

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MAIN REGISTRY

AT DAR ES SALAAM

MISC. CIVIL CAUSE NO. 15 OF 2022

IN THE MATTER OF ADVOCATES ACT (CAP 341 R.E 2019)

BETWEEN

ERICK NICHOLAUS NDWELLAPETITIONER

VERSUS

THE ATTORNEY GENERALRESPONDENT

RULING

14/02/2023&17/03/2023

MZUNA, J.:

This is a petition by **Erick Nicholas Ndwela** Role No. 1940 seeking for an order to lift the suspension order of five years effective from 17th day of June, 2020 to 16th June 2025. The order was imposed by the Advocates Committee.

Briefly stated, the said petitioner was suspended from practicing as an advocate after being found guilty for professional misconduct allegedly due to his negligent act of failure to file an appeal on time as instructed. He further failed to prosecute an application for extension of time to appeal out of time which led to a dismissal of the appeal for want of prosecution. Efforts to challenge that decision met a snagging block after

his client's case one Tulo Yohana Shekumkay (not a party in this application) was struck out for being incompetent as it was filed out of time.

The committee in addition to the suspension order, ordered him to refund the complainant compensation of Tshs One Million and two hundred thousand shillings only. Still minded, he sought refuge to this court by preferring this application under sections 28(1)(2)(a) and 29 (1) of the Advocates Committee Act, Cap 341 RE 2019 (herein after, the Act). The petition is supported by his sworn affidavit.

During the hearing of this petition *viva voce*, the petitioner appeared in person and unrepresented whereas Ms. Doreen Mhina, the learned State Attorney appeared for the respondent. The main issue is *whether there are materials upon which this application can be granted?*

Reading from the submission of the Petitioner and the filed affidavit the contents of which were adopted to form part of his submission, the petitioner said that more than two years had lapsed after the order for suspension. That, he complied with the orders set by the Advocates Committee by paying Tulo Yohana Shekumkay Tshs 1.2million as ordered.

That he never practiced as an advocate from the date of the order which made him live under very difficult conditions as he had no other

alternative means to earn income. He being a married man with two children who are schooling and depend on him, it has become difficult to pay for their school fees. That he depends on charity of other family members. He feels sorry and is therefore remorseful for the inconvenience caused. He promised not to do so in future. He further said had never committed any offence while serving the punishment.

In reply, Ms. Doreen Mhina, the learned State Attorney did not object this petition save that he left it to the court to exercise its discretionary powers despite the fact that the applicant committed professional misconduct and was suspended for five years. She conceded as well that he has been out of practice for 2 years and 8 months and had paid fine as per the order.

I have keenly considered the submissions from both parties as well as the affidavit and counter affidavit. It is undisputed fact that the petitioner is currently serving the punishment imposed on him by the Advocates Committee on the 17th June 2020 to 16th June 2025. The petitioner has served the punishment for more than two years. He has demonstrated regret and declared financial difficulties ever since when he was suspended in 2020.

The governing law to which this petition has been preferred, is section 28 and 29 of the Act, which clearly demonstrates that petition of this nature *"to reduce the period of suspension"* should be made *"after the expiration of two years from the date of such order or of half the period of suspension, whichever is the less."*

Exception to that provision where a petition can be made any time, the petitioner may apply to a Judge in Chambers for permission to apply for reconsideration of the original order if *"any new material fact coming to light since the making of the original order of suspension or removal from the Roll, which fact might have influenced the Court or the Committee in making the order"*.

Again a petition of this nature, in view of the provisions of section 29 (1), must be *"by petition and shall be accompanied by a supported affidavit setting forth the grounds upon which the applicant relies."* That was stated in the case of **Sabas William Kiwango v. The Hon. Attorney General**, Misc. Civil Application No. 17 of 2011, CAT (unreported). Copy of such petition and affidavit shall be *"served upon the Attorney-General not less than seven days before the day of hearing."*

All of the above conditions, I am convinced have been complied with. Powers of this court are clearly stated under section 31 (a) (i) – (iii) of the Act.

That, the Court may-

(a) in the case of an application to set aside the order of suspension or to reduce the period of suspension-

(i) set aside the order of suspension;

(ii) reduce the period of suspension for a specified time or to a specified date; or

(iii) decline to make any order.”

The above provision is couched in a discretionary manner “may” not mandatory. Such discretionary powers must however be exercised judicially. Admittedly the misconduct committed by the petitioner, no court or judicial body worth such a name can condone it. It lowers the carrier of advocates as well as dignity of that profession. Being an Advocate, no doubt, is a noble profession which requires high level of discipline, accountability and responsibility towards clients, court and the society at large to ensure trustworthy and stature of the profession.

I have keenly considered the petition as well as mitigating factors as shown under paragraph 3 (i) –(ix) of the supporting affidavit. He avers

that he is remorseful on the professional misconduct which he committed by paying 1.2 million as ordered by the Advocate Committee. That, the petitioner served more than two years out of five years and he has been a good citizen ever since when he became as an Advocate which was the only financial source to sustain his family given the fact that even his spouse is unemployed. To mention but few. I am convinced that his own repentance that he will not repeat such profession misconduct, considered along with the gravity of the offence, deserves leniency.

That said and done, I hereby reduce one year from the imposed suspension period of five years to that of four years. All facts being equal, regard should also be on the fact that even the litigant who lodged a complaint leading to the suspension, equally suffered loss of money, time and income. On account of the aforesaid remission, the petitioner will start to practice on 16th June 2024. The imposed punishment will end on 15th June 2024.

Application partly allowed with no order for costs.



M. G. MZUNA,
JUDGE.
17th March, 2023