

**THE REPUBLIC OF UGANDA
 IN THE HIGH COURT OF UGANDA SITTING AT GULU
 MISCELLANEOUS CIVIL CAUSE No. 0008 OF 2017**

	THE REGISTERED TRUSTEES OF KER BWOBO	}	
5	LAND DEVELOPMENT TRUST	} APPLICANT

VERSUS

NWOYA DISTRICT LAND BOARD	RESPONDENT
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10 Before: Hon Justice Stephen Mubiru.

RULING

This is an application made under section 36 (7) of *The Judicature Act*, sections 96 and 98 of *The Civil Procedure Act* and Rule 5 (1) of *The Judicature (Judicial Review) Rules*, S.I. 11 of 2009 for extension of time within which to file an application for judicial review of the respondent's decision dated 23rd September, 2016 by which the respondent revoked a lease offer it had extended to the applicant. The ground upon which the application is made is that following the respondent's decision sought to be impugned, the applicant instructed an advocate to challenge it by way of judicial review. Unfortunately, the advocate inadvertently filed pleadings on 23rd December, 2016 in draft form and was forced to withdraw them before the respondent had filed a reply. By that time it was no longer possible to file another application without first seeking leave of this court, hence this application.

25 The respondent has opposed the application and by way of affidavit in reply of the Secretary to the Board Ms. Acca Everline, contend that it was counsel for the applicant's gross negligence to have signed and filed drafts instead of fair copies of the intended application when they did so. The problem was compounded by counsel's inability to discover that mistake until three months later on 16th March, 2017. Furthermore, the current application was filed on 5th May, 2017 30 manifesting further inordinate delay of one and a half months from the discovery of the error. The application was not fixed and service was not effected until another five months had elapsed on 6th October, 2017. In any event, the intended application for judicial review does not stand any

chance of success. The application should therefore be dismissed or in the alternative the respondent should be awarded costs.

5 In his written submissions, counsel for the applicant Mr. Mulongo Peter has argued that this court has discretion to enlarge time within which the applicant may initiate judicial review proceedings against an unfavourable decision of the respondent because the provisions of Rule 5 (1) of *The Judicature (Judicial Review) Rules*, S.I. 11 of 2009 are only directory and not mandatory and in any event the rule itself permits the court to do so where there is "a good reason" for doing so. Since the initial defective application was filed within the stipulated time, 10 the applicant ought to be granted leave for he is not to be blamed for the mistakes of his advocate. The applicant should not be denied an opportunity to be heard on basis of mistakes of his counsel. Counsel cited a number of authorities supporting his submission that court should give this provision a liberal interpretation in order to promote the interests of justice.

15 In his written submissions in reply, counsel for the respondent Ms. Elizabeth Nyakwebara, State Attorney, argued that the three months within which the applicant should have filed the application elapsed on 22nd September, 2016 since the decision sought to be challenged by way of judicial review 23rd September, 2016. In her view, the application filed on 23rd September, 2016 was one day out of time. Withdrawal of the erroneous application was done on 16th March, 20 2017 (three months later) while the instant application was filed on 5th May, 2017 (a further two months later), hence a total of eight months after the decision sought to be challenged. These was dilatory conduct which should count against the applicant.

According to Regulation 5 (1) of *The Judicature (Judicial Review) Rules, 2009*, an application 25 for judicial review should be made promptly and in any event within three months from the date when the grounds of the application first arose, unless the Court considers that there is "good reason" for extending the period within which the application shall be made. An order for enlargement of time should ordinarily be granted unless the applicant is guilty of unexplained and inordinate delay in seeking the indulgence of the Court, has not presented a reasonable 30 explanation of his or her failure to file the application within the time prescribed by Act, or where the extension will be prejudicial to the respondent or the Court is otherwise satisfied that

the intended application is not an arguable one. It would be wrong to shut an applicant out of court and deny him or her the right to challenge administrative action unless it can fairly be said that his or her action was in the circumstances inexcusable and his or her opponent was prejudiced by it. In an application of this nature, the court must balance considerations of access
5 to justice on the one hand and the desire to have finality to administrative action on the other.

Therefore, when an application is made for enlargement of time, it should not be granted as a matter of course. Grant of extension of time is discretionary and depends on proof of “good reason” showing that the justice of the matter warrants such an extension. The court is required
10 to carefully scrutinize the application to determine whether it presents proper grounds justifying the grant of such enlargement. The evidence in support of the application ought to be very carefully scrutinized, and if that evidence does not make it quite clear that the applicant comes within the terms of the established considerations, then the order ought to be refused. It is only if that evidence makes it absolutely plain that the applicant is entitled to leave that the application
15 should be granted and the order made, for such an order may have the effect of depriving the respondent of a very valuable right to finality of administrative action.

This requirement was re-echoed in cases dealing with enlargement of time to appeal such as *Tight Security Ltd v. Chartis Uganda Insurance Company Limited and another H.C. Misc*
20 *Application No 8 of 2014* where it was held that for an application of this kind to be allowed, the applicant must show good cause. “Good cause” that justifies the grant of applications of this nature has been the subject of several decisions of courts and the examples include; *Mugo v. Wanjiri [1970] EA 481* and *Pinnacle Projects Limited v. Business In Motion Consultants Limited, H.C. Misc. Appl. No 362 of 2010*, where it was held that the sufficient reason must
25 relate to the inability or failure to take a particular step in time; *Roussos v. Gulam Hussein Habib Virani, Nasmudin Habib Virani, S.C. Civil Appeal No. 9 of 1993* in which it was decided that a mistake by an advocate, though negligent, may be accepted as a sufficient cause, ignorance of procedure by an unrepresented defendant may amount to sufficient cause, illness by a party may also constitute sufficient cause, but failure to instruct an advocate is not sufficient cause, which
30 principle was further stated in *Andrew Bamanya v. Shamsherali Zaver, C.A Civil Application No. 70 of 2001* that mistakes, faults, lapses and dilatory conduct of counsel should not be visited on

the litigant; and further that where there are serious issues to be tried, the court ought to grant the application (see *Sango Bay Estates Ltd v. Dresdmer Bank [1971] EA 17* and *G M Combined (U) Limited v. A. K. Detergents (U) Limited S.C Civil Appeal No. 34 of 1995*). However, the application will not be granted if there is inordinate delay in filing it (see for example *Rossette*
5 *Kizito v. Administrator General and others, S.C. Civil Application No. 9 of 1986 [1993]5 KALR*
4). What constitutes “sufficient reason” will naturally depend on the circumstances of each case. It was held in *Shanti v. Hindocha and others [1973] EA 207*, that;

The position of an applicant for an extension of time is entirely different from that of
10 an applicant for leave to appeal. He is concerned with showing sufficient reason
(read special circumstances) why he should be given more time and the most
persuasive reason that he can show is that the delay has not been caused or
contributed to by dilatory conduct on his own part. But there are other reasons and
these are all matters of degree. (Emphasis added).

Although such circumstances ordinarily relate to the inability or failure to take the particular
15 step within the prescribed time which is considered to be the most persuasive reason, it is not the
only acceptable reason. The reasons may not necessarily be restricted to explaining the delay. An
applicant who has been indolent, has not furnished grounds to show that the intended application
is meritorious may in a particular case yet succeed because of the nature of the subject matter of the
dispute, absence of any significant prejudice likely to be caused to the respondent and the
20 Court’s constitutional obligation to administer substantive justice without undue regard to
technicalities. I am persuaded in this point of view by the principle in *National Enterprises*
Corporation v. Mukisa Foods, C.A. Civil Appeal No. 42 of 1997 where the Court of Appeal held
that denying a subject a hearing should be the last resort of court.

25 The considerations which guide courts in arriving at the appropriate decision were outlined in the
case of *Tiberio Okeny and another v. The Attorney General and two others C. A. Civil Appeal*
No. 51 of 2001, where it was held that;

- 30 (a) First and foremost, the application must show sufficient reason related to
the liability or failure to take some particular step within the prescribed
time. The general requirement notwithstanding each case must be decided
on facts.
- (b) The administration of justice normally requires that substance of all
disputes should be investigated and decided on the merits and that error and
lapses should not necessarily debar a litigant from pursuit of his rights.

- (c) Whilst mistakes of counsel sometimes may amount to sufficient reason this is only if they amount to an error of judgment but not inordinate delay or negligence to observe or ascertain plain requirements of the law.
- 5 (d) Unless the Appellant was guilty dilatory conduct in the instructions of his lawyer, errors or omission on the part of counsel should not be visited on the litigant.
- 10 (e) Where an Applicant instructed a lawyer in time, his rights should not be blocked on the grounds of his lawyer's negligence or omission to comply with the requirements of the law.....it is only after "sufficient reason" has been advanced that a court considers, before exercising its discretion whether or not to grant extension, the question of prejudice, or the possibility of success and such other factors ...".

15 Similarly in *Phillip Keipto Chemwolo and another v. Augustine Kubende [1986] KLR 495* the Kenya Court of Appeal held that:

Blunders will continue to be made from time to time and it does not follow that because a mistake has been made a party should suffer the penalty of not having his case determined on its merits.

20 Furthermore In *Banco Arabe Espanol v. Bank of Uganda [1999] 2 EA 22* by the Supreme Court of Uganda that:

25 The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits and that errors or lapses should not necessarily debar a litigant from the pursuit of his rights and unless a lack of adherence to rules renders the appeal process difficult and inoperative, it would seem that the main purpose of litigation, namely the hearing and determination of disputes, should be fostered rather than hindered.

30 In the instant application, the applicant instructed the advocates on time and indeed they filed an application expeditiously. There is no explanation as to what prompted the advocate to file drafts instead, apart from sheer inadvertence. Be that as it may, I have not found any evidence to suggest that the applicant had a hand in causing that failure or lapse. It appears to me that the blame is wholly attributable to the advocates for whose mistake, fault, lapse or dilatory conduct the applicant cannot be penalised.

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Indeed it is now trite that the mistakes, faults, lapses or dilatory conduct of Counsel should not be visited on the litigant (see the Supreme Court decisions in *Andrew Bamanya v. Shamsherali*

Zaver, S.C. Civil Appln. No. 70 of 2001; Ggoloba Godfrey v. Harriet Kizito S.C. Civil Appeal No.7 of 2006; and Zam Nalumansi v. Sulaiman Bale, S.C. Civil Application No. 2 of 1999). However, there is a distinction between mistakes, faults, lapses or dilatory conduct of Counsel and errors of judgment of counsel.

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Acts of un-skilfulness, carelessness or lack of knowledge have long been distinguished from errors of judgment. Whereas the former are a result of factors such as inadvertence, negligence and sheer incompetence, i.e. a failure to act with the competence reasonably to be expected of ordinary members of the profession, the latter is the product of the deliberate application one's
10 mind to the complex tasks of assessing probabilities and predicting values in directing one's choices during the imponderables and uncertainties of litigation, where unfortunately it turns out that the wrong or more disadvantageous choice was made. Whereas the former may not be visited on a litigant, a litigant is bound by the latter since in choosing legal representation, a litigant relies not only on the assumed skilfulness of the advocate but also largely on that
15 advocate's capacity at judgment and making rational decisions.

The acid test is whether the decision permits of a reasonable explanation. If so, the course adopted will be regarded as optimistic and as reflecting on the advocate's judgment but it is not a mistake. Litigants are only absolved of acts or omissions of their advocates that occur in the
20 course of their professional work which no member of the profession who was reasonably well-informed and competent would have done or omitted to do. Implicit in mistakes, faults, lapses or dilatory conduct of Counsel is the common thread of breach by Counsel, of the duty owed to his or her client by failure to conform to the applicable standards of professionalism. It is only just that such lapses should not be visited on a litigant. It would be repugnant to good conscience and
25 fairness to hold litigants liable for mistakes, faults, lapses or dilatory conduct of Counsel which implicitly involve breach by Counsel, of the duties owed to their clients by failure to conform to the applicable standards. I am therefore inclined to decide in favour of granting this application for to do otherwise would be to condemn the applicant for something that was not its fault, to which it did not make any contribution and over which it had no effective control. I any event, it
30 has not been demonstrated to me by the respondent that it stands to suffer nay prejudice by such extension or that the application sought to be filed is not arguable.

Nevertheless, public interest in good administration requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision the authority has reached in purported exercise of decision-making powers for any longer period than is absolutely necessary in fairness to the person affected by the decision (see *O'Reilly v. Mackman*, [1983] 2 AC 237, [1982] 3 WLR 1096, [1982] 3 All ER 1124). The purpose of this requirement is to protect public administration against false, frivolous or tardy challenges to official action. For that reason, counsel for the applicants should file and serve the application for judicial review within fourteen days from now and fix that application for hearing on a date falling within three months of the date of this ruling, failure of which the application may be dismissed summarily.

10 The costs of this application are awarded to the respondent.

Dated at Gulu this 6th day of September, 2018.

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Stephen Mubiru
Judge
6th September, 2018.

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