

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

**CIVIL APPLICATION NO. 392/01 OF 2017**

**MMI STEEL INDUSTRY LIMITED.....APPLICANT**

**VERSUS**

**MOHAMED SAID KATOTO .....RESPONDENT**

**(Application for stay of execution of the Judgment and Decree of the High  
Court of Tanzania**

**(Dar es Salaam Registry) at Dar es Salaam)**

**(MKASIMONGWA,J.)**

**dated the 27<sup>th</sup> day of December, 2016**

**in**

**Civil Case No. 127 of 2012**

.....

**RULING**

31<sup>st</sup> October, 2018 & 30<sup>th</sup> April, 2019

**LILA, J.A.:**

In this application the applicant is seeking for extension of time within which to file an application for stay of execution of the judgment and decree of the High Court dated 27<sup>th</sup> day of December, 2016 in Civil Case No. 127 of 2012.

The application was brought under Rule 10 and 48(1)(2) of the Tanzania Court of Appeal Rules, 2009 (the Rules) and was filed on 4<sup>th</sup> September, 2017 and is supported by the affidavit of Sylvivatus Sylvivanus Mayenga, learned advocate for the applicant.

The Applicant has enlisted eight grounds in the notice of motion upon which the application is based but, substantially, they can be condensed into three namely; **one**, the judgment of the High Court was delivered in their absence and without notice, **two**, they were served with the copy of decree late and, **three**, there is an illegality committed by the high Court by entertaining a matter it had no jurisdiction.

The applicant also filed written submissions in support of the application. On the rival side, the respondent neither filed an affidavit in reply nor written submission to controvert the affidavit in support of the application and the written submission in support of the application, respectively.

When the application was called on for hearing before me on 3/10/2018, only the applicant entered appearance through Mr. Sylvanus Sylvanus Mayenga, learned advocate, whereas the respondent did not enter appearance despite being duly served with the notice of hearing through Msemwa and Company Advocates on 20/9/2018. On that account, Mr. Mayenga urged the Court to proceed with the hearing of the application *ex parte* under Rule 63(2) of the Rules. After satisfying myself that the respondent was duly served, I granted the prayer and the hearing of the application proceeded in the absence of the respondent.

Mr. Mayenga adopted both the contents of the affidavit and written submission in support of the application without more and he urged the Court to grant the application. He did not, however, press for costs.

Expounding on the basis of the application in the written submission, the applicant first explained the legal position obtaining in grant of an application for extension of time by making reference to Rule 10 of the Rule which requires a party applying for extension of time to show good cause for the delay and that the grant of such application is at the discretion of the Court. He cited the Court's unreported cases of **Kalunga and Company, advocates v Nationa Bank of Commerce Limited**, Civil Application No. 124 of 2005, **Said Issa Ambunda v Tanzania Harbours Authority**, Civil Application No. 42 of 2005 and the persuasive decision in the case of **Castellow versus Somerset County Council** (1993) All E. R. 952, to bolster his assertion.

Submitting in respect of ground one, the applicant stated that the judgment was delivered without issuing notice to the parties and therefore denying the parties their right to be notified of the date of delivery of the

had no jurisdiction. That, the applicant insisted, constituted good cause for extending time and the case of **The Principal secretary, Ministry of Defence and National Service v Deuram P. Valambhia** [1992] TLR 186 was cited in support of his assertion.

In sum, the applicant urged the application be granted, but, as indicated above, the applicant did not press for costs.

Before I embark into the determination of the application, I find it apposite to expound the law governing the grant of applications of this nature. As afore stated the application has been brought under Rule 10 of the Rules. That Rule provides:-

*"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 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 so extended."*

It is worth noting here at the very outset that the present application was filed before the Rules were amended by Government Notice No. 362 of 2017 wherein the time for lodging an application for stay of execution was specifically provided to be within fourteen days of the service of the notice of execution. Prior to, the position was that such an application must be filed within sixty days of the delivery of the decision sought to be stayed, as rightly submitted by the applicant.

In the present application, the applicant averred in paragraphs 3, 4 and 5 of the affidavit in support of the application that delivery of the judgment was set to be 14/11/2016 but the same was delivered on 27/12/2016 without notice to the parties which fact came to his knowledge on 16/2/2017. As this assertion was not controverted by the respondent following failure to file an affidavit in reply, I take it to be true. Definitely, as rightly submitted by the applicant, time to file an application for stay of execution had already lapsed.

I am agreed with the applicant that it is a legal requirement that an application for stay of execution must be accompanied with the decree or order sought to be stayed [See **Ahmed Athumani Mganga and 2 Others v Hatibu Abdallah**, Civil Application No. 136 of 2004

(Unreported), **Consolidated Holding Corporation v JIT Finance Ltd, Registered Trustees of Tanganyika national Parks and Joseph Laizer** (Supra)]. So without being supplied with the decree the applicant could not apply for stay of execution. In this application the applicant submitted that the decree was availed to him on 22/8/2017. This being the case the applicant was therefore justified not to have had filed the application for stay of execution by that date.

As demonstrated above, the present application was filed on 4/9/2017. By a simple arithmetic calculation, it took less than fifteen days from the date he was served with the copy of the decree, for the applicant to file the present application. The application was, therefore, promptly filed.

The applicant has also raised an illegality as a ground for applying for extension of time to apply for stay of execution. Logically, if execution proceeds before the appeal is determined, the outcome of the appeal, if it will be in favour of the applicant, will be rendered nugatory. The alleged illegality is that the High Court heard and determined a matter for which the pecuniary claim exceeded the mandate of the High Court. Again, I am at one with the applicant that a claim of illegality constitutes good cause

for the grant of an application for extension of time. The Court has maintained that stance in a number of decisions. (See **VIP Engineering and Marketing Limited, Tanzania Revenue Authority and Liquidator of Tritel (T) Ltd v CITIBANK Tanzania Limited**, Consolidated Civil Reference No. 6, 7 and 8 of 2006 and **Murtaza Mohamed Raza Virani v Mehboob hassanali Versi**, civil Application No. 168 of 2014 (Unreported) and **Principal Secretary Ministry of defence and National Service v Deuram Valambhia** (Supra). In all those decisions the Court categorically stated that where the application raises serious questions of illegality of the impugned decision, there is good cause for extension of time under rule 10 of the Rules. For instance, in the case of **Murtaza Mohamed Raza Virani's** case (Supra), the Court explicitly stated that:-

*" Having given due consideration to the submissions of the parties, I am satisfied that as the application raises serious questions of illegality of the challenged decision, there is good cause for extension of time under Rule 10 regardless of whether or not a reasonable explanation to*

*account for the delay has been given. I therefore allow  
the application."*


As alluded to above, the application raises a question of pecuniary jurisdiction of the trial court. This is a serious matter which need be addressed by the Court. This, therefore, constitutes good cause for granting the application.

In fine, the application is hereby granted. The applicant is given thirty (30) days of the delivery of the ruling within which to lodge an application for stay of execution. Each party to bear its own costs.

**DATED at DAR ES SALAAM** this 17<sup>th</sup> day of April, 2019.

S. A. LILA  
**JUSTICE OF APPEAL**

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

  
B. A. MPEPO  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**