

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

CIVIL APPLICATION NO. 349/01 OF 2018

AFRICAN BANKING CORPORATION (T) LIMITED APPLICANT

VERSUS

GEORGE WILLIAMSON LIMITED RESPONDENT

**(Application for an order granting the Applicant an extension of time
within which to file an application for stay of execution of the
decree of the High Court of Tanzania,
at Dar es Salaam District Registry)**

(Shangwa, J.)

**dated the 10th day of July, 2015
in
Civil Case No. 90 of 2011**

RULING

6th & 17th May, 2019

KITUSI, J.A.:

African Banking Corporation (T) Limited, the applicant, lost in Civil Case No 90 of 2011 before the High Court of Tanzania at Dar es Salaam and was adjudged to pay to the respondent USD 2,000,000.00 as general damages and USD 193,377 as refund, which decree the said respondent, George Williamson, is bent at getting executed. This application is for extension of time within which the applicant may apply for stay of that

intended execution. It is made by a notice of motion under Rule 10 and 48 of the Court of Appeal Rules, 2009, the Rules.

The notice of motion cites three grounds for the application which are;

- a) The previous application (Civil Application No. 67/01 of 2017) for stay of execution was struck out by this court on 13/6/2018 for citing wrong provisions of the law.
- b) The amount awarded by the High Court in the decree is colossal and based on wrong principles.
- c) That the applicant has not been idle in the pursuit for remedy to cure the illegality.

The application is supported by an affidavit of Dr. Masumbuko Roman Mahunga Lamwai, learned advocate for the applicant, as well as written submissions that were drawn by the said learned counsel and filed on 10th September 2018.

The respondent contests the application and has filed an affidavit in reply taken by Deryck Henry Tweedley, former Principal Officer of the respondent, now member of its Board. No written submissions were filed by the respondent, which, in terms of Rule 106 (10) of the Rules as

amended by Government Notice No 362 of 2017, is an inconsequential omission.

At the hearing of the application, Dr. Lamwai, learned advocate, assisted by Ms. Mary Lamwai, learned advocate, appeared for the applicant, whereas the respondent enjoyed the services of Mr. John Mhozya and Mr. Novatus Mhangwa, also learned advocates. Dr Lamwai adopted the supporting affidavit and the written submissions then addressed the court to elaborate on the points. In response, Mr. Mhozya adopted the affidavit in reply and made his oral submissions.

To begin with Dr Lamwai's submissions, he cited the case of **Attorney General V. Oysterbay Villas Limited and Kinondoni Municipal Council**, Civil Application No. 299/16 of 2016 (unreported) for the principle that an application for extension of time may not be granted but for good cause, a very settled position of the law. The learned counsel then proceeded to cite three major reasons in support of the application, stated under paragraphs 8, 10 and 11 of the supporting affidavit.

The first reason appearing under paragraphs 8 and 10 of the supporting affidavit is that the applicant had earlier filed the application for

stay of execution and did so within time, vide Civil Application No. 67 of 2017, but the said application was struck out for having cited wrong provisions of the law. The learned counsel advanced this fact to support the argument that the applicant was not idle in pursuing a remedy to the matter. Counsel submitted that the wrong citing of the provision in Civil application No. 67 of 2017 was human error caused by the fact that at that time he was working under pressure as there was a looming danger of the applicant's banking activities being closed due to execution of the decree against it by a garnishee order. It is further submitted that the applicant has already been punished for that by striking out the application, so it should not be punished twice.

The second reason is bereavement. Dr Lamwai submitted that after the application had been struck out, he lost his eldest brother in the family, so he had to be around to handle funeral matters, and consequently he did not immediately file the application for stay of the execution. Dr Lamwai went on to submit that if the prayer for extension of time is not granted, the applicant will be denied the opportunity to apply for stay of execution of the decree involving huge sums that may incapacitate the bank, the applicant.

It is contended that the bereavement was followed by counsel's engagement at the University of Tumbuni as Dean of the Faculty of Law. This fact was stated under paragraph 11 of the affidavit and canvassed in the oral submissions.

On the other hand, Mr. Mhozya was brutal in contesting the application. He submitted that what is stated under paragraphs 8 and 10 is nothing more than proof of negligence, recklessness or inaction on the part of counsel for the applicant, and those have never been considered as forming good cause for purposes of extension of time. The learned counsel cited unreported decisions of this Court in **Bharya Engineering & Contracting Co. Ltd V. Hamoud Ahmad Nassor**, Civil Application No. 342/01 of 2017 and; **Allison Xerox Sila V. Tanzania Harbours Authority**, Civil Reference No. 14 of 1998. Mr. Mhozya's point is that the citing of wrong provisions of the law in Civil Application No 67/01 of 2017 was a result of sheer negligence or lack of care.

On the argument that Dr Lamwai was working under pressure in the course of pursuing other applications at the High Court, Mr. Mhozya counter submitted that there is no mention of those applications nor is there disclosure as to when they were coming in court. The contention that

Dr. Lamwai was involved in University Examinations was also attacked as lacking details. Mr. Mhozya submitted that there is no proof that Dr. Lamwai is indeed the Dean of the Faculty of Law at Tumaini University and that the said examinations would not have proceeded without him. There is also no examination time table, it was further submitted.

So, it is Mr. Mhozya's submission that the applicant has not accounted for each day of the delay from 22 June 2018 to 11 July 2018, 19 days in total. The learned counsel cited two cases to support his submission that the applicant has a duty to account for each day of the delay. The cases are; **Selemani Juma Masala V. Sylvester Paul Mosha & Another**, Civil Application No. 210/01 of 2017; **Mr. Manson Shaba & 143 Others V. The Ministry of Works & 2 Others**, Civil Application No 244 of 2015 and; **Lyamuya Construction Company Ltd V. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 (all unreported).

Mr. Mhozya raised another issue regarding the competence of the intended application for stay of execution, referring to Rule 11(4) of the Rules as amended by Government Notice No 362 of 2017 which requires such application to be lodged within 14 days of service of notice of

execution. He therefore submitted that the intended application for stay will be barred by time.

In rejoinder Dr Lamwai insisted that in applications for extension of time the Court has to decide each case on the basis of its peculiar facts, and submitted that in the circumstances of this case, the applicant has demonstrated good cause. He took the view that a typographic error is not an act of negligence as submitted by Mr. Mhozya and submitted that even our laws have provisions for correction of errors which goes to show that it is a known phenomenon. In any event, Dr. Lamwai submitted that, the issue of negligence was the point for determination in Civil Application No. 67/01 of 2017 and the applicant was punished for that. He invited the Court to desist from punishing the applicant once again for the same error.

Submitting on the alleged lack of details of counsel's involvement in litigations at the High Court, Dr. Lamwai submitted that the case is mentioned under paragraph 6 of the supporting affidavit. He further submitted that the respondent has not disputed paragraph 9 of the supporting affidavit under which it is stated that he Dr Lamwai is the Dean of the Faculty of Law at Tumaini University. Counsel submitted that this fact must be taken to have been admitted so Mr. Mhozya cannot now be

heard disputing it by a mere assertion from the bar. While admitting that it is required of the applicant to account for each day of the delay, Dr Lamwai submitted that such accounting is not a mechanical process as there are certain circumstances that cannot be accounted for with precision. He added that the delay of 19 days is reasonable under the circumstances where counsel was involved in University examinations immediately after burial of his brother.

As regards the contention that the new Rule 11(4) Of the Rules, apply, counsel for the applicant conceded to the submission that it has a retrospective effect, but went on to state that it would have applied to the instant case if there had been no previous application for stay of execution.

It is now my duty to consider the opposing submissions for and against the application. At the outset it is necessary to consider whether or not I need to pronounce myself on the submission by the respondent that the wrong citation of the law in Civil Application No. 67/01 of 2017 was due to negligence. With respect, Civil Application No. 67/01 of 2017 is not before me for determination and the fact that it was for stay of execution is not disputed. While I refrain from deciding the issue of the alleged negligence for the reason that it is not before me, the fact that the

applicant instituted and prosecuted that application is relevant in the present application for extension of time. In **Mary Mchome Mbwambo and Another V. Mbeya Cement Co. Ltd**, Civil Application No 271/01 of 2016 and; **Royal Insurance Tanzania Ltd V. Kiwengwe Stand Hotel Ltd**, Civil Application No 111 of 2009 (both unreported) we held that if a party establishes that he did not sit back, but pursued his matter in court, that fact may amount to good cause subsequently in an application for extension of time. Considering the submissions by counsel for the applicant, I am satisfied that whatever happened to the Civil Application No. 67/01 of 2017 is proof that the applicant did not let grass grow under his feet, and that vigilancy , in my conclusion, constitutes good cause.

Next for consideration is whether the delay from 22nd June, 2018 when the funeral came to an end, to 11th July, 2018, a day before filing of this application, has been accounted for. Here the law is settled, that the applicant has to account for each day of the delay [**Dsm City Council V. S. Group Co. Ltd**, Civil Appeal No. 234 of 2015 CAT]. The applicant's account is stated under paragraph 11 of the affidavit, to wit:-

11. Further, that I have just been able to obtain copies of the ruling and order referred to in para. 8 herein above and I state

that I have not delayed in taking measures to remedy the situation because my brother Joseph Salema passed away at Muhimbili Hospital on the 9th day of June, 2018 and we buried him at Rombo, Kilimanjaro on the 14th day of June, 2018. As the eldest in the family, I had to stay back after the funeral for another week and when I came back, I had University examinations to administer as Dean of the Faculty of Law, Tumaini University, Dar es Salaam College. Copies of the burial permit and the collection form for the deceased's body are annexed hereto as Annexure 'A6' and I crave leave to refer to them as part of this affidavit.

The length of the delay is 19 days which, considering the bereavement that was followed by involvement in University examinations, cannot be said to be inordinate. In **Lyamuya Construction Company Ltd V. The Board of Registered Trustees of Young Women Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported) among the four factors that were considered as-forming good cause include diligence and the length of the delay not being inordinate. The applicant has satisfied me on those two factors.

The other factor for consideration by the Court is the degree of prejudice to the respondent if the application for extension of time is granted. Mr. Mhozya for the respondent has not shown how the respondent will be prejudiced by the order of extension of time if it is given as such there is no material for me to conclude that it will be prejudiced.

In the circumstances I am constrained to grant the application for extension of time within which to file an application for stay of execution. The same should be filed within 14 days of this order, and costs shall be in the cause.

It is so ordered.

DATED at DAR ES SALAAM this 14th day of May, 2019

I. P. KITUSI
JUSTICE OF APPEAL

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


B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL