IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

CIVIL APPLICATION NO. 4/05/2017

MSH: CIVIL APPLICATION NO. 9 OF 2016

1. **ZAHARA KITINDI**
2. **DOMINIC B. FRANCIS** ..... **APPLICANTS**

VERSUS

1. **JUMA SWALEHE**
2. **RAMLA JUMA SWALEHE**
3. **BARAKA JUMA SWALEHE**
4. **ATHUMANI JUMA SWALEHE**
5. **BISULA JUMA SWALEHE**
6. **SALIM JUMA SWALEHE** .....**RESPONDENTS**
7. **AZIZA JUMA SWALEHE**
8. **RAMADHANI JUMA SWALEHE**
9. **RASHID JUMA SWALEHE**
10. **ASHURA JUMA WALEHE**

(Application for extension of time to file an application for stay of execution of the judgment and decree of the High Court of Tanzania, at Moshi)

(Mwingwa, J.)

dated the 19th day of February, 2016
in
DC. Civil Appeal Nos. 10 & 11 of 2014

.....

RULING

1st & 3rd March, 2017

MWAMBEGELE, J.A.:

The applicants Zahara Kitindi and Dominic B. Francis have, by Notice of Motion, lodged the present application under the provisions of rule 10 of the Tanzania Court of Appeal Rules, 2009 (henceforth

"the Rules") seeking the indulgence of this court to extend time within which to file an application for stay of execution of the judgment and decree of the High Court (Mwingwa, J.) pronounced on 19.02.2016 in DC Civil Appeal Nos. 10 & 11 of 2014. The Notice of Motion is supported by an affidavit duly sworn by Dominic B. Francis; the second applicant, on behalf of the first applicant. It is resisted by an affidavit in reply affirmed by Ramla Juma Swalehe; the second respondent on behalf of the rest of the respondents.

Before the application could be heard, the respondents, through advocate Peter E. Shayo of a law firm going by the name styled Shayo, Jonathan & Company, Consulting Advocates, put the Court and the applicants on notice that they had a preliminary objection against the application. The Notice of Preliminary Objection was filed on 23.02.2017 under rule 107 (1) of the Rules. For easy reference, the body of the Notice of Preliminary Objection is couched thus:

> *"TAKE NOTICE that on 1st March, 2017 when the above mention Notice of Motion is set for hearing , the advocate for the*

respondents will move a single judge of this Court for an order to dismiss the motion on the ground that the applicant did not file written submission in support of the application in terms of rule 106 (1) of the Rules of this Court".

The provisions of sub-rule (1) of rule 107 under which the Notice of Preliminary Objection has been made reads:

"A respondent intending to rely upon preliminary objection to the hearing of the appeal shall give the appellant three clear days notice thereof before hearing, setting out the grounds of objection such as the specific law, principle or decision relied upon, and shall file five such copies of the notice with the Registrar within the same time and copies or photostat of the law or decision, as the case may be shall be attached to the notice."

At the hearing, the applicants and respondents were, respectively, represented by Ms. E. Minde and Mr. Peter Shayo, both learned counsel. Through their advocate; Ms. Minde, learned counsel, the applicants admitted to have been served with the Notice of Preliminary Objection within the prescribed timeframe.

In the wake of the preliminary objection, the main application had to be kept at abeyance pending the determination of the preliminary objection. The course taken by the Court was to accede to the practice in this jurisdiction founded upon prudence which has it that a court seized with a preliminary objection is first required to determine that objection before going into the merits or the substance of the case or application before it – see: **Shahida Abdul Hassanali Kassam v. Mahedi Mohamed Gulamali Kanji**, Civil Application No. 42 of 1999 and **Thabit Ramadhani Maziku & Another v. Amina Khamisi Tyela & Another**, Civil Appeal No. 98 of 2011; both are unreported decisions of the Court.

Consequent upon the foregoing and prompted by the Court, the learned counsel for the parties agreed that they should argue the preliminary objection first and then argue the main application. It

was agreed that should the Court sustain the objection in the course of composing a ruling thereof, that will be the end of the matter but if the Court overrules the objection, it will proceed to compose a ruling of the main application.

In the hearing of the preliminary objection, it was Mr. Shayo, learned counsel, who kicked the ball rolling. Arguing for the preliminary objection, the learned counsel for applicants was brief but to the point. He submitted that the applicants have not filed any written submissions in support of the application as prescribed by the provisions of rule 106 (1) of the Rules. The provisions, he submitted, are couched in mandatory terms and in the light of sub-rule (9) of the rule, the application must be dismissed as was the case in **Alphonce Buhatwa v. Julieth Rhoda Alphonce**, Civil Application No. 209 of 2016; an unreported decision of the Court which was appended with the Notice of Preliminary Objection. In the premises, the learned counsel beckoned the Court to dismiss the application with costs.

Responding, Ms. Minde, learned counsel for the applicants, conceded to the open fact that the applicants did not file written

submissions in support of the application as dictated by rule 106 (1) of the Rules. However, Ms. Minde was quick to state that failure to comply with these provisions did not prejudice the respondents. If anything, she added, the course has denied the applicants to expound further on the application. She therefore urged the Court to dispense with the conditions under the rule as provided by sub-rule (19) thereof and dismiss the preliminary objection. The learned counsel buttressed her proposition with an unreported decision of the Court of **Khalid Mwisongo v. M/S Unitrans (T) Ltd**, Civil Appeal No. 56 of 2011.

In a short rejoinder, Mr. Shayo, learned counsel, stated that the respondents will be prejudiced if the application is not dismissed under the provisions of sub-rule (9) of rule 106 as sub-rule (1) thereof is couched in imperative terms. On the **Mwisongo** case cited and relied upon by the learned counsel for the applicants, Mr. Shayo rebutted that the case was decided before the **Buhatwa** case which has been cited and relied upon by the respondents. Thus, he argued, the decision of the same court which came later should be followed.

Let me, firstly, dispose of the preliminary objection. As rightly submitted by Mr. Shayo, learned counsel, the provisions of sub-rule (1) of rule 106 of the Rules require, *inter alia*, an applicant to file in the appropriate registry written submissions in support of an application within sixty (60) days after lodging the Notice of Motion. It is clear therefore that the applicants in the instant application ought to have filed written submissions in support of the application within the timeframe stated above. It is also apparent that the provisions of sub-rule (9) of rule 106 of the Rules provide that upon failure by the applicant to comply with sub-rule (1), the Court may dismiss the application. However, the Court has been bestowed with discretionary powers under sub-rule (19) of the same rule to forbear with the application of the conditions under the rule "where it considers the circumstances of an appeal or application to be exceptional, or that the hearing of an appeal must be accelerated in the interest of justice". Such discretion of the Court is unfettered. For easy reference, I reproduce the sub-sub-rule as hereunder:

> *"The Court may, where it considers the circumstances of an appeal or application to be exceptional, or that the hearing of an*

appeal must be accelerated in the interest of justice, waive compliance with the provisions of this Rule in so far as they relate to the preparation and filing of written submissions, either wholly or in part, or reduce the time limits specified in this Rule, to such extent as the Court may deem reasonable in the circumstances of the case."

From my reading of the foregoing provisions of the law, it is apparent that the Court will only waive compliance with the provisions of the rule upon consideration of one of the two conditions prescribed; one, existence of exceptional circumstances, and two, that the hearing of the matter must be accelerated in the interest of justice. In the instant case, the applicants' counsel has submitted that the respondents have not been prejudiced to which the respondent's counsel states that they have.

I have considered the rival arguments on the point by these trained minds. Having so done, with due respect to the learned

counsel for the respondents, I do not read anything in the law and facts available that would suggest any prejudice on the part of the respondents. The learned counsel for the respondents has pegged the prejudice on the word "shall" used in the sub-rule which according to him imputes imperativeness. With due respect to the learned counsel for the respondents, I have serious doubts if the word "shall" used in the sub-rule imports imperativeness. I say so because if that was the case, the provisions of sub-rule (9) would not have given the Court an option to dismiss or not to dismiss the application or appeal for its noncompliance. Also, the provisions of sub-rule (19) would not have given the Court the unfettered discretion it has given. In my considered view, the word "shall" used in sub-rule (1) of rule 106 of the Rules is not imperative but relative and is subject to the provisions of rules (9) and (19) of the same rule. On this stance, I have drawn inspiration from the decision of the Full Bench of the Court in ***Bahati Makeja Vs R***, Criminal Appeal No. 118 of 2006 (unreported) in which it considered the imperative nature or otherwise of the word "shall" in the Criminal Procedure Act, Cap. 20 of the Revised Edition, 2002. In **Makeja** the Full Bench, speaking through Ramadhani, CJ, held:

"... s. 388 is absolutely essential for the administration of justice under the CPA. There are a number of innocuous omissions in trials so if the word "shall" is every time taken to be imperative then many proceedings and decisions will be nullified and reversed. We have no flicker of doubt in our minds that the criminal law system would be utterly crippled without the protective provision of s. 388. ... the interpretation of the word "shall" given in s. 53 (2) of Cap 1 must be subjected to the protective provisions of s. 388".

And the Full Bench of the Court, went on to articulate:

"... the word "Shall" in the CPA is not imperative as provided by s. 53 (2) of Cap. 1 but is relative and is subjected to s. 388 of the CPA"

Taking inspiration from the **Makeja** case and borrowing the words of their Lordships in that case, it is my considered view that, if the word "shall" in sub-rule (1) of rule 106 is taken to be imperative, then the protective provisions of sub-rules (9) and (19) of the same rule will be rendered meaningless. Sub-rules (9) and (19) were not put in place as an embellishment; they were enacted with a purpose which is to protect the interests of justice in every given case.

In addition to the above, there is another reason why I feel that the word "shall" in the sub-rule should not be interpreted as imperative contrary to the provisions of sub-section (2) of section 53 of the Interpretation Act, Cap. 1 of the Revised Edition, 2002. This is that I, for one, feel that it will be in the interest of justice if this matter is disposed of expeditiously. The reason is not hard to seek. Expeditious determination of cases is an aspect falling within the scope and purview of the vision of the judiciary of Tanzania. And, above all, it is not disputed that the legal wrangle on the disputed land dates way back in 1994 in **Zahara w/o Kitindi v. Athumani Kitindi and Juma Swalehe**, Civil Case No. 111 of 1994 in Moshi District Court. The dispute has therefore been lurking in the courts of law for about 26 years now. It is therefore apt that the same is

disposed of to its logical finality and this will be made possible only if the invitation by the learned counsel for the respondents to have it dismissed under the provision of sub-rule (9) of rule 106 of the Rules is refused.

For the avoidance of doubt, I have read and considered the **Buhatwa** case cited and supplied to the Court by Mr. Shayo, learned counsel. I am also aware that the decision is very recent as it was pronounced on 26.10.2016 compared to the **Mwisongo** decision which was made on 13.04.2012. I equally am alive to the principle brought to the fore by Mr. Shayo to the effect that in cases of conflict between the decisions of the Court on the same point, the one which came later should reign. Mr. Shayo did not cite any authority in this regard but I think he had in mind **Arcopar (O.M.) S.A v. Harbert Marwa and Family & 3 Others,** Civil Application No. 94 of 2013 (unreported); the decision of this Court pronounced in the recent past; on 03.02.2015 to be precise. In **Arcopar**, the Court discussed at some considerable length on the point and revisited in the process textbooks, legal articles and a prethora of authorities in the country, East Africa and the world at large. Having so done, the Court concluded:

"Following the most recent decision, in our view, makes a lot of legal common sense, because it makes the law predictable and certain and the principle is timeless in the sense that, if, for instance, a full Bench departs from its previous recent decision that decision would prevail as the most recent."

In view of the above, I would agree with Mr. Shayo that it is good practice that in cases of conflicting decisions on the same point in the Court, to follow the most recent decision, as was held in **Arcopar** (supra), makes a lot of legal common sense because it makes the law predictable and certain.

However, the principle is, in my view, not applicable in the case at hand. I shall demonstrate.

The **Buhatwa** case, in my considered view, is distinguishable from the facts of this case. While in that case there were no exceptional circumstances to dispense with the application of the conditions under sub-rule (1) of rule 106 and the Court did not find it

as a matter to be accelerated in its disposition, in the present case, the opposite, as alluded to above, is true. That is to say, in the present case there are in place special circumstances that make the case exceptional and the Court feels that there is dire need to accelerate the determination of the dispute between the parties hence the exercise of the discretion to dispense with the requirements under the provisions of rule 106 (1) of the Rules.

I also wish to underscore here that the discretion bestowed upon the Court by the sub-section is exercised depending upon the circumstances and facts of each case – see: **Mwinyshehe A. Mwinyishehe v. Secretary General Bilal Muslim Mission**, Civil Appeal No. 36 of 2010, **Mechmar Corporation (Malaysia) Berhard v. VIP Engineering and Marketing Ltd.**, Civil Application No. 9 of 2011, **Dar Es Salaam City Council v. Justine Mrosso**, Civil Application No. 47 of 2013, **TISCO Consultants and Associates v. New Northern Creameries Ltd**, Civil Application No. 102 "A" of 2010, **Khalid Mwisongo v. M/S Unitrans (T) Ltd**, Civil Appeal No. 56 of 2011 and **the Zanzibar Shipping Corporation & Anor v. Mohamed Hassan Khamis & 5 ors**, Civil Application No. 8 of 2014 (all unreported), to mention but a few.

Thus upon consideration of the peculiar facts of each particular case and subjecting those facts to the sieve of whether or not the circumstances of the case are exceptional, of whether or not there is need to accelerate the hearing of the matter and, most importantly, whether or not there will be any prejudice on the opposite party, the Court has all along been exercising the discretion bestowed upon it accordingly; that is to either dismiss an application or appeal under sub-rule (9) of rule 106 as was the case in **Buhatwa** (supra), **Masunga Mbegete & 2 Others**, Civil Application No. 68 of 2010 (unreported), **Mechmar Corporation (Malaysia) Berhard** (supra) and **Mwinshehe** (supra) or dispense with the conditions prescribed by the rule as was the case in the **Mwisongo**, **Dar Es Salaam City Council**, **TISCO Consultants and Associates**, **the Zanzibar Shipping Corporation** and **the Zanzibar Shipping Corporation** cases (supra). What is important is for the Court to consider the existence in the case of special circumstances and the need to have the matter accelerated as well as consideration of the issue whether or not any party will be prejudiced if the conditions under the rule are overlooked.

I think the foregoing sufficiently explains why I would decline the invitation by Mr. Shayo, learned counsel, to dismiss the present application under the provisions of sub-rule (9) of rule 106 of the Rules and in its stead exercise the discretion under sub-rule (19) thereof.

In sum, therefore, I decline the invitation of Mr. Shayo, learned counsel and proceed to overrule the preliminary objection with no order as to costs. I will therefore proceed to determine the main application on merits. However, before doing that, let me restate the law on applications of this nature which is well settled in this jurisdiction.

Applications for extension of time within which to perform any act in legal proceedings are controlled by the provisions of rule 10 of the Rules under which the present application has been made. Rule 10 reads:

> *"The Court may, upon good cause shown, extend the time limited by these Rules or by any decision of the High Court or tribunal, for the doing of any act authorized*

or required by these Rules, whether before or after the expiration of that time and whether before or after the doing of the act; and any reference in these Rules to any such time shall be construed as a reference to that time as so extended."

It is apparent from the above provisions that extension of time may only be granted upon the applicant showing good cause for the delay. It is trite law that to grant or refuse extension is entirely in the discretion of the Court. It is also trite that such discretion is judicial and so it has be exercised according to the rules of reason and justice, and not according to private opinion or arbitrarily – see: **Yusufu Same & Anor v. Hadija Yusufu**, Civil Appeal No. 1 of 2002 and **Lyamuya Construction Company Ltd v. Board of Registered Trustee of Young Women's Christian Association of Tanzania,** Civil Application No. 2 of 2010, both unreported.

What amounts to "good cause" has not been defined under the Rules. This is so because extension of time, being a matter within the Court's discretion, cannot be laid down by any hard and fast rules

but will be determined by consideration of all the circumstances of each particular case – see: **Regional Manager, TANROADS Kagera v. Ruaha Concrete Company Limited,** Civil Application No. 96 of 2007 and **Tanga Cement Company Limited v. Jumanne D. Massanga and Amos A. Mwalwanda**, Civil Application No. 6 of 2001, both unreported decisions of this Court. In **Tanga Cement** (supra) for instance, this court, referring to its earlier unreported decision of **Dar es Salaam City Council v. Jayantilal P. Rajani**, Civil Application No. 27 of 1987, the Court observed:

> *"What amounts to sufficient cause has not been defined. From decided cases a number of factors have to be taken into account, including whether or not the application has been brought promptly; the absence of any explanation for delay, lack of diligence on the part of the applicant".*

Likewise, it was observed in **Lyamuya Construction** (supra) that on the authorities on this point, the following principles may be deciphered:

> *"(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; and*
>
> *(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."*

Reverting to instant application, as can be gleaned in the Notice of Motion and the flanking affidavit as well as the oral submissions before me, the applicant has ascribed the reasons for not filing the application for stay of execution in time to the time spent in

prosecuting the application in a wrong court and later filing it in a proper court but out of time. This is evident at para 12 of the affidavit supporting the Notice of Motion. For ease of reference, let the para paint the picture:

> *"12. That time was inadvertently wasted in prosecuting in good faith the said Misc. Application No. 18/2016 which was inadvertently filed in a wrong Court and Misc. No. 4/2016 which was struck out for not being filed timely"*

I have dispassionately considered the reasons for the delay in filing the application for stay of execution whose time for filing is sought to be extended. I have scanned the record of the matter as well. The record, which forms part of the affidavit as deposed in the affidavit supporting the Notice of Motion, vindicates the applicants' depositions. The record bears out that the decision intended to be challenged was pronounced on 19.02.2016 and Notice of Appeal against it was signed by the applicants on 22.02.2016 and lodged in the Court on the same date; 22.02.2016. Misc. Civil Application No.

18 of 2016 was immediately filed but struck out on 11.05.2016 for being filed in a wrong court. Immediately thereafter, the applicants filed in this Court Civil Application No. 4 of 2016 for stay of execution but the same was struck out on 10.10.2016 for the reason that it was not filed within sixty (60) days from the date of filing of the Notice of Appeal. Undeterred, the applicants filed the present application. The Notice of Motion of the present application was signed on 11.10.2016 just a day after Civil Application No. 4 of 2016 was struck out and lodged on 17.10.2016; just a week after the striking out of the said Civil Application No. 4 of 2016.

The sum total of the foregoing steps taken by the applicants and the speed thereof suggest that the applicants acted with extreme promptness in taking steps to challenge and stay the judgment and decree of the High Court.

The period of delay between the filing in the High Court of Misc. Application No. 18 of 2016 for stay of execution of the judgment and decree of DC Civil Appeal No. 10 & 11 0f 2014 and 11.05.2016 when it was struck out for being filed in a wrong court as well as the period of delay between the preparation and filing of Civil

Application No. 4 of 2016 for stay of execution of the same judgment and decree and 10.10.2016 when it was struck out by this Court for being filed out of time, can conveniently be termed as a "technical delay" within the meaning of the decision of the Court in **Fortunatus Masha v. William Shija And Another** [1997] TLR 154. In that case, at p. 155, the Court observed:

> *"... **a distinction should be made between cases involving real or actual delays and those like the present one which only involve what can be called technical delays** in the sense that the original appeal was lodged in time but the present situation arose only because the original appeal for one reason or another has been found to be incompetent and a fresh appeal has to be instituted. In the circumstances, the negligence if any really refers to the filing of an incompetent appeal not the delay in filing it. **The filing of an incompetent appeal having been duly***

penalised by striking it out, the same cannot be used yet again to determine the timeousness of applying for filing the fresh appeal. *In fact in the present case, the applicant acted immediately after the pronouncement of the ruling of this Court striking out the first appeal."*

[Emphasis supplied].

It is my considered view that the applicants have explained away the delay to my satisfaction. In the light of **Fortunatus Masha**, the filing of Misc. Application No. 18 of 2016 in a wrong court having been duly penalized by striking it out and the filing of Civil Application No. 4 of 2016 in a proper court but out of time also having been duly penalized by striking it out, cannot be used yet again to determine the timeousness of applying for filing the fresh application. It is no gainsaying that the applicants acted immediately after the pronouncement of the decision the execution of which is sought to be stayed.

The foregoing said and done, I am satisfied that the applicants have brought to the fore sufficient reasons why they did not file the application for stay of execution within the timeframe prescribed by the law and would, in the premises, grant the prayer sought in the Notice of Motion.

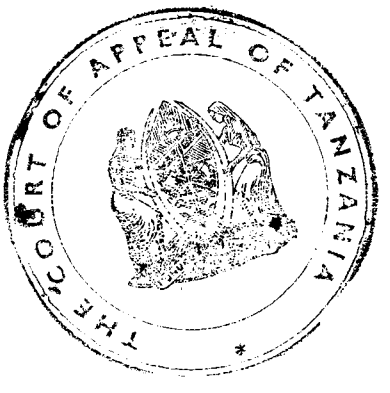
In the end of it all, the present application is allowed. The applicants to file the intended application for stay of execution of the judgment and decree of the High Court in DC Civil Appeal Nos. 10 & 11 of 2014 handed down on 19.02.2016, within sixty (60) days of delivery of this ruling. The circumstances of this case are such that there should be made no order as to costs. I therefore make no order as to costs.

Order accordingly.

DATED at **ARUSHA** this 3rd day of March, 2017.

J.C.M. MWAMBEGELE
JUSTICE OF APPEAL

I certify that this is a true copy of the original.



A.H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL