be "***reasonable cause***" for the lateness or delay in filing the appeal. Courts have, in many decisions, stated what is not reasonable cause.

1. Negligence or inaction on part of an advocate, has not been held to be reasonable cause (see cases **Abdul Ramadhan v. Saidi Ramadhani Baamary and Another** Civil Application No. 14 of 1994 – Court of Appeal for Tanzania – Lubuva J.A.; **Kighoma Ali Malima v. Abbas Yusuf Mwingamno** – Civil Application No. 5.87; **Institute of Finance Management and Simon Manyaki** – civil Application No. 13 of 1987; **Maulidi Juma v. Abdallah**

Juma – Civil Application No. 20 of 1988; **Shah Hemraj Bharmal and Brothers v. Santosh Kumari w/o J.N. Bholia** [1961] E.A. 679.

2. Even the Director of Public Prosecutions (D.P.P.) gets it tough when he is late. Mushi J. said this, about him, in **D.P.P. v. Tito Douglas Lyimo** Miscellaneous Civil Application No. 43/93 H.C. Moshi Registry: In rejecting an application for leave to extend the period for giving notice of appeal and filing appeal itself, Mushi J. said:

“The legislature has enacted the procedure and time is which the D.P.P. has to appeal. The D.P.P. has been given 30 days within which to file notice of appeal against ten (10) days given to the ordinary citizen. Parties in a case are entitled to assume that unless an appeal is preferred within the prescribed period, the matter is over. To expect otherwise is to make life very uncertain.”

3. An applicant cannot say that he had no money with which to process an appeal. In other words, being broke or poverty cannot constitute “sufficient reason” or “reasonable cause” for a delay (see **Cowell v Taylor** 31 Ch. D. p 39; **Karim**

Elahi v. Ahmed Mohamed K.L.R. Vol. 12 1929 – 1930 p. 49);

4. Even where the delay has been caused by clerks in a registry – that may not constitute reasonable cause for the delay (see case of **D.P. Valambhia v. Transport Equipment Ltd.** Court of Appeal Civil Application No, 29/91);
5. Of course, ignorance of the law governing appeals is not "*a sufficient reason for excusing discretion*" in favour of the applicant (see **Rex v. Brown Mbetwa**, 15 E.A.C.A. The Court in that case said "*to do so would open the door wide to the reception of appeals months out of time and clearly give rise to abuse.*"
6. **K.J. Rustomji in Law of Limitation**, 5th ed. at pages 106, 107, underscores the uphill task that an advocate faces when it comes to making an application for leave to appeal out of time. The author says:

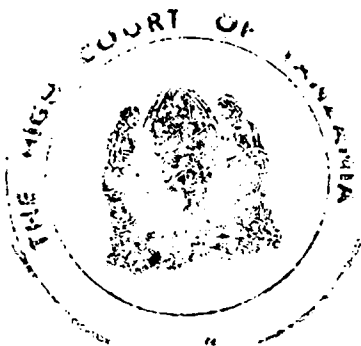
"There is a distinction between a mistake committed with some amount of care and circumspection and a mistake committed with gross or culpable negligence. For the delay to be

on the peculiar circumstances of that case or application, as the case may be.

After all, whether to allow or not to allow the application for extension of time, is a matter of **discretion** of the court. The case of **Daniel John Peters v. the Administrator General of Nyasaland** (1942) 9 E.A.C.A 14 held that:

"The Court has perfect free discretion to give leave, the only question being whether upon the facts of the particular case, that discretion should be exercised."

After saying all that, the application for leave to appeal to this court, out of time, is rejected. It is rejected with costs.



DODOMA

13TH JULY, 2006.


J.E.C. MASANCHE
JUDGE

Parties:- Absent.

excused, it is necessary to satisfy the court not only that the mistake was honestly made, but also that it was made despite due care and attention on the part of the advocate. Negligence of counsel or solicitor stands on the same footing as that of any other person, and therefore a mere mistake or negligence by him is not sufficient cause. Likewise, an error caused by a mere slip or blunder on part of the counsel's or solicitor's clerk is not sufficient cause."

If I may add, in Britain, a solicitor has been held liable in damages to his client for negligently allowing limitation period to expire (see case of **Fletcher & Son v. Jubb Booth and Helliwell** [1920] 1. KB 275).

To come to the instant application, it is amply clear that the uncertainty on the part of the advocate, on whether to go to the High Court on appeal or on an application for a revision, was the **sole** cause of delay. So, an error on the part of an advocate may not constitute reasonable cause.

My understanding of the authorities on applications for leave to appeal to a higher court, is that no definite principles can be put up. The test, would appear to be subjective, and would largely depend