IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM:KIMARO,J.A.,MASSATI,J.A., And JUMA, J.A.,)

CIVIL APPLICATION NO. 119 OF 2015

LUPEMBE FARMERS COORPERATIVE JOINT ENTERPRISES LIMITED (MUVYULU).....APPLICANT

VERSUS

1. **DHOW MERCANTILE (AE) LIMITED**
2. **LUPEMBE TEA ESTATES LIMITED**
3. **CONSOLIDATED HOLDINGS CORPORATION .....RESPONDENTS**

(Application for stay of execution of the Judgment and Decree of the High Court of Tanzania Land Division at Dar es Salaam)

(Mgetta, J.)

dated 31st day of December, 2014
in
Land Case No. 193 of 2008

RULING OF THE COURT

4th&16thNovember,2015

MASSATI, J.A.:

Before us, there is an application for stay of execution of the judgment and decree of the High Court (Land Division) in Land Case No. 193 of 2008 dated 31st December, 2014. It is taken out under Rule 11(2) (b) (c) (d) (i) and (iii) and (e) of the Tanzania Court of Appeal Rules 2009 (the Rules) and supported by the affidavit of MEDECK MHOMISOLI. The Notice of Motion

sets out twenty seven grounds in support of the application; which was drawn and filed by RugemelezaNshala, Advocates.

On being served with the application, the 1st and 2nd respondents, reacted by filing a Notice of Preliminary Objections; drawn and lodged by Ngalo&Company, Advocates.So, when the matter came up for hearing on 4th November 2015, Mr. Michael Ngalo who appeared for the 1st and 2nd respondents, was all set to argue the preliminary objections. The applicant was represented by Dr. RugemelezaNshala, learned counsel, whereas the 3rd respondent was represented by Mr. Obadiah Kameya, learned Principal State Attorney.

Mr. Ngalo had two points of preliminary objections. The first one was that the application was time barred. He submitted that in terms of rule 11(2) (c) of the Rules and case law, the application should have been filed within 60 (sixty) days from the date of filing the notice of appeal. As the Notice of Appeal was lodged on 7/1/2015, the application should have been filed latest by 6/3/2015. Instead it was filed on 11/6/2015, some 162 days later without leave of the Court to file it out of time. He cited the

decisions of **NOBLE MOTORS LTD Vs UMOJA WA WAKULIMA WADOGO BONDE LA KISERE (UWABOKE)** MZA Civil Application No. 7 of 2012 and **ADOLF JOHN MAGESA V ELIZABETH MOHAMED,** MZA Civil application No. 7 of 2012 (both unreported) to support his argument.

His second objection had two limbs, both relating to the substance and form of the affidavit filed in support of the application. In the first limb, he submitted that as paragraphs 5,6,7,8,9, 10 and 11 were argumentative, conclusive and speculative, the affidavit was defective in substance. For that, he relied on **ex-parte MATOVU** (1966) EA. 514 a Ugandan case cited in **LALAGO COTTON GINNERY AND OIL MILLS COMPANY LTD V LOANS AND ADVANCES REALIZATION TRUST** Civil Application No. 80 of 2002 (unreported).

The second limb of this objection was that, the verification clause contains allegations of the deponent having been advised by counsel without showing so in the body of the affidavit. For this formulation, the learned counsel relied on the decision of this

Court in **SALIMA VUAI FOUM V REGISTRAR OF COOPERATIVE SOCIETIES AND THREE OTHERS (1995)TLR.**

It is on account of the above preliminary objections that Mr. Ngalo prayed that the Court strike out the application for incompetency.

On his part Mr. Kameya,learnedPrincipal State Attorney, while agreeing in principle with Mr. Ngalo that, the application was filed out of time, strongly felt that there was need for the rule in question to prescribe clearly the time within which an application for stay should be filed. This, he submitted, would minimize any ambiguity in the Rule.

But Dr. Nshala resisted the preliminary objections. He started by agreeing that an application for stay of execution under Rule 11 of the Rules, should be lodged within 60 days from the date of filing the Notice of Appeal. However, he took a very strong exception on the argument relating to the commencement of the period of limitation. His view was that since rule 11(2)

(c)is hedged on Rule 90 (1), the latter should be read as a whole. This includes, the proviso, he argued. If this was so, it should be taken that the time taken to receive a copy of the decree/judgment, which is an essential accompaniment in an application for stay, should be excluded and so the 60 day period should be reckoned from the date of receipt of the copy of those documents as evidenced by the certificate of delay. He went on to argue that if that view is accepted, then, since he received the copy of the decree on 6th May, 2015, as averred in paragraph 3 of the affidavit, and since the application was filed on 11th June, 2015, it must be deemed to have been filed in time. So, in conclusion,he submitted that that objection lacked substance. To strengthen his arguments, the learned counsel referred to us the decision of this Court in**DEUSDEDIT KIMWAGA V PRINCIPAL SECRETARY MINISTRY OF FINANCE,** Civil Application No. 31 of 2000 (unreported).

With regard to the objection on the affidavit, Dr. Nshala, submitted that the affidavit was not defective and if there were any defects, they are curable. Paragraph 9 just sets out the

grounds in support of the Notice of Motion and paragraphs 5,6, and 8 are sourced from the deponent's own knowledge. Paragraph 8 raises the ground of illegality, which is a good ground for stay.He cited the decision of **MANTRAC TANZANIA LIMITED V RAYMOND COSTA** Civil Application No. 11 of 2010 (unreported), to complement his argument.

As to the second limb of the defect in the affidavit, the learned counsel submitted that, as there was no law compelling a deponent to indicate where to disclose the source of information or advice, it was permissible to place it either in the body of the affidavit or in the verification clause. So there was nothing wrong for the source of the advice to be shown in the verification clause, he argued.

Finally, Dr. Nshala submitted that, even if the offensive paragraphs were expunged from the affidavit, the remainder were still sufficient to support the application. So this objection too lacked substance and should be dismissed, he argued. Lastly he went on to pray to the Court to issue an order to maintain the status quo pending the determination of the preliminary

objections. He said that, the Court had such powers under Rules (2) and (4) of the Rules.

In his rejoinder Mr. Ngalo, first, strongly resisted against the prayer for an order to maintain the status quo. He grounded his resistance on the fact that there was no sufficient material before the Court for it to give such an order. He advised that if Dr. Nshala was intent on bringing it up, he should have filed a Notice of Motion, so as to give avenue to the parties to react,but it would not be in the interests of justice to do so now as the other parties are taken by surprise.

On the use of the proviso to rule 90 (1) of the Rules in computing the limitation period for lodging an application for stay, Mr. Ngalo's reaction was that the proviso could not be applied to applications for stay, and that the numerous decisions of the Court give a correct interpretation of the law. He went on to argue that **KIMWAGA's**case was different as it was an application for extension of time, and that if Dr. Nshala felt that the current decisions were wrong, he would have taken proper steps to ask the Court to depart from those decisions. He

recommended that if one found himself out of time the remedy was to apply for extension of time in which to lodge such an application. He therefore reiterated that the decisions he cited were still good law.

On the defective affidavit, Mr. Ngalo, insisted that the paragraphshe cited were argumentative, conclusive, and speculative and so insisted that the affidavit was incurably defective. He thus prayed that the application for stay of execution be struck out as it is not supported by a competent affidavit, and it is time barred. He also prayed for costs.

We think that the issue before us is a narrow one. Was the application for stay of execution filed in time?

From the submissions of the learned counsel, it is not in dispute that in terms of Rule 11(2) (c) and Rule 90 (1) an application for stay of execution has to be filed within 60 days from the date of filing the notice of appeal. This is a necessary outcome from reading the two Rules together. For ease of reference, we reproduce them here in below:-

Rule 11(2):

> " *(c) 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 show, order the execution to be stayed" (emphasis supplied).*

Rule 90 (1):

> *"Subject to the provisions of Rule 128, an appeal shall be instituted by lodging in the appropriate registry,* ***within sixty days of the date when the notice of appeal was lodged****with:- (emphasis supplied)*
>
> *(a) a memorandum of appeal in quintuplicate;*
> *(b) the record of appeal in quintuplicate;*
> *(c) security for the costs of the appeal,*
>
> *save that where an application for a copy of the proceedings in the High Court has been made within*

thirty days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted be excluded such time as may be certified by the Registrar of the High Court as having been required for the preparation and delivery of that copy to the appellant".

That this Court has constantly interpreted these two provisionsas setting out the period of limitation for lodging an application for stay as demonstrated by a thickwall of case law cited in **NOBLE MOTORS LIMITED V UMOJA WA WAKULIMA WADOGO BONDE LA KISERE** (UWABOKE) case, **ADOLF JOHN MAGESA V ELIZABETH and TANZANIA ELECTRIC SUPPLY COMPANY LIMITED V DAWANS HOLDINGS SA (COSTA RICA) DOWANS TANZANIA LIMITED (TANZANIA)** Civil Application No. 142 of 2012 (unreported).

However, we agree with Dr. Nshala that in the above cases, the Court never considered the full extent of the proviso to Rule

90(1) in computing the time set for filing an application for stay of execution. The major reason for this omission is that in those occasions, the Court was never addressed on that aspect,neither did it have to consider it because it was never raised. Now that the question has been raised in the present case, we have to address our minds on it.

Much as we find Dr. Nshala's argument attractive, with unfeigned respect we cannot go along with him. Here are our reasons. In the first place we agree with him that, in an applicationfor stay of execution,pending appeal a copy of the Judgment and particularly the decree has/have to be attached, together with a notice of appeal (See **ANGEL KYAKA V EMMANUEL KITOI,** Civil Application No. 19 of 2008 (unreported).But these are the only documents demanded of an applicantfor stay. Unlike in an application for stay, the putative appellant has to also apply for "a copy of the proceedings" in terms of Rule 90(1), so that he may prepare a record of appeal. In an application for stay one does not require a record of appeal or a copy of proceedings.

In our considered view it takes longer to get "a copy of the proceedings" for preparing a record of appeal than to get a copy of the decree for purposes of stay of execution. That is the rationale behind the proviso to Rule 90(1). So,we agree with Mr. Ngalothat, it cannot be used to salvage a belated application for stay. A diligent litigant could, if he so wishes separately obtain a copy of the decree before getting "a copy of the proceedings" and proceed to lodge an application for stay, before or within the period allowed for lodging an appeal set out in the principal part of Rule 90(1) of the Rules.

Secondly, while the proviso to Rule 90(1) is wholly applicable to an intended appellant, not every applicant for stay of execution has to be a candidate of anappeal. In certain cases, an applicant for revision may also have access to this remedy. (See **SELCOM GAMING MANAGEMENT (T) LTD AND GAMING BOARDS OF TANZANIA** (2006) TLR.200. It would be contrary to judicial policy and rules of statutory interpretation to apply discriminately and differently, the same rule of limitation

for those who intend to appeal and for those who approach the Court for other remedies, but also wish to apply for stay.

Thirdly and this is more important;an application for stay is only necessary if execution is imminent.For execution to proceed, the decree holder must have the decree in hand. If a copy of the decree is not ready or not available, no execution is possible. So the need for stay of execution would not arise.

For the above reasons we are not persuaded that the proviso to Rule 90 (1) of the Rules should also apply to cases of applications for stay of execution. We therefore affirm our previous decisions that the limitation period for lodging all applications for stay is 60 days "of the date when the notice of appeal was lodged".The remedy for any party who finds himself at cross roads with this time limit, is to apply for extension of time.

As limitation is fundamental to any action in Court, we are inclined to find that this ground is sufficient to dispose of the matter before us. We therefore agree with Mr. Ngalo, and Mr.

Kameya, that the application is time barred. The preliminary objection is therefore upheld. The application is accordingly struck out with costs.

DATED at **DAR ES SALAAM** this 9th November, 2015.

N. P. KIMARO
JUSTICE OF APPEAL

S. A. MASSATI
JUSTICE OF APPEAL

I. H. JUMA
JUSTICE OF APPEAL

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

E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL