IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: LILA, J.A., GALEBA, J.A. And MGEYEKWA, J.A.)

CIVIL APPLICATION NO. 22 OF 2023

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.....21TH 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 reference from the ruling of a single Justice of the Court of Appeal of Tanzania at Arusha)

(Sehel, J.A.)

dated the 1st day of September, 2023

in

Civil Application No. 546/02 of 2021

.....

RULING OF THE COURT

12th & 23rd February, 2024

LILA, J.A.:

The applicants were dissatisfied by a decision of a single Justice in Civil Application No. 546/02/2021 denying them extension of time within which to apply for stay of execution of the decree of the High Court of Tanzania at Arusha in Land Case No. 13 of 2004. The application before the single Justice was made under Rule 10 of the Tanzania Court of Appeal Rules, 2009 (the Rules). The applicants had lodged a notice of appeal against the decision and decree and the intended stay order was for halting execution until the intended appeal is heard and determined.

The learned single Justice was not inclined to grant the order sought. The two reasons advanced by the applicants for the delay that the notice of eviction reached them late and invocation of technical delay as being

good causes for the delay could not positively move her to agree that they met the thresholds set by the law. Having revisited various decisions of the Court restating legal positions relating to applications for extension of time and in particular the case of **Constantino Victor John vs. Muhimbili National Hospital**, Civil Application No. 214 of 2020 [2021] TZCA 77 which puts as a condition precedent that the initial appeal or application must have been filed within time for invocation of technical delay as good cause for delay, she held that the initial application for stay of execution in Miscellaneous Land Application No. 108 0f 2019 which was later dismissed for being incompetent was belatedly lodged on 30/12/2019 which was beyond the statutory period of fourteen (14) days, hence technical delay could not be relied on. She further found that thirty (30) days lapsed from the date the incompetent application was dismissed to the date the application for extension before her was lodged as being too long without being accounted for. She was fortified to that finding by the Court's guidance in **Bushiri Hassan vs. Latifa Lukio Mashayo**, Civil Application No. 3 of 2007 (unreported) which requires each day of delay be accounted for.

The applicants, by way of a letter directed to the Hon. Deputy Registrar of the Court of Appeal, have moved the Court, under rule 62(1)

of the Rules, to reverse the decision and grant the applicants an extension of time within which to file an application for stay of execution against the decision and decree in Land Case No. 13 of 2004 pending hearing and determination of the intended appeal.

Ms. Sara Severini Lawena, learned counsel, appeared before us representing the applicants whereas Mr. John Umbulla, learned counsel and Mr. Peter Musetti, learned Senior State Attorney appeared respectively, for the 1st and 2nd respondents. Neither of the parties lodged written submissions. The applicants and the 1st respondent filed lists of authorities in terms of rule 34 of the Rules.

The attack on the single Justice's ruling by Ms. Lawena centered on two areas of the decision; **one**, the learned single Justice interpreted narrowly the expression "good cause" under Rule 10 of the Rules and **two**, the thirty (30) days were accounted for.

Elaborating the onslaughts generally, Ms. Lawena was perplexed to find that the learned single Justice had not considered the rights of the applicants to be served with the notice of intention to execute the decree and that the applicants had spent much of their time in court pursuing their rights. Alive of the legal position under which the Court may justifiably

interfere with the single Justice's exercise of discretion to grant or not extension of time as restated in **G.A.B Swale vs Tanzania Zambia Railway Authority**, Civil Reference No. 5 of 2011 cited in **Farida F. Mbarak and Another vs Domina Kagaruki and Four Others**, Civil Reference No. 14 of 2019 (both unreported), Ms. Lawena submitted that had the learned single Justice properly examined the reasons for delay advanced by the appellants, she would have not denied the applicants extension of time sought. She singled out three factors that justify this Court's interference on the single Justice's decision to be: -

> *"1. The single justice failed to take into account relevant matters, or;*
>
> *2. There was misapprehension or improper appreciation of the law or fact applicable to that issue, or;*
>
> *3. If looked at in relation to the available evidence and law, the decision is plainly wrong."*

It was her further argument that the single Justice, in her decision, referred to paragraphs 5, 6, 7, 8 and 9 of the applicants' supporting affidavit in the application for extension of time which paragraphs reflected the reasons for the delay for consideration by the Court but she was unable to realize that the applicants were in court corridoes for a long time

prosecuting various cases relating to ownership of the disputed land and later in preparing the application for extension of time that was before her.

On our prompting, however, whether in those paragraphs there was indication that the applicants had raised such grounds or reasons for the delay in lodging the application for extension, Ms. Lawena, exhibiting her professionalism, readily conceded that there was no such ground in either the applicants' notice of motion or in the supporting affidavit and, therefore, she could not advance such argument before the Single Justice or before us as it will be an argument from the bar which is not allowed. She was of the view that the learned single Justice ought to have considered the extent of prejudice the applicants were to suffer if the eviction order was effected banking on the argument that the applicants had indicated, in the supporting affidavit, the damage they would suffer by the eviction order, again, relying on the case of **Farida F. Mbarak and Another vs Domina Kagaruki and Four Others** (supra). While acknowledging that promptness in lodging an application for extension is another factor to be considered by the Court in exercising its discretion whether or not to grant a motion for extension of time, she stoutly argued that thirty days of delay is not inordinate and urged the Court to reverse the single Justice's decision and grant time to the applicants to apply for

stay of execution of the decree of the High Court in Land Case No. 13 of 2004.

Ms. Lawena's another arsenal was targeted to fault the single Justice for holding that invocation of technical delay to justify the delay was improper for a reason that the initial application for stay of execution which was later dismissed was filled out of time. Her main argument was that the learned single Justice reckoned time applying the Rules, 2009 (the Rules) which requires an application for stay of execution to be lodged within fourteen (14) days while such application was filed in the High Court where the Rules do not apply but the Law of Limitation Act (the LLA). She was, however, unable to point out the relevant provision of the LLA. For this reason, she insisted, the learned single Justice misdirected herself and her refusal of extension of time was improper calling for the Court's interference and reverse her decision.

In rebuttal and arguing eloquently as is their usual approach to issues before them and exhibiting their experience on the field, Mr. Umbulla and Mr. Musetti could not mince words. They readily conceded that the learned single Justice strayed into an error to apply the Rules to determine time limit of lodging an application for stay of execution which was lodged

in the High Court. The above notwithstanding, they were firm that the application for extension of time before the single Justice was belatedly lodged and the delay was not accounted for as was rightly decided by the learned single Justice. Both were in agreement that the learned single Justice considered the arguments by both sides, dates of lodging matters in Court and in the High Court and affidavit by both sides and annexures and rightly found that the period of delay from the time the incompetent application for stay of execution was dismissed on 30/6/2021 to 1/7/2021 when the application for extension of time placed before the single Justice was filed, was not explained away. They further asserted that Ms. Lawena had conceded that fact but argued that such period was used by the applicants to prepare the application for extension of time. They impressed on the Court to appreciate the fact that she also conceded that such a reason was not advanced by the applicants in neither the notice of motion nor in their supporting affidavit, hence find the argument misplaced. They concluded that the learned single Justice was justified to dismiss the application for want of reason for the thirty (30) days delay. Mr. Umbulla relied on the Court's decision in **Fortunatus Masha vs William Shija and Another** [1997] T. L. R. 154 and **Finca (T) Limited and Another vs. Boniface Mwalukisa**, Civil Application No. 589/12 of 2018

(unreported) and Mr. Musetti rested his arguments on **D. N. Bahram Logistics Ltd and Another vs National Bank of Commerce Ltd and Another**, Civil Reference No. 10 of 2017 (unreported) and **G.A.B Swale vs Tanzania Zambia Railway Authority** (supra). It is worth noting that, at a certain stage, Mr. Musetti seemed to support the learned single Justice's course of applying the Rules to hold that the application for stay of execution ought to have been filed within fourteen (14) days. In all, both learned counsel prayed for the application to be dismissed with costs.

Rejoining, Ms. Lawena reitrated her earlier submission and impressed upon the Court to hold that a delay of thirty days is reasonable and not inordinate. In conclusion, she urged the Court to hold that the application before the single Justice met the thresholds for granting extension of time hence the refusal was unjustified. As for cost, she left it for the Court to decide.

Now, before the Court is the issue whether or not the reasons fronted by the applicants justify the Court's interference with and upset the single Justice's exercise of discretion to grant extension of time. It is trite that the thresholds justifying such action were propounded in **G.A.B Swale vs Tanzania Zambia Railway Authority** (supra) as cited in **Farida F.**

Mbarak and Another vs Domina Kagaruki and Four Others (supra).

For our ease of reference, we meticulously recite them as hereunder: -

> *"(i) Only those issues which were raised and considered before the single Justice may be raised in a reference [See **Gem and Rock Ventures Co Ltd v. Yona Mvutah**, Civil Reference No. 1 of 2010 (unreported)]*

And if the decision involves the exercise of judicial discretion: -

> *(ii) If the single Justice has taken into account irrelevant factors, or;*
>
> *(iii) If the single justice has failed to take into account relevant matters; or;*
>
> *(iv) If there is misapprehension or improper application of the law or fact applicable to that issue, or;*
>
> *(v) If looked at in relation to the available evidence and law, the decision is plainly wrong (See **Kenya canners Ltd v. Titus Muriri Docts** (1996) LLR 5434 a decision of the Court of Appeal of Kenya, which we find persuasive) (See also **Mbogo and Another v. Shah** (1996) EA 93 at page 3 – 4)."*

As afore stated, in the instant application, the applicants aspire the single Justice's decision refusing to grant extension of time be interfered and reversed for two reasons. Before delving onto them, we shall preface our decision by stating that we have with sober minds followed the parties' arguments before us, thoroughly perused the single Justice's decision sought to be reversed and also studied the various decisions referred to by the parties' counsel. From all these materials, it appears that the parties' counsel are not at issue on the principles applicable in applications of this nature, the guidance of which is founded in Rule 62 (1)(2) of the Rules and case law. No doubt the applicants are questioning the single Justice's exercise of her discretion not to grant extension of time for reasons she put up. There is no dispute, either, that the case of **G.A.B Swale vs Tanzania Zambia Railway Authority** (supra) provides, in clear terms, justifications for the Court's interference with the single Justice's decision. A pertinent question begging for our deliberation is do the grounds advanced justify this Court to take that course? This is the central issue we are invited to determine in this application.

We shall first discuss the complaint that the single Justice wrongly applied the Rules in a matter lodged in the High Court to decide that it was lodged outside the prescribed period. Adjudging the period within which

the initial application for execution was lodged so as to accord with the Court's stance in **Constantino Victor John vs. Muhimbili National Hospital** (supra), the learned single Justice agreed with Ms. Lupondo, learned State Attorney who appeared for the 2nd respondent, that in terms of Rule 11 (4) of the Rules, the application ought to have been filed within fourteen (14) days from 21/11/2019 when they were served with notice of execution, that is on or before 5/12/2019. However, at pages 3 and 4 of the typed ruling, she had noted from the applicants' supporting affidavit that the initial application was filed in the High Court and in the latler page she categorically stated that: -

> *"Further, on 30th November, 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."***
>
> *[Emphasis added)]*

And, after a long discussion, she concluded, at page 17 of the record that: -

"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."*

[Emphasis added]

Actually, and with due respect, the above cements the fact that the said application for stay of execution was lodged in the High Court. It is plain therefore that the Rules could not apply in the circumstances. It is not hard to find a rationale as Rule 3 of the Rules defines the term "Court" to mean the Court of Appeal of Tanzania and also Rule 11(4) of the Rules requires an application for stay of execution to the Court be made within fourteen days of service of notice of execution on the applicant by the executing officer or from the date he is otherwise made aware of the existence of an application for execution. A reading of the whole Rule, reveals that the Rules apply only in matters filed in the Court including an application for stay of execution. With respect, we cannot avoid holding that it was wrong for the learned single Justice to peg time limit of filing an application for stay of execution in the High Court using the Rules.

Certainly, the course taken by the learned single Justice amounted to an improper application of the law which justifies the Court's interference with the single Justice's decision.

We are now faced with an immediate question which emerges whether or not the above ground alone may prompt the Court to overturn the single Justice's decision and grant extension of time? We now turn to consider this pertinent issue.

As was rightly held by the single Justice in the ruling being assailed, the Court's mandate to exercise its discretion to grant extension of time or not is governed by Rule 10 of the Rules. According to it, an applicant is under a legal duty to establish causes of delay acceptable by the Court to be good reasons. In a string of decisions, the Court has propounded certain factors that would guide it although they are not exhaustive as every case has to be looked at depending on its facts. The factors are length of the delay, whether or not the applicant acted diligently, that is whether he was prompt in lodging the application, reasons for delay, the degree of prejudice to the respondent if time is extended and existence or not of an illegality in the decision sought to be challenged upon grant of extension of time and each day of delay should be accounted for. (See

Tanzania Revenue Authority vs Tanga Transport Co. Ltd, Civil Application No. 4 of 2009, **Bertha Bwire vs Alex Maganga**, Civil Application No. 7 of 2016, **Tanga Cement Co. vs Jumanne Masangwa and Another**, Civil Application No. 6 of 2001, **Vodacom Foundation vs Commissioner General (TRA)**, Civil Application No. 107/20 of 2017 and **Bushiri Hassan vs Latifa Lukio Mashayo**, Civil Application No. 3 of 2007 (all unreported). For clarity and relevant to our case, in the latter case the Court stated that: -

> *"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."*

In the light of the above, save for an allegation of illegality which stands alone as a ground which, if established, an applicant may be granted extension of time (see **Principal Secretary Ministry of Defence and National Service vs Devram P. Valambhia** [1992] T.L.R. 387), the rest of the factors must be complied with conjointly.

From the arguments of the learned counsel of the parties, it appears that it was not disputed that there was a delay of thirty (30) days in lodging the application for extension of time that was placed before the

learned single Justice. Ms. Lawena had two propositions in favour of need to grant the application for extension of time. **One**; she insisted that had the learned single Justice widely interpreted the *"term good cause"* reflected in Rule 10 of the Rules, she would have realized that it included the extent of prejudice the applicants were to face if extension of time was to be refused and, **two**; that such time was not inordinate and the application was lodged within reasonable time. She added that such time was spent by the applicants to prepare the application for extension of time which considering the extent of prejudice on the part of the applicants, the single Justice ought to have granted extension of time.

The learned single Justice, in her ruling, ruled out that the delay was inordinate and the delay was not explained away. At issue before us is, therefore, whether the two reasons advanced by Ms. Lawena justify the Court's interference with the single Justice's decision and therefore reversing her findings.

We start with Ms. Lawena's second argument. In the ordinary course of things, we agree with the respondents' counsel's arguments that a delay of thirty (30) days is inordinate. But, if good cause is shown, such time may not be inordinate. As demonstrated above, it all depends on the facts

of each particular case. In the instant case, there was concession by Ms. Lawena that no reason was advanced for the delay of thirty (30) days in lodging the application for extension of time in both the notice of motion and the supporting affidavit hence her arguments in attempt to explain away the delay would amount to arguments from the bar which would be ineffectual. Indeed, that is established stance. An identical scenario to the present one occurred in **Karibu Textile Mills Limited vs. Commissioner General Tanzania Revenue Authority**, Civil Application No. 21 of 2017 (unreported) and the Court held that: -

> *"The explanation that he gave us in his written and oral submission that the applicant spent the thirty days period preparing, drawing up and filing the application for extension of time, is nothing but a statement from the bar that cannot be acted upon. Nor could it have been acted upon by the learned single Justice, had it been made in the applicant's submission before him."*

The requirement of the law is to have the reasons for delay expressed in the notice of motion and or in the supporting affidavit, otherwise raising them in the submissions or orally before the Court during the hearing as Ms. Lawena did, is improper. By analogy, we find Ms.

Lawena's argument that the period of thirty (30) days was spent by the applicants in preparing the application for extension of time that was placed before the single Justice to be last kirks of a dying horse. It cannot be acted on to fault the learned single Justice's decision.

The first limb of Ms. Lawena's argument bears out no difficult to answer. All that we note is an attempt by Ms. Lawena to convince the Court to hold otherwise than it earlier decided on factors to be considered in granting extension of time. She actually wanted the Court to consider the extent of prejudice on the part of the applicants quite opposed to the established law, as above cited, that it is the extent of prejudice the respondent is to suffer if extension of time is granted. If that was her intention, she ought to have moved the Court under Rule 106(4) of the Rules. That Rule provides: -

> *"4. Where the parties intend to invite the Court to depart from one of its own decisions, this shall be clearly stated in a separate paragraph of the submissions, to which special attention shall be drawn, and the intention shall also be restated as one of the reasons."*

Unfortunately, Ms. Lawena did not comply with the above requirement. We therefore disregard such unauthorized invitation.

In a string of Court decision, the extent of prejudice to be considered in an application for extension of time is that which the respondent stands to suffer if time is extended, not the applicant (See **Bertha Bwire vs Alex Maganga** (supra), **Samwel Kobelo Muhulo vs. National Housing Corporation**, Civil Application No. 302/17 of 2017 (unreported) and **Farida F. Mbarak and Another vs Domina Kagaruki and Four Others** (supra). To be precise, in **Tanga Cement Co. Ltd vs Jumanne Masangwa and Another** (supra), the Court dealing with an application for extension of time, sought inspiration from the case of **C. M. Van Stillevoldt v. El Carriers Inc.** (1983) 1 All ER 699 at page 703 wherein Griffiths, L. J. said: -

> *"In my judgment, all relevant factors must be taken into account in deciding how to exercise the discretion to extend time. Those factors include the length of the delay, the reasons for the delay, whether there is an arguable case on appeal, and* ***the degree of prejudice to the defendant if time is extended."***

This observation, which we find audible, is also an authority that in applications for extension of time, all factors should be considered. The Court followed suit in the above listed decisions hence making it part of our

legal position save for the factor *"whether there is an arguable case on appeal"* which in other cases is cited as *"whether there is an overwhelming chances of success of the intended appeal"* which has been considered to have the effect of prejudging the outcome or merits of the intended matter to be lodged upon extension of time being granted such as an appeal, revision, review or reference hence sidelined it as not among the factors to consider [see **M/S Regimanuel Gray (T) vs. Mrs Mwajabu Mrisho Kitundu & 99 Others**, Civil Application No. 420/17 of 2019 (unreported)]. We think, as the law now stands, the extent of prejudice to be considered is that of respondent. We think there is good reason for that. That is; having succeeded in a litigation, a winning party has a right to enjoy the fruits thereof instantly by executing a decree. Granting extension to a losing party to fault the decree delays execution of the decree. In the event, this ground of reference is unmeritorious.

In fine, succeeding in the first ground that the learned single Judge applied an inapplicable Court of Appeal Rule alone, is not sufficient to reverse the single Justice's decision. All other factors ought to have been established including accounting for the delay of thirty (30) days. As we have held that the days were not accounted for, this application fails. We

therefore see no justification to interfere with the learned single Justice's decision.

All said, the application fails and is dismissed. As is the practice, costs follow the event and we see nothing justifying the contrary. The respondents to be paid costs in this application.

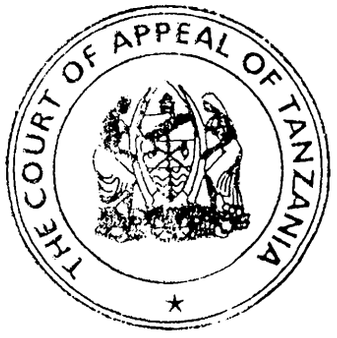
DATED at **ARUSHA** this 23rd day of February, 2024.

S. A. LILA
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

A. Z. MGEYEKWA
JUSTICE OF APPEAL

The Ruling delivered this 23rd day of February, 2024 in the presence of Ms. Sara Severini Lawena, learned counsel for the Applicants, Mr. John Sikay Umbulla, learned Counsel for the 1st Respondent and Lewani Mbise learned State Attorney for the 2nd Respondent, is hereby certified as a true copy of the original.



D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL