**IN THE COURT OF APPEAL OF TANZANIA**

**AT DAR ES SALAAM**

**CIVIL APPLICATION NO. 267 OF 2015**

**NATIONAL BANK OF COMMERCE (NBC) LIMITED.....APPLICANT**

**VERSUS**

**1. SAO LIGO HOLDINGS LIMITED**
**2. MAGRETH JOSEPH .....RESPONDENTS**

**(Application for extension of time within which to apply for stay of execution from the decision of the High Court of Tanzania at Dar es Salaam)**

**(Mgetta, J.)**

**Dated the 30th day of September, 2014**

**in**

**Land Case No. 79of 2006**

---

# RULING

4th March & 21st April, 2016

**MBAROUK, J.A.:**

By way of notice of motion, the applicant has filed this application under Rule 10 of the Court of Appeal Rules, 2009, GN. No. 368 of 2009 (the Rules). The applicant is seeking for an order of extension of time within which to file an application

for stay of execution of the decree dated 30th September, 2014 in the High Court of Tanzania Land Division in Land Case No. 79 of 2006 pending hearing and determination of the intended appeal. The notice of motion is supported by the affidavit sworn by Mr. Gaspar Nyika.

After the filing of this application on 21/12/2015, the record shows that the 1st Respondent through their advocate filed a notice of preliminary objection under Rule 4 (2) (a) of the Rules to the effect that the application is incompetent for failure to file written submissions within the time prescribed by the law.

In this application, Ms. Fatma Karume, learned advocate represented the applicant, whereas Mr. Walter Chipeta, and Mr. Living Kimaro, learned advocates represented the 1st and 2nd Respondents respectively.

To start with, I allowed Mr. Chipeta to argue his preliminary objection. He submitted that, looking at the record, the application was filed on 21/12/2015. However, sixty days passed without filing the written submissions in support of the application as mandatorily required by Rule 106 (1) of the Rules. Mr. Chipeta further submitted that by 11/3/2016 the applicant was yet to file his written submissions. He said that it was not until 15/3/2016 when the applicant filed the same. He added that, as there was no order given for extension of time by this Court, the act by the applicant to file his written submissions after the notice of preliminary objection was to pre-empt the preliminary objection.

Furthermore, Mr. Chipeta submitted that no exceptional circumstances were given by the applicant to allow him to file his written submissions after the expiration of sixty days as provided stated under Rule 106(1) of the Rules. He therefore urged the Court to invoke Rule 106 (9) of the Rules and dismiss

the application with costs. In support of his argument, Mr. Chipeta cited the decision of this Court in the case of **Mechmar Corporation (Malaysia) Berhard v. VIP Engineering and Marketing Ltd.,** Civil Application No. 9 of 2011 (unreported).

On her part, Ms. Fatma Karume from the outset submitted that, the **Mechmar** case (supra) is distinguishable from this application. After all, she submitted that, even if it is true that generally under section 53(2) of the Interpretation of Laws Act (Cap. 1 R.E. 2002) when the word shall is used in any written law, such word, shall be interpreted to mean that the function must be performed. However, she submitted that according to the decision of this Court in **Leonard Magesa v. M/s Olam (T) Ltd,** Civil Appeal No. 117 of 2010 (unreported) it was stated that, on reading Rule 106 of the Rules as a whole, its main purpose is to speed up the administration of substantive justice. Ms. Fatma Karume further submitted that

according to the decision in **Leonard Magesa** (supra) if Rule 106 of the Rules is read in context, the word "shall" used, does not necessarily mean mandatory. She added that it was also stated in that decision that there are several claw back provisions which limit Rule 106(1) of the Rules not to interpret the word "shall" to mean mandatory. She therefore said, if deep analysis is done after reading Rule 106(1) of the Rules, the result will be that, failure to file written submissions will not render the application incompetent.

Ms. Fatma Karume further submitted that as there was no prejudice occasioned on the part of the applicant, this preliminary objection is a mere technicality. To support her argument, she cited the decision of this Court in the case of **Khalid Mwisongo v. M/s Unitrans (T) Ltd,** Civil Appeal No. 56 of 2011 (unreported).

In her reply to the issue of pre-empting the PO, Ms. Fatma Karume, submitted that, even if the PO was filed on

11/3/2016, but they were served with it on 18/3/2016 after having already filed their written submissions on 15/3/2016. She therefore, urged me to find that the applicant did not pre-empt the PO by filing their written submissions on 15/3/2016 as they were not aware of the presence of the PO filed on 11/3/2016.

She finally urged me to overrule the PO and order the application to be heard on merit.

In his rejoinder submission, Mr. Chipeta submitted that the decision in **Mechmar's case** (supra) is still a good law and contended that, the decision in **Leonard Magesa's** case (supra) did not water-down the requirement under Rule 106 (1) of the Rules.

Reacting on the issue that the applicant was served with the PO on 18/3/2016, Mr. Chipeta conceded that this was true. However, he still reiterated his earlier prayer that this

application should be dismissed with costs by invoking Rule 106 (9) of the Rules.

Considering the submissions made by the learned advocates for the parties on the issue of the PO raised by the learned advocate for the 1st Respondent to the effect that this application is incompetent for failure on the part of the applicant to file written submissions within the prescribed time, I am of the view that it is prudent first to examine the provisions of Rule 106(1) of the Rules which state as follows:-

> *"A party to a civil appeal, application or other proceeding, shall within sixty (60) after lodging the record of appeal or filing the notice of motion, file in the appropriate registry a written submission in support of or in opposition to the appeal or the cross-appeal or application, if any, as the case may be."*

Looking at Rule 106 as a whole I agree with what have been stated in the case of **Leonard Magesa** (supra) that the word "shall" used in Rule 106 (1) of the Rules does not necessarily mean mandatory and depends upon the circumstances of each case. This is because, the facts and circumstances which led the Court to use its discretion conferred upon it under Rule 106(9) of the Rules in one case may differ in one way or another in the other case. For example the facts and circumstances leading the Court to use its discretion to dismiss the application in the case of **Mechmar** (supra) is completely different from the facts in the instant case.

In addition to that, in the **Leonard Magesa case** (supra) the Court has extensively analysed as to why the word "shall" used in Rule 106(1) of the Rules does not necessarily mean mandatory. I concur with that decision, because looking at Rule 106 of the Rules as a whole most of its sub Rules use

the word "may" meaning that the Court is given discretion. For example see Rules 106 (9), (10), (18) and (19) of the Rules.

In the instant case, the PO filed by the advocate for the 1st Respondent states that the written submissions were not filed within the time prescribed by the law which is sixty days. On the question as to whether the filing of the written submissions on 15/3/2016 pre-empted the PO filed by the 1st Respondent on 11/3/2016, as conceded by Mr. Chipeta, the applicant was served with the PO on 18/3/2016, therefore the issue that the applicant pre-empted the PO does not arise. This is because the applicant was not aware of the PO until 18/3/2016 when he was served with it. The only question remaining is whether or not the written submissions was filed within the prescribed time.

Looking at the record, it is clear that the notice of motion was filed on 21/12/2015 and the applicant filed his written submissions on 15/3/2016. The period between 21/12/2015

and 15/3/2016 seemed to include various "Court vacation" days. According to Rule 3 of the Rules, the term "Court vacation" is interpreted as follows:-

> "
> *"Court vacation" means a Saturday, Sunday or a public holiday, including the 15th December to 31st January and from the second Saturday before Easter to the first Tuesday after inclusive, and any other day on which the Registry is closed."*

As on the issue of computation of time, Rule 8 of the Rules reads as follows:-

> *"Any period of time fixed by these Rules or by any decision of the Court for doing any act shall be reckoned in accordance with the following provisions:-*

*(a) a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day in which the event happens or the act or thing is done;*

*(b) .....*

*(c) .....*

*(d) Where any particular number of days is prescribed by these rules, or is fixed by an order of the Court, in computing the same, the day from which the said period is to be reckoned shall be excluded, and, if the last day expires on a day when the court is closed, that day and any succeeding days on which the Court remains closed shall also be excluded.*

Whereas Rule 26(2) of the Rules provides as follows:-

*"26(1) .....*

*(2) No business may be conducted during vacations, unless the Chief Justice directs otherwise, except the delivery of judgment and when the matter is shown to be of urgency, the hearing of applications and the taxation of bills."*

Taking into account those provisions in their totality and as pointed out in the case of **Leonard Magesa** (supra) that the purpose of Rule 106 is to speed up the administration of substantive justice, and taking into account that each case has to be determined on its own facts, I therefore cannot invoke Rule 106 (9) of the Rules to dismiss the application. This is for the reason that when counting the number of days to be excluded between 21/12/2015 to 15/3/2016 the applicant has

filed his written submissions within the time prescribed under Rule 106 (1) of the Rules. For that reason and for all that has been stated earlier in this PO, the same is overruled.

Embarking on the main application, the applicant has provided three grounds to explain why it failed to file its application for stay of execution on time. The applicant gave the following grounds:-

1. *The Applicants had not yet filed a Notice of Appeal against the decision dated September 30, 2014 and the same was filed on November 30, 2015 following the grant of an application for extension of time within which to file a Notice of Appeal to the Court of Appeal by the High Court of Tanzania Land Division.*

2. *That in terms of rule 11(2)(b) of the Court of Appeal Rules a Notice of Appeal is a pre-requisite for an application for stay of execution of a decree pending appeal.*
3. *As evidenced in the contents of the Affidavit in support of the Notice of Motion, there is a good cause shown to grant extension of time within which to file the application for stay of execution.*

Those three grounds were further expounded in the affidavit of Gaspar Nyika filed in support of the notice of motion as shown in paragraphs, 10, 11 and 12.

At the hearing of the main application, Ms. Fatma Karume, briefly and concisely submitted that as required under Rule 11 (2)(b) of the Rules, it is a pre requisite condition that a notice of appeal has to be annexed to an application for stay of

execution. She further submitted that, an extension of time to file the notice of appeal has already been granted by the High Court (Mjemmas, J.) in its Ruling in Misc. Civil Application No. 288 of 2015 dated 26/11/2015, where the applicant was ordered to file it within fourteen days from the date of that ruling. Ms. Fatma Karume added that, the notice of appeal has already been filed since 30/11/2015.

As to whether there is good cause shown to grant extension of time, Ms. Fatma Karume contended that, they could not have filed the notice of appeal before Mjemmas, J. issued his ruling on their application. She further added that they were prevented from filing an application for stay of execution without first annexing a notice of appeal in their application. She also contended that, after being granted extension of time to file the notice of appeal and after having filed it, they are now applying for an extension of time to file an application for stay of execution. She therefore urged me to

find that good cause has been established as the applicant was diligent and acted promptly. She then prayed for the application to be granted and costs to abide by the results of the intended appeal.

On his part, Mr. Chipeta, briefly submitted that, the applicant has failed to show good cause to allow the Court grant extension of time. He said, the only reason given that they had no notice of appeal is not enough. He added that even if there was a change of advocates, but the record shows that they even failed to apply for copies of proceedings and judgment. In support of his argument that a change of Counsel is not a good cause to grant extension of time, Mr. Chipeta cited the case of **National Bank of Commerce v. Sadrudin Meghji,** (1998) TLR 503. For that reason, he prayed for the application to be dismissed with costs.

On the part of the advocate for the 2nd Respondent, he simply prayed to adopt what has been submitted by his learned friend, advocate for the 1st Respondent.

In her rejoinder submissions, the learned advocate for the applicant contended that the case of **National Bank of Commerce,** (supra) is distinguishable from the facts in this application as the applicant in this case had not claimed that the delay was caused by change of advocate but as shown in the notice of motion and as it appears at paragraphs 10, 11 and 12 of the affidavit in support of the application.

It is now trite law that, in determining applications for extension of time, this Court has been conferred with a discretion under Rule 10 of the Rules to extend time for doing of any act authorized or required by these Rules whether before or after the expiration of that time upon "good cause" shown. However, categories of what constitute 'good cause'

are not specifically stated as it depends upon the circumstances of each case. See the decision in the case of **Seif Store Limited v. Zulfikar H. Karim,** Civil Application No. 181 of 2013 (unreported). In expounding more on what amounts to "good cause", this Court in the case of **Jumanne Hassan Bilingi v. Republic,** Criminal Application No. 23 of 2013 (unreported) stated as follows:-

> *"... what amounts to good cause is upon the discretion of the Court and it differs from case to case. But basically* ***various judicial pronouncements defined good cause to mean reasonabie cause which prevented the applicant from pursuing his action within the prescribed time."*** (Emphasis added).

In the instant application, among the three reasons for the delay given by the applicant in his notice of motion is that, in terms of Rules 11 (2) (b) of the Rules having a notice of appeal is a pre-requisite for an application for stay of execution. The record shows that immediately after having noticed the anomaly the learned advocate for the applicant acted promptly by filing an application for extension of time to file a notice of appeal before the High Court (Mjemmas, J.) and as shown earlier, the application was granted and the notice of appeal has already been filed since 30/11/2015. That is why they have filed this application.

On my part, I am convinced that the circumstances in this application have shown that reasonable cause was given which prevented the applicant from pursuing

the filing of an application for stay of execution within the prescribed time. The reason shown by the applicant warrants me to exercise my discretion conferred upon me under Rule 10 of the Rules to grant extension of time to file the application for stay of execution. For that reason, I grant the applicant's prayer and further order that the same to be filed within fourteen (14) days from the date of the delivery of this Ruling. Costs of this application to abide by the results of the intended appeal.

**DATED** at **DAR ES SALAAM**, this 15th day of April, 2016

M.S. MBAROUK
**JUSTICE OF APPEAL**

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

Z.A. Maruma
**DEPUTY REGISTRAR**
**COURT OF APPEAL**