

IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

CIVIL APPLICATION NO. 512/03 OF 2019

THE REGISTERED TRUSTEES OF BAKWATA APPLICANT

VERSUS

THE REGISTERED TRUSTEES OF DODOMA

GENERAL MUSLIM ASSOCIATION RESPONDENT

(Application for extension of time to apply for stay of execution of the decree arising from the decision of the High Court of Tanzania, at Dodoma in Civil Case No. 6 of 2017 pending determination of an intended appeal in Misc. Civil Application No. 18 of 2017)

(Mansoor, J.)

dated the 16th day of June, 2017

in

Misc. Civil Application No. 18 of 2017

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RULING

9th June & 13th August, 2021

MWARIJA, J.A.:

In this application, the applicant, the Registered Trustees of BAKWATA is seeking extension of time to apply for an order staying execution of the decree of the High Court of Tanzania at Dodoma (Shangali, J) arising from Civil Case No. 6 of 2017 pending determination of the intended appeal against the decision of the same court (Mansoor, J) in Misc. Civil Application No. 18 of 2017. In the decision which gave rise to the decree, Civil Case No. 6 of 2017, the respondent, the Registered Trustees of Dodoma General Muslims

Association sued the applicant following a dispute over ownership of a piece of land situated within Dodoma Municipality and held under Certificate of Title No. 15391 (the suit land). The suit land comprises of buildings in which the business of a school known as Jamhuri Secondary School (the school) is being operated.

In its decision, the High Court found that the suit land and all buildings thereon, including those used to operate the school, are the properties of the respondent. The learned trial Judge dismissed the applicant's counterclaim that the Certificate of Title No. 15391 was issued in its name on 25/11/1963 but the ownership was later fraudulently charged into the name of the respondent. It found however, that the school business is owned by the applicant using the school buildings as the tenant of the respondent. The court thus declared that the applicant was entitled to continue to run the school subject to fulfilment of the terms of the tenancy agreement between it and the respondent, failure of which it should be evicted.

After the decision, on 30/4/2015, the parties entered into an agreement by which the applicant paid the respondent TZS 330,000,000.00 intended for an adjustment of the decree. According to that deed, the payment was to have the effect of reaching a settlement out of court, as full satisfaction of the decree. As a result, the applicant

instituted in the High Court (the executing court), Misc. Civil Application No. 18 of 2017 moving the court to record the agreement intended for an adjusted decree as full satisfaction thereof. The application was however, resisted by the respondent. In its decision dated 16/6/2017, the High Court declined to record that agreement. The decision aggrieved the applicant and thus on 19/6/2017, it lodged a notice of appeal to this Court.

While the applicant was in the process of filing the intended appeal, it was, on 13/7/2019, served with a copy of an application for execution of the decree. By that application, the respondent intends to evict the applicant from the suit land. Still determined to challenge the decision of the High Court in which Mansoor, J refused to record the agreement which was intended for full satisfaction of decree upon its adjustment, the applicant opted to apply for stay of execution of the decree pending hearing and determination of the intended appeal. It realized however, that it had delayed to do so hence this application for extension of time.

The application which has been brought under *inter alia*, Rule 10 of the Tanzania Court of Appeal Rules, 2009 as amended (the Rules) is supported by an affidavit affirmed by Nuhu Jabir Mruma, the applicant's

Trustee and General Secretary. According to the notice of motion, the reason for the delay in filing the intended application is as follows:

"...the applicant's delay is neither deliberate nor negligent rather it was caused by the absence of the applicant's General Secretary from office for some time."

The application was opposed by the respondent through an affidavit in reply affirmed by Mohamed Muhammad Thabit, the Chairman of the respondent, responsible for administrative matters.

At the hearing of the application, the applicant was represented by Mr. Elias Machibya assisted by Ms. Magreth Mbasha, learned advocates. On its part, the respondent had the services of Mr. Ally Nkhangaa assisted by Mr. Cedrack Mbunda, learned advocates.

Submitting in support of the application, Ms. Mbasha started by adopting the contents of the notice of motion and the supporting affidavit, particularly paragraphs 11, 12 and 13 in which the deponent states that the delay in filing the intended application was caused by his absence from office and that the person who acted in his position did not have the mandate of dealing with matters relating to court cases.

Adding to what was submitted by Ms. Mbasha, Mr. Machibya argued that the absence of the General Secretary of the applicant from office constituted good cause for grant of extension of time.

Furthermore, making reference to paragraphs 15 and 16 of the supporting affidavit, the learned counsel submitted that the decision sought to be appealed against is tainted with illegalities which require to be addressed by the Court. Citing the case of **Convergence Wireless Networks (Mauritius) and 3 others. v. WIA Group Limited and 2 Others**, Civil Application No. 263 'B' of 2015 (unreported), Mr. Machibya submitted that existence of illegalities in a decision constitutes a good cause for grant of the sought order.

When asked about the effect of inexistence of a notice of appeal against the decree, the execution of which is sought to be stayed, Mr. Machibya responded by arguing that, even though there is no notice of appeal filed against the decree, the Court has the power of staying execution of that decree pending determination of the intended appeal against the decision in which the High Court refused to record adjustment of the decree.

In reply, Mr. Nkhangaa, who also started by adopting the contents of the affidavit in reply, argued first, that the application is misconceived and secondly, that the reasons advanced by the applicant for the delay do not constitute good cause for grant of extension of time.

On the contention that the application is misconceived, the learned counsel argued that since the decree which gave rise to Misc. Civil

Application No. 18 of 2017 from which this application originated has not been appealed against, the intended application for stay of execution will not be tenable because the conditions precedent as stipulated under Rule 11 of the Rules, including existence of a notice of appeal against a decree, will not be met. In the circumstances, he said, even if the applicant is granted extension of time, the application for stay of execution will be an exercise in futility.

With regard to the reasons given by the applicant as being the cause for the delay, Mr. Nkhangaa argued that the same are not plausible. According to the learned counsel, since the decree is against the applicant which is a Trustees not an individual, the fact that its General Secretary was not in office does not constitute a good cause for grant of the sought order. On the ground that the decision sought to be appealed against is tainted with illegalities, the respondent's counsel disputed that contention.

Joining hands with Mr. Nkhangaa, Mr. Mbunda added that the contention by the applicant in paragraph 12 of the supporting affidavit that the delay was not deliberate or due to negligence, is incorrect. According to Mr. Mbunda, the contention is based on the management by the applicant, of its affairs and therefore, failure on its part to take

action within the prescribed time cannot be described otherwise than exhibition of laxity.

In rejoinder, Mr. Machibya responded to the point raised by Mr. Nkhangaa that the application is untenable on account that, what is eventually intended to be applied is a stay order against the decision which did not give rise to the decree sought be executed. The learned counsel opposed that argument contending that the same has been raised prematurely.

Having considered the submissions made by the counsel for the parties, the first issue for determination is whether or not the application is competent. I need not be detained much in determining this issue. Although the applicant has not appealed against the decree which is sought to be executed, it is not precluded from applying for an order staying execution of that decree pending determination of the decision which arose in the proceedings commenced subsequent to the issuing of the decree. The example of such subsequent proceedings include an application for revision - see for instance, the cases of **Stephen Mafimbo Madwary v. Udugu Hamidu Mgeni**, Civil Application No. 71 of 2011 and **Mrs. Violet Deelip Pandya v. Jayprakash Indravai Jani**, Civil Application No. 17 of 2006 (both unreported). In those cases, the applicants were granted orders of stay of execution pending

determination of their applications for revision. In my considered view, the position applies where a party challenges, by way of an appeal, the decision made in the proceedings conducted subsequent to the decision giving rise to a decree. It is noteworthy to state here however, that given the absence of a notice of appeal which is one of the conditions for applying for stay of execution under Rules 11 of the Rules, the applicable provision as was invoked in the two cases above, is the current Rule 4 (2) of the Rules.

That said, the next issue is whether the applicant has established a good cause for grant of extension of time. As shown above, the applicant relies on the fact that its General Secretary was absent from office at the time of service upon it, of the notice of execution of the decree. In paragraphs 9 – 12 of his affidavit, the applicant's General Secretary states as follows:

*"9. That, while the Applicants were waiting to be supplied with the copies of the proceedings and records in the said cases, on **13/07/2019** at the Applicants Head Quarters at Dar es Salaam received the summons in Execution No. 6 of 2019. The said summons although was directed to the Respondents but was served to the Applicants while I was out of office. The summons indicated that, the application for*

*execution is fixed for mention 7th August, 2019. The said summons was received by MWENDA SAID MWENDA who was acting as Secretary General in my absence. **A copy of the letter of 08/07/2019 appointed Mwenda Said Mwenda to act as General Secretary of the Applicants is herewith attached as Annexure MPA – 6 and leave is craved to make it be regarded as part to this Affidavit.***

10. *That, after receiving the said summons, the said MWENDA SAID MWENDA had no instructions to deal with serious matters like the cases, as such, he instructed our leaders to appear before the court on 7th August, 2019 and inform the court that, I am out of office the case be adjourned to another date. Our office at Dodoma appeared before the court on 07/08/2019 and he was given the Application for Execution lodged by the Respondents on 10/06/2019. As such, the said application was adjourned to 19/09/2019 where I was expected to be back in office. **Copies of the summons and the application for execution are hereto attached as Annexure MPA – 7 and leave is craved to make them be regarded as part to this Affidavit.***
11. *That, I returned back to Dar es Salaam from my official visits to various regions of the country on*

10/09/2019. Thereafter, I started to get the instructions from Mufti of Tanzania to handle the said matter. As such, by 16th September, 2019 I got directives from Mufti to instruct Advocate to handle this matter. However, by this date when I met Advocate, I was told that, the time to apply for stay of execution has already expired.

12. *That, the delay in lodging the application for stay is not deliberate, nor negligent, but it was caused by my absence in the office and **MWENDA SAID MWENDA** who was acting in my position had no power to deal with matters of cases. I spent my tour two months from 10th July, 2019 to 10th September, 2019. **Copies of some of receipts for fuel in various areas where I passed in my tour are herewith collectively attached as Annexure MPA – 8 and leave is craved to make them be regarded as part to this Affidavit.**"*

The Court has, in a number of cases, described the factors which should be considered when determining the issue whether or not a delay was due to a good cause. For instance, in the case of **Lyamuya Construction Company Ltd v. Board of Registered Trustees of Young Christian of Tanzania**, Civil Application No. 2 of 2010

(unreported), it was observed that in answering the issue, the Court should be guided by the following factors:

- “1. *The applicant must account for all the period of delay;*
2. *The delay should not be inordinate;*
3. *The applicant must show diligence, and not apathy, negligence or sloppiness of the action that he intends to take;*
4. *If the court feels that there are other sufficient reasons, such as existence of a point of law of sufficient importance, such as the illegality of the decision sought to be challenged”.*

In this case, the intended application which, under Rule 11 (3) of the Rules was supposed to be filed within fourteen days of the service upon the applicant of the notice of execution, that is, by 27/7/2019, the applicant has delayed for 53 days. The position of the law is that in an application of this nature, an applicant is supposed to account for every day of the delay - see for example the cases of **Hemedi Ramadhani and 15 Others v. Tanzania Harbours Authority**, Civil Appeal No. 63 of 2001 and **AMI (Tanzania) Limited v. OTTU on Behalf of P.L. Assenga & 106 Others**, Civil Appeal No. 54 of 2008 (both unreported).

In the case at hand, after the applicant had been served with a notice of execution on 13/07/2019, it stayed without taking any action

to file the intended application until on 10/09/2019, a period of 58 days when, upon his return in office, the General Secretary consulted the Mufti of Tanzania. Thereafter, on 16/9/2019 the advocate who filed the present application on 19/09/2019 was engaged.

The reason for the delay advanced by the applicant, that it was due to the absence from office of its General Secretary is, in my considered view, not a good cause for grant of extension of time. I do not, with respect, agree with the contention that Mr. Mwenda Said Mwenda who acted in the position of the General Secretary, could not have done anything concerning the intended application allegedly because he lacked the mandate to deal with matters relating to court cases. From the record, the case which gave rise to the application for execution of the decree was being handled by an advocate, not the General Secretary in person. It is thus beyond comprehension that, after having been served, the Acting General Secretary could not on his own, consult the advocate on record or the Mufti of Tanzania or by means of the available communication facilities, seek directions from the General Secretary on the matter. In my considered view, by failing to take action for the period of 64 days, the said Mwenda Said Mwenda exhibited a laxity. The inaction continued after the return of the General Secretary because, despite having returned in office on 10/09/2019, it

was not until on 16/09/2019 when he consulted the Mufti, the result of which this application was filed on 19/09/2019. The period between 10/09/2019 and 15/09/2019 is therefore also unaccounted for.

All in all, I find that the applicant has failed to establish that the delay was due to a good cause. It did not only fail to exercise diligence but exhibited laxity after service upon it of the notice of execution of the decree.

With regard to the other ground which was relied upon by the applicant; that the decision sought to be challenged on appeal is tainted with illegalities, as stated above, the allegation is contained in paragraphs 15 and 16 of the supporting affidavit which state as follows:

- "15. That, the ruling of Honourable L. Mansoor, J. dated 16/06/2017 in Misc. Civil Application No. 18 of 2017 leaves a lot of legal points to be determined by this Court in the intended Appeal. It is desired that, this Honourable Court to decide whether the agreement entered into for payment of Tshs. 330,000/= (sic) in place of the Applicants vacate (sic) was not viable for certification by the executing court.*
- 16. That, this Honourable Court is intended to be moved in the appeal to determine whether it was correct for the High Court to decide the merit of the application in the preliminary stage. The*

Applicants' appeal has strong and key legal basis."

Having scrutinized the contents of the two paragraphs of the affidavit, I could not find any illegality which is apparent on the face of the record so as to warrant the grant of extension of time. What is clear from the allegation in those paragraphs of the affidavit, is that the applicant was dissatisfied with the decision which is intended to be challenged. In the circumstances, since the alleged illegalities will require a long drawn process of hearing to be discovered, then the same do not constitute a good cause for grant of extension of time - see for example, the case of **Lyamuya Construction Company** (supra). In that case, the Court had this to say on that principle:

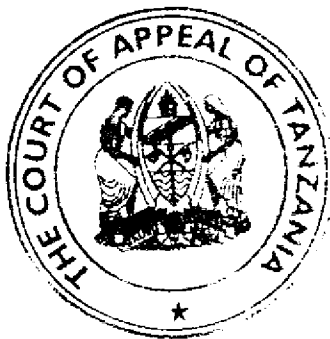
"Since every party intending to appeal seeks to challenge a decision either on points of law or facts, it cannot in my view be said that in VALAMBHIA'S case the Court meant to draw general rule that every applicant who demonstrates that his intended appeal raises points of law should, as of right, be granted extension of time if he applies for one. The Court there emphasized that such point of law must be that of sufficient importance and, I would add that it must be apparent on the face of the record, such as question of jurisdiction; not one that would be discovered by long drawn argument or process"

On the basis of the foregoing reasons, this application is devoid of merit. The same is thus hereby dismissed with costs.

DATED at DAR ES SALAAM this 11th day of August, 2021.

A. G. MWARIJA
JUSTICE OF APPEAL

The Ruling delivered this 13th day of August, 2021 in the presence of Mr. Elias Machibya, counsel for the applicant linked via video conference at Dodoma High Court ,and Mr. Gastus Magezi, learned counsel for the Respondent linked via video conference at Dodoma High Court, is hereby certified as a true copy of the original.




E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL