

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

CIVIL APPLICATION NO. 102 OF 2016

TANZANIA ELECTRIC SUPPLY CO. LTD..... APPLICANT

VERSUS

ISAAC MINJA RESPONDENT

**(Application for Extension of time from the decision of the
High Court of Tanzania at Dar es Salaam.)**

(Shangwa, J.)

dated the 28th day of February, 2016

in

Civil Case/Appeal No. 21 of 2005

.....

RULING

2nd & 19th September 2016.

MUGASHA, J.A.:

This is an application for extension of time to file an application for revision by notice of motion brought under Rule 10 of the Court of Appeal Rules, (the Rules).The grounds stated by the applicant in the notice of motion are as follows:-

- 1. The applicant's delay was due to delayed of being availed with the judgment and decree of the High Court of Tanzania Dar es Salaam Registry in Civil Case No. 21/2005.*

- 2. The Respondent has already initiated execution proceedings of the said decree in the High Court of Tanzania Dar-es-salaam Registry for executing the said decree.*
- 3. The decree was procured illegally as special damages were never proved.*

The application is supported by the affidavit of **STELLA MODEST RWEIKIZA**, the advocate of the applicant. The application has been challenged through the affidavit in reply of **ISAAC MINJA**, the respondent: To buttress the notice of motion, the applicant has filed written submissions as required under rule 106(1) of the Rules.

A brief background to this application is briefly as follows: The respondent who was a former employee of the applicant resided in a house situate on plot No. 37 Kurasini Minazini Street, in Temeke District within Dar es Salaam region. The said house was rented upon payment of Tshs. 50,000/= which was deducted by the applicant from respondent's monthly salary. On 17/4/2002, while the respondent was in the office, someone called and informed him that some civilians and policemen were removing his properties from his residence and throwing them outside.

Having confirmed that households thrown out included four (4) deep freezers, two (2) fridges with 1,050 liters of milk destroyed the sale of which would have fetched Tshs. 482,500/=, the respondent inquired from Police and he was told that, the exercise was pursuant to executing the Kinondoni District court order. On a further inquiry from the court, he was informed that the eviction Order was in respect of a case between his employer (the applicant) and Mohamed Mohsin in relation to the house co-occupied by the applicant. The court issued a stop order and the respondent was allowed to re-occupy the house. Later, in 2002 – 2003 the respondent was summoned at Temeke Police and charged with Criminal Trespass in that house. This made the respondent to sue the applicant for violating the duty to protect the respondent against the trespass. The suit was concluded in favour of the respondent who was awarded a total sum of Tshs. 30, 472,500/= being specific damages for the spoilt milk and loss of business, lost or damaged properties and a sum of Tshs. 20, 000,000/= being general damages for anguish trauma and pain because of being humiliated as his properties were thrown outside the house.

Dissatisfied, the applicant filed a notice of appeal. On 12/3/2014 the applicant applied to the Registrar seeking to be supplied with certified copies of judgment and decree. The applicant made a reminder on 12/8/2015. However, she was supplied with the decree and the judgment on 23/06/2016. It is against the said backdrop the applicant, brought the present motion applying for extension of time to apply for stay of execution.

At the hearing of the application, the applicant was represented by Mr. Isidory-Nkindi learned counsel and the respondent was represented by Mr. H.H. Nyange learned counsel.

When the application was called on for hearing I had to deal first with a preliminary objection raised by the respondent on the competence of the application on the following ground:

"The applicant has not lodged and annexed to the application a valid notice of appeal against the decree of the High Court dated 28th February, 2014 in Civil Case No. 21/2015. The Notice of Appeal lodged on 13th March, 2014 and annexed to the application is in respect of a decision that was made on 3^d March, 2014."

Mr. Nyange submitted that, since the decree in Civil Case 21/2005 was issued on 28/2/2014 and not on 13/3/2014 as reflected in the notice of appeal which is annexed to this application, the notice of appeal is fatal and it offends rules 83(6) and 11(2) of the Rules. As such, he argued that the application is incompetent and it should be struck out on account of being accompanied by a defective notice of appeal.

On the other hand, Mr. Isidory Nkindi for the applicant submitted that, a notice of appeal is not a pre-requisite in an application for extension of time to apply for stay of execution brought under rule 10 of the Rules. He argued that, Mr. Nyange's attack on the notice of appeal aims at examining the legality of the notice of appeal which is not the domain of a Single judge. He urged the Court to dismiss the Preliminary objection.

In my considered view, under rule 10 of the Rules, the Court has power to extend time for the doing of any act authorised or required by the Court Rules if there is good cause. The rule does not suggest that in the application for enlargement of time, like present one, a notice of appeal is a necessary prerequisite. **(See: PAUL JUMA VS DIESEL & AUTO ELECTRIC**

SERVICES (DAS LTD) AND TWO OTHERS CIVIL APPLICATION NO. 54 of 2007.

(Unreported).

I wish to point out that, the applicant has complied with rule 48(1) and 49(1) of the Rules which require the application of this nature to be by notice of motion supported by affidavit. Moreover, the Rules did not envisage the notice of appeal as a prerequisite document in an application for extension otherwise the Rules could have specifically provided so as it is the case in an application for stay of execution under rule 11 (1) (c) of the Rules. Besides, dwelling on the propriety or otherwise of the notice of appeal is tantamount to examining the appeal which is not the domain of a single Judge. As such, the issue may be conveniently raised and addressed at the opportune moment.

In the circumstances, I agree with the applicant's counsel that a notice of appeal is not necessary in an application for enlargement of time to apply for stay. In other words, even if the notice of appeal was not annexed to the present application, that does not render the application incompetent. However, since the notice of appeal is annexed to this

application it can as well be safely ignored. With all said and done the preliminary objection is misconceived and it is accordingly dismissed.

Reverting to the substantive application, it is the submission of the applicant that, the applicant has demonstrated sufficient cause warranting the grant of the application. In the affidavit and the written submissions the applicant contends that, following the delivery of impugned decision on 28/02/2014, after filing the notice of appeal, on 12/03/2014 the applicant wrote a letter to the Registrar seeking to be supplied with the judgment and the decree. Subsequently, on 12/8/2015 the applicant wrote to the Registrar another letter in reminder but the judgment and the decree were not supplied until on 23rd March, 2016. As such, Mr. Nkindi argued that, the applicant could not have applied for stay of execution within specified time because of the delayed supply of judgment and decree in Civil Case No. 21 of 2005. Relying on the case of **BLUE STAR SERVICE STATION VS JACKSON MUSSETI (1997) TLR 310**, Mr. Nkindi submitted that, since the decree is indispensable in an application for stay of execution, the applicant could not have risked to file an incompetent application for stay which is not

accompanied by the decree and judgment or else the application would have been struck out.

Furthermore, the other ground upon which this application is sought is a complaint on illegality as deposed by the applicant in paragraph 5 of the affidavit which is to the effect that, the respondent did not prove both special and general damages to justify the award of a total sum of Tshs. 50,472,500/=. Therefore, Mr. Nkindi argued that, the said existence of illegality suffices a good cause to warrant the grant of the application.

On the other hand, Mr. Nyange submitted that, on 19/4/2015 the court issued to the respondent the impugned copies of the judgment and decree used by the respondent to file the application for execution which was served to the applicant on 12/08/2015. In this regard, Mr. Nyange argued that, the applicant was in possession of the judgment and decree from the date when she was served with the application for execution. Moreover, in paragraph 10 of the affidavit in reply the respondent has deposed as follows:

"That copies of judgment and decree for use in an application for execution did not have to be only those supplied by the

Court to the applicant. Even copies of the judgment and decree which I annexed to the application for execution and served upon the applicant on 12th August, 2015 could have sufficed. The applicant has no explanation for not using them."

It is very unfortunate that, at the hearing of the application the respondent's deposition was echoed by Mr. Nyange learned counsel who submitted that, the applicant ought to have applied for stay or extension of time, relying on judgment and decree annexed to the application for execution which was served to the applicant on 12/08/2015. He added that, since the applicant was already in possession of the judgment and decree, the applicant should not have written a reminder letter to the Registrar seeking the same judgment and decree. Thus, Mr. Nyange argued that, the applicant has failed to account for the delay between 12/08/2015 when she was served with the execution application and 18/4/2016 when the present application was filed. Therefore, Mr. Nyange contended that, the applicant has not shown good cause for delaying to apply for stay of execution.

However, the complaint on illegality raised by the applicant was not at all responded to by the respondent be it in the affidavit in reply or Mr. Nyange his counsel at the hearing of the application.

From the respective submissions, both counsel are in agreement that the crucial issue for determination is whether the applicant has demonstrated good cause to warrant the Court to exercise its judicial discretion under rule 10 which states:-

"The court may, upon good cause shown, extend 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 expiration of that time and whether before or after the 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."

What amounts to good cause was said by the Court in the case of **TANGA CEMENT COMPANY LIMITED v JUMANNE D. MASSANGA AND AMOS A. MWALWANDA CIVIL APPLICATION NO. 6 OF 2001** where **NSEKELA JA** said:

*"What amounts to sufficient cause has not been defined.
From decided cases a number of factors have to be taken*

into account including whether or not the application has been brought promptly, the absence of any valid explanation for delay, lack of diligence on the part of the applicant”

In **VIP ENGINEERING & MARKETING LIMITED AND 2 OTHERS VS CITIBANK TANZANIA LIMITED, CONSOLIDATED REFERENCES no. 6, 7 and 8 of 2006. (Unreported)** the Court stated:

“It is therefore, settled law that a claim of illegality of the challenged decision constitutes sufficient reason for extension of time under rule 8 regardless of whether or not a reasonable explanation has been given by the applicant under the rule to account for the delay”. (Emphasis supplied).

At the outset, this application for extension of time to lodge an application for stay is hinged on two limbs. **One**, the complaint of illegality and **Two**, an account of delay.

In my considered view, the applicant’s claim on illegality of the impugned decision on the quantam of special and general damages is among the special circumstances constituting sufficient causes for

extension of time under rule 10 of the Rules, regardless of whether or not a reasonable ground has been given to account for the delay. (**VIP ENGINEERING & MARKETING LIMITED AND 2 OTHERS VS CITIBANK TANZANIA LIMITED, CONSOLIDATED REFERENCES**(supra) and the case of **MINISTRY OF DEFENCE, NATIONAL SERVICE VS DEVRAM VALLAMBHIA** (supra).

As to the second limb regarding the reasons for the delay, counsel have taken different positions as to whether the applicants have demonstrated good cause for the grant of the application. While the applicant contends that, the delay to apply for stay of execution was occasioned by the delayed supply of the judgment and decree; the respondent argues that the applicant has not accounted for the delay from 12/8/2015 when she was served with the application for execution which was accompanied with the judgment and decree in Land Case No.21 of 2005.

As earlier reiterated to be unfortunate, Mr. Nyange learned counsel and the respondent suggested that instead of waiting to be supplied with judgment and decree of Civil Case No.21 of 2005 from the court, the applicant could as well have applied for extension of time or apply for stay

of execution relying on the judgment and decree annexed to the respondent's application for execution. The suggestion tantamount to permitting the sourcing the court documents through the backdoor which is highly deplorable and it should not be condoned otherwise, the courts will open flood gates of unauthentic documents and in return the ends of justice will be defeated. As to where a party should source the court documents applied for was addressed by the Court in **TRANSCONTINENTAL FOWARDERS LIMITED VS TANGANYIKA MOTORS (1997) TLR 328** where it was stated that:

" the applicant cannot institute the appeal until such time that she has been supplied with the proceedings applied for.... there was no legal provision requiring him to keep reminding the Registry to forward the proceedings and once rule 83 was complied with the intending applicant was home and dry."

The Court further added that parties should not "short circuit" the prescribed procedures.

In the light of **TRANSCONTINENTAL FOWARDERS LIMITED VS TANGANYIKA MOTORS (supra)**, in the present application since the applicant had applied to be supplied with the decree and judgment from

the Registrar, he was entitled to wait to be supplied with the requisite documents from the court and not from any other source including what was annexed to the application for execution by the respondent. What taxed my mind is that, it took almost ten months for the applicant to obtain the judgment and decree from the date the respondent was served with those documents in May 2015 and after the respondent had filed an application for execution. This is not only irregular but it leaves a lot to be desired since the respondent was issued with judgment and respondent earlier than the applicant who despite applying for the judgment and decree she was supplied ten months later after the respondent was served.

In view of the aforesaid, in the present application **one**, in the absence of the judgment and decree in Civil Case No 21 of 2005, the applicant could not timely apply for stay of execution and **two**, since the judgment and decree were supplied late after expiry of time to apply for stay of execution that constitutes a good cause for the delay. Besides, applicant's relentless effort to follow up the judgment and the decree signifies the applicant's seriousness in pursuing the matter which indeed adds value to the already demonstrated good cause. Besides, but without prejudice, even if there was unaccounted delay, the applicant deserves the

grant of extension of time to apply for stay execution on the complaint of illegality of the decision sought to be stayed which has not been vigorously contested by the respondent.

In view of the aforesaid reasons, I am satisfied that, the applicant has shown good cause warranting the grant of the application. I hereby grant the application to file stay of execution not later than thirty (30) days from the date of this Order. I make no order as to costs.

DATED at **DAR ES SALAAM** this 5th day of September, 2016

S.E.A MUGASHA
JUSTICE OF APPEAL

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


E. Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL