

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF ARUSHA
AT ARUSHA**

MISC. LAND APPLICATION NO 82 OF 2021

(C/F Application No 91 of 2019 Arusha District Land and Housing Tribunal)

ELIA EDWARD MOLLEL APPLICANT

VERSUS

DAINESS JOHNSTONE MWANDWANI RESPONDENT

RULING

24/5/2022 & 05/07/2022

KAMUZORA, J

The Applicant herein lodged this application under Order 8(1) and (2) of the Advocates Remuneration Order, GN No. 263 of 2015 seeking for extension of time within which to file civil reference out of time. The application is supported by the affidavit sworn by the Applicant and contested through the counter affidavit sworn by the Respondent.

When the matter was called on for hearing both parties were duly represented by learned counsel. The Applicant was represented by Mr. Sylvester Kahunduka learned counsel whereas, the Respondent enjoyed the service of Mr. Joshua Albert, learned counsel. Hearing was by way of oral submissions.

A brief history of the matter as depicted from the application is such that, the Respondent filed an application for the bill of costs against the Applicant whereas the application was heard ex-parte against the Applicant. The Applicant was ordered to pay the Respondent an amount of Tshs. 2,878,000/=. Being aggrieved by the ruling and as time to file the Civil reference before this court had lapsed the Applicant preferred the present application.

Submitting in support of the Application Mr. Kahunduka adopted the Applicant's affidavit filed in support of the application and argued that, the Applicant is seeking for an extension of time to file a civil reference in objecting the ruling in application No. 91 of 2019 delivered by the District Land and Housing Tribunal for Arusha on 16/08/2021. That, the Applicant intends to file a civil reference under order 7 rule 2 of GN No 263/2015 but he is time barred. That, the Applicant became aware of the ruling of 9/10/2021 after he was served with a demand note by the counsel for the Respondent requiring him to pay a total of Tshs 2,878,000/= within 7 days.

Referring to paragraph 4 of the Applicant's affidavit the Applicant's counsel submitted that, the Applicant engaged an advocate by the name of Faisal Rukaka to represent him in the application at the

DLHT who informed him that the matter was still pending at the DLHT. That, it was until 9/10/2021 when the Applicant received a demand notice when he learned that his advocate was ordered to file a reply submission in vain.

That by the time the Applicant was aware the 21 days had already lapsed and was out of time for 32 days to file a reference to the High Court as the same had to be filed on 06/09/2021. That, the delay was occasioned by the Applicants advocate who did not have proper communication on the conduct of the case before the tribunal.

The Applicant's counsel added that, it is a principle that negligence of an advocate in some case does not amount to good reason for extension of time as per the decision in the case of **Michael Lezan Kweka v John Eliafie** [1997] TLR 152. The counsel however submitted that, the Applicant took action immediately after he became aware of the ruling. That, on the following day he filed this application online on 10/10/2021 which was admitted on 11/10/2021 and payment was done on 12/10/2021 and on 15/10/2021 the physical copies were brought to the court.

Finalising the counsel for the Applicant argued that, it is the discretion of the court to grant extension of time thus he calls upon this

court to grant the application as the delay was occasioned by the negligence of the Applicant's counsel.

Replying to the Applicant's submission, the counsel for the Respondent submitted that, the court have discretion to grant the application upon good cause being shown. That, the said discretion must be exercised judiciously and on sound principles. He argued that, the Applicant has failed to advance sufficient reasons for the delay including accounting for each day of the delay. That, the Applicant was aware of each stage of the proceedings at the DLHT and he was represented by his counsel one Faisal Rukaka who was present in person when the matter was scheduled for hearing on 22/01/2021.

Regarding the magnitude of the delay, he stated that there was a delay of 60 days since the date of the ruling to the date this application was filed on 15/10/2021. That, the delay is unexplainable and negligence to the part of the Applicant and his counsel. In support of his submission, he cited the case of **Dr. Ally Shaabahy Vs Tanga Bohora Jamiat** [1997] TLR 305.

The Respondent counsel went on and argued that the Applicant has not demonstrated any sufficient cause to make this court grant an extension of time. And he supported his submission with the case of

Sebastian Daula vs. Grace Rwamafa (Legal representative of Joshua Rwamafa), Civil Application No 4 of 2014 (Unreported). That, in order for the Applicant to be granted with extension of time he must sufficiently meet the four important factors that is the length of the delay, the reason for the delay the degree of prejudice to the Respondent if the application is granted and the chance of appeal to succeed if application is granted.

As for the length of the delay he submitted that, the Applicant has delayed for almost 60 days before filing this application. And for the reason for the delay, he stated that, the Applicant has not shown any reason rather for the advocates negligence. That, if the application is granted the Respondent will be prejudiced for not being issued with the amount awarded by the tribunal. That, the Applicant has not shown the chances of success in the appeal and that even if the application is granted the reference will not succeed. To cement on his submission, he cited the case of East African Court of Appeal, 2007,1973, **Shanti Vs. Handocha**. Basing on the submissions above the counsel for the Respondent prays that the application be dismissed with costs.

In a brief rejoinder the Applicant's counsel argued that, the claim that the length of delay of 60 days is misconceived. That, up to

6/9/2021, the Applicant was within time to file the reference and the delay is to be counted from 7/9/2021. That, the application was filed on 10/10/2021 and the delay was for only 32 days.

The counsel for the Applicant added that, the Applicant was unaware of the ruling until 9/10/2021 when he was served with a demand note. That, the Applicant has accounted for all days from 9/10/221 to 15/10/2021 and also the reasons for the delay have been given that the party not to be punished for the mistake of his advocate and that the Respondent will not be prejudiced if the application is granted.

On the argument based on chance of success the counsel urged this court not to regard that argument on account that it will be preempt the civil reference. He insisted that, since the Respondent's counsel was unable to supply the authorities cited, the same be disregarded. That, the Applicant do not deny the fact that he was served with notice but insisted that, he hired an advocate to deal with the matter which again was heard on one side. He thus prays for the application to be granted as the Applicant has shown reasonable cause for the application to be granted.

The main issue calling for the determination by this court is whether the Applicant has demonstrated sufficient reasons for the delay.

The reasons for the delay have been stated by the Applicant under paragraph 6 and 7 of the Applicant's affidavit that the Applicant despite having an advocate to represent his interest at the DLHT he was not made aware with the tribunals ruling which was delivered on 16/08/2021 until when he was served with a demand note by the Respondent on 9/10/2021.

The grant of extension of time is a matter of discretion of the court, the discretion which however, must be exercised judiciously. Moreover, the Applicant has to account for every day of the delay. For this see the case of **Bushiri Hassan Vs. Latifa Mashayo**, Civil Application No.2 of 2007 CAT (Unreported). From the case of **Lyamuya Construction Company Limited Vs. Board of Registered Trustees of Young women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 CAT (Unreported) the court of Appeal of Tanzania has formulated the guidelines to be considered in the grant of extension of time where the court held that: -

"On the authorities however, the following guidelines may be formulated:

- a) The Applicant must account for all the period of delay;*
- b) The delay should not be inordinate;*
- c) The Applicant must show diligence, not apathy, negligence or sloppiness in the prosecution of the action that he intends to take; and*
- d) If the court feels that there are other reasons, such as the existence of a point of law of sufficient importance, such as the illegality of the decision sought to be challenged"*

Reference must be filed within 21 days from the date of the decision pursuant to Order 7 Rule 2 of GN. No. 263 of 2015. An application for extension of time is covered under Order 8 Rule 1 of GN. No. 263/2015 which mandate the court to grant enlargement of time upon sufficient cause being shown. I am also mindful of the fact there are no hard and fast rule as to what constitutes a good cause but the guidelines for consideration were set in the case of **Lyamuya Constructions** (Supra). The power vested in the Court in extending time must be exercised judiciously when determining good/sufficient cause by considering circumstances of each case.

It is undisputed fact between the parties and pursuant to annexure A1 that, the DLHT ruling was delivered on 16/08/2021 hence time limit to file civil reference to this court was up to 6/09/2021. The fact that the Applicant preferred this application seeking for an

enlargement of time proves that, the Applicant acknowledges that he is out of statutory prescribed time.

It is settled that a mistake made by a party's advocate through negligence or lack of diligence cannot constitute a ground for condonation of delay but a minor lapse committed in good faith can be ignored. For this see the case of **Kambona Charles (as administrator of the estate of the late CHARLES PANGANI) vs Elizabeth Charles**, Civil Application NO. 529/17 OF 2019 CAT at Dar es Salaam (Unreported) which cited with approval the case of **Yusufu Same and Another v. Hadija Yusufu**, Civil Appeal No. 1 of 2002 (unreported) where it was held that,

*"Generally speaking, an error made by an advocate through negligence or lack of diligence is not sufficient cause for extension of time. This has been held in numerous decisions of the Court and other similar jurisdictions.... But there are times, depending on the circumstances surrounding the case, where extension of time may be granted even where there is some element of negligence by the Applicant's advocate as was held by a single Judge of the Court (Mfalila, JA, as he then was) in **Felix Tumbo Kisima v. TTC Limited and Another** - CAT Civil Application No. 1 of 1997 (unreported)." Emphasis original.*

The Applicant did not deny being served with summons to appear at the DLHT for hearing of the application for Bill of costs and he stated that he engaged his advocate to represent and defend the suit. What the Applicant disputes is that he was not informed on the date of ruling either by the tribunal or his advocate until 9/10/2021 when he received a demand note and became aware of the existence of the said ruling.

From the records, the Applicant was aware of the existence of the case. He was duty bound to make follow up of his case and not to raise the defence of the negligence of the advocate. As prior pointed out above, negligence of the advocate is not excuse unless shown that the Applicant diligently made follow up of his case and what transpired was unavoidable. I therefore conclude that no good reason was advanced by the Applicant to warrant the grant of extension of time.

For the above reasons, I find no merit in this application and proceed on dismissing the same with costs.

Order accordingly.

DATED at ARUSHA this 5th day of July, 2022.




D.C. KAMUZORA

JUDGE