

IN THE COURT OF APPEAL OF TANZANIA
AT ZANZIBAR

(CORAM: MBAROUK, J.A., MKUYE, J.A., And WAMBALI, J.A.)

CIVIL APPLICATION NO. 511/15 OF 2018

AMINA KARIM JETHA.....APPLICANT

VERSUS

**WAKF AND TRUST PROPERTY
COMMISSION (As Administrator of the
Estate of the Late ALI SALIM ALI)RESPONDENT**

**(Application for stay of execution against the judgment
and decree of the High Court of Zanzibar,
at Vuga)**

(Issa, J.)

**dated the 7th day of March, 2017
in
Civil Case No. 65 of 2016**

RULING OF THE COURT

11th & 14th December, 2018

WAMBALI, J.A.:

This is an application for stay of execution lodged by the applicant, Amina Karim Jetha. The application has been preferred under the provisions of Rules 11(3), (4), (5), (6) and (7); 48(1) and 60(2)(b) of the Tanzania Court of Appeal Rules, 2009 (the

Rules) through a notice of motion supported by the affidavit deposed by Amina Karim Jetha.

The applicant seeks an order of the Court for stay of execution of the decision of the High Court of Zanzibar in Civil Case No. 65 of 2016.

Upon being served with the application, the respondent through the services of Mr. Haji Suleiman Tetere, learned advocate, reacted by lodging a notice of preliminary objection comprising two points. First, that the application for stay of execution is accompanied by a defective notice of appeal which purports to be against "judgment and decree" which did not exist instead of "ruling and drawn order" as decided by the High Court. Second, that the applicant's notice of motion is hopelessly time barred.

During the hearing of the application, Mr. Salim Mnkonje, learned advocate appeared for the applicant, while Mr. Haji Suleiman Tetere assisted by Mr. Salum Bushiri, both learned advocates represented the respondent.

Addressing the Court on the preliminary objection, Mr. Mnkonje conceded to the fact that the application makes reference to “judgment and decree” instead of a “ruling and drawn order” of the High Court. Mr. Mnkonje deeply regretted for the defects as this Court in its ruling dated 7th December 2017 in respect of Civil Appeal No. 177 of 2017 resolved the matter.

In the circumstance, the learned advocate for the applicant, urged the Court for the interests of justice, to allow the applicant to effect the necessary amendments in the notice of motion and the affidavit which have made reference to “judgment and decree” instead of “ruling and drawn order”. He also prayed that each party should bear its own costs.

On the other hand, Mr. Mnkonje urged us to find that the application is in time as it was lodged within 14 days prescribed by the Rules. He explained that the applicant was served with the notice on 31st October, 2018 by the Registrar of the High Court to appear on 14th November, 2018 to show cause why execution should not proceed. In response, the applicant lodged this application on 13th November, 2018, Mr. Mnkonje emphasized. He

argued therefore that the application was lodged within 14 days prescribed by Rule 11(4) of the Rules as amended by GN No. 362 of 2017. Mr. Mnkonje thus contradicted the statement of the respondent contained in the affidavit in reply that the applicant had knowledge of the pending execution since December, 2017. In the event, he implored us to overrule this point of objection.

In his reply, despite welcoming the concession of Mr. Mnkonje on the defects contained in the notice of motion and the affidavit of the applicant, Mr. Teterere urged us to strike out the application with costs as the requested amendments by the applicant are not tenable. He further stated that the applicant is employing delaying tactics to deny the respondent the benefits granted in the ruling of the High Court.

On the issue of the application being time barred, Mr. Teterere was firm that the applicant had knowledge of the impending process of execution in the High Court and that is why he managed to file an application for stay of execution in that court on 8th January, 2018 which was struck out. Mr. Teterere emphasized that Rule 11(4) of the Rules provides that an application for stay of

execution must be lodged by the applicant within fourteen days of service of the notice of execution on the applicant or from the date he was made aware of the existence of an application for execution. Mr. Teterere thus urged us to find that the application is incompetent for being time barred and strike it out with costs.

Having heard the counsel for the parties, we wish to start with the issue of time limit which has been supported by the counsel for the respondent and resisted by the counsel for the applicant.

To determine this matter, we need first to make reference to the provision of Rule 11(4) of the Rules. It provides as follows:

"11(4) An application for stay of execution shall be made within fourteen days of service of the notice of execution on the applicant by the executing officer or from the date he is otherwise made aware of the existence of an application for execution."

Admittedly, a close reading of the above quoted provision, shows that two situations are provided within which an application for stay of execution can be made. First, within fourteen days of service of the notice of execution on the applicant by the executing officer. Second, from the date the applicant is otherwise made aware of the existence of an application for stay of execution.

In the present matter, we are settled in our mind that it is the first situation which apply. The record of the application leaves us in no doubt that the applicant on 31st October, 2018 received and duly acknowledged the notice of appearing before the Registrar of the High Court on 14th November, 2018 for the impending execution processes. We note that the applicant lodged this application on 13/11/2018, which was within fourteen days provided by Rule 11(4) of the Rules. Consequently, the applicant could not have lodged the application before she was served with the notice by the executing officer. Indeed, as stated by Mr. Mnkonje, the applicant could not have legally lodged an application in this Court in December, 2017 when she is taken to have been

aware of the impending process of execution as this Court had on 7th December, 2017 struck out Civil Appeal No. 177 of 2017. We entertain no doubt that it is the ruling of this Court which prompted and necessitated the applicant to apply for extension of time before the High Court within which to lodge a fresh notice of appeal to appeal against the decision of the High Court. It is acknowledged that the requisite fresh notice of appeal was lodged by the applicant on 3rd April, 2018.

In the event, we find, with respect, the forceful argument of Mr. Tetere for the respondent on the application being time barred lacking merit. We therefore overrule the preliminary objection on time limit.

With regard to the reference of "judgment and decree" instead of "ruling and drawn order" in the application by the applicant, we need first to make the following remarks. Our close scrutiny of the record of the application indicates that it is the notice of motion and the affidavit of the applicant which repeatedly make reference to "judgment and decree" instead of "ruling and drawn order". The notice of appeal which was

lodged by the applicant on 3rd April 2018 does not contain that defect as argued by Mr. Tetere. We take note of the fact that the record of the application contain both the notice of appeal which was struck out together with the appeal by this Court on 7th December 2017 and the current notice of appeal referred above. We therefore, with respect think that Mr. Tetere in his first point of preliminary objection wrongly made reference to the fact that the application is accompanied by a defective notice of appeal which make reference to "judgment and decree" instead of "ruling and drawn order".

Nevertheless, as we have observed above, what is apparent is that the defects are contained in the notice of motion and the affidavit of the applicant as conceded by Mr. Mnkonje.

In the circumstances, we uphold the objection on the basis that the application is incompetent for containing defects both in the notice of motion and the supporting affidavit.

In the event, the proper cause for us to do, which we hereby do, is to strike out the application for being

incompetent. Nevertheless, having regard to the circumstances surrounding the dispute between the parties, and taking cognisance of the need to have the dispute of the parties settled by the Court, we invoke the provision of Rule 4(2)(b) of the Rules and grant leave to the applicant to lodge a fresh application before the Court within fourteen days from the date of this ruling. We further order that the respondent is entitled to costs. It is so ordered.

DATED at ZANZIBAR this 13th day of December, 2018.


M. S. MBAROUK
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

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




B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL