

**IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)**

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL APPLICATION NO. 126 OF 2020

MS. FARHIA ABDULLAH NUR.....APPLICANT

Versus

ADVATECH OFFICE SUPPLIES LTD.....1st RESPONDENT

BOLSTO SOLUTIONS LTD.....2nd RESPONDENT

Last Order: 21st Oct, 2020

Date of Ruling: 18th Nov, 2020

RULING

FIKIRINI, J.

This application filed under certificate of urgency has been made pursuant to section 14 (1) of the Law of Limitation Act, Cap. 89 R.E. 2019, section 38 (1), 68 (e) and Order XXXIX Rule 5 of the Civil Procedure Code, Cap. 33 R.E. 2019 (the CPC), and Rule 2 (2) of the High Court (Commercial Division) Procedure Rules, 2012 as amended (the Rules). The application is seeking for the following orders:

1. That, this Court may be pleased to extend time for the applicant to file an application for an order to uplift the warrant of arrest and detention of the applicant as a Civil prisoner issued by the Court on 03rd May, 2017 pending hearing and determination of the application for extension of time to file

Notice of Intention to appeal to the Court of appeal among other prayers, now pending in this Court.

2. That, subject to the grant of the prayer above this Court be pleased to uplift the warrant of arrest and detention of the applicant issued on the 03rd May, 2017, and proceed to stay the execution of the decree of the Court in Commercial Case No. 167 of 2014 against the applicant pending hearing and determination of the application for extension of time to file Notice of Appeal to the Court of Appeal, among other prayers.
3. Costs and any other reliefs this Court may deem fit to grant.

The application is supported by an affidavit of Ms. Farhia Abdullah Nur and skeleton arguments as per Rule 64 of the Rules filed by Mr. Deogratias Kiritta Lyimo counsel for the applicant. Mr. Hassan Kiangio, advocate and Principal officer of the 1st respondent duly authorized filed counter-affidavit contesting the application.

On 21st October, 2020 when the matter was called for hearing Mr. Lyimo assisted by Mr. Alfred Kiritta Lyimo argued the application on behalf of the applicant while Mr. Selemani Almasi learned counsel represented the 1st respondent. Before proceeding with his oral submission Mr. Lyimo prayed to adopt the affidavit in

support of the application as well as the skeleton arguments to form part of his submission in respect of the application, the prayer which this Court granted.

Submitting on the application and particularly on the first ground, referencing to paragraphs 20, 21 and 23 of the affidavit, it was Mr. Lyimo's submission that all that that happened from the 03rd May, 2017 up to when this application was filed has been explained in those paragraphs. The applicant has pointed out after Court decision in Commercial Case No. 167 of 2014 and the execution order for arrest and detention as civil prisoner which followed, the applicant resorted to the Court of Appeal by way of revision as Revision No. 261 of 2017 filed on 27th June, 2017 as well as registering Civil Application No. 270 of 2017. The two pending matters before the Court of Appeal could not allow filing of another matter before this Court, until after the Civil Application No. 270 of 2017 was withdrawn on 22nd June, 2020 and after the Court of Appeal struck out the application for Revision No.261 of 2017 on 05th August, 2020 and copies of the rulings to the applicant availed. Copies of the said rulings were annexed to the affidavit in support.

The applicant applied to be supplied with copies of the ruling and drawn orders, which were availed to her on 07th August, 2020, and then Miscellaneous Commercial Application No. 125 and 126 were preferred on 12th August, 2020. It was Mr. Lyimo's further submission that the chronology of events as listed in

paragraphs 20, 21 and 23 of the affidavit accounted for all the time of delay as required by the law. Bolstering his stance he cited the case of **Seleman Juma Masala v Sylvester Paul Moshi & Another, Civil Application No. 210/01/2017**, on the legal requirement to justify each and every day of the delay to file an application for extension of time. Another case cited is that of **Oysterbay Properties Ltd v Kinondoni Municipality Council & Others, [2011] E.A. 351**, where the Court has pointed out on against whom a decree can be enforced, and has also explained the situations which could compel a corporate veil be lifted and hold the directors of the company personally liable for the company's debt.

On the issue of security for costs, Mr. Lyimo cited to this Court the case of **Advatech Office Supplies Ltd v Ms. Farhia Abdullah Nur, Civil Application No. 353/17/2017**, in which the Court of Appeal declined to grant the prayer for the reason that the applicant was capable of settling the costs of the application.

The second ground was considered by the Counsel as having been well covered in the submissions made in relation to the first ground. On the strength of his submission, Mr. Lyimo prayed for the application, be granted.

Mr. Almasi, responding to the submission, prefaced his by praying to adopt the counter-affidavit plus the annextures accompanying it, the prayer which was granted by this Court. Arguing on the first limb of the application on extension of

time, Mr. Almasi contended that the applicant has not been able to furnish this Court with pertinent information to warrant the grant of the prayer sought. As for the security for costs, he submitted that the applicant failed to fulfill the undertaking of furnishing security for the due performance of the decree as required under Order XXXIX Rule 5 (3) (c) of the CPC, when the applicant applied for a stay of execution be granted. In reference to this argument he referred this Court to the information in paragraph 15 (d) of the counter-affidavit. Mr. Almasi prompted the Court that the decree emanated from the Deed of Settlement signed on 15th June, 2016 and registered on 16th June, 2016 and in order to be granted the relief sought of stay of execution, the applicant should have stated clearly about the security in her affidavit, failure of which the prayer to uplift the warrant of arrest and stay of execution should be rejected and dismissed. Supporting his submission, he cited the cases of **MIC (T) Ltd v Cxc Africa Ltd, Civil Application No. 172/01 of 2019, CAT** and **Indian Ocean Hotels Ltd t/a Golden Tulip Dar Es Salaam v Nitesh Suchak t/a Smart Dry Cleaners, Civil Application No. 82 'A' of 2010** (both unreported) copies supplied.

Maintaining his submission, it was his contention that the history as disclosed under paragraph 15 of the counter-affidavit makes it necessary for deposit or the furnishing of the security to be ordered to allow the decree holder to enjoy fruits of

the decree once the matter has been decided in her favour. He also submitted that moreover, the applicant has failed to account for about 6 (six) days as required in law, submitted Mr. Almasi. To account for each and every delayed day was emphasized in the case of **Salim Lakhani & 2 Others v Ishfaq Shabir Yusufali (As an Administrator of the Estate of the Late Shabir Yusufali)**, Civil Application No. 455 of 2019, pointed out the counsel. As for the case of **Advatech Office Supplies** (supra) it was his submission that the facts in that case were distinguishable to the facts in the present application. In the former application the applicant filed for security for costs and the application was declined. In the present situation it was the 1st respondent seeking for security to be furnished by the applicant, as a condition to uplift the warrant of arrest and order stay of execution to be granted. The referred **Advatech Office Supplies** case (supra) was thus not applicable, he contended.

The applicant's actions, as scrutinized under paragraph 15 of the counter-affidavit, did not exhibit faithfulness at all. He thus urged the Court to dismiss the application and if the Court opts to exercise its discretion then it should do so with conditions, which the applicant has not said anything.

Mr. Lyimo in rejoinder submitted that the 5 (five) unaccounted days were used to prepare the application. The time was thus justified considering the bulk of the

vents involved. There was therefore no inordinate delay from when the Court of appeal made its decision up to when this application was filed, emphasized the counsel.

Concerning the security for costs issue, it was his position that the applicant was not a judgment debtor in Commercial Case No. 167 of 2014. The 1st respondent was the decree holder, which he was at liberty to execute against the 2nd respondent instead of focusing on the applicant who was not a judgment debtor. He, however, knowingly went ahead and opted to leave it to the Court to decide, even though the applicant would be a stranger to the decree to be executed, in which a requirement or intention to deposit the financial security did not arise. Furthermore, there was a judgment debtor, in this case a legal entity who was around doing business and the decree was capable of being executed against them (the 2nd respondent), Mr. Lyimo underscored. On those bases he urged the Court to grant the application.

I have dully considered the application and the accompanying affidavits in light of the rivalry submissions and filed skeleton arguments by the applicant's counsel and oral submissions by the counsels. There are two issues so far for determination: *one*, whether to grant or not grant application for extension of time and uplifting of the order for warrant of arrest and detention, and *two*, whether the application for grant of stay of execution, should be granted with condition, as desired by the 2nd

respondent once the Court finds it pertinent to grant the application. Before I dwell on determining the application and the reliefs sought, I find it apt to state relevant legal principles under the circumstances. **One**, that the Court is bestowed with unlimited discretionary powers. However, those discretionary powers have to be exercised according to the rules of reason and justice, and not according to private opinion, whimsical inclinations or arbitrarily. There is a long list of authorities on that aside from **Selemani Juma Masala** referred by Mr. Lyimo (*supra*). To add just a few are **Mbogo v Shah [1908] EA**; **Yusuph Same & Hawa Dada v Hadija Yusuph**, Civil Appeal No. 1 of 2003, CAT; **Regional Manager, Tanroads Kagera v Ruaha Concrete Company Limited**, Civil Application No. 96 of 2007 and **Lyamuya Construction Company Ltd v Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010; and **Ngao Godwin Losero v Julius Mwarabu**, Civil Application No. 10 of 2015. All except **Mbogo v Shah** are unreported Court of Appeal decisions.

Two, in order for the Court to act there must be sufficient reasons advanced upon which the Court will rely in arriving at its decision on whether to grant the application for extension of time or not. Although what amounts to sufficient reasons or cause has not been defined as illustrated in the case of **Philemon Mang'ehe t/a Bukine Traders v Gesbo Hebron Bajuta**, Civil Application No. 8

of 2016 (unreported), but over time and through case laws a number of factors to be taken into account have been established. In the **Mumello** case (supra), the Court had this to say:

“What amounts to sufficient cause has not been defined and from decided cases as number of factors have to be taken into accounting including whether or not the application has been brought promptly, the absence of any or valid explanation and lack of diligence on the part of the applicant.”

Accounting for each and every day of the delay is one of the requirements. Mr. Lyimo expounding on the 5 (five) unaccounted days, he contended were days used in preparation of the application. Justifying the time period of 5 (five) days, he stated the documents were bulky and asserted that the delay was not inordinate. Mr. Almasi contested the submission by claiming that the applicant has not been able to explain or account for each and every day of the delay.

Tracing from the background to this application, after the 2nd respondent has failed to enter appearance or file defence despite service including substituted service by way of publication, default judgment in Commercial Case No. 167 of 2014 was entered on 28th July, 2015 as averred in paragraph 13 of the affidavit. This was followed by a notice to show cause issued in respect of the 2nd respondent, when an

application for execution was filed. According to paragraph 14, 15 and 16, neither the directors of the 2nd respondent, Bolsto Solutions Limited, nor its legal representative showed up in Court when the application was called for hearing. Considering, that the applicant was still the Managing Director of the 2nd respondent's company, the status which was being disputed by the applicant, the Court opted to summon her to show cause why execution order by way of arrest and detention as a civil prisoner, should not be effected. On 03rd May, 2017 the Court ordered and issued arrest warrant and detention of the applicant as civil prisoner, in satisfying the Court decree passed.

Aggrieved the applicant filed both a revision registered as Civil Application No. 261/16 of 2017 to challenge the ruling dated 03rd May, 2017 and a Civil Application No. 270 of 2017, for uplifting of the warrant of arrest and detention of the applicant. The application for revision was struck out on 05th August, 2020 while the Civil Application No. 270 of 2017 was withdrawn on 22nd July, 2020 for having being overtaken by events due to the existence of the application for revision in Civil Application No. 261/16 of 2017. It is after the order dated 05th August, 2020 striking out the Civil Application No. 261/16 of 2017, the applicant was now at liberty to revert to this Court to line up her actions properly. Since time for taking appropriate action has already elapsed, her intended application has to be

preceded by an application for extension of time so that the Court can consider doing the following:

- (i) Uplift the warrant of arrest and detention of the applicant as a civil prisoner issued on 03rd May, 2017 pending hearing and determination of the application for extension of time to file notice of appeal to the Court of Appeal; and
- (ii) Grant stay of execution of decree in Commercial Case No. 167 of 2014 pending hearing and determination of the application for extension of time to file notice of appeal to the Court of Appeal.

From the submissions made, it is evident that this application was filed 5 (five) days according to Mr. Lyimo and 6 (six) days according to Mr. Almasi, but my counting of the from 07th August, 2020 besides being a Friday, followed by Saturday and Sunday, and not right away as probably computed by Mr. Almasi to get 6 (six). Nonetheless be it 5 (five) or six (6) days, Mr. Lyimo has provided explanation in paragraph 27 of the affidavit in support as to the delay. Mr. Kiangio in paragraph 13 of the counter- affidavit, disputed the assertion and put the applicant to strict proof. In all fairness considering the copies were supplied on Friday, and the following days happened to be Saturday and Sunday, even though there is no law or rule prohibiting a party or counsel working on those days, but in

most cases than not, people tend to slow down in terms of work and productivity. Fairly considering, the application, the counsel had only 2 (two) working days prior to filing the application on 12th August, 2020. That aside, the explanation that the counsel had to go through bulk of documents in preparation of the present application, in the absence of any other evidence to the contrary, should and will not be ignored.

In addition, the applicant's action has in my view been consistence in searching for justice and to see her rights restored. Immediately after the order dated 03rd May, 2017, she preferred as revision titled as Civil Application No. 261/16 of 2017 challenging the ruling and order as well as Civil Application No. 270 of 2017 seeking for uplifting of warrant of arrest and detention order against her. The applicant's actions resonate with what was illustrated in the case of **Royal Insurance Tanzania Ltd v Kiwengwa Strand Hotel Ltd, Civil Application No. 111 of 2009 at p.13**, where the Court considered such immediate reactions favourably, as I do in this application.

In the would be intended application for extension of time to file notice of appeal to the Court of Appeal, one of the contentious issue is whether it was lawful for the Court to order execution of the decree in Commercial Case No. 167 of 2014, against the applicant while she has already indicated no longer being the director

and shareholder of the 2nd respondent at the time of instituting the suit up until its completion and the execution order which came after. This issue needs Court of Appeal clarification going by the decision in **Oysterbay Properties** (supra), in which the Court held:

“A decree can only be enforced against a party to the suit and not third parties.”

I have considered this positively despite the averment in paragraphs 15 (a) – (d) of the counter-affidavit regarding the applicant’s actions and behavior towards dealing with the order for warrant of arrest and detention, which as illustrated in paragraph 5 of the affidavit, saw her arrested on 14th June, 2016 and detained overnight at Central Police. And on the 15th June, 2016 taken before the Commercial Court to show cause why she should not be detained further as civil prisoner in execution of judgment and decree in Commercial Case No. 167 of 2014 issued against the 2nd respondent.

The reason behind the above finding is basically, that there are issues which need to be resolved in one way or the other, which I do not think this Court would be the proper forum.

Furthermore, this application is just a stepping stone building into the application for extension of time to file notice of appeal to appeal to the Court of Appeal, on one hand. And on the other it is an application for extension of time to file an application to uplift the order for warrant of arrest and detention order, which touches on one's right to freedom and unnecessary or unfairly detention. The sensitivity which comes with right to freedom and one's liberty cannot be taken lightly. And in this application I have thoughtfully given attention to that.

Putting all the above together I find the application for extension on time is deserving granting and proceed to grant it with an order uplifting the warrant of arrest and detention order pending hearing and determination of the application for extension of time to file notice of appeal, which is also pending before this Court.

Turning to the second issue, on stay of execution albeit with conditions as submitted by Mr. Almasi, Mr. Lyimo opposed the proposal arguing that grant of the extension of time subject to raising the warrant of arrest and detention did not require security pursuant to Order XXXIX Rule 5 of the CPC. He however, was quick to opt leaving it to Court to decide, despite the fact that the execution order was against the stranger to the decree of the Court, in which deposit of financial security did not arise. Stressing that there was a judgment debtor, a legal entity

who was around doing business and the decree was capable of being executed against her.

Stay of execution of a decree or order is governed by Order XXXIX Rule 5 (1), (2) and (3) of The CPC. The Court in dealing with such application has to satisfy itself 3 (three) things: (i) that substantial loss might occur if the application is not granted, (ii) the application was made timely, and (iii) security was given. Despite the stipulated criteria, in the case of **MIC Tanzania Ltd** (supra), p. 13, in which the decision in **Tanzania Cotton Marketing Board v Cogecot Cotton Co. SA [1997] T. L. R. 63**, was cited with approval, the Court maintained granting or not granting the stay of execution order is discretionary upon the Court. The discretion has to nonetheless, be exercised with common sense and on balance of advantage basis. In other words, weighing the pros and cons of either granting or not granting the application, before the Court, can decide on either route.

Having in mind the above position and breathing that into the application before me, I am of the view that, no compelling reasons existed to warrant granting of the stay of execution with a condition based on the availed facts in the affidavit in support of the application. The reasons behind my position are, that after examining the contents of the affidavit as well as the counter-affidavit, I find there is indeed an issue to be resolved as to whether the applicant was the right person

upon which an order for warrant of arrest and detention as civil prisoner to be issued against. As well articulated in the case of **Oysterbay Properties**, a decree must be executed against a party to the suit, and not against a third party. Since this portion is still controverted to order the applicant to furnish security, in my view might be unjustly.

The exercise of issuing an order to execute a decree against the applicant was to be preceded by an order of this Court that there was a decree intended to be executed against applicant by showing the reasons why the decree holder wanted to execute the decree against the applicant instead of the 2nd respondent in whose name the decree was passed against. In short a decree holder has no automatic right to choose a person of her choice who may be arrested and detained as a civil prisoner for the purpose of executing the decree which was passed against another person without first requiring her to show cause why such order should not be executed against a third party who was not even a party to the case subject of execution. Since the 2nd respondent is a limited liability company with distinct personality from its shareholders and directors, therefore caution has to be taken. Reading from the affidavit the decree sought to be executed was against the 2nd respondent and not the applicant. As averred under paragraph 15 of the affidavit, the averment not controverted, that no application was filed to raise the veil of incorporation to

pave way for the execution of the decree against a limited liability company against its directors including the applicant presuming she is still holding the position.

And this places me in the same position as Mr. Lyimo that the order should not necessarily be with condition. The applicant will only be liable after it has been proved that she was still a director and shareholder at the time of filing of the Commercial Case No. 167 of 2014 and consequently during the execution stage and hence liable. Otherwise she is a stranger to the decree to warrant requiring her to furnish security.

In the upshot, I find the reliefs sought in the application meritorious and hence proceed to grant the application. The warrant of arrest and detention order is hereby uplifted and stay of execution granted without any condition. It is so ordered.



P. S. FIKIRINI

JUDGE

18th NOVEMBER, 2020