

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CIVIL APPLICATION NO. 435/01/2018

**PARADISE HOLIDAY RESORT LIMITED APPLICANT
VERSUS**

THEODORE N. LYIMO RESPONDENT

**(Application for extension of time within which to apply for stay of execution
from the Decision of the High Court of Tanzania of Tanzania, Dar es Salaam**

District Registry)

(Mutungi, J.)

dated the 26th day of July, 2018

in

Miscellaneous Civil Application No. 85 of 2018

.....

RULING

9th & 17th May, 2019

NDIKA, J.A.:

The applicant seeks under Rule 10 of the Tanzania Court of Appeal Rules, 2009 (the Rules) an extension of time to apply for a stay of execution from the decision of the High Court of Tanzania at Dar es Salaam in Miscellaneous Civil Application No. 85 of 2018. The application is supported by an affidavit deposed by Mr. Deogratias Lyimo Kiritta, an advocate acting on behalf of the applicant. In response, Mr. Jovin Aloyce Lyimo, also an advocate, swore an affidavit in reply on behalf of the respondent.

Very briefly, the background to this matter is as follows: the respondent successfully sued the applicant in the Resident Magistrate's Court of Dar es Salaam at Kisutu in Civil Case No. 233 of 2010 for special and general damages primarily for loss of certain of his personal belongings that occurred on 24th August, 2002 while he was a resident at a hotel owned and operated by the applicant. Aggrieved, the applicant appealed to the High Court at Dar es Salaam vide Civil Appeal No. 25 of 2015.

I should point out that the record before me is materially sketchy as certain necessary documents are omitted. Nonetheless, it appears that the aforesaid appeal (that is Civil Appeal No. 25 of 2015) was dismissed by Mutungi, J. on 11th December, 2019. That decision prompted the applicant to institute Miscellaneous Civil Application No. 85 of 2018 in the same court to have the aforesaid dismissal set aside and the appeal restored. The application was, again, decided by Mutungi, J. in favour of the respondent. It is noteworthy that a copy of that decision was not annexed to this application.

Being dissatisfied by Mutungi, J.'s ruling and order, the applicant duly manifested its intention to appeal to this Court by lodging a notice of appeal on 13th August, 2018. At the same time, the applicant submitted to the Registrar a formal request for a copy of proceedings, impugned ruling and drawn order. A short while later, on 27th August, 2018 to be exact, the applicant was served with an application by the respondent for execution of the original decree along with a summons to show cause as to why execution of the decree should not proceed. In terms of Rule 11 (4) of the Rules as amended by the Tanzania Court of Appeal (Amendment) Rules, 2017, G.N. No. 362 of 2017, an application for stay of execution must be made within fourteen days of service of the notice of execution, but the applicant herein filed none by 10th September, 2018 when the aforesaid prescribed period expired, hence this quest for extension of time.

The basis upon which the applicant seeks condonation of the delay is revealed by the averments in Paragraphs 7 and 8 of the supporting affidavit thus:

"7. That, the application for stay of execution to this Court was required to be filed within fourteen days from the date the applicant got knowledge of the

*execution proceedings by the respondent. However, the same could not be filed on time **because the counsel in the conduct of the matter was bereaved and had travelled to Moshi for funeral ceremony and returned to Dar es Salaam on 12th day of September, 2018** in (sic) which the time had already lapsed and there was a delay of two days.*

8. That, the applicant's intended appeal has overwhelming chances of success as the applicant had accounted properly all the days in which he had delayed to file an application in the High Court for setting aside the dismissal order in respect of Civil Appeal No. 25 of 2015 issued by the High Court on 11th day of December, 2017 by Hon. Mutungi, Judge."[Emphasis added]

In the affidavit in reply lodged on his behalf, the respondent attributes the delay to the applicant's culpable inaction and laxity, stating that the alleged travel by the applicant's counsel to attend a bereavement in Moshi is manifestly discrepant and unsubstantiated.

At the hearing, Mr. Shehzad Walli, learned counsel for the applicant, highlighted the contents of the notice of motion, the accompanying

affidavit and the written submissions in support of the application. He urged me to grant the extension of time sought ardently contending that the absence of applicant's counsel from Dar es Salaam during the material time prevented the applicant from applying in time for a stay of execution. In support of his position, the learned counsel cited unreported decisions of the Court in **Benedict Mumello v. Bank of Tanzania**, Civil Application No. 12 of 2002; **Ahmed Mbaraka v. Mwananchi Engineering and Contracting Co Ltd.**, Civil Application No. 229 of 2014; and **Tanzania Bureau of Standards v. Anita Kaveva Maro**, Civil Application No. 54/18/2017.

On the other hand, Mr. Octavian Temu, learned advocate for the respondent, disagreed. Relying on the affidavit in reply and the written submissions in opposition to the application lodged on the respondent's behalf, the learned counsel assailed the accompanying affidavit claiming that it failed to substantiate the alleged travel to Moshi of the applicant's advocate. He contended that the alleged travel is a generalized claim, not backed up by any documentation (such as tickets, death certificate and so on). He said that the deceased's name is also not revealed. It was his submission that the alleged travel is neither credible nor reliable.

Rejoining, Mr. Walli submitted, in few words, that the bereavement narrative is a true and believable account as it was made by a deponent who, being an advocate, was an officer of the Court.

To begin with, it is settled that the Court's power for extending time under Rule 10 of the Rules is both broad and discretionary but it is exercisable upon good cause being shown. Admittedly, it may not be possible to lay down an invariable or constant definition of the phrase "good cause" so as to guide the exercise of the Court's discretion under Rule 10, but the Court consistently considers factors such as the length of the delay, the reasons for the delay, the degree of prejudice the respondent stands to suffer if time is extended, whether the applicant was diligent, whether there is point of law of sufficient importance such as the illegality of the decision sought to be challenged: (see, for instance, this Court's unreported decisions in **Dar es Salaam City Council v. Jayantilal P. Rajani**, Civil Application No. 27 of 1987; **Tanga Cement Company Limited v. Jumanne D. Masangwa and Amos A. Mwalwanda**, Civil Application No. 6 of 2001; **Eliya Anderson v. Republic**, Criminal Application No. 2 of 2013; and **William Ndingu @ Ngoso v. Republic**, Criminal Appeal No. 3 of 2014). See also **Principal**

Secretary, Ministry of Defence and National Service v. Devram Valambhia [1992] TLR 185; and **Lyamuya Construction Company Limited v. Board of Registered Trustees of Young Women Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported).

I have given due consideration to all the material on the record in the light of the submissions of the parties and the authorities relied by the parties. The question that I have to determine is whether there is a good cause for enlarging time.

It is common cause that the applicant was served with the notice of execution on 27th August, 2018 and that from that date he had fourteen days within which to apply to this Court for a stay of the execution. For the applicant, it is claimed that when the aforesaid limitation period expired on or about 10th September, 2018 the applicant's counsel was in Moshi attending the bereavement and burial and that he (or she) returned to Dar es Salaam two days later. It is noteworthy that this matter was lodged seven days later, that is, on 17th September, 2018.

Admittedly, the delay involved in this matter is rather short. It is sometimes urged that the delay of a few days is very short and that itself is sufficient for condoning the delay. The fact that the delay is short is certainly one of the circumstances that will have to be taken into account in exercising the discretion to enlarge time. Nonetheless, that does not mean that the fact that the delay is short is by itself sufficient in all cases for condoning the delay.

Having applied my mind to all the material in the instant matter and weighed the contending arguments, I find justification in Mr. Temu's criticism of the applicant's position. The affidavit in support of the application leaves much to be desired; it is plainly discrepant. While averring that the applicant's advocate was prevented to act within time to apply to lodge an application for stay of execution, the affidavit does not disclose the following key details: first, the name of the bereaved advocate of the applicant; secondly, the name of the deceased and his relationship to the advocate; thirdly, the exact date on which the bereavement occurred and the date when the advocate left Dar es Salaam for Moshi for the funeral.

Besides the plainly blanket averment alluded to above coupled with the material concealment of key details, the supporting affidavit is not backed up by any documentation such as bus tickets or air tickets to evidence the alleged travel to and from Moshi.

The foregoing apart, I am left to wonder if the unnamed applicant's counsel left Dar es Salaam for Moshi immediately after receiving the notice of execution on 27th August, 2018 then why he (or she) stayed in Moshi for over fifteen days until 12th September, 2018 for a bereavement that would by commonsense have taken a few days only. Alternatively, if at all he left for Moshi, say, a few days after the notice of execution was served on the applicant, I wonder why he (or she) did not draw up the intended application and have it lodged before he left Dar es Salaam. Furthermore, assuming that he travelled to Moshi and left the matter unattended until when he came back to Dar es Salaam on 12th September, 2018 while knowing that by then the prescribed time would have run out, that demonstrates negligence and laxity on the part of the counsel, which must not be condoned by the Court.

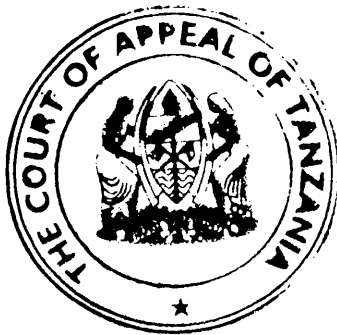
In view of the foregoing, I hold that the bereavement narrative presented by the accompanying affidavit is unreliable and implausible. I cannot act on it to exercise my discretion in favour of the applicant. In the premises, I find no good cause shown to warrant the extension of time sought.

In the upshot, the application stands dismissed with costs.

DATED at DAR ES SALAAM this 16th day of May, 2019.

G. A. M. NDIKA
JUSTICE OF APPEAL

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




B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL