IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MUGASHA, J.A. MWAMBEGELE, J.A. MWANDAMBO, J.A.)

CIVIL APPLICATION NO. 114/11 OF 2019

HENRY BUBINZA (The Administrator of the Estate of the late MATHIAS NJILE BUBINZA .....APPLICANT

VERSUS

1. **AGRICULTURAL INPUTS TRUST FUND**
2. **UBAPA COMPANY LTD – MUSOMA**
3. **ABDALLLAH SALEHE** **.....RESPONDENTS**
4. **MEMO COMPANY LTD - TABORA**

(Application for stay of execution from the decree of the High Court of Tanzania at Tabora)

(Utamwa, J.)

dated the 23rd June, 2016
in
Land Case No. 7 of 2013

RULING OF THE COURT

22nd October & 16th November, 2020

MWANDAMBO, J.A.:

By way of notice of motion, the applicant has moved the Court to make an order for stay of execution under rule 11(3), (4), (5) (a-c), (6), (7) (a-d) and 48(1) of the Tanzania Court of Appeal Rules, 2009 - G.N No. 368 of 2009 as amended by the Tanzania Court of Appeal (Amendments) Rules, 2017-G.N. No. 362 of 2017 (the Rules). The decree whose execution

is sought to be stayed pending appeal was made on 23rd June 2016 in Land Case No. 7 of 2013 by the High Court (Utamwa, J.) sitting at Tabora. The affidavit of Henry Bubinza, the applicant supports the application but for lack of service of the copies of the notice of motion, the respondents did not file any affidavit in reply.

Briefly stated, the facts giving rise to the application are as follows: Before the High Court, one Mathias Njile Bubinza (deceased, now represented by the applicant) sued the respondents challenging the sale of his mortgaged property sold by way of public auction. That suit was dismissed for want of prosecution on 23rd June, 2016. Aggrieved, the applicant lodged a notice of appeal in terms of rule 83(1) of the Rules and subsequently, he lodged an appeal at Tabora sub-registry on 2nd August, 2017. In terms of rule 11(2) (c) of the Rules before the amendments thereto by GN No. 362 of 2017, an application for stay of execution of an appealable decree or order ought to have been filed before the expiry of the period for appealing, that is to say; within sixty days from the date of lodging the notice of appeal regardless whether there was an application for or threat of execution. However, the applicant did not do so.

Sometime in August 2018, the first respondent sought to execute the decree by way of eviction of the applicant from his mortgaged house following its sale by way of public auction. It is not clear to us why the first respondent sought to apply for execution of the decree which was, from the face of it not capable of execution, for the High Court merely dismissed the suit instituted against the respondents. All the same, the Deputy Registrar of the High Court before whom the parties appeared to show cause why execution should not proceed, found nothing to stop execution from being carried out. The applicant's attempt to challenge that order by way of reference was barren of fruit before Bongole, J. who dismissed it. Aggrieved, the applicant lodged a notice of appeal on 12th March, 2019. Two weeks later, Memo Company Limited, a Court Broker based in Tabora, served on the applicant a notice of eviction which he received on 1st April, 2019. It is that notice which triggered the instant application. However, copies of the notice of motion and affidavits were not served on the respondents as of the date the application was called on for hearing on 1st October, 2019 and hence the failure to file their affidavits in reply in accordance with rule 56(1) of the Rules. Mr. Mushumba,

learned advocate, took exception to the applicant's failure to serve the respondents with copies of the notice of motion and affidavit.

On the date the application was called on for hearing, Mr. Frank Samwel, learned advocate appeared for the applicant whereas, Mr. George Kato Mushumba joined forces with Mr. Charles Malyato, both learned advocates to represent the first, second and third respondents. The fourth respondent did not enter appearance due to want of service. Ahead of the commencement of hearing, Mr. Samwel sought and was granted leave to strike off the fourth respondent, for he was neither a party in the High Court nor a necessary party in the instant application. Consequently, the name of the fourth respondent was struck off from the list of respondents.

Before hearing took off, we invited the learned Advocates for the parties to address the Court on two aspects. The first was whether the instant application was filed within the time prescribed by the Rules. The second one raised at the outset by Mr. Mushumba in relation to the consequences of the failure by the applicant to serve requisite copies of the documents on the respondents within the time fixed by rule 55(1) of the Rules.

Mr. Samwel was the first to address the Court. On the first issue, he submitted forcefully that the application was filed well within fourteen days following service of the notice of eviction on the applicant. The learned advocate was adamant that though the decree whose execution is sought to be stayed was made prior to the amendment of the Rules vide GN. No. 362 of 2017, the application is not governed by the Rules in force on the date of the decree. The learned Advocate invited us to hold that the application was lodged within the prescribed time on the basis of the current rule 11(4) of the Rules.

As to failure to serve the respondents, Mr. Samwel feigned ignorance of that failure. According to him, his client had assured him that he had effected service despite the absence of proof of such service. Otherwise, the leaned Advocate prayed for leave to effect service on the respondents out of time under rule 10 of the Rules.

Mr. Mushumba for his part was emphatic that the application is time barred since it was lodged beyond the time prescribed by rule 11(2) (c) of the Rules in force on the date of the decree. Mr. Mushumba argued that the amendment to rule 11(2) of the Rules introduced by GN. No. 362 of 2017 did not apply retrospectively to the extent it involves limitation of the

period within which applications for stay of execution could be made. According to the learned advocate, the applicable provisions on the date of the decree, that is to say; 23rd June 2016, was rule 11(2) (c) of the Rules. Under that rule, the grant of an order for stay of execution was subject to an application being made before the expiry of the period for appealing which is sixty (60) days from the date of lodging of the notice of appeal. Counsel reiterated that the amendments to rule 11(2) of the Rules by G.N. No. 362 of 2017 did not have any retrospective effect so as to cover the decree prior to the amendment.

Mr. Mushumba argued further that the fact that the service of a notice of execution on the applicant was effected in March 2019, did not mean that the applicant could apply for stay of execution under the amended Rules without seeking an order for extension of time and so the application is hopelessly out of time. The learned advocate implored us to hold that the question of limitation covers substantive rather than procedural rights and so it cannot operate retrospectively. Nevertheless, Mr. Mushumba cited no authority in support of his proposition understandably so because the issue was raised by the Court on its own motion and the respondents were not served with copies of the notice of

motion. On that account, he invited the Court to strike out the application for being time barred.

With regard to the failure to serve requisite documents within the prescribed time, Mr. Mushumba found it superfluous arguing that issue on account of the time bar. Be it as it may, counsel submitted in the alternative that the applicant has not complied with rule 55(1) of the Rules couched in mandatory terms and so he must be visited with the consequences of striking out the application. In response to the prayer for extension of time, counsel played it down arguing that it was misplaced as the same could only be made before a single justice in the light of rule 60(1) of the Rules. At any rate, the learned advocate reiterated that since the application is time barred, the application for extension of time cannot serve any useful purpose. On the whole, the learned advocate invited the Court to strike out the application for being time barred and for the applicant's failure to comply with rule 55(1) of the Rules.

Mr. Samwel had nothing to submit in rejoinder.

After hearing the learned advocates on the two issues, we reserved our ruling to another date that would be communicated to the parties by

the Registrar of the Court. In the course of the deliberations, we found it compelling to recall the learned advocates to address us on a related issue on the competence of the application from another perspective in case the first issues were to be decided in the applicant's favour. On the resumed hearing, the Court invited learned advocates' views on the competence of the application if, as alluded to above, we were to endorse the arguments by Mr. Samwel regarding the retrospective application of rule 11(4) of the Rules.

Mr. Nehemia Gaba, learned advocate who, this time around, appeared for the applicant conceded that the application was indeed filed outside fourteen days prescribed by rule 11(4) of the Rules and so it is not competently before the Court. By reason of the concession by the learned advocate for the applicant, Mr. Mushumba who represented the first, second and third respondents assisted by Mr. Malyato invited us to strike out the application for being time barred.

First for our determination is whether the application for stay of execution is time barred on the basis of rule 11(2) (c) of the Rules in force on the date when the impugned decree was passed. The learned advocate for the respondents argued strongly against the retrospective application of

the amendments to rule 11(2) through G.N. No. 362 of 2017 published on 22nd September, 2017.

The rule was subject of further amendments through the Tanzania Court of Appeal (Amendments) Rules, 2019, G.N. No. 344 of 2019 published on 26th April, 2019. At the first hearing, the applicant's counsel was firm that the application was filed within the prescribed period pursuant to rule 11(4) of the Rules as amended by G.N. No. 362 of 2017 having a retrospective effect. That means that notwithstanding the fact that the decree, the subject of the instant application was made on 23rd June, 2016 before the coming into operation of GN No. 362 of 2017, the application is properly before the Court by reason of the amended Rules and hence the justification for predicating the application under rule 11(3), (4), (5), (6), (7) of the Rules as amended by G.N No. 362 of 2017.

Nevertheless, as seen above, Mr. Gaba conceded as such during the resumed hearing that the application was filed beyond the prescribed time notwithstanding the retrospective application of the amendment to rule 11(2) of the Rules vide GN. No. 362 of 2017.

Rule 11(2) (c) of the Rules before the amendments provided as follows:

> *"Where an application is made for stay of execution of an appealable decree or order before the expiration of the time allowed for appealing therefrom, the Court, may upon good cause shown, order the execution to be stayed."*

That rule was amended in 2017 by G.N. No. 362 of 2017 and it now provides in part:

> *"(4) An application for stay of execution shall be made within fourteen days of service of the 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."*

It is plain from the above that prior to the amendments, every aggrieved litigant in the High Court could make an application for stay of execution before the expiry of the period allowed for institution of an appeal regardless whether or not a decree holder had commenced execution of the decree. Without the amendments, it may not be difficult to argue as Mr. Mushumba did that the application before us is time barred because it was made way beyond sixty days of lodging of the notice of

appeal. After the amendments, an application for stay of execution can only be made within fourteen (14) days upon the applicant receiving a notice of execution or when he becomes aware of the execution process. The nagging question is whether the application is covered by the amendments to rule 11(2) (c) of the Rules applicable on the date of the decree whose execution is sought to be stayed. That takes us to the principle regarding retrospective application of statutes.

Luckily, this is not the first time the Court is called upon to pronounce itself on the retrospective application of statutes albeit in aspects other than the question now before us. There is more than sufficient authority in this regard from decided cases, amongst others, **Freeman Aikaeli Mbowe & Another v. Alex O. Lema,** Civil Appeal No. 84 of 2001 (unreported), **S.S. Makorongo v. Severine Consigilio** [2005] 1 EA 247 and **Lala Wino v. Karatu District Council**, Civil Application No. 132/02 of 2018 (unreported). In **Freeman Aikael Mbowe**, for instance, the Court cited with approval a passage by Lord Blackburn in **Gardner v. Lucas** (1878) App.cas.582, at 603 thus:

> *"It is quite clear that the subject matter of an act might be such that, though there were not any*

express words to show it, it might be retrospective. For instance, ***I think it is perfectly settled that if the Legislature intended to frame a new procedure, that instead of proceeding in this form or that, you should proceed in another and a different way, clearly the bygone transactions are to be sued for and enforced according to the new form of procedure. Alterations in the form of procedure are always retrospective, unless there is some good reason or other why they should not be.*** *"* (at p. 4 of the judgment - emphasis added).

In **S.S. Makorongo** (supra), the Court made reference to an earlier decision of the defunct Court of Appeal for East Africa in the case of **Municipality of Mombasa v. Nyali Limited** [1963] E.A. 371 in which the said court stated (at page 374) thus:-

"Whether or not legislation operates retrospectively depends on the intention of the enacting body as manifested by the legislation. In seeking to ascertain the intention behind the legislation the Courts are guided by certain rules of construction. One of these rules is that if the legislation affects substantive rights it will not be construed to have

retrospective operation unless a clear intention to that effect is manifested; whereas if it affects procedure only, prima facie it operates retrospectively unless there is good reason to the contrary. But in the last resort it is the intention behind the legislation which has to be ascertained and a rule of construction is only one of the factors to which regard must be had in order to ascertain that intention." [Emphasis added].

Faced with an identical scenario in **The Director of Public Prosecutions v. Jackson Sifael Mtares and 3 Others**, Criminal Appeal No. 2 of 2018 (unreported), we relied on **S.S. Makorongo** (supra) to articulate:

"Normally, [a legislation] may not be made to apply retrospectively where the said legislation affects the substantive rights of the potential victims of that new law. On the other hand however, if it affects procedure only, prima facie it operates retrospectively unless there is good reason to the contrary."

We are settled in our mind that the above standpoint represents a correct interpretation of the law in Tanzania and, for that reason, we have no legal justification to depart from the settled position.

Applying the above to the instant application, there is no dispute that the applicant did not exercise his right to apply for stay of execution before the expiry of the period allowed for appealing in terms of Rule 11(2) (c) of the Rules in force on the date of the impugned decree. That period expired long before the applicant lodged the instant application on 11th April 2019 under rule 11(3), (4), (5) (a-c), (6), (7) (a-d) of the current Rules. At that time, the respondents had an accrued right to plead time bar in defence. That right could not be extinguished by the amendment to the Rules requiring the applicant to make such an application within fourteen days of the date of an application for execution or when the applicant becomes aware of the execution. The position would not have been the same had the period for instituting an application not lapsed. In that case, the applicant could have made the application under the Rules as amended. In our view, as the time for doing so had already expired, he could not take advantage of the amendments to the Rules by making the application as he did without leave of the Court to do so out of time. He

had no automatic right to apply for stay of execution under the Rules in force when he made the application.

That said, we hold that the application is incompetent notwithstanding rule 11 (4) of G.N No. 362 of 2017 reducing the limitation of time to fourteen days of service on the applicant of the notice of execution by the executing officer or from the date he becomes aware of the existence of an application for execution. That rule had no retrospective application to litigants such as the applicant whose period of limitation prescribed under the old rule had already expired. That is the reason why we profoundly agree with Mr. Mushumba that the applicant missed the boat by relying on rule 11 (4) of the Rules to bolster the stance that the application was not filed timeously. The application was filed out of time regardless of the coming into operation of G.N No. 362 of 2017 which altered the procedure in making applications for stay of execution. On that basis, the application is, for all intents and purposes, incompetent and liable to be struck out.

Even assuming, just for the sake of arguments, our decision on the retrospective application of rule 11(4) of the Rules would have been different, Messrs. Gaba and Mushumba are at one that the application was

in any event time barred. The applicant has annexed to the founding affidavit a notice of eviction served on him on 1st April 2019 consistent with the requirement under rule 11(4) and 11(7) (d) of the Rules. However, the notice of eviction was just an aftermath in the process of execution which had already commenced way back in June, 2018. It is evident from the proceedings of the Application for Execution No. 43 of 2018 before Nyaki, DR, the applicant was aware of the execution prior to 16th August 2018 the date on which he appeared before the Deputy Registrar in response to a notice to show cause why execution should not be carried out. The applicant failed to satisfy the executing court and hence the order for the execution to proceed. The applicant did nothing to apply for stay of execution or seek extension of time to do so. Instead, he elected to challenge the Deputy Registrar's order by way of reference before Bongole, J. in Civil Reference No. 7 of 2018 which was dismissed on 26th February, 2019 and hence the notice of eviction dated 26th March 2019.

On the whole, even if we were to hold that the amendments effected in 2017 were applicable, the application would still be time barred it being filed beyond 14 days following service of notice of execution or the date on which the applicant became aware of it.

Considering that we have held that the application is time barred for being filed beyond the sixty days prescribed by rule 11(2) (c) which was applicable then, we find it superfluous discussing the issue touching on noncompliance with rule 55(1) of the Rules.

That said, the application is hereby struck out. As the issue resulting in our final order was raised by the Court, we make no order as to costs. It is ordered accordingly.

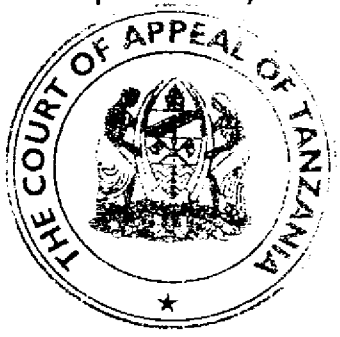
DATED at **DAR ES SALAAM** this 11th day of November, 2020.

S.E.A. MUGASHA
JUSTICE OF APPEAL

J.C.M. MWAMBEGELE
JUSTICE OF APPEAL

L.J.S. MWANDAMBO
JUSTICE OF APPEAL

Ruling delivered this 16th day of November, 2020 in the presence of Mr. Nehemia Gabo, learned counsel for the Applicant and also holding brief for Mr. George Kato Mushumba and Mr. Charles Malyato learned counsels for respondents, is hereby certified as a true copy of original.



S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL