

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CIVIL APPLICATION NO. 49/01 OF 2018

TANZANIA CIGARETTE COMPANY (TCC) APPLICANT

VERSUS

HASSAN MARUA RESPONDENT

(Originating from the High Court of Tanzania (Labour Division)

at Dar es Salaam)

(Hon. Mashaka, J)

dated the 30th day of June, 2015

in

Application for Revision No. 154 of 2014

RULING

3rd April & 27th May, 2019

KOROSSO, J.A:

Before me for consideration and determination, is an application made by way of notice of motion and supported by the affidavit sworn by Godson Kiliza, the Director of Legal Affairs and Company Secretary of the applicant. The application is passaged under Rule 10 of the Tanzania Court of Appeal Rules, 2009, as amended by Government Notice No. 362 of 2017 (henceforth to be referred to as "the Rules"). The relief sought in the application is extension of time within which the applicant may file an application for Stay

of Execution of the Judgment and decree of the High Court Labour Division at Dar es Salaam (Hon. Mashaka, J), dated 30th June 2015 in Revision No. 154 of 2014.

The application, as expounded in the notice of motion filed by the applicants, and is premised on the following grounds: First, that the delay to lodge an application for Stay of Execution has been occasioned by the decision of the Deputy Registrar, Hon. Malewo of the High Court Labour Division in Execution Number 319 of 2015 dated 7th September 2016 adjourning execution pending determination of an intended appeal before the Court of Appeal of Tanzania. That the Deputy Registrar, Hon. Lyimo who succeeded Hon. Malewo, vacated the previous order for adjournment of execution, pending determination of the appeal and also issued a garnishee *order nisi*. Thus leading to the situation which has moved the applicants to file the current application, since as expounded by the applicants, in the absence of the stay order, the High Court Labour Division is proceeding with the execution.

The reasons for delay in filing the application for stay of execution and thus seeking this Court to extend time to file the same as expounded in paragraph 22 of the affidavit supporting the application, are that this was

occasioned by the changed procedures at the High Court of Tanzania Labour Division, that is, the orders by Hon. Malewo DR, of adjourning execution process pending determination of the Appeal filed and the decision of Hon. Lyimo DR who succeeded Hon. Malewo, to vacate the said Order and proceeding with execution. The applicant submitted various decisions of this Court to justify their application and prayers.

On the part of the respondents, in their affidavit in reply, affirmed by Mashaka Khalfan Ngole, learned advocate for the respondents, and filed submissions, contend that the grounds advanced by the applicants for delay in filing an application for stay of execution in time do not have any material subsistence to warrant the orders sought. The respondents submitted that the applicant have not demonstrated sufficient cause to warrant the Court to grant extension of time as sought by the applicant in line with the requirements of Rule 10 of the Tanzania Court of Appeal Rules. The respondents implored the Court not to take into consideration explanations and reasons for the delay to file in time application for stay of execution provided by the applicants. Arguing that the advanced reasons by the applicants, do not augur well with the position of this Court as set in various decisions, including ***Michael Lessani Kweka vs. John Eliafye*** (1997)TLR

152 and ***Tanzania Electric Supply Company Limited and 3 Others vs Independent Power Tanzania Limited***, Consolidated Civil Appeal No. 19 and 27 of 1999(2000)TLR 324, (a case also cited by the applicants).

Before we proceed further, I find it important to put forth a brief background to the matter as discerned from the records. The respondent is a former employee of the applicant terminated from employment. A labour dispute ensued, instituted by the respondent, that is, Labour dispute No. CMA/DSM/TEM/316/2010, at Commission for Mediation and Arbitration (CMA). In this dispute, the respondent challenged his termination. The CMA granted an award in the respondent's favour. The applicant being dissatisfied, filed for revision before the High Court of Tanzania, Labour Division, whereby a judgment and decree in favor of the respondent was pronounced on the 30th of June 2015. The applicant was aggrieved by the Judgment and decree and lodged a notice of appeal on 10th July 2015 to this court and on 29th January 2018, lodged appeal registered as Civil Appeal No. 17 of 2018.

While an appeal to this Court had been filed by the applicants, the respondent, on 2nd October 2015, filed Execution proceedings in the High Court Labour Division, Execution No. 319 of 2015. The applicant, in response

filed an application for Stay of execution, Misc. Civil Application No. 1 of 2016. During the hearing of the said application, the applicant prayed for an order for adjourning hearing of execution proceedings pending determination of the filed appeal. The court, steered by Hon. Malewo DR, granted the prayers and issued an order for adjournment of proceedings for execution, pending determination of the Appeal filed. On the 11th of October 2017, proceedings were called for hearing, despite the previous order, and Hon. Lyimo who had taken over, upon hearing, granted the prayer for Execution to proceed and also issued a *garnishee order nisi* over the applicant's account number 0106005461300 situated at Standard Chartered Bank, International House.

It is now settled, that where there is such an application, that is an application for extension of time, the duty of the Court is to determine whether there is good cause shown by the applicants to move the Court to exercise its discretion to grant the extension of time sought. This position is outlined in Rule 10 of the Rules and has been expounded in various decisions of this Court including those cited by the applicant and the respondents, such as the **Principal Secretary, Ministry of Defence and National Service v. Devram P. Valambhia** (1992) TLR 387 and **Tanzania Revenue**

Authority vs. Tango Transport Co. Ltd, Consolidated Civil Applications No. 4 of 2009 and No. 9 of 2008. It is also well established that in exercising its discretion the Court will do so according to common sense and in a judicious manner.

In determining whether there is good cause shown, the Court is guided by the principle expounded in various decisions of this Court, including **Tanzania Revenue Authority vs. Tango Transport Co. Ltd (*supra*)**, where the Court stated that the following matters should be considered when determining whether there is good cause shown. First, *length of delay*. Second, *reason for delay*. Third, *whether there is an arguable case*, such as, whether there is a point of law on the illegality or otherwise of the decisions sought to be challenged. Fourth, the degree of prejudice to the defendant if the application is granted.

With regard to reason for delay, the main reason advanced by the applicant is that there was a change of orders by the Honorable Court that is, from staying proceedings pending determination of the appeal filed against judgment and decree, to one, vacating that order for stay of proceedings, and ordering hearing and determination of execution proceedings. On the 1st November 2017, the Court Ruled on the Execution

proceedings and the applicant was served with a garnishee order and ruling, which the applicant claimed were erroneous in terms of citation of the case. This situation led the applicant to write a letter to the court requesting for rectification of the error and to be furnished with a correct copy of the Ruling and garnishee order. The correct Ruling and garnishee order were served to the applicant on the 29th January 2018.

The applicant then proceeded to file the current application for extension of time to file an application for stay of execution, since the execution proceedings were ongoing. The applicant have alleged in their submissions that from 29th January 2018 when the impugned decision and garnishee order was served upon the applicants, to the 22nd February 2018, when the current application was filed, the time was spent consulting and researching on the best legal step to adopt, drafting the application and assembling all necessary documentation to support the application, is about 24 days, arguing also that the delay is neither excessive nor inordinate.

The issue whether there is an arguable case, the applicant contend there was an illegality in the proceeding through the change of orders by the presiding Deputy Registrars, since in vacating the previous order, that the DR was *functus officio*. A decision from Kenya was cited to cement this

argument, that is ***Raila Odinga and 2 Others v. Independent Electoral and Boundaries Commission and 3 Others*** (2013) EKLR,

The applicants have also stated that they have an arguable case and in the event the applicant are granted extension of time, it will not prejudice the respondent, since the High Court Labour Division is proceeding with an Execution proceedings filed by the respondent and if it comes to conclusion it is the applicant who will be the one to pay.

On the other hand the respondents submitted that the explanations provided by the applicants on the delay to file the application in time, when considered within the settled principles in various decisions, such as **Michael Lesani Kweka vs. John Eliafye** (1997) TLR 132 (CA) and **TANESCO and 3 Others vs. Independent Power Tanzania Limited**, Consolidated Civil Appeal No. 19 and 27 of 1999(2000) TLR 324 at pg. 337, do not meet the legal boundaries set out in the cited decisions. The respondent counsel submitted that the applicant counsel failed to make a valid computation of time, and tried to justify without conviction that there was good cause for delay.

The respondent counsel argued that the applicant failed to comply with the law, since it requires one to file stay of execution while an appeal has been filed within a period of 60 days from the date thereof. That the applicant failed to file any application for stay of execution as required by law. That, the applicant was represented by a counsel at the early stages and thus failure to file an application for stay of execution is a negligent act and thus the applicant should not be shown any mercy.

The Court has carefully considered the submissions from the counsels for the applicants and the respondents also all the evidence and supporting evidence and cases cited by both counsels. There is no doubt that the Judgment by the High Court, Labour Division, on revision proceedings was delivered on 30th June 2014. There is also the fact that the applicant being aggrieved by the said decision, filed lodged a notice of appeal on the 10th July 2015 and lodged an Appeal on the 29th of January 2018. It is also a fact that the respondents filed for Execution on the 2nd October 2015. The applicant filed Stay of Execution registered as Misc. Civil Application No. 1 of 2016, which was struck out for being incompetent on the 18th of August 2016.

The Execution proceedings filed by respondents came for hearing on 7th September 2016, and upon prayer by the applicant the DR who was presiding over the hearing, granted the prayer for stay of proceedings pending appeal. On the 7th of September 2017, Execution proceedings were put on Special Case Clearance Session and came for hearing before another presiding DR, who vacated the order for stay of execution proceedings pending appeal hearing and on 1st November 2017, delivered a Ruling granting the Execution. A garnishee order was also issued against the Applicant's account situated at Standard Chartered Bank. It is also important to note that the current application was filed on 22nd February 2018.

The relevant position of the law governing the present application is Rule 10 of the Rules, which states that, the Court may upon good cause shown, extend time for the doing of any act authorized or required by these Rules, whether before or after the expiration of that time. From the contents of this Rule, the Court is provided with a discretionary power which is broad to extend time, where the Court is satisfied that good cause has been shown. There is no law which expounds or defines the term "good cause" or any hard and fast rules on how a Court when exercising its jurisdiction should be

governed. But what is in place expounded by case law are matters to consider when determining good cause in such an application.

Cases such as **TANROAD Kagera v. Ruaha Concrete Company Limited**, Civil Application No. 96 of 2007 (unreported), **Dar es Salaam City Council v. Jayantilal P. Rajani**, Civil Application No. 27 of 1987 (unreported) are a few of the cases which have addressed the issue of what are matters to consider when determining good cause to warrant extension of time. It should be understood that each case warrants determination based on its own merits, but some matters for consideration are for instance, whether the application for extension of time has been brought promptly; whether the explanation for delay has revealed and explained each and every day of the delay; the reasons for the delay; the degree of prejudice to the respondent where time to be extended and whether the applicant can show he was not negligent or nugatory.

The Current application relates to application for extension of time to file an application for stay of execution, the issue for consideration is whether the applicant has shown sufficient cause to warrant the Court to exercise its discretion and grant extension of time.

Having considered what is before the Court, on the part of explaining the delay to file execution proceedings, the Court has considered the applicants counsel explanation on the length of the delay as expounded in affidavit sworn by Godson Kiliza learned advocate in paragraph 5, expounding on action taken upon receiving the Judgment and being dissatisfied that the applicant lodged an appeal. Paragraph 6 narrates the fact that the respondents filed an application for execution and vide paragraph 7 it is after the application for execution from the respondents, it is then that the applicant filed Stay of Execution, which was filed in 2016, and no date is specified while the Judgment was delivered on the 30th of June 2015 and notice of appeal filed on 1st July 2015. According to paragraph 10, the applicant's application for stay of execution on 18th August 2016 was struck out.

According to Paragraphs 14 and 15 and 16, they aver on the order for stay of execution proceedings to when the said order was vacated and execution proceedings were ordered to proceed and finalized. Considering all these averments the Court is not satisfied that the applicant managed to explain the length and reason for the delay to show that they were diligent all the time. There is a lot of inaction and complicity in the action of the

applicant discerned from the contents of the highlighted paragraphs. In terms of execution one cannot see any initiative by the applicant that was prompted from own side to really ensure they made an intervention.

Failure of the applicant to apply for stay of execution within time, is an act showing negligence on the part of the applicants. I have considered the reasons advanced by the applicants that there were errors and illegality in the execution proceedings, whereas the first presiding DR ordered for stay of proceedings, and the second one vacated the first order. It should be noted that at this juncture, it is not the role of the Court to consider whether or not to grant the applicant stay of execution, but to consider whether the applicant has shown good cause to warrant the Court to grant extension of time to apply for stay of execution. It should be understood that it is not every claim of illegality that will be found to be good cause, the illegality must be somewhat apparent.

In **Lyamuya Construction Company Limited** {supra}, the Court stated that:

"Since every party intending to appeal seeks to challenge a decision either on point of law or fact; it

cannot in my view, be said that in Vallambhia's case, the Court meant to draw a general rule that every applicant who demonstrates that his intended appeal raises points of law should as of right be granted extension of time if he applies for one. The Court there emphasized that such point of law must be that of sufficient importance and, I would add that it must be apparent on the face of the record, such as the question of jurisdiction; not one that would be discovered by long drawn argument or process."

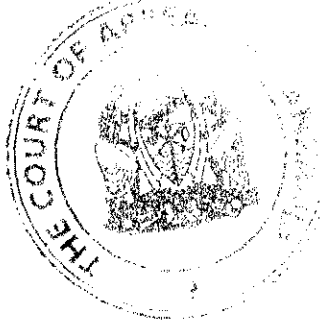
I am in tandem and privy to the above said position. Having considered the averment by the applicant, and applying the above position to the current application, I find the contention by the applicants counsel that the proceedings and Ruling which grounds the current application is engrained in errors and procedural irregularities is not authenticated or substantiated by any averments in the affidavital evidence before the Court. What has been averred, I find can be addressed through other available remedies


In the premised, I find that the applicants have failed to disclose good cause for the Court to exercise its discretion to enlarge time as prayed. Consequently, I dismiss this application with costs.

DATED at **DAR ES SALAAM** this 27th day of April, 2019.

W. B. KOROSSO
JUSTICE OF APPEAL

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




B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL