

IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

HIGH COURT OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

MISCELLANEOUS CIVIL APPLICATION NO. 06 OF 2023

*(C/F Bill of Cost No. 15 of 2021 in the District Land and Housing Tribunal of
Moshi at Moshi)*

AWADHI MOHAMED MSANGI..... APPLICANT

VERSUS

MWAJABU SELEMAN.....RESPONDENT

RULING

Date of Last Order: 19.10.2023

Date of Ruling : 12.12.2023

MONGELLA, J.

The application at hand is preferred under **Order 8 (1) and (2) of the Advocates Remuneration Order, 2015** and **Section 14 (1) of the Law of Limitation Act** [Cap 89 RE. 2019]. In the application, the applicant is seeking for extension of time to file reference against the Tribunal's decision rendered in Bill of Costs No. 15 of 2021. The applicant also prays for costs of the application and any relief deemed fit by this court.

The applicant's application was duly accompanied by his affirmed affidavit and opposed by the respondent through her affirmed counter affidavit.

The brief facts of this application as drawn from the applicant's affidavit are that: the applicant was the respondent in Bill of Costs No. 15 of 2021 on which he is aggrieved. In the course of preparations to lodge a reference in this court, he discovered that he was out of time, thus had to first seek for extension to file the reference.

The application was argued orally whereby both parties were represented by learned advocates. The applicant was represented by Mr. Erasto Kamani and the Respondent by Mr. Willence Shayo.

Mr. Kamani commenced his submissions by praying to first adopt the applicant's affidavit. He averred that the applicant had three reasons for delay which were; sickness, illegality of the impugned decision and the degree of prejudice the applicant stands to suffer.

On the reason of sickness, he averred that after delivery of the decision on 26.09.2022, the applicant got sick with diabetes, pressure and malaria. He claimed that the sickness was severe given the fact that he had been amputated a few months earlier. He argued that the applicant's illness lasted until late January 2023 whereby he got a bit better. That, the applicant then promptly filed the application at hand upon noticing that he was out of time to file reference. In the circumstances, he had the view that the applicant was diligent in filing the application. He also considered the applicant's delay not inordinate.

With regard to the question of illegality, Mr. Kamani held the stance that the Bill of Cost was issued in contravention of **Rule 48 of the Advocates Remuneration Order** which requires an entire bill to be vacated where the 1/6 of the same has been disallowed by the Taxing master. He contended that in the Bill of Cost, the respondent prayed for 18,180,000/=-, but the Tribunal only allowed 2,100,000/=-. He added that, even if instruction fees are deducted, still the value that was left after such deduction was more than 1/6 of the amount claimed.

Pointing another illegality, he contended that the decision of the Tribunal contravened **Regulation 6 (3) of the Office of the Attorney General (Discharge of Duties) Regulations of 2006** (GN. No. 154/2006), which prohibits state attorneys to be paid for assisting parties to prosecute their cases, a fact that the trial Tribunal also admitted in its decision, but still awarded costs at T.shs.2,100,000/-.

In respect of the illegalities pointed out, he averred that the court has a duty to ascertain points of illegalities and irregularities even if it means extending time to do the same and where the illegality is established, to take appropriate steps to put the matter and the record straight. He supported that stance with the case of **The Principal Secretary, Ministry of Defence and National Service vs. Devram P. Valambhia** [1992] T. L. R. 185. Considering the illegalities pointed out and the criteria settled under the law, he had the view that the illegality is apparent on the face of record and is of sufficient importance. He further supported his argument with the

case of **Lyamuya Construction Co. Ltd vs. Board of Registered of Young Women's Christian Association of Tanzania** (Civil Application 2 of 2010) [2011] TZCA 4 TANZLII.

As to degree of prejudice to the respondent if the extension is granted, he contended that the respondent would not be prejudiced if the extension is granted. That, instead, the court would have accorded justice in the matter. He averred that the respondent did not indicate how he would be prejudiced in his counter affidavit if the application is granted. He concluded by submitting that the granting of extension of time is within the discretion of the court, but the same ought to be exercised according to rules of reasons and justice taking into consideration the reasons advanced by the applicant. He thus prayed for the application to be granted.

In reply, while adopting the respondent's counter affidavit, Mr. Shayo revisited the criteria for granting extension of time as set out in the case of **Lyamuya Construction Co. Ltd** (supra). He argued that none of the criteria in that case has been satisfied by the appellant.

Addressing the reason of sickness, he contended that the applicant did not produce evidence on his whereabouts for the entire period from 26.09.2022 to 26.02.2023 when this application was filed. He challenged the annexed report on the ground that it only showed that he was admitted in the hospital from 02.10.2022 to 17.11.2022,

but afterwards there were no details on where he had been. In the premises, he had the stance that there were missing details from 17.11.2022 to 26.02.2023, which is almost 99 days. He considered the unexplained 99 days inordinate. Mr. Shayo further argued that since the applicant did not take any action in the period of 99 days, he lacked diligence, displayed negligence, apathy and sloppiness.

Replying to the question of illegality, he held the view that the illegality claimed was never explained by Mr. Kamani as he did not state which amount was claimed as advocate's' fee and which when deducted would still make 1/6 of the bill of cost disallowed. On applicability of the ground of illegality, he argued that an illegality would only stand if the same is on a point of sufficient importance and apparent on the face of record and not one that needs to be ascertained by a long-drawn argument. He referred the case of **Lyamuya Construction Ltd** (supra) to support his point. Challenging Mr. Kamani's reliance on illegality, he contended that the illegality advanced by Mr. kamani is not of sufficient importance. That, it was well stated in the impugned decision that the advocate fee was rejected as the state attorney had no authorization to receive the payment. He held the view that after rejection of such fee, the client was still entitled to other costs.

Concerning the argument that the respondent will not be prejudiced, Mr. Shayo challenged that the point presented a new fact not pleaded by the applicant in his affidavit. He thus prayed for the court disregard it. In respect of his prayer, he contended that

a matter not deponed in an affidavit cannot be argued. To buttress his point, he referred the decision in the case of **Hassan Kapera Mtumba vs. Salim Suleiman Hamdu** (Civil Application 505 of 2017) [2020] TZCA 236 TANZLII, whereby the Court considered such fact as a mere statement from the bar and rejected it. On the other hand, he argued that the respondent would be prejudiced because he had already filed an application for execution, being, Miscellaneous Application No. 18 of 2023. He argued that the application for execution is in the last process of execution and the respondent has already incurred costs. In the premises, he prayed for the application to be dismissed with costs as the applicant has not advanced sufficient reasons and has failed to account for each day of delay.

Rejoining, Mr. Kamani while conceding to the criteria set in **Lyamuya Construction Ltd.** (supra), contended that the criteria have been satisfied by the applicant. Considering the applicant's affidavit, he contended that all days were accounted for. He maintained the reason of sickness saying that upon being discharged, the appellant had not yet recovered until January 2023 whereby upon getting better he filed the application at hand. with regard to accounting for each day of delay, it was his contention that it is not mandatory for the applicant to show what he was doing daily. He averred that calculation on whether the delay was inordinate or not depends on the circumstances of the case. Considering the applicant's condition, he had the view that the 99 days delayed are not inordinate.

As to the presence of illegality on the decision sought to be challenged, Mr. Kamani rejoined that it was not his business to state the amount of the instruction fee that was charged. That, what he knows was that the disallowed costs were more than 1/6 of the amount claimed. He maintained that the illegalities were apparent on the face of record and not one to be found after prolonged arguments. He averred that although at first the Tribunal chairman said that the instruction fee was not to be paid, he later changed and stated that the same ought to be paid. In that respect, Mr. Kamani was of the view that the illegality could not be ignored and that if the extension is granted, the mistake shall be rectified.

With regard to the degree of prejudice, he held the view that the same could not be included in the applicant's affidavit, but it was for the respondent to provide for the same in his counter affidavit. He contended that this kind of issue is usually brought up after hearing of parties. He referred the case of **African Banking Corporation Tanzania Limited vs. George Williamson Ltd**, Civil Application No. 349/01 of 2018 (CAT- Dare es Salaam) in which, he said, the issue of degree of prejudice was raised during hearing and the court still determined the same. As to Mr. Shayo's argument that the respondent has already filed for execution, Mr. Kamani contended that the respondent shall not suffer having filed his execution. He had such stance averring that even if the application succeeds, the respondent will not stand to be affected. That, the principle requires the measuring of degree upon which a party will

suffer and not that the party should not suffer at all. In conclusion, he maintained his prayer for the application to be granted.

I have accorded the submissions of both parties' counsels due consideration. It is well settled that granting of extension of time is within the discretion of the court, but judiciously exercised. As acknowledged by the counsels for both parties, the necessary criteria to be observed in granting extension of time were well settled in the case of **Lyamuya Construction Co. Ltd** (supra) whereby the Court stated:

"As a matter of general principle, it is in the discretion of the Court to grant extension of time. But that discretion is judicial, and so it must be exercised according to the rules of reason and justice, and not according to private opinion or arbitrarily. 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, and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take.
- (d) If the court feels that there are other sufficient reasons, such as the existence of a point of law of sufficient importance; such as the illegality of the decision sought to be challenged."

In this application, the applicant has advanced three reasons for the delay which are; sickness, illegalities in the impugned decision and the degree of prejudice to the respondent.

It is well known that sickness could suffice as a good cause to grant extension of time. See; **Nyanza Roads Works Limited vs. Giovanni Guidon** (Civil Appeal 75 of 2020) [2021] TZCA 396 TANZLII; **Murtaza Murtaza Mohamed Raza Virani & Another vs. Mehboob Hassanali Versi** (Civil Application No. 448 of 2020) [2023] TZCA 6 TANZLII; and **Melchiad Peter Kimaro & Another vs. Riziki Samuel** (Civil Application No. 257/05 of 2023) [2023] TZCA 17691 TANZLII. However, a party alleging sickness must demonstrate that the same was the sole reason for delaying in taking action in pursuing his reliefs within time. This was stated in **Nyanza Roads Works Limited vs Giovanni Guidon** (supra) whereby it was stated:

“While there is no dispute on the respondent's heart complications which would ordinarily constitute good cause, **the respondent did not satisfy the CMA that the delay was solely due to sickness.**”

From the facts displayed in the applicant's affidavit and Mr. Kamani's submission, it is claimed that from 26.09.2022 when the taxing officer (the Tribunal chairman) delivered his decision on the Bill of Costs the applicant had intended to challenge the decision, but while in process of preparing his reference, he got ill whereby he was bedridden from 02.10.2022 to 17.11.2022 when he

requested to be discharged due to financial constraints. That, he again remained ill until January 2023 when he finally got better enough to file this application. These facts are deponed under paragraph 11 to 15 of the applicant's affidavit. I will reproduce paragraphs 13 to 15 for ease of reference:

"13. That, before preparing and lodging that appeal, my diabetic disease which was associated with Blood pressure, eye disease and fever became so serious that I was bed ridden from 02/10/2022 and due to lack of money on 17/11/2022 I requested to be discharged. Copies of sheet showing my sickness history is jointly annexed hereto and marked AW3.

14. That, when I was discharged, I was not yet recovered so I went on attending clinics while at home.

15. That, my sickness prolonged up to the end of January 2023 when I started getting little relief and when I got relief, the time to file "reference" had already elapsed hence this application."

I have observed the admitted medical chit and found it disclosing details from 02.10.2022 to 17.11.2022. This only suffices to account for the mentioned dates and thus does not save the applicant on the remaining 98 days. In my view, the days after 17.11.2022 ought to have been accounted for. If the applicant was still sick and attending hospital as an outpatient, he ought to have furnished

medical records to that effect. In absence of proof of sickness on the unaccounted days, this reason is hereby rejected.

The applicant has also plead illegality. It is well settled that illegalities in impugned decision are a sufficient reason for granting extension of time. See, **The Principal Secretary, Ministry of Defence and National Service vs. Devram P. Valambhia** (supra); **Lyamuya Construction Co. Ltd** (Supra); **Power & Network Backup Ltd vs. Olafsson Sequeira** (Civil Application No. 307 of 2021) [2023] TZCA 80 TANZLII; and **Mashaka Juma Shabani & Others vs. The Attorney General** (Civil Reference No. 30 of 2019) [2023] TZCA 17615 TANZLII. A core factor in the stated cases is that the alleged illegality must be apparent on the face of record and not something that needs to be drawn from a long argument. In **Valambhia** (supra) the Court stated:

“However, as observed by the learned single Justice, it is not sufficient to allege that the decision sought to be challenged is tainted with illegality. The illegality must be apparent on the face of the record.”

In **Lyamuya Construction Co. Ltd** (supra) the Court of Appeal explained what it meant in **Valambhia's** case (supra) that:

“Since every party intending to appeal seeks to challenge a decision either on points of law or fact, it cannot in my view, be said that in VALAMBHIA's case, the Court meant to draw

a general rule that every applicant who demonstrates that his intended appeal raises points of law should as of right, be granted extension of time if he applies for one. The Court there emphasized that such point of law, must be that "of sufficient importance" and I would add that it must also be apparent on the face of the record, such as the question of jurisdiction; not one that would be discovered by a long drawn argument or process."

The applicant herein raised two points of illegality. **One**, that the Tribunal awarded costs billed by the state attorney who represented the respondent while state attorneys were by then already banned from representing parties and thus could also not charge parties for the services they offered. I find this matter well provided under **The Office of the Attorney General (Discharge of Duties) Act** and **Office of the Attorney General (Discharge of Duties) Regulations, 2006**. It appears that indeed the respondent was represented by a state attorney at the Tribunal as such fact was never disputed, what was disputed was whether the taxing officer billed his expenses. I thus find the point raised meeting the criteria set for consideration in granting extension of time.

Two, that, the taxing officer allowed the Bill of Costs while 1/6 of the same had been disallowed. This issue seems to stem from **Order 48 of the Advocates Remuneration Order, 2015**. I also find this matter not being one requiring long drawn arguments as it is apparent on

the face of record given the billed amount was not the taxed amount. The point is thus worth of being checked in an appeal.

As to whether the respondent would be prejudiced. Rather than a core factor to be determined by the court, the same is still among the factors a court will observe in granting the extension. The factors in **Lyamuya Construction Co. Ltd** (supra), have been expanded over the years to assist courts in ascertaining whether there is a sufficient reason for delay. These factors were also stated in **Paradise Hotel Resort Ltd vs. Theodore N. Lyimo** (Civil Application 435 of 2018) [2019] TZCA 156 TANZLII, in which it was held:

“Admittedly, it may not be possible to lay down an invariable or constant definition of the phrase "good cause" so as to guide the exercise of the Court's discretion ... but the Court consistently considers factors such as the length of the delay, the reasons for the delay, **the degree of prejudice the respondent stands to suffer if time is extended**, whether the applicant was diligent, whether there is point of law of sufficient importance such as the illegality of the decision sought to be challenged.”

I, in fact agree with Mr. Kamani that “the degree of prejudice to the other party” is not a factor that must be pleaded by the applicant. The same serves as a checklist for the court and parties can thus discuss the point while presenting their submissions. However, the facts showing how the respondent shall be affected

by the grant of extension of time must be deponed in the counter affidavit.

In the application at hand, while Mr. Kamani contends that the respondent would not be prejudiced, Mr. Shayo holds a contrary view. In assessing the degree of prejudice, the court is to measure the detriments of granting the application or denying the same to each party. While the degree of prejudice may not be raised during initial stages, I am of the view that the mentioning of the same at the earliest stage is a primary indication of the suffering about to be inflicted to the party. Thus, without addressing in his affidavit, the respondent's allegation of there being an application for execution and the stage it has reached remains unproved. I am thus of the view that the respondent would not be prejudiced if this application is granted as the applicant would be if it is denied.

In the foregoing reasons, I hereby grant the applicant 30 days to file his Reference against the impugned Bill of Costs. Given the nature of the application, and the circumstances, I make no orders as to costs.

Dated and delivered at Moshi on this 12th day of December 2023.



X

L. M. MONGELLA
JUDGE
Signed by: L. M. MONGELLA