

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

CIVIL APPLICATION NO. 94 OF 2016

TANESCOAPPLICANT

VERSUS

MUFUNGO LEONARD MAJURA.....1st RESPONDENT
ELIKIRA FANUEL KWEKA..... 2nd RESPONDENT
KAMBWIRI OMARI SHAIBU.....3rd RESPONDENT
MOYA JOHN CONRAD..... 4th RESPONDENT
SALIMA RAJABU KIZIGO.....5thRESPONDENT
MRS ABINIEL SALATIEL MBALA..... 6th RESPONDENT
IRENE BARAZA SALEHE.....7th RESPONDENT
GALIO BANGO KISESA.....8th RESPONDENT
ALLY MWALIMU SHOMVI..... 9th RESPONDENT
OMARI SALUM NGALOMBA..... 10th RESPONDENT
NAKUM ANAEL PALLANGYO..... 11th RESPONDENT
NGIMBA MARY PAUL..... 13th RESPONDENT
MAJOR MUSA SELEMANI KINGAI.....14th RESPONDENT
OMARI RAJABU REMMY..... 15th RESPONDENT
MASENGEDO JUMA MGWENO..... 16th RESPONDENT

(Mansoor, J.)

(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)

in

Land Case No. 55 of 2008 High Court Land Division and
Civil Application No. 195 of 2015 Court of Appeal

RULING

03rd May, & 05th June, 2017

MWANGESI, J. A.:

The application at hand has been made under the provision of Rule 10 of the Court of Appeal Rules 2009, (the Rules) whereby, by way of motion, the applicant is moving the Court to grant extension of time

within which it can apply for stay of execution of the decree of the High Court Land Division in respect of Land Case No. 55 of 2008. The application has been supported by an affidavit that has been sworn by Stella Modest Rweikiza. Additionally, in terms of the provision of Rule 106 (1) of the Court of Appeal Rules, the applicant has lodged a written submission in amplification of the application.

On their part, the respondents have filed a joint affidavit in reply to the application, which has been sworn by Audax Kahendaguza Vedasto, who happens to be their learned counsel. The learned counsel for the respondents has as well filed a written submission in reply to the written submission by the applicant. When the application was called on for hearing, Messrs Richard Rweyongeza and Majura Magafu learned counsel, did enter appearance for the applicant, whereas Mr. Audax Kahendaguza Vedasto learned counsel, did enter appearance for all respondents. In his oral submission to amplify the application, Mr. Richard Rweyongeza learned counsel, has in the first place requested the Court to wholly adopt the sworn affidavit of Stella Modest Rweikiza, which has been lodged in support of the application as well as the written submission that was filed on the 1st June 2016 as part of his submission. He has however, requested the Court to take note of the paragraphs

which were expunged by the Court (Mwarija J.A.), in the ruling that was delivered on the 18th August 2016 whereby, paragraphs 10 and 12 to 18 of the sworn affidavit were expunged. In the same vein, he has asked the submission in respect of such expunged paragraphs of the affidavit, to be as well expunged from the record of the Court.

Submitting on the application which is before the Court, the learned counsel has prefaced the submission with the background of the matter leading to the application at hand. He has argued that, it originates from the judgment and decree in Land Case No. 55 of 2008 between the respondents herein who were the plaintiffs, and the applicant who was the defendant, which was delivered on the 05th February 2015 (Mansour J.). According to the judgment, the respondents were awarded by the court a total amount of TZs 945,266,500/=, which they were claiming from the applicant being balance of compensation for their land situated in Guluka Kwalala in Ukonga area within Dar Es Salaam City, intended to be acquired by the applicant for implementation of its Dar Es Salaam electrification upgrade projects known as TEDAP. The applicant being aggrieved by the whole decision of the trial Court, did lodge a notice of appeal and asked from the court to be supplied with copies of judgment, decree and proceedings for processing the appeal. The applicant did

further apply for extension of time to apply for leave to appeal that is, Miscellaneous Land Application No. 59 of 2015, which was struck out on the 26th February 2016 and later re-filed vide Miscellaneous Land Application No. 224 of 2016, which is still pending in Court.

It has further been contended by the leaned counsel for the applicant that, the applicant did file an application in this Court that is, Civil Application No. 199 of 2015 for extension of time to apply for stay of execution of which, its ruling granting the sought extension for thirty (30) days to file the application was delivered on the 23rd February 2016. The applicant did however, fail to lodge the application for stay within the period of thirty days which was extended by this Court, a thing that has prompted it to present the current application for another extension of time to file the application for stay of execution.

The account for the delay by the applicant in lodging the application for stay of execution according to the learned counsel for the applicant, is contained in paragraph eight, nine and ten of the affidavit of Stella Modest Rweikiza in support of the application, which are worded as hereunder that is to say:

8. *That on the 31st March 2016, while making a follow up and inquiry at the Court of Appeal, as to when the ruling in Civil Application No. 199 of 2015 would be delivered, I was informed by Honorable Kahyoza that, to his knowledge the ruling had already been delivered and that, notice of delivery of the ruling was served and received by the applicant.*
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 23rd February 2016, the applicant was served with a notice to appear for the ruling on the very same day at 1100 hours, and the same was received by the Office clerk one Aneth Mkinga. Very unfortunate on that day of 23rd February 2016, all the advocates of the applicant's company had travelled to Arusha to attend the Tanganyika Law Society (TLS) continuous legal education trainings (CLE) and annual general meeting and therefore, there 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 the 24th February 2016. Thereafter, she was exempted from duty*

therefore information as to receiving of the notice was never communicated to any of the applicant's advocates. And the Office clerk has been on a sick bed since then.

In the view of the learned counsel for the applicant, the reasons contained in the affidavit of Stella Modest Rweikiza constituted sound grounds in terms of the provision of Rule 10 of the Court of Appeal Rules and that, this Court be pleased to grant the sought extension of time. With regard to the affidavit in reply that has been lodged on behalf of the respondents, it has been the submission of Mr. Richard Rweyongeza learned counsel that, it is only paragraph 10 of the affidavit in reply, that has attempted to resist the application. However, in the same there has been a general evasive statement that cannot be termed as opposition to the application so to speak. And as regards the written submission that has been filed by his learned brother, in the view of the learned counsel for the applicant, the same has caused some difficulty in comprehending it in that, in some instances his learned brother has indicated that, execution has already been concluded, while at the same time he has argued that, stay of execution has been granted. In his understanding, such contention by his learned brother is not correct because, there has never been any order by this Court for stay of

execution of the matter at hand. Whatever might have been the case, he has requested this Court to grant the extension of time which has been sought in this application with costs.

As earlier hinted, the respondents have filed a joint affidavit in reply that has been sworn by their learned counsel as well as a written submission in reply in compliance with the provision of Rule 106 (8) of the Court of Appeal Rules. As complained by the learned counsel for the applicant, the written submission by the learned counsel for the respondents has been a bit difficult to comprehend. It has been stated by the learned counsel for the respondents in his submission that, the instructions which he has from his clients is that, he should neither submit to oppose the application nor support the application. This is from the fact that, neither order of the Court, will change the position of the parties. Thereafter, the learned counsel for the respondents has continued to make submissions in issues which in my view are not relevant to the application at issue for extension of time under Rule 10 of the Court of Appeal Rules. In any event, what stands for my deliberation is the issue as to whether the application by the applicant for extension of time to file the application for stay of execution is founded on sound reasons

Nonetheless, before I embark on considering the merits of the application which is before me, I would wish to make some comment on the complaint which has been raised by the learned counsel for the respondents in his submission to the effect that, there has been some interference by the administrative wing of the Judiciary to the conduct of the suit concerning his clients. Being a seasoned lawyer I believe he is aware that, judicial issues and administrative issues are two distinct matters, which are treated independently. If there is any genuine complaint concerning the administrative wing of the judiciary in respect to the issue concerning his clients, it has to be pursued through the proper channel of administration. And since the matter before me is a judicial issue, I will handle it in the way it deserves. I would therefore proceed to consider the matter before me which is an application for extension of time. The issue for deliberation is whether the applicant has advanced sound grounds to convince the Court to grant the sought relief for extension of time.

The provision that confers the Court with powers to extend time is Rule 10 of the Court of Appeal Rules which bears the following wording that is,

"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 the 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 as so extended."

In line with what has been stipulated in the above quoted provision of law, what has to be considered by the Court before it can grant or refuse an application for extension of time is **good cause**. And what constitutes good cause has never been defined in any provision of law. The only available guidance is from case law. In the case of **the Regional Manager, Tanroads Kagera Vs Ruaha Concrete Company**, Civil Application No. 96 of 2007 (unreported), this Court had an occasion of discussing **sufficient cause**, contained in Rule 8 of the repealed Court of Appeal Rules, 1979, which is similar to **good cause** contained in Rule 10 of the current Court of Appeal Rules, 2009, when it stated thus:

*"What constitutes **sufficient cause** cannot be laid down by any hard and fast rules. This must be determined by reference to all the circumstances of each particular case. This means that the applicant must place before the Court material which will move the Court to exercise its judicial discretion in order to extend the time limited by the rules."*

There was yet the decision in the case of **Lyamuya Construction Company Limited Vs Board of Trustees of Young Women's Christians Association of Tanzania**, Civil Application No. 2 of 2010, where the Court moved further by establishing some basic conditions which have to be met before the Court can hold that, there was indeed sufficient cause. These conditions were named to be:-

- (a) The applicant must account for the delay for the period of delay.*
- (b) The delay should not be inordinate.*
- (c) The applicant must show diligence, and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take.*

(d) If the Court feels that, there are other reasons, such as the existence of a point of law of sufficient importance, such as the illegality of the decision sought to be challenged.

My task in line with what was held in the above cited decisions is to gauge as to whether in the instant application, there has been advanced anything material to move the Court to grant the sought extension of time. The material that has been placed before me is the affidavit that has been sworn in support of the application. According to the contents of paragraphs 8, 9 and 10 of the affidavit of Stella Modest Rweikiza as quoted above, which carry the application, it has been alleged that, the delay was essentially occasioned by Aneth Mkinga, who upon receiving the ruling fell sick and thereby, cutting off communication between what had transpired in Court and the learned counsel for the applicant, who were absent on the date when the ruling was read. The question that crops thereafter is whether the ground in the way it has been presented is sound.

My reading of the reasons for the delay as contained in the said three paragraphs of the affidavit sworn by Stella Modest Rweikiza as supported by the sick chit which Aneth Mkinga used to get treated at Muhimbili National Hospital that has been annexed as annexure 6 to the

affidavit, I have failed to get convinced that, it is indeed a sound ground. The ruling was delivered on the 22nd day of February 2016, the sick chit of Aneth Mkinga is of the 1st March 2016 whereby, she was given an excuse from duty (ED) for 7 days meaning that, it was to last up to the 8th March 2016. Thereafter, nothing has been said about the remaining 24 days, until on the 01st day of April 2016, when Stella Modest Rweikiza alleges to have obtained the copy of the ruling as per paragraph 11 of her affidavit. The law is settled that, a party applying for extension of time, has to account for each day of the delay. See: **Phiri M. K. Mandari and Others Vs Tanzania Ports Authority** Civil Application No. 84 of 2013 (unreported). The failure by the applicant to account for the 24 days is an indication that, it has not been diligent enough to prosecute its application, which in turn, is a sign of apathy and sloppiness. To that end, I find that the applicant has failed to establish good cause for the delay.

There has also been another line of argument by the applicant for the sought extension of time, which has been pegged on the merit of the impugned decision. It has been argued in the written submission amplifying what has been signified in paragraph 3 of the affidavit that, the decision sought to be expunged was not legally reached at as the

amount awarded by the Court to the respondents was not established at all.

The position of our law in a situation where among the grounds for extension of time is a complaint on illegality of the decision intended to be impugned was stated by this Court in the case of **VIP Engineering and Marketing Limited and Two Others Vs Citibank Tanzania Limited**, Consolidated Civil Reference No. 6, 7 and 8 of 2006, when it held thus:

"It is settled law that a claim of illegality of the challenged decision constitutes sufficient reason for extension of time under Rule 8 (now Rule 10) of the Court of Appeal Rules regardless of whether or not a reasonable explanation has been given by the applicant under the Rules to account for the delay."

The above stance is not confined to our own jurisdiction only. The same could also be noted in the decision of the Supreme Court of Uganda in the case of **Boney N. Katatumba Vs Waheed Karim**, Civil Application No. 27 of 2007 (unreported), which was quoted with approval by this Court in the case of **Prosper Baltazar Kileo and Another Vs**

Republic, Criminal Application No. 1 of 2010 (unreported), wherein Mulega JSC in an attempt to define **sufficient cause** had this to say that is:

*"Under Rule 5 of the Supreme Rules, the Court may, for sufficient reason, extend the time prescribed by the Rules. What constitutes sufficient reason is left to the Court's unfettered discretion. In this context, the Court will accept either a reason that prevented an applicant from taking the essential step in time, or other reason why the intended appeal should be allowed to proceed though out of time. For example, an application that is brought promptly will be considered more sympathetically than the one that is brought after unexplained delay. **But even where the application is unduly delayed, the Court may grant extension of time, if shutting out the appeal may appear to cause injustice.**"*

[Emphasis supplied]

Notwithstanding the fact that, the applicant in the instant application has failed to sufficiently account for the delay in lodging the application, the fact that, there is a complaint of illegality in the decision

intended to be impugned, in line with what was held in the above quoted decisions, it suffices to move the Court to grant the extension of time so that, the alleged illegality can be addressed by this Court. In that regard, the application for extension of time to apply for stay of execution is hereby granted. I would make no order as to costs.

Order accordingly.

DATED at **DAR ES SALAAM** this 01st day of June, 2017.

S.S. MWANGESI
JUSTICE OF APPEAL

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



A handwritten signature in black ink, appearing to read "A.H. Msumi".

A.H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL