Civil Appeal No.147 of 2006 – The Court of Appeal of Tanzania at Dar es Salaam Msoffe J.A	The registered trustees of Archiodiocese of Dar es Salaam Vs. The Chairman Bunju Village Court and eleven others (Appeal from decision of High Court at Dar es Salaam Misc. Civil Application No.64 of 2005 (Shanga J.)	1. Reason for failutre to appeal on time must be given on an affidavity not on submission because submission are not evidence. 2. The political solution out of Court does not constitute any explanation for failing to appeal in time (see Hellen Jacob Vs Ramadhan Rajab (1996) TLR 139 3. The term "sufficient cause" as ground to appeal means a party must have good case on the merits in their intended appeal (see Dephne Parry Vs. Murray Alexander Carson (1963) EA 546 also Law of Limitation, 5th Edition by Rustonji.

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MUNUO, J, A. MSOFFE, J, A. And KILEO, J, A.)

CIVIL APPEAL NO. 147 OF 2006

THE REGISTERED TRUSTEES OF THE ARCHDIOCESE OF DAR ES SALAAM..... APPELLANT

VERSUS

1. THE CHAIRMAN BUNJU VILLAGE GOVERNMENT
2. SEFU KITUTWE
3. HELEN CHUGAJI
4. SELEMAN GUNDUMU
5. KANOTI ERNEST

6. MSHAMU ARDALLALI **RESPONDENTS**
7. MSHAMU OMARY
8. IBRAHIM M. MTIMA
9. HAKIA ALLY MBUMA
10. MARTIN MWANYIKA
11. MARY KABISA
12. DORIS SABUNI

(Appeal from the decision of the High Court at Dar es Salaam)

(Shangwa, J.)

Dated 06 December, 2005
in
Misc Civil Application No. 64 of 2005.

JUDGMENT OF THE COURT

9 October & 1st November, 2007

MSOFFE, J, A.:

The appellant and the respondents were plaintiff and defendants, respectively, in RM Civil Case No. 51 of 2003 of the Court of Resident Magistrate at Kisutu, Dar es Salaam. The suit was brought under "Order XXXV: Summary Procedure" of the Civil Procedure Code, 1966. The respondents did not apply to be given leave to appear and defend the suit in

terms of Rule 3 thereof. Instead, they filed an application for extension of time to file a written statement of defence. The respondents and their advocate (Mr. Myovela) did not pursue this application. On 15/3/2004 the Resident Magistrate's Court entered a summary judgment against the respondents. Aggrieved, the respondents sought to appeal against the judgment but realized that they were late in instituting the intended appeal. So, on 19/4/2005, which was about 13 months later, they filed an application in the High Court of Tanzania (District Registry) at Dar es Salaam, seeking extension of time to appeal against the judgment. The High Court (Shangwa, J.) in a Ruling delivered on 6/12/2005, granted the application. The learned judge reasoned as follows:-

> "....The major reason which was given by the Applicants for their failure to file a written statement of defence within time is that they were looking for an amicable political settlement of their dispute out of court which did not materialize as expected.
>
> Taking into consideration the fact that this is a serious dispute between the parties concerning trespass on land, and the fact that the plaintiff /

> Respondent's suit was filed under O. XXV (sic) of the Civil Procedure Code 1966 - Summary procedure which means that the defendants /Applicants could not defend the suit before obtaining leave of the trial Magistrate to do so; I do allow this application for leave to appeal out of time. I think that their intended appeal against the proceedings and judgment of the trial Court has a very big chance of success....."

The appellant is aggrieved, hence this appeal.

The memorandum of appeal which was filed by Mr.Mwezi Mhango, learned advocate for the appellant, contains three grounds of complaint which read as follows:-

1. The learned judge erred in law and fact in granting the Respondents leave to file an appeal out of time in the absence of a sufficient reason or cause for the delay of more than twelve months.

2. The learned trial judge misdirected himself in law and in fact in that he took into consideration extraneous matters namely: that the Respondents failed to file a written statement of defence because of on – going out of Court negotiations of a political nature instead of deciding whether the Respondents had shown sufficient or reasonable cause for the delay in filing the appeal.
3. The decision is against the evidence before the learned judge.

In arguing the above grounds Mr. Mhango did so generally. In the process, he urged that if an application for extension of time is to be granted there have to be sufficient reasons or cause for the delay. The reasons have to be shown in the affidavit in support of the application. In this case, Mr. Mhango went on to say, no reasons were shown in the affidavit in support of the application before the High Court. Even if there had been a reason for the delay a political settlement out of Court is no reason for extending time, Mr. Mhango contended, citing **Helen Jacob** v **Ramadhan Rajab** (1996)

TLR 139. At any rate, the alleged political settlement out of court was not borne out by the affidavit. This was a point which was canvassed by counsel in his submissions. Submissions by counsel, as opposed to an affidavit, are not evidence, Mr. Mhango concluded.

Mr. Said H. el Maamry, learned advocate, appeared and resisted the appeal on behalf of the respondents. He maintained that the political settlement out of Court was a point mentioned in the submissions by counsel. He went on to say that there is no law providing that sufficient reasons have to be shown in an affidavit in support of an application. In principle, a judge should address himself on matters before him. So, since the issue of political settlement was mentioned in the submissions it was only fair that the judge addresses it. In his further view, a look at the record will show that the political settlement was a special matter in this case and since this is a sensitive land dispute it was only fair that substantial justice be done instead of deciding the matter on technicalities. In conclusion, he was of the view that the judge should not be faulted in saying that the chances of success of the intended appeal was a good reason for extending time.

To start with, it is not in dispute that no reasons for the failure to appeal in time were given in the affidavit in support of the application before the High Court. Since, as correctly submitted by Mr. Mhango, an affidavit is evidence we think it was expected that reasons for the delay would be reflected in the affidavit. In the absence of reasons, it occurs to us that there was no material evidence upon which the judge could determine on merit the application before him. We appreciate Mr. El Maamry's point that a political settlement out of Court was given in the written submissions as a reason for the delay. With respect however, submissions are not evidence. Submissions are generally meant to reflect the general features of a party's case. They are elaborations or explanations on evidence already tendered. They are expected to contain arguments on the applicable law. They are not intended to be a substitute for evidence.

Assuming that the much talked about political settlement was a good reason for the delay it will nevertheless be noted that the settlement was attempted **before** the suit was filed in Court. A look at the available correspondences will show that the political settlement was attempted in the

years 1998, 1999 and 2000. This was before the suit was filed in 2003. It is therefore clear that no political settlement was attempted **after** the judgment was given on 15/3/2004. So, the alleged political settlement out of court being canvassed as a reason for the delay in appealing within time was not an issue and would have no leg to stand on. At any rate, as was held in **Jacob's** case (supra), a political solution out of court does not constitute any explanation for failing to appeal in time.

Yet again, assuming the political settlement was a strong point, we would see no good reason why the respondents could not, during the period in question before the expiry of the period of appealing, have filed their intended appeal, without prejudice to the political settlement, and have it withdrawn later, if the political settlement had succeeded! In an ideal case that would have been the wise and sensible thing to have done.

The crucial question is whether in the light of what we have tried to demonstrate above there was basis for the judge to hold in effect that "sufficient cause" was established to warrant the grant of the application before him.

It is difficult to attempt to define the meaning of the words "sufficient cause". It is generally accepted however, that the words should receive a liberal construction in order to advance substantial justice, when no negligence, or inaction or want of ***bona fides***, is imputable to the appellant. – See **The Indian Limitation Act with Notes,** Sixth Edition by H. G. Pearson and B. K. Acharyya at page 25 and **B. B. Mitra's Indian Limitation Act**, 10th Edition at page 34, and **Law of Limitation,** 5th Edition, by Rustomji at page 84(also quoted at page 548 in **Daphne Parry v Murray Alexander Carson**, (1963) EA 546). In similar vein, **Rustomji,** (quoted at page 548 of **Parry's** case (supra) had the following to say:-

> "Though the court should no doubt give a liberal interpretation to the words "sufficient cause," its interpretation must be in accordance with judicial principles. If the appellant has a good case on the merits but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy, and the

> appeal should be dismissed as time – barred, even at the risk of injustice and hardship to the appellant".

In giving a liberal interpretation to the words "sufficient cause" to this case it will be noted at once that the respondents had no good case on the merits in their intended appeal to the High Court. They could not have had a good case when, as already stated, they did not apply for leave to to appear and defend the suit in the Rm's Court in the first place! If they had wished their starting point really ought to have been to file an application in the RM's Court for extension of time to file an application for leave to appear and defend. Their application for extension of time to file a written statement of defence was misconceived, to say the least.

Having ruled out chances of success of their intended appeal to the High Court the next point that falls for consideration is whether there was any other reason for granting the application. This point need not detain us. Without hesitation, we are in agreement with Mr. Mhango that there was no reason, let alone sufficient, to justify the failure in appealing within time. Since we have already ruled out the idea of a political settlement as a cause

for the delay it will follow that the judge ought not to have granted the application before him.

Looking at the case in its totality we are of the view that the respondents were themselves to blame for inaction. They had an opportunity to file an application for leave to appear and defend the suit before the RM's Court yet they did not do so. Also, once the Summary Judgment was given they failed, for no apparent reason, to appeal against it in time.

In the end, for the reasons stated, we allow the appeal with costs here and below.

DATED at DAR ES SALAAM this 24th day of October, 2007.

E. N. MUNUO
JUSTICE OF APPEAL

J. H. MSOFFE
JUSTICE OF APPEAL

E. A. KILEO
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

S. M. RUMANYIKA
DEPUTY REGISTRAR