IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

CIVIL APPLICATION NO. 546/02 OF 2021

MELAU MAUNA ..... 1st APPLICANT
JOEL METIVAN as the Legal Representative
of METIVANI MWOITA.....2nd APPLICANT
FRANCIS MWOITA.....3rd APPLICANT
JOHN MWOITA.....4th APPLICANT
PHILIPO LONGITUTI.....5th APPLICANT
EMMANUEL LENAKOONI.....6th APPLICANT
LOGALAA MAUNA.....7th APPLICANT
JACOB FRANCIS .....8th APPLICANT
RAYMOND PHILIPO.....9th APPLICANT
PAULO IKAYO.....10th APPLICANT
JOHN IKAYO.....11th APPLICANT
JULIUS MWOITA.....12th APPLICANT
LONYAKWA MELAU.....13th APPLICANT
LOVOYO MELAU.....14th APPLICANT
CHRISTOPHER JOHN.....15th APPLICANT
HERMAN MWOITA.....16th APPLICANT
KAKA FRANCIS.....17th APPLICANT
LOREU LOPAKWANI.....18th APPLICANT
SAMBOTI NGOSIA.....19th APPLICANT
TUBALAI PHILIPO..... .....20th APPLICANT
TUKAI MAUNA.....21st APPLICANT

VERSUS

THE REGISTERED TRUSTEES OF THE
EVANGELICAL LUTHERAN CHURCH IN TANZANIA (ELCT)
NORTH CENTRAL DIOCESE.....1st RESPONDENT
ARUSHA DISTRICT COUNCIL.....2nd RESPONDENT

(Application for extension of time to file an application for Stay of Execution against the judgment and decree of the High Court of Tanzania, Land Division at Arusha)

(Nchimbi, J.)

dated 5th day of September, 2013

in

Land Case No. 13 of 2004

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RULING

22nd & 1st September, 2023

SEHEL, J.A.:

This is a ruling on an application for extension of time within which to apply for stay of execution of the decree of the High Court of Tanzania at Aursha, Land Division (the High Court), in Land Case No. 13 of 2004 pending hearing and final determination of the applicants' intended appeal. The application is brought by way of a notice of motion made under the provisions of Rules 10 and 48 (1) of the Tanzania Court of Appeal Rules, 2009 as amended (the Rules). It is supported by a joint affidavit, deposed to by all applicants.

In order to have a better understanding as to why the applicants have preferred the present application, I find it necessary to give a brief account of the facts. The applicants sued the 1st respondent in the High Court in Land Case No. 13 of 2004 claiming ownership of a 15 acres patch of land located at Moivo Village within Moivo Ward in Arumeru District, Arusha Region (the disputed property). According to the applicants, in the late 1970's and early 1980's, each of the applicants parted with his/her piece land to the 2nd respondent for the 1st respondent to expand Enaboushu Secondary School, the property of the 1st respondent, in consideration that they be compensated for unexhausted improvements and be re-located to different areas. Since they were neither compensated nor given alternative plots, they decided to sue the 1st respondent trying to recover the disputed property.

On the other side, the 1st respondent denied the allegations and claimed that the compensation had already been paid to the applicants. Further, she presented a third-party notice for indemnification and or contribution against the 2nd respondent in regard to the applicants' claim. She also counter claimed against the applicants seeking to be declared lawful owner. The 2nd respondent who was joined as a third-party denied any indemnification.

At the end of the trial, the High Court was not convinced with the applicants' claims. Accordingly, it dismissed the suit, allowed the counter claim by declaring the 1st respondent lawful owner of the disputed property and discharged the third-party. Further, it awarded the 1st respondent general damages at the tune of TZS. 25,000,000.00. Aggrieved, the applicants lodged a notice of appeal on 19th September, 2012. On the same date, that is, on 19th September, 2012, they lodge a letter requesting to be supplied with the copies of proceedings, judgment and decree for purposes of lodging an appeal to the Court.

While the applicants were waiting to be supplied with the requested documents, the 1st respondent filed an application for execution before the High Court. That application was granted on 10th November, 2019, wherein the High Court ordered, among others, the applicants to vacate from the disputed property. It also attached the

properties of some of the judgment debtors in order to satisfy the decretal sum of TZS. 25,000,000.00.

According to the supporting affidavit, the applicants became aware of the execution proceedings on 21st November, 2019 when they were served with the eviction order by the court broker. Having been required to vacate the premises, they filed an application in this Court on 20th December, 2019, seeking for revisional orders against the decision of the executing court. Further, on 30th December, 2019, they filed an application for stay of execution before the High Court in Miscellaneous Land Application No. 108 of 2019 which was dismissed with costs on 1st June, 2021 after a successful objection that since the applicants had already lodged a notice of appeal, the application was incompetent before the High Court for being lodged into a wrong court. Therefore, the applicants have now filed the present application for extension of time.

On the other hand, the 1st and 2nd respondents, each filed their separate affidavit in reply to oppose the motion for extension of time. The affidavit of the 1st respondent was deponed to by Mr. John Sikay Umbulla, learned advocate for the 1st respondent. He averred that the applicants became aware of the execution proceedings on 18th September, 2018 when their advocate, one, S.J. Lawena was served

with the application to show cause as to why execution should not proceed. He further deposed that despite being served neither the advocate nor the applicants entered appearance hence the application was heard in their absence, and ultimately, it was granted.

The same facts that the applicants became aware on 18th September, 2018 were deposed by the 2nd respondent in her affidavit in reply sworn by Monica Augustine Mwailolo, Principal Officer of the 2nd respondent.

At the hearing of the application, Ms. Sarah Lawena, learned advocate appeared for the applicants, whereas, the 1st respondent had the legal services of Mr. John Umbulla, also learned advocate and Mses. Grace Lupondo, Adelaida Masua and Zamaradi Johannes, all learned State Attorneys, appeared for the 2nd respondent.

Having adopted the notice of motion and the supporting affidavit, Ms. Lawena argued that the applicants are seeking an extension of time to apply for stay of execution of the decree of the High Court dated 5th September, 2013, on two grounds as can be gathered from paragraphs 6, 7, 8, 9, 10 and 11 of the founding affidavit. She argued that the applicants were not aware of the application for execution because they were not issued with a notice to show cause, and that, they became aware on 21st November, 2019 when they were served with an eviction

order by the court broker. She added that even after becoming aware, they mistakenly filed an application for stay of execution before the High Court while there was already a notice of appeal lodged before this Court.

While acknowledging that in application for extension of time, the applicant is required to advance sufficient cuase, Ms. Lawena argued that each case must be determined according to its own peculiar circumstances because as to what amounts to sufficient cause is not defined in the Rules. She then referred to the case of **Hamis Macha Sancho v. Joyce Bachubila**, Civil Application No. 487/17 of 2016 (unreported), where it was held that a number of factors may be taken into account, such as, whether or not the application has been brought promptly, the absence of any valid explanation for delay and lack of diligence on the part of the applicant. Ms. Lawena also contended that the guidelines, set out in the case of **Lyamuya Construction Company Limited v. The Board of Registered Trustee of Young Women's Christian Association of Tanzania** [2011] TZCA 4, are not required to be cumulatively fulfilled. She also made reference to the case of **Kalunga & Company, Advocates v. National Bank of Commerce Limited** [2006] T.L.R. 235 where it was held that the discretion in Rule 8 (now Rule 10) of the Rules, however wide it may be,

is a discretion to be exercised judicially having regard to the particular circumstances of each case.

With the stated position of law, she contended that, in this matter, the applicants acted promptly and have accounted for each day of delay. Elaborating on the diligence and promptness, she argued that after the applicants had noted that they took a wrong forum, they filed the present application within a shortest period of time on 1st July, 2021, as the application for stay of execution was dismissed with costs on 1st June, 2021. It was her further submission that, the applicants stand to suffer more if the order will be executed since they will be evicted from the land that they had been occupying it in their entire lifetime and some of them have been born therein. At the end, she urged me to allow the application as prayed in the notice of motion.

Having fully adopted the affidavit in reply, Mr. Umbulla strongly resisted the application arguing that the applicants have shown gross negligence in pursuing their application for stay of execution. He counter-attacked the applicants' argument that they belatedly became aware of the execution order. He explained that at the time the application for execution was lodged, the applicants had the legal services of S.J. Lawena from Lawena & Co. Advocates who was duly served on 18th September, 2018 with the notice to show cause as to why

the application for execution should not be granted. He pointed out that this fact is deposed in paragraph 5 of the affidavit in reply and also reflected in the ruling of the executing court.

He added further that after the ruling was delivered, the applicants were again notified on 4th December, 2019, as per annexure NCD1 attached to the affidavit in reply. Annexure NCD1 is a fourteen (14) days' notice within which to settle the decretal sum. Mr. Umbulla contended that despite being duly served, the applicants remained idle till 30th December, 2019, when they filed an application for stay of execution in the High Court while knowing that there was already a notice of appeal which they lodged on 19th September, 2012. Mr. Umbulla argued further that if the counsel for the applicants was diligent enough, he would acted promptly, and also, he would not have filed the application in the wrong court. In that respect, he submitted, the applicants delayed for six months in filing the application thus they were to be blamed for their own mistakes.

Mr. Umbulla went on to argue that, the applicants have also exhibited carelessness in this application as they failed to account for thirty days delay from the time when the incompetent application was dismissed with costs to the filing of the present application.

It was his submission that the power to grant or refuse to grant an application for extension of time is within the discretion of the Court and such discretion is exercisable according to the rules of reason and justice. He added that in order for a Court to extend time, there must be some material on which the Court can exercise its discretion as the Court cannot act according to private whims or opinions as it was held in the case of **Lyamuya Construction Company Ltd** (supra). He argued that, the circumstances in the present application do not permit the applicants to be granted the requested extension of time.

In his conclusion, the learned counsel for the 1st respondent distinguished the cited case of **Hamis Macha Sancho** (supra) that, in that application, the reason for delay was sickness of the applicant which was proved but in the present application that is not the reason advanced by the applicants. Further, in the cited case of **Kalunga & Company, Advocates** (supra), Mr. Umbulla contended that the ground advanced therein was illegality which is also not the case in the present application. Accordingly, he urged me to dismiss the application with costs.

Ms. Lupondo who responded on behalf of the 2nd respondent also resisted the application. She made almost similar submissions to the ones made by her learned friend, Mr. Umbulla, that the Court has wide

powers in extending time but such powers can only be exercisable where sufficient cause has been established. She further acknowledged that the Rules do not define what amounts to sufficient cause. That apart, she argued that the same can be established by looking at certain guidelines set out by the Court, particularly, in the case of **Lyamuya Construction Company Ltd** (supra). Ms. Lupondo had a divergent opinion with the submission made Ms. Lawena that the guidelines ought not to be established cumulatively. She contended that all guidelines with the exception of illegality must be established by a party seeking an extension of time.

It was her submission that, according to Rule 11 (4) of the Rules, an application for stay of execution must be made within fourteen (14) days from the date the intended applicant became aware of the application for execution. In the present application, she pointed out that, the applicants became aware on 18th September, 2018 hence they ought to have filed the application by 2nd October, 2018 but they did not do so. Even if, she argued, it is taken that the applicants became aware of the eviction order on 21st November, 2019 as deposed in their affidavit they were supposed to file the application for stay of execution on or before 5th December, 2019 but instead they belatedly filed it on 30th December, 2019, and in a wrong court. The learned State Attorney

further contended that even after the incompetent application was struck out, the applicants delayed by thirty (30) days without explanation as to why it took them such long time in filing the present application.

Ms. Lupondo contended that, in totality, the actions of the applicants are not excusable because from the date when they became aware to the filing of the present application, they have been negligent and no explanation on the inordinate delay hence they failed to advance sufficient cause for the Court to exercise its judicial discretion. As for the authority that a single day of delay has to be accounted for, the learned State Attorney made reference in the case of **Finca (T) Limited & Another v. Boniface Mwalukisa** [2019] 1 T.L.R. 312 wherein it cited the case of **Bushiri Hassan v. Latifa Lukio Mashayo**, Civil Application No. 3 of 2007 (unreported).

In rejoinder, Ms. Lawena briefly reiterated that the applicants became aware of the existence of the eviction order on 21st November, 2019 after being required to vacate from the disputed land. On the contention that the applicants were served through their counsel on 18th September, 2018, she rejoined that the annexure NCD1 attached in the affidavit in reply of the 1st respondent is not a valid proof as it does not bear the advocate's stamp. As regards to the argument that the

applicants have not accounted for each day of the delay, Ms. Lawena argued that paragraphs 7, 8 and 9 of the supporting affidavit proved that the applicants acted promptly and accounted for each day of delay by taking the actions they believe were right in pursuing the application for stay of execution. She thus reiterated her submission in chief and urged me to grant the application.

Having dispassionately followed the rival submissions for and against the application advanced by the counsel for the parties, the issue for determination is whether the applicants have managed to show good cause for the grant of an extension of time within which to apply for stay of execution of the decree of the High Court in Land Case No. 13 of 2004. I wish to state at the outset that, the power of the Court to enlarge time for doing any act authorized or required by the Rules is governed by Rule 10 of the Rules that provides:

> *"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 doing of the act, and any reference in these Rules to any such time shall be construed as a reference to that time so extended."*

As correctly submitted by the counsel for the parties, there is no single definition of the term 'good cause' stated in the above Rules, but there are some guiding factors which the Court may consider to ascertain whether there is good cause or not. The factors, depending on the circumstances of each particular case, are; whether the applicant has accounted for all the period of delay; whether the delay was not inordinate; whether the applicant had shown diligence and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take and whether there is any point of law of sufficient importance, such as, illegality of the decision sought to be challenged. All these factors were well stated and restated by this Court in its numerous decisions including the cases of **Lyamuya Construction Company Ltd** (supra); **Tanga Cement Company Limited v. Jumanne D. Masangwa & Another**, Civil Application No. 6 of 2001 [2004] TZCA 45; **Regional Manager TANROADS, Kagera v. Ruaha Concrete Company Limited**, Civil Application No. 96 of 2007 (unreported) and **Benedict Shayo v. Consolidated Holdings Corporation as Official Receivers of Tanzania Film Company Limited**, Civil Application No. 366/01/2017 [2018] TZCA 252.

The applicants in the present application have advanced two grounds as can be garnered in paragraphs 6, 7, 8, 9 and 10 of the

founding affidavit. **One**, they were belatedly notified on the presence of the eviction order, and **two**, there was a technical delay since instead of filing the application before the Court, the applicants filed it in the High Court.

Starting with the time as to when the applicants became aware of the eviction order. It is deposed in paragraph 6 of the affidavit that the applicants were notified on 21st November, 2019. However, the 1st and 2nd respondents claimed that the applicants were notified on 18th September, 2018 and on 4th December, 2019. To support their contention, the 1st respondent attached annexure NCD1 in her affidavit in reply and the 2nd respondent attached annexure OSG-1, a notice to show cause why execution should proceed.

Having carefully scrutinized the two annexures, I noticed that they do not contain sufficient information to prove that the applicants were actually notified on the dates alleged by the respondents. For instance, annexure NCD1 only bears the name of S.J. Lawena and a signature but it does not have a rubber stamp of the said advocate. Annexure OSG-1 does not have any information to suggest that the notice was truly served on the applicants. Since the annexures lacked key information to prove that the applicants were duly served, I find it hard to go along with the submissions of the counsel for the respondents. I am therefore

satisfied with the deposition made by the applicants in paragraph 6 of the supporting affidavit that, they were served with an order from the High Court requiring them to vacate from the disputed piece of land on 21st November, 2019.

As correctly submitted by Ms. Lupondo, in terms of Rule 11 (4) of the Rules, an application for stay of execution has to be filed within fourteen (14) days from the date when the notice of execution was served upon the applicant or when the applicant became aware of the existence of an application for execution. Given that the applicants were served on 21st November, 2019, they ought to have filed the application for stay of execution on or before 5th December, 2019.

However, the applicants are pleading for a technical delay excuse. They impressed upon me to find that the time they used in the High Court while prosecuting their application for stay of execution be excused as they argued that they were diligently prosecuting it in a wrong forum. Admittedly, a technical delay, a principle established by case law, is applicable where an applicant who seeks an extension of time had formerly filed in time either his appeal or application which was later on struck out for incompetence. This principle was well explained in the case of **Fortunatus Masha v. William Shija & Another** [1997] T.L.R. 154 thus:

*"...**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]*

From the above holding it is crystal clear that for an excuse of a technical delay to be invoked, a party seeking an extension of time must have filed his initial appeal or application in time. In the case of **Constantino Victor John v. Muhimblli National Hospital**, Civil Application No. 214 of 2020 [2021] TZCA 77 the Court said:

"For the avoidance of doubt, technical delay is applicable only in a situation when the first

appeal or application is timely filed. That is to say, is the applicant in the matter at hand had timely filed the application for review which was withdrawn, he would have pleaded technical delay."

In the application at hand, as earlier on stated, the applicants were served on 21st November, 2019 but according to paragraph 10 of the founding affidavit, the applicants filed an application for stay of execution in the High Court on 30th December, 2019 which was far beyond the period prescribed by the law of fourteen days. In that respect, technical delay is not applicable to the applicants.

Furthermore, as argued by the counsel for the respondents, the applicants failed to account for thirty days counted from the date when the incompetent application was dismissed with costs to the filing of the present application. I have taken pain to go through the entire affidavit and the notice of motion but failed to find any account of those days. In my considered view, the period of thirty days is too long hence ought to have been accounted for but there is no single explanation from the applicants either in their notice of motion or affidavit in support of the application.

The Court has now and then emphasized on the requirement of accounting for each and every day. In the case of **Bushiri Hassan** (supra) it was stated:

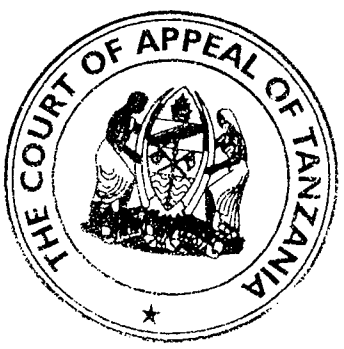
> *"Delay of even a single day, has to be accounted for otherwise there would be no point of having rules prescribing periods within which certain steps have to be taken...."*

From the above given reasons, I find that the applicants have failed to advance any reason, let alone good cause for the Court to grant the sought extension of time. Accordingly, I dismiss the application with costs.

DATED at **ARUSHA** this 31st day of August, 2023.

B. M. A. SEHEL
JUSTICE OF APPEAL

The ruling delivered this 1st day of September, 2023 in the presence of 1st, 2nd, 3rd, 9th, 16th applicants and Mr. John Umbulla, learned advocate for the 1st respondent, Ms. Zamaradi Johannes, learned State Attorney for the 2nd respondent, is hereby certified as a true copy of the original.



C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL