

**IN THE COURT OF APPEAL OF TANZANIA**

**AT DAR ES SALAAM**

**CIVIL APPLICATION NO. 94 OF 2016**

**TANZANIA ELETRIC SUPPLY CO. LTD.....APPLICANT**

**VERSUS**

**MUFUNGO LEONARLD MAJURA & 14 OTHERS .....RESPONDENTS**

**(Application for extension of time to lodge an application for stay of execution from the decision of the High court of Tanzania (Land division) at Dar es Salaam.)**

**(Mansoor J.)**

**Dated the 5<sup>th</sup> day of February, 2016**

**in**

**Land Case No. 55 of 2008**

**RULING**

17<sup>th</sup> May & 17<sup>th</sup> August, 2016

**MWARIIJA, J.A.:**

The applicant has brought this application seeking for extension of time to apply for stay of execution of the decree issued by the High Court (Land division) in Land Case No. 55 of 2008. The application was brought under Rule 10 of the Tanzania Court of Appeal Rules, 2009 (the Rules). It is further supported by the affidavit of Stella Modest Rweikiza, advocate.

Upon service on them of a copy of the application, the respondents did, through their advocate, Mr. Audax Kahendaguza Vedasto, file an affidavit in reply.

On the same date, the learned counsel filed a notice of preliminary objection to the effect that:

*"The Honourable Court lacks jurisdiction to make the order prayed for".*

He also raised the following preliminary points in the alternative: (a) that the Court has not been moved to extend time (b) that the application is superfluous and overtaken by event as the applicant is seeking for extension of time to apply for stay of execution of the decree which has been executed and (c) that the affidavit is incurably defective for being improperly verified and for containing extraneous matters by way of legal arguments, opinion, conclusions and hearsay.

When the application was called on for hearing on 17/5/2016, the applicant was represented by Mr. Richard Rweyongeza and Mr. Owa Msefya, learned advocates while the respondents had the services of Mr. Audax Kahendaguza Vedasto, learned counsel. Since, as stated above, a preliminary objection had been raised, the same had to be determined first.

Submitting on the main ground, that the court lacks jurisdiction to entertain the application, Mr. Vedasto argued that the applicant was granted the first application for extension of time on 23/2/2016. That, he said, was done in Civil Application No. 199 of 2015. The applicant was granted 30 days within which to

apply for stay of execution of the decree. Mr. Vedasto argued that by virtue of the provisions of Rule 10 of the Rules, the Court is only empowered to extend the time limited by the Rules or any decision of the High Court or a tribunal. He stressed that unlike S. 93 of the Civil Procedure Code, [Cap.33 R.E. 2002] (the CPC) which empowers the courts to which the CPC applies to extend the time originally extended by those Courts, Rule 10 of the Rules does not vest the Court with the power of extending time after it has exercised its power under that Rule.

He cited a passage in the book, **Interpretation of Statutes** by Bindra N.S in which at page 354, the learned author states the principle that where a statute enumerates things upon which the statute has to operate, everything else must be excluded from its operation. Mr. Vedasto argued further that even if the court would have jurisdiction, that jurisdiction ceased on 23/3/2016 upon expiry of the period of 30 days granted in Civil Application No. 199 of 2016. He cited the case of **African Trophy Hunting Ltd v. A.G.** [1999] TLR 407 to bolster his argument that since this application was filed on 6/4/2016, two weeks after expiry of the period of 30 days extended by the Court, the Court has ceased to have jurisdiction.

The learned counsel argued also the alternative ground of the preliminary objection consisting of items (a) – (c) stated above. On item (a), he submitted that the Court has not been properly moved because Rule 4(2) (a) of the Rules has not been cited. He argued that the Court should have been moved under that

provision because Rule 10 is not an applicable provision. He cited to that effect the cases of **Muhimbili National Hospital v. Constatine John**, Civil Application No. 52 of 2013 and **Stephen Mafimbo v. Udugu**, Civil Application No. 71 of 2011 (both unreported).

With regard to item (b), Mr. Vedasto argued that the application is superfluous as the same has been overtaken by events. He contended that the decree, whose execution is sought to be stayed, has already been executed. He relied on paragraphs 6 and 15 of the affidavit filed in support of the application.

As to item (c), the respondents' counsel challenged the affidavit arguing that the same has been improperly verified and that it contains extraneous matters. He contended that, in paragraphs 9 and 10, the deponent did not disclose the source of the information sworn to in those paragraphs. He said that the deponent stated the facts which were not of his own knowledge, the same having been informed to her by another person, Aneth Mkinga. Mr. Vedasto argued thus that the deponent ought to have verified that the facts were true according to the information received from the said Aneth Mkinga. Citing the case of **Salima Vuai Foun v. Registrar of Cooperative Societies and Three Others** [1995] TLR 75, the learned counsel submitted that the affidavit is incurably defective.

As to the other paragraphs, the learned counsel argued that paragraphs 12 - 18 are also defective on account that paragraphs 12 and 13 contain opinion, arguments and conclusions while paragraphs 14 – 17 contain opinion and arguments. As to paragraph 18, he argued that the same contains opinion, conclusion and a prayer.

On these arguments, the learned counsel submitted that the defects in the affidavit render the application incompetent because the remaining paragraphs will not sustain it. Relying on the case of **Phantom Modern Transport v. D.T. Dobie**, Civil Reference No. 15 of 2001 and 3 of 2002, he prayed that the application be found to be incompetent.

In response, Mr. Rweyongeza adopted the written submission filed in opposition to the preliminary objection and proceeded to make elaboration thereon. On the main ground, the learned counsel countered the contention that the Court lacks jurisdiction arguing that the objection has been raised out of misinterpretation of Rule 10 of the Rules. According to the learned counsel, the provision empowers the Court to extend not only the time limited by the Rules or by any decision of the High Court or a tribunal but also the period which has been extended by the Court. He relied on the wording of Rule 10 where it is stated that reference in the Rules to any time shall be construed as reference to any extended period. He argued

further that by virtue of that Rule, an application for extension of time may be made before or after expiration of the extended time.

As to item (a) of the alternative ground, Mr. Rweyongeza argued that the proper provision for moving the Court in an application for extension of time is Rule 10 and that since there is that specific provision, there was no need of citing Rule 4(2) (a) of the Rules because that provision applies only where there is no specific provision for moving the Court for that purpose. As to item (b), he argued in his written submission that execution of a decree becomes complete when the decree holder is fully paid. In this case, the learned counsel argued, this has not been done.

On ground (c), Mr. Rweyongeza conceded that paragraphs 16 and 18 of the affidavit contain arguments, opinion, conclusions and a prayer. He argued however that the other grounds contain nothing but facts. With regard to the argument that paragraphs 9 and 10 are defective on the ground that the deponent did not verify that the information was received from another person, Mr. Rweyongeza contended that the information was of the deponent's own knowledge because he received it in her official capacity. The learned counsel relied on the word "knowledge" as defined in the **Oxford Advanced Learner's Dictionary**. The word is defined as:-

*"To come to somebody's attention."*

He argued therefore that the information contained in paragraphs 9 and 10 came into the attention of the deponent's knowledge by virtue of her official position hence a matter which was of her own knowledge.

In rejoinder Mr. Vedasto argued that the wording of Rule 10 relied upon by Mr. Rweyongeza refer to the periods provided in the Rules or by the order of the High Court or a tribunal, not a period extended by the Court. The respondents' counsel stressed thus that the period of 30 days which was extended by the Court is not covered by Rule 10 or any other provision of the Rules.

As to the contents of paragraphs 9 and 10 of the affidavit, he reiterated his submission that since the deponent did not disclose the source of the information, those paragraphs were rendered incurably defective. He maintained that the deponent should have named the person who gave her the information contained in those paragraphs. On the effect of the alleged defects, Mr. Vedasto argued that if paragraphs 9, 10 and 12 – 18 are expunged, the affidavit will not sustain the application. He prayed that the application be dismissed with costs for being incompetent.

The main point of objection raised by the learned counsel for the respondents is based on Rule 10 of the Rules which states as follows:-

*"The Court may, upon good cause shown, extend the time limited by these Rules or by any decision of the High Court or tribunal, for the doing of any act authorized by these Rules, whether before or after the expiration of that time and whether before or after the doing of the act, and any reference in the Rules to any such time shall be construed as a reference to that time as so extended."*

The basis of Mr. Vedasto's main point of objection is that after extending the time limited by the Rules or by the decision of the High Court or tribunal the Court is not Vested with jurisdiction to grant further extension to the extended time. With respect to the learned counsel, in my considered view, that is not the correct position. According to Rule 10, reproduced above, the Court has the power of extending the previously enlarged time. As submitted by Mr. Rweyongeza, under that Rule, the period which may be extended includes the time which has been extended by the Court. This is clear from the wording of that Rule which states **inter alia** that:

*"... any reference in these Rules to any such time shall be construed as reference to that time as so extended."*



Clearly therefore, since reference to the time which the Court may extend under the Rules must be construed as reference to the time as so extended, there is no gain saying that the Court has jurisdiction to grant extension to the extended period of limitation.

Mr. Vedasto cited s. 93 of the CPC with a view of showing that unlike the Rules, the CPC empowers the courts to which that law applies, to enlarge the period of limitation originally fixed or granted by those courts. In my considered view, it would have been absurd if Rule 10 of the Rules did not give such power to the Court. Where for example, the person who was granted extension of time fails, due to any good cause like illness, to file his application, denying him another opportunity of applying for another extension would certainly result into an injustice. For these reasons, I find the main ground of the preliminary objection to be devoid of merit and hereby overrule it.

Having so found, I now turn to consider items (a) – (c) of the alternative ground of the preliminary objection. On item (a), having found that the Court has jurisdiction under Rule 10 to grant extension of time to the previously enlarged time, Rule 4(2) (a) of the Rules is not applicable because that Rule applies where there is no specific provision for moving the court. That point of objection is therefore without merit.

With regard to item (b), I find with respect, that the issue whether or not the application has been overtaken by event cannot be determined in a preliminary objection. The issue whether or not the decree sought to be stayed has been executed is contested by the parties. In paragraph 15 of the affidavit, it is alleged that the decretal sum has not been paid to the decree holder. It is stated that the amount was deposited with the Bank of Tanzania. In paragraph 9 of the affidavit in reply however, it is stated **inter alia** as follows:

*"... With regard to averment in para 6 and also para 15 of the affidavit that the judgment debtor has already paid the decretal sum through the Court in favour of the Respondents, I add that **following that development the process of delivery of that money by the Court to the Decree Holders followed.***

*(Emphasis added).*

Whereas therefore, the applicant's contention is that the decretal amount is deposited in the Bank, the respondents' allegation is that payment to the respondent has been made. It is trite principle that a preliminary objection must be based on a pure point of law. Where a matter requires evidence to be determined, the same cannot be entertained as preliminary objection - See for

example the case of **National Insurance Corporation of (T) Ltd & another v. Shengena Ltd**, Civil Application No. 20 of 2007 (unreported). Since therefore, in this application, the issue whether or not the decree has been executed is contested, item (b) of the alternative ground raised by the learned counsel for the respondents does not qualify to be determined as a preliminary point of law.

On item (c), Mr. Vedasto challenged the competence of the affidavit on two fronts; **firstly**, that the same is improperly verified and **secondly**, that it contains extraneous matters by way of legal arguments, opinion, conclusions and hearsay. The objection as regards the first ground is based on paragraphs 9 and 10 of the affidavit which read as follows:

"9. *That I was given copy of the said notice and on my further follow – up as to the person who received the same, I discovered that on the 23<sup>rd</sup> day of 2016 the applicant was served with a notice to appear for the ruling on the very day at 11.00 AM and the same was received by the office clerk one Aneth Mkinga. Very unfortunately on that date of 23<sup>rd</sup> February, 2016, all the Advocates of the Applicant's company had travelled to Arusha to attend the Tanganyika Law Society continuous Legal Education*

*Training (CLE) and Annual General Meeting, therefore was no appearance for the Applicant during delivery of the ruling...”*

10. *That unfortunately the office clerk fell severely ill and she was treated at Muhimbili National Hospital on 24<sup>th</sup> February, 2016. Thereafter she was exempted from duty, therefore no information as to receiving of the notice was ever communicated to any of the applicant’s advocates, and Office Clerk has been on sick bed since then...”*

In the verification clause, the deponent verified that what she stated in **inter alia**, the two paragraphs above are true to the best of her own knowledge. I agree with Mr. Vedasto that the averment contained in paragraph 10 could not have been from the deponent’s own knowledge because the facts that Aneth Mkinga fell sick on 24/2/2016 and that she consequently went to hospital where she was treated and exempted from duty are matters which could not be known by the deponent without being informed by the said person.

As to paragraph 9 however, the deponent stated the fact which came into her knowledge after she had been given a copy of the notice of hearing and matters which she discovered after making a follow-up on the reasons for failure by

any of the applicant's advocate to appear in Court on the date of the ruling. The deponent averred therefore that the facts which she discovered were true to the best of her knowledge.

Relying on the case of **Salima Vuai** (supra), the learned counsel for the respondent urged the Court to find the affidavit totally defective for want of proper verification. I find, with respect, that the position in that case is distinguishable from the particular facts of the present case. In **that case**, the affidavit had neither the verification clause nor did the deponent specify the source of the information deponed by her. In the present case the verification clause reads as follows:-

*"I STELLA MODEST RWEIKIZA verify that all what is stated above in paragraphs 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17 and 18 are true to the best of my knowledge and what is contained in paragraph 8, I was informed by Hon. Kahyoza the information I verily believe to be true."*

(Emphasis added).

It is clear that the deponent has specified the facts which are true to her knowledge and those which are true to her information. She furthermore, specified

the source of that information which she verily believed to be true. The fact that paragraph 10 of the affidavit is defective does not, therefore, render the verification clause defective.

With regard to paragraphs 16 and 18, as conceded by Mr. Rweyongeza, the same are defective because they contain arguments, opinion, conclusion and a prayer. In paragraph 16, the deponent states for example, that if the application is not granted, the appeal will be rendered nugatory. That is an opinion and conclusion. In paragraph 18, she urges the Court to consider the interest of justice in determining the application. That is not a matter of fact to which an affidavit must be confined. It is a prayer.

Having read the other paragraphs complained of by the learned counsel for the respondents, paragraphs 12 – 15 and 17, I agree that the same are also defective. In paragraph 12, the deponent concluded that the application was made without undue delay. As to paragraph 13, she states that there are paramount legal issues requiring the intervention of the Court and that such legal issues need to be considered so as to safeguard the public property and interest. In paragraph 14, it is stated that the learned trial judge committed an irregularity for failing to evaluate the plaintiff's evidence. These are legal arguments and conclusions.

Paragraphs 15 and 17 are also not confined to matters of facts. In paragraph 15 the deponent states **inter alia** that the appeal stands greater chances of success while in paragraph 17, she states that the amount which the respondents seek to be paid is a public money which needs to be protected. As submitted by Mr. Vedasto, these statements are arguments, opinion and conclusions.

Having found that paragraphs 10 and 12 – 18 are defective, the issue is whether as a result of those defective paragraphs of the affidavit, the application has been rendered incompetent. According to the case of **Phantom Modern Transport (1985) Limited** (supra) cited by Mr. Vedasto, where the defective parts of the affidavit are inconsequential, the same can be expunged or overlooked leaving the substantial paragraphs intact and the Court can proceed on it. In this application, when paragraphs 10 and 12 – 18 are expunged, the Court can proceed to act on the remaining paragraphs because the same sustain the application. This being an application for extension of time, what the applicant is required to establish is a good cause for the delay. Where the affidavit contains averments on the facts explaining the cause for the delay, that part of the affidavit is substantial and the same sustains the affidavit. I find that paragraphs 1 – 11, particularly paragraph 9 in which the deponent states the cause for the delay sustains the affidavit and thus the application is competent.

On the basis of the foregoing reasons, I find the preliminary objection to be devoid of merit. The same is hereby dismissed. Costs shall abide the outcome of the application.

**DATED** at **DAR ES SALAAM** this 10<sup>th</sup> day of August, 2016.

A.G. MWARIJA  
**JUSTICE OF APPEAL**

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



E.F. Fussi  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**