IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

CIVIL APPLICATION NO. 319/08 OF 2019

CRDB BANK PLC ..... APPLICANT

VERSUS

VICTORIA GENERAL SUPPLY CO. LTD ..... RESPONDENT

(Application from the Judgment of the High Court of Tanzani at Mwanza)

(Ebrahim, J.)

dated the 29th day of May, 2018

in

Civil Case No. 13 of 2015

RULING

26th November & 3rd December, 2019

MWANDAMBO, J.A:

CRDB Bank PLC who acts through Mr. James Njelwa, learned Advocate, has preferred an application under rule 10 of the Tanzania Court of Appeal Rules, 2009 (hereinafter to be referred to as the Rules) for an order extending the time for filing an application for stay of execution. The application is by way of notice of motion supported by an affidavit deponed to by the applicant's learned Advocate. The decree sought to be stayed in the intended application stems from the decree of the High Court at Mwanza (Ebrahim, J.) made on 29th May 2018 in Civil Case No. 13 of 2015.

Not amused, the respondent who is advocated by Mr. Salum Aman Magongo, learned counsel resists the application. It does so through an affidavit in reply deponed to by Jonathan Kalaze, the respondent's principal officer.

The filing of the instant application has been prompted by facts which are, by and large, not seriously contested. At stake is a monetary decree of the High Court made on 29th May 2018 condemning the applicant to pay the respondent TZS 50,000,000.00 on account of general and punitive damages for breach of contract plus interest and costs. Aggrieved by that decision, the applicant lodged a notice of appeal in this Court on 4th June 2018. During the pendency of the notice of appeal, on 4th December, 2018 to be exact, the respondent filed an application for execution of the decree before the High Court for an amount of TZS 71,000,000.00. Subsequently, the Deputy Registrar of the High Court issued a notice of hearing of that application scheduled for 25th March 2019.

In terms of rule 11(4) of the Rules, the applicant had 14 days within which to apply for stay of execution reckoned from the date of service of the application for execution. Indeed, the applicant filed her application,

No. 142/08 of 2019, on 22nd March 2019 before the expiry of the period following service of the notice of hearing. However, by an order of the Court (Kwariko, J.A.) made on 8th May 2019, that application was marked withdrawn under rule 58(3) of the Rules. No amount of authority is required to explain that the order withdrawing the application did not bar the applicant from lodging a fresh application subject to complying with rule 11(4) of the Rules that is, filing it within 14 days following service of the notice of application for execution. Since the applicant could no longer be in a position to comply with rule 11(4) of the Rules, it filed the instant application on 17th May 2019.

The notice of motion contains only one ground that is, the delay was not deliberate and inordinate since the applicant had filed an application for stay within time before withdrawing it on 8th May 2019. However, para 8 of the affidavit raises four other grounds. Critical of all is the applicant's contention that the High Court had no jurisdiction to entertain the suit and grant the reliefs as it did in favour of the respondent.

The respondent has taken exception to the application on several fronts, amongst others, it contends that the withdrawal of Civil Application

No. 142/08 of 2019 was prompted by a preliminary objection against its competence. Likewise, the respondent contends that the applicant has failed to account for the delay between 8th and 16th May, 2019. It thus invites the Court to dismiss the application.

Prior to the hearing, both learned Advocates had filed their written submissions for and in reply pursuant to rule 106 (1) and (7) respectively of the Rules. The same learned advocates appeared for their respective clients for hearing before me. Each adopted the affidavit and written submissions and had their time to highlight on certain aspects at the oral hearing.

Mr. Njelwa, learned Advocate for the applicant, urged the Court to grant the application because the applicant has shown good cause for the Court's exercise of its discretion under rule 10 of the Rules. The learned Advocate relied on the Court's previous decisions in **Salvand K. A. Rwegasira vs. China Henan International Group Co. Ltd.,** Civil Reference No. 18 of 2006, **Kalunga and Company Advocates vs. National Bank of Commerce Ltd.,** Civil Application No. 124 of 2005 (both unreported) for the proposition that the Court's grant of an

application for extension of time under rule 10 of the Rules is discretional and exercisable judicially based on material placed before it. The learned Advocate stressed that the applicant has placed sufficient material upon which the Court can exercise its discretion in granting the application.

In addition to the above, it was the learned Advocate's submission that the application should be granted in any event on account of an illegality in the decision of the High Court whose execution is sought to be stayed in the intended application. The Court was referred to several decisions holding that where an illegality is claimed, the court should readily grant the application. Such decisions are: **Principal Secretary, Ministry of Defence and National Service vs. Devram Vallambia** [1992] TLR 185, **Motor Vessel Sepideh and Pemba Island Tours and Safaris vs. Yusuf Moh'd Yusuf and Ahmad Abdullah**, Civil Application No. 91 of 2013 and **Arunaben Chagan Mistry vs. Naushad Mohamed Hussein and 3 Others**, Civil Application No. 6 of 2016 (all unreported).

In his oral address, Mr. Njelwa focused mainly on two aspects. One, the application was lodged without inordinate delay and two, the withdrawal of the previously filed application for stay of execution was not

attributable to any negligence on his part but by excusable human error. For the latter proposition, the learned Advocate brought into play the Court's previus decision in **China Henan International Group Co. Ltd vs. Heinan Salvand K. A. Rwegasira,** Civil Application No. 43 of 2006 (unreported). On the basis of the above, counsel implored me to grant the application.

For his part, Mr. Magongo brought to the fore three issues. One, the defect leading to the withdrawal of the previously filed application was, but an inexcusable negligence in line with **William Shija vs. Fortunatus Masha** [1997] TLR 213. Secondly, Mr. Magongo argued that the applicant has not accounted for each day of delay in filing her application from 8th to 16th May 2019. He relied on the Court's previous decision in Dar **es Salaam City Council vs. S.Group Security Co. Ltd**, Civil Application No. 234 of 2015 (unreported). Counsel's third point aspect relates to illegality underscored in **Lyamuya Construction Co. Ltd vs. Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported), that illegality must be apparent on the record with sufficient importance which is not the case in the instant application. In his oral address, the learned Advocate argued that contrary

to the submissions by the applicant's learned Advocate, the applicant had a duty to show that, not only that application was filed without inordinate delay but also accounting for each day of delay consistent with the Court's decision in **Lyamuya's** case (supra). Next Mr. Magongo attacked the applicant's advocate's reliance on **China Henan's** case (supra) on excusable human error which befell the applicant's previously filed application for stay of execution. According to the learned advocate, that decision was reversed by the full Court in reference and so it was not helpful to the applicant. On the whole, counsel reiterated his prayer for the dismissal of the application.

When it was his turn for a rejoinder, Mr. Njelwa had nothing useful to add other than reiterating his submissions in chief.

I have keenly followed the engaging submissions by the learned advocates for and against the application. Counsel are at one and rightly so that the Court's power under rule 10 of the Rules is not only discretional but also it is exercisable judicially. The cases cited by Mr. Njelwa are felicitous on that point. As the law is well settled, I need not add anything of my own. The only issue remaining for consideration is whether there is

sufficient material for me to exercise the discretion as urged by the applicant.

As seen above, three matters have been canvassed for my consideration in the context of the application. Before I do that I find it apt echoing the benchmarks expressed in **Lyamuya's** case (supra). The Court reiterated several benchmarks to be taken into account in granting or refusing applications of this nature. It stated:-

> *"But that discretion is judicial, and so it must be exercised according to the rules of reason and justice, and not according to private opinion or arbitrarily. On the authorities however, the following guidelines may be formulated:-*
>
> *(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.*
>
> *(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."[At pages 6 and 7].*

Apart from the above, it is settled law too that the applicant must disclose the reason for his delay and account for each day of delay – See

for instance; **Yusuf Same and Hawa Dada vs. Hadija Yusuf**, Civil Application No. 1 of 2002(unreported). The main and the only reason for the delay in lodging an application for stay of execution is the withdrawal of an earlier application in Civil Application No. 142/08 of 2019 by the Court's order made on 8th May 2019. The reason is not disputed by the respondent except for the cause of the withdrawal which is said to have been prompted by a defect in the said application. Although that aspect is not apparent in the order withdrawing the said application, the applicant has conceded as such attributing it to human error.

Mr. Magongo would have me hold otherwise relying on **China Henan's** case (supra) on reference which he contends that it reversed the ruling of the single Justice of Appeal in Civil Application No. 43 of 2006. The learned Single Justice accepted that non citation of a specific provision under which an application before her was preferred was an excusable human error. However, my reading of Civil Reference No. 18 of 2006 from the decision of the single Justice (Munuo, J.A) in Civil Application No. 43 of 2005 cited by Mr. Njelwa shows plainly that the full Court upheld the holding of the single justice as evident at pages 8-10 of the said ruling. I would accordingly accept that the withdrawal of Civil Application No.

142/08 of 2019 was not a result of negligence rather due to human error as submitted by Mr. Njelwa. That means that the reason for the delay stands unchallenged and I so hold. Having so held, the next question is whether the applicant has accounted for each day of delay.

Apparently, the contest is in respect of eight days covering the period between the date on which the said application was marked withdrawn and 16th May 2019, on which the applicant lodged the instant application. Admittedly, it is settled law from the authorities referred to above that a delay even if it is for a single day must be accounted for and that is the essence of Mr. Magongo's argument. The applicant has averred in para 6 of the affidavit that although the order withdrawing the previously filed application was made on 8th May 2019, a copy of that order was not availed until 10th May 2019. There has not been much contest on that aspect and so I accept the applicant's averment which reduces the delay to five days reckoned from 11th May 2019. I have taken note that 11th and 12th May 2016 fell on Saturday and Sunday respectively when the Court was closed. That reduces the number of the days of delay to three days that is, from 13th to 16th May 2019. Admittedly, the applicant has not accounted for the three days but I think that can be weighed having regard

to one of the factors underscored in **Lyamuya's** case (supra), that is, the applicant must show diligence and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take.

It is evident that the applicant had filed her previous application promptly and acted swiftly in lodging the instant application just a few days after the order withdrawing the previous application. It is equally noteworthy that the length of the delay from the date applicant collected a copy of the order withdrawing the previous application and the date it filed the instant application is three days. I do not consider that period to be so inordinate to come to a conclusion that the applicant was not diligent in pursuing its application for stay of execution.

In the circumstances, I am satisfied that the applicant has placed its application within the ambit of rule 10 of the Rules. In consequence, I have no hesitation in holding that good cause for the delay has been shown warranting the Court's exercise of its discretion in her favour.

Considering that the foregoing is sufficient to dispose of this matter, I find no need to deal with the argument that extension of time be granted

on the ground that the impugned decision of the High Court is fraught with illegalities.

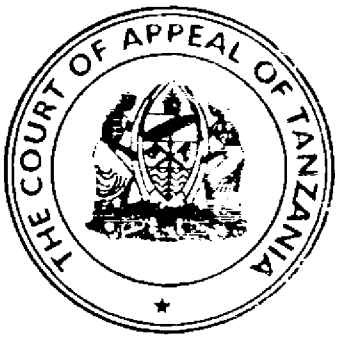
That said, I grant the application and order the applicant to file her application for stay of execution within 14 (fourteen) days from the delivery of this ruling. Costs shall abide the result of the intended application.

Order accordingly.

DATED at **MWANZA** this 2nd day of December, 2019.

L.J.S. MWANDAMBO
JUSTICE OF APPEAL

This Ruling delivered on this 3rd day of December, 2019 in the presence of Mr. Masoud Mwanaupanga held brief for Mr. James Njelwa counsel for the applicant and Mr. Masoud Mwanaupanga learned counsel for the respondent, is hereby certified as a true copy of the original.



S. J. Kainda
DEPUTY REGISTRAR
COURT OF APPEAL