

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

AT DAR ES SALAAM

MISC. LAND CASE APPLICATION NO. 706 OF 2019

(Arising from Misc. Land Case Application No. 218B of 2006)

GRACE PAUL APPLICANT

VERSUS

1. PASCHAL NERE MATUNDA

2. CHRISTINA V. THOMAS

3. KEISA DOROTHEA INNOCENT

4. KINONDONI MUNICIPAL COUNCIL

5. COMMISSIONER FOR LAND

6. ATTORNEY GENERAL

..... RESPONDENTS

RULING

Date of Last Order: 02/07/2021 &
Date of Ruling: 14/07/2021

S.M KALUNDE, J:-

This ruling resolves an application for extension of time within which, the applicant, can file reference against the award of bill of cost in **Misc. Land Case Application No. 218B of 2006**. The application is brought by way of chamber summons under **rule 8(1) and (2) of the Advocates Remuneration Order, G.N. 264 of 2015**. The application is supported by an affidavit

sworn by **Mr. Samson Edward Mbamba**, learned counsel for the applicant.

In response, the 1st defendants filed a counter affidavit sworn by Paschal Nere Matunda, the 1st respondent. In essence he denied all the applicants claims in the affidavit. The respondent pleaded that the applicant has failed to demonstrate good cause for the grant of the orders sought. They thus prayed the application be dismissed with costs.

Leave of the Court was granted for the application to be disposed by way of written submissions. The applicants' submission were drawn and filed by learned counsel **Mr. Samson Edward Mbamba**, while those of the respondent were drawn by **F.A.M. Mgare** learned advocate.

In support of the application Mr. Mbamba advanced two reasons for extension of time. **Firstly**, he argued that there was a technical delay in filing the present application. Submitting in support of this argument he argued that vide Civil Reference No. 02 of 2017 the applicant filed an application for revision of time, the said application was subsequently struck out by this Court on 29th November, 2019 for failure to properly cite the enabling law. Upon being struck out the present application was subsequently filed on 12th December, 2019. On that account, the council implored that the application was filed on time. In support of this argument he cited the Court of Appeal decision in **Eliakim Swai & Another vs. Thobia Karawa Shoo**, Civil Application No. 2 of

2016 (unreported) and **Barclays Bank Tanzania Limited vs Phylislan Mcheni**, Civil Application No. 176 of 2015 (unreported).

Secondly, Mr. Mbamba argued that there was illegalities and irregularities in the proceedings leading up to the impugned decision. He contended that the Taxing Master awarded costs of two advocates, that is Francis Mgare and Associated Attorneys, who both presented separate receipts on instruction fees. He argued that the award of two costs was contrary to the provisions of **rule 49 of the Advocates Remuneration Order** (supra) which prohibits award of costs to two advocates in one case without certification by a judge.

Further to that the counsel complained that the Taxing Master awarded costs to an advocate who had submitted receipts indicating that the charging and payment of instruction fees was before he had been engaged. The counsel alleged that the fraud perpetrated by the 1st respondent escaped the Taxing Masters attention, hence making an illegal decision. Relying on the Court of Appeal decision in **Tanzania National Parks Authority (TANAPA) vs Joseph K. Magombi**, Civil Application No. 471/1 of 2016 (unreported), the counsel contended that the two illegalities demanded extension of time be granted for the same to be rectified. He prayed that the application be granted with costs.

Responding to the above arguments, Mr. Mgare highlighted that for applications of the present nature to be successful, the applicant must demonstrate good cause. He added that the decision to extend time is a discretion of the Court which is

exercisable upon consideration of various factors. To support the above views, he referred to the case of **Republic vs. Yohana Kaponda & 9 Others** [1985] TLR 85; **Mwita Mhere & Another vs. Republic** [2005] TLR 108; and **Lyamuya Construction Company Ltd. vs. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010, CAT (unreported).

In response to the issue of technical delay, Mr. Mgare argued that filing an incompetent application which was eventually struck out was a negligence of the counsel. He argued that negligence by an advocate did not amount to sufficient cause to warrant extension of time. In support of that argument, he cited the case of **Umoja Garage vs. National Bank of Commerce**, [1997] TLR, 109 and **Tanzania Harbours Authority vs. Mohamed R. Mohamed** [2003] TLR, 77.

On the question of illegality, the counsel argued that the position of law is clear that not every allegation of illegality or irregularity is a sufficient cause for extension of time. He argued that the cases of **Tanzania Harbours Authority vs. Mohamed R. Mohamed** (supra) and **Lyamuya Construction Company Ltd. vs. Board of Registered Trustees of Young Women's Christian Association of Tanzania** (supra) were decided in their own merits. The applicant went on to respond to the substance of the alleged illegality, for obvious reasons I shall not reproduce the arguments.

The counsel went on to cite the case of **Wambele Mtumwa Shahame vs Mohamed Hamis** (Civil Reference No.8 Of 2016) [2018] TZCA 39; (06 August 2018) and insisted that the applicant had failed to account for everyday of the delay. He concluded with a prayer that the application be dismissed with costs.

In rejoining Mr. Mbamba argued that the principle of accounting for each day of the delay applied only in cases of actual delay and not in cases of technical delay or where there is an allegation of illegality in the decision sought to be challenged. To support his view, he cited the case of **VIP Engineering and Marketing Limited and Three Others vs. Citibank Tanzania Limited**, Consolidated Civil Reference No. 6, 7 and 8 of 2006 CA (Unreported) where the Court of Appeal patently stated:

"It is, therefore, settled law that a claim of illegality of the challenged decision constitutes sufficient reason for extension of time under rule 8 regardless of whether or not a reasonable explanation has been given by the applicant under the rule to account for the delay."

In further support of his argument Mr. Mbamba cited the cases of **National Insurance Corporation of (T) Ltd vs. Shengena Limited**, Civil Application No. 63 of 2011, Court of Appeal at Dar es Salaam (unreported) and **Paul Juma vs. Diesel & Auto Electric Service Ltd & 2 Others**, Civil Application No. 54 of 2007, Court of Appeal at Dar es Salaam (unreported).

I have given an anxious consideration to the submissions by the counsels on whether sufficient cause has been advanced to warrant the grant of the orders sought. I am mindful of the position of law that whether to grant or refuse an application for extension of time is within the discretion of the Court. I am also aware that such discretion is to be exercised judiciously regard being to the circumstances of each case.

To start with, I agree with both counsels that for an application for extension of time to succeed the applicant must demonstrate sufficient cause. Both counsels seem to also agree that what amount to good cause depends on each particular case, specifically, Mr. Mgare referred us to the guiding consideration enunciated in **Lyamuya Construction Company Ltd. vs. Board of Registered Trustees of Young Women's Christian Association of Tanzania** (supra) where the factors were listed to include:

- 1 The applicant must account for all the period of delay.*
- 2 The delay should not be inordinate.*
- 3 The applicant must show diligence, and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take.*
- 4 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."*

I also agree with Mr. Mbamba that, where there is an alleged illegality, an application for extension of time may be granted even if the applicant has failed to account for each day of the delay. That view was expressed by the Court of Appeal in **National Insurance Corporation of (T) Ltd vs. Shengena Limited** (supra) and **Paul Juma vs. Diesel & Auto Electric Service Ltd & 2 Others** (supra); and most recently in **TANESCO vs. Mufungo Leonard Majura & 15 Others**, Civil Application No. 94 of 2016.

TANESCO vs. Mufungo Leonard Majura & 15 Others (supra) the Court of Appeal, **Mwangesi J.A.**, stated:

"Notwithstanding the fact that, the applicant in the instant application has failed to sufficiently account for the delay in lodging the application, the fact that, there is a complaint of illegality in the decision extended to be impugned, in line with what was held in the above quoted decisions, it suffices to move the Court to grant the extension of time so that, the alleged illegality case addressed by this Court. In that regard, the application for extension of time to apply for stay of execution is hereby granted. I would make no order as to costs."

It is also true, as was alleged by Mr. Mgare, that not every allegation of illegality suffices to ground an extension of time. This view was stated in **Tanzania Harbours Authority vs. Mohamed R. Mohamed** (supra) and **Lyamuya Construction Company**

Ltd. vs. Board of Registered Trustees of Young Women's Christian Association of Tanzania (supra). In **Lyamuya's Case** it was the Court of Appeal made a point that:

"Since every party intending to appeal seeks to challenge a decision either on a point of law or facts, it cannot in my view, be said that in VALAMBIA'S case, the court meant to draw a general rule that every applicant who demonstrates that his intended appeal raises a point 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, would add that it must also be apparent on the face of record, such as the question of jurisdiction; not one that would be discovered by a long drawn argument or process." [Emphasis mine]

In the present there is an allegation of breach of the provisions of **rule 49 of the Advocates Remuneration Order** (supra) which prohibits award of costs to two advocates in one case without certification by a judge. At this stage I am not enjoined to consider the merit or otherwise of the argument. On the basis of the above cited authorities and records I am satisfied that the issue raised by the applicant deserves consideration in an application for reference.

For that reason alone, I grant the application. Consequently, the applicant is granted 21 days within which to file an application for reference. The extended period shall commence after obtaining certified copies of this ruling. Costs will be in the cause.

Order accordingly.

DATED at DAR ES SALAAM this 14th day of July, 2021.




S.M. KALUNDE

JUDGE