IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

CIVIL APPLICATION NO. 397/17 OF 2019

1. MEKEFASON MANDALI
2. REHEMA R. KANGE
3. MARIAM MAGERO
4. EZRA J. MATOKE
5. MARY KILIAN JOSEPH MCHAU
(Legal representative of KILIAN J. MCHAU)
6. ABDALLAH J. MVUNGI
7. ELIHURUMA MREMI
8. RUKIA ATHUMAN
9. MAJUTO RAJABU MBISA
(Administrator of the estate of ABUU M. BASAI) ..... **APPLICANTS**

VERSUS

THE REGISTERED TRUSTEES OF
THE ARCHDIOCESE OF DAR ES SALAAM ..... **RESPONDENT**

[Application for extension of time to apply for stay of execution of the decree involving the decision of the High Court of Tanzania (Land Division) at Dar es Salaam]

(Mkuye, J.)

dated the 22nd day of July, 2016
in
Land Case No. 181 of 2009

.....

RULING

4th & 30th October, 2019

MMILLA, J.A.:

This application has been taken by Mekefason Mandali and 8 others. It has been brought by way of Notice of Motion, and is seeking for

extension of time within which to apply for stay of execution of the judgment and decree of the High Court of Tanzania (Land Division) at Dar es Salaam, dated 22.7.2016 in Land Case No. 181 of 2009. It is supported by an affidavit jointly sworn by the applicants.

According to the Notice of Motion and the accompanying joint affidavit of the applicants, the application is dependent on two grounds; **one** that, they did not take immediate steps to apply for stay of execution because they had a pending application for extension of time in which to file an application for revision; and **two** that, the judgment of the High Court which is the subject of the intended revision is tainted with illegality or irregularity. It is impressed that such grounds constitute good cause to persuade the Court to extend time in order to correct those anomalies.

On the other hand, Mr. Michael Ngalo, learned advocate who represents the respondent, filed an affidavit in reply in which he has explained, among other things, that the applicants have not assigned good cause for the delay and have failed to account for each day of delay. Reference is to paragraphs 14 to 16 of the said affidavit in reply.

On the agreement of counsel for the parties, this application was argued by way of written submissions. The learned advocate for the

applicants had signified to, and filed their written submissions on 4.10.2019; whereas Mr. Ngalo had promised to and filed theirs on 7.10.2019. A rejoinder by Mr. Mbamba was filed 9.10.2014.

Mr. Mbamba's strong point in his submissions was that prior to the determination of Civil Application No. 482/17/2017 vide which they had applied for extension of time within which to file an application for stay of execution, whose ruling was rendered on 4.9.2019, the applicants had no right to file an application for stay of execution. It was submitted that they acquired that right on 9.9.2019 when they filed the pending substantive application for revision. That explains why, he went on to submit, they did not file the intended application for stay of execution within a period of 14 days counted from 6.12.2018 when they were served with the notice to show cause why execution should not be carried out. He also submitted that though Rule 11 of the Rules makes reference to existence of a Notice of Appeal, his clients' intended application for stay is predicated on case law. He secured his position by citing the case of **National Housing Corporation v. Peter Kasidi & Others**, Civil Application No. 243 of 2016, CAT (unreported). In that case the Court observed that:-

> *"To begin with, it is common ground that the Rules do not specifically provide for the procedure for seeking an*

order for preserving the substance of an intended application for revision. It is therefore, understandable that the applicant herein resorted to the Court's inherent powers as spelt out under Rule 4 (2) (a) and (b) of the Rules thus:

> *(2) Where it is necessary to make an order for the purposes*
> *of-*
> *(a) dealing with any matter for which no provision is made by these Rules or any other written law;*
> *(b) better meeting the ends of justice; or*
> *(c) [omitted]*
>
> *The Court may, on application or on its own motion, give directions as to the procedure to be adopted or make any other order which it considers necessary."*

As regards the second ground, Mr. Mbamba has submitted that the decision of the High Court which is the subject of the application for revision is tainted with illegality or irregularity, a fact which he says, constitutes good cause to persuade the Court to grant an order herein sought. He has therefore, prayed the Court to allow the application.

In opposing the arguments of his learned friend, Mr. Ngalo has submitted in the first place that the notice to show cause why execution

should not be carried out was served on the applicants on 2.4.2019 and not 6.12.2018 as purported. He has similarly contended that although the applicants are a mixture of Christians and Moslems, their joint affidavit mistakenly indicates that they made an oath which is a fundamental error because Moslems do not make oath but they affirm. He submitted that because of this error, that affidavit cannot be acted upon.

Mr. Ngalo has likewise submitted that in his reading of the single judge's ruling in Civil Application No. 482/17/2017 constituted in annexture HM1, he grasps that the Hon. Judge did not make any definitive finding or holding on the alleged illegality or irregularity. He charged that the applicants' application is nothing but reflects their concerted strategy to frustrate and stifle the application for execution and have it delayed. He adds that it's the applicants' further strategy and plan to engage the respondent in endless multiplicity of proceedings in respect of the subject matter of the disputed property.

At any rate, Mr. Ngalo has submitted, the applicants have not advanced sufficient grounds to constitute good cause for the delay to file an application for stay of execution within the time dictated by Rule 11 (4) of the Rules as amended to attract the Court to exercise its discretion

under Rule 10 of the said Rules. He cautioned that it is a misconception on the part of the applicants, and maybe they have been ill-advised, to resort to filing an application for revision instead of the previously chosen course of instituting an appeal. He has added that the latter course is the proper one in the circumstances of the case at hand because they had the right to appeal against the decision of the High Court which is the subject of the intended revision.

In any way, relying on the case of **Mabibo Beer Wines and Spirits Ltd. v. Fair Competition Commission & 3 Others**, Civil Application No. 583/20/2018 (unreported), Mr. Ngalo asserted, the applicants did not account for each single day of the delay from the lapse of 14 days of learning about the existence of the application for execution. He underscored that after filing the application for revision on 10.9.2019, the applicants stayed idle until 17.9.2019 when they lodged the present application for extension of time, therefore they did not account for the period from 10.9.2019 to 17.9.2019.

In his conclusion, Mr. Ngalo urged the Court to find that the present application is incompetent for want of proper and valid supporting affidavit, or in the alternative, that the application has no merits for want of good

cause to persuade the Court to exercise its discretion to extend time as is being sought. Accordingly, he prayed for the application to either be struck out, or in the alternative, to be dismissed with costs for lack of merits.

Mr. Mbamba's rejoinder was very brief. He firstly opposed Mr. Ngalo's contention that after filing the application for revision on 10.9.2019, the applicants stayed idle until 17.9.2019 when they lodged the present application for extension of time. He elaborated that they lodged the application at the Court's Registry on 13.9.2019 as the stamp therein bears evidence, and that it was beyond their control that it was registered/recorded on 17.9.2019.

As to the question of the applicants making oath in their joint affidavit instead of affirming, Mr. Mbamba submitted that it is not a serious defect. He relied on the case of **Zanzibar Shipping Corporation & Another v. Mohamed Hassan & Another**, Civil Application No. 8 of 2014 (unreported). Even, Mr. Mbamba added, it is a matter of form which would be curable in terms of the principle of overriding objectives introduced by sections 3A and 3B of Act No. 8 of 2018.

On when exactly the applicants became aware of the application for execution, Mr. Mbamba insisted that it was served to them on 6.12.2018

and not 18.4.2019 or 2.7.2019 as is being claimed by his learned friend, and referred the Court to page 87 of the record at which it is shown that they served that document to them on 6.12.2018. He insisted that they are not aware of any other such application for execution except in respect of the one they were served on 6.12.2018.

Similarly, Mr. Mbamba emphasized that in Civil Application No. 482/17/2017, the single judge of the Court took note that the issue to be raised in the intended application for revision was the question of illegality or irregularity of the assaulted decision of the High Court dated 22.7.2016 in Land Case No. 181 of 2009, and that indeed that is the position. On the basis of the reasons he advanced, Mr. Mbamba reiterated his request for the Court to grant the application as defended.

I have carefully considered the grounds raised in the Notice of Motion, the affidavit in support of the application and the respondent's affidavit in reply, as well as the rival submissions of counsel for the parties. I wish to address first the aspect raised by learned counsel Ngalo that the application is incompetent on account that its accompanying affidavit is fatally defective for showing that the applicants made oath in their joint

affidavit whereas they are a mixture of Christians and Moslems, and that the latter do not make oath but they affirm.

It is certain that in the present matter the applicants are a mixture of Christians and Moslems, but that their joint affidavit in support of the application indicates that they took an oath. It is similarly the position that unlike Christians who make oath, Moslems do not; instead they affirm. Mr. Mbamba has readily admitted this fact. Given this situation, there is no doubt that taking an oath in the circumstances of the applicants' joint affidavit in support of the application constituted a defect. The immediate question to be answered however becomes; is such a defect fatal to the applicants' affidavit and therefore it affects the competency of their application?

May I start by saying that as was correctly stated in **Zanzibar Shipping Corporation & Another** (supra), the differences between the two aspects touches on the particular person's religious belief, but in essence, a person who swears and the one who affirms are in effect making promises to speak the truth. I would say therefore that it is not a fatal defect as Mr. Ngalo wants us to believe – **See the cases of DSM Education & Office Stationary and Another v. NBC Holding**

Corporation and 2 Others, Civil Application No. 1999, **Director of Public Prosecutions v. Dodoli Kapufi and Another,** Criminal Application No. 11 of 2008 and **Asha Haruna v. Republic,** Criminal Appeal No. 74 of 2005, CAT (all unreported). The position was elaborately discussed in **Asha Haruna's** case in which the Court said that:-

> *We wish to start with the complaint in ground one of the appeal, that is, that the evidence of P.W.3 and P.W.4 is a nullity because although these two witnesses are Moslems as reflected in the record of appeal, they were sworn instead of being affirmed so their evidence should be nullified. Like the learned State Attorney, we checked the definitions of the words "sworn" and "affirm" to see whether they substantially differ.*
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> *At page 1210 of the Oxford Advanced Learner's Dictionary, 6th Edition, Oxford, the phrase –*
>
> *Swear to God means make a public or official promise especially in a court of law to speak the truth.*
>
> *At page 19 of the same dictionary, the word –*
>
> *Affirm means state firmly or publicity that something is true.*

> ***We are of the settled opinion that the words 'sworn' and 'affirmed' mean that the witness be he Christian or Moslem will testify truthfully. In that situation, using the word 'sworn' instead of 'affirmed' in respect of P.W.3 and P.W.4 who undertook to testify truthfully, occasioned no injustice to the said witnesses or to the appellant.*** *The error, we hasten to hold, is curable under section 388 of the Criminal Procedure Act, Cap 20 for the said error did not prevent P.W.3 and P.W.4 from deposing truthfully.* ***It appears to us that swearing or affirming a witness is more a question or semantics because at the end of the day, the goal is to cause the witness to solemnly promised to tell the truth and the truth only.*** *Hence ground one of the appeal is lacking in merit.* [The emphasis is added].

On the basis of the above, it cannot be validly said that the defect affected the competency of the application. This is particularly so when, as correctly submitted by Mr. Mbamba, I consider that the defect is a matter of form which may be relaxed/acquiesced in terms of the principle of overriding objectives introduced by sections 3A and 3B of Act No. 8 of 2018

which is geared at seeing to it that cases are dealt with justly, efficiently and expeditiously at a proportionate costs.

I now turn to consider the application on its merits. I wish to begin by re-stating the obvious that in order to succeed in an application under Rule 10 of the Rules, the applicant has the duty to advance grounds which will show good cause for the delay. That Rule stipulates that:-

> *"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 as so extended."* [The emphasis is added].

This position has been emphasized in a range of cases, including those of **Wambele Mtumwa Shahame v. Mohamed Hamis**, Civil Application No. 138 of 2016, and **Lyamuya Construction Company Limited v. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010, CAT (both unreported). In view of what I have just said, the burning issue is whether

or not the applicant in the present case has shown good cause to warrant the Court to exercise the discretion it has under Rule 10 of the Rules.

The phrase "good cause" however, has not been defined under the Rules. It is generally accepted nevertheless, that these words should receive a literal construction in order to advance substantial justice when no negligence, or inaction, or want of *bona fides,* is imputable to the applicant/appellant – See the cases of the **Registered Trustees of the Archdiocese of Dar es Salaam v. The Chairman Bunju Village Government & Others,** Civil Appeal No. 147 of 2006 and the **Regional Manager, TANROADS Kagera v. Ruaha Concrete Company Ltd.**, Civil Application No. 99 of 2007, CAT (both unreported). In the latter case of **Regional Manager, TANROADS Kagera,** the Court said:-

> *"What constitutes good sufficient reason (as it were in the old Rules) cannot be laid down by any hard and fast rules. This must be determined by reference to all the circumstances of each 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."*

As earlier on pointed out, the applicants have raised two grounds in this regard; one that they did not take immediate steps to apply for stay of

execution because they had a pending application for extension of time in which to file an application for revision; and two that, the judgment of the High Court which is the subject of the intended revision is allegedly tainted with illegality or irregularity. I will begin with the first ground.

On the basis of its registration number, it is certain that Civil Application No 482/17/2017 which sought for extension of time in which to file an application for revision was filed in the Court's Registry in 2017, well before the applicants were served with the notice to show cause why execution could not be carried out. I need to emphasize here that, whether or not the notice to show cause was served on 6.12. 20018 as formidably argued by Mr. Mbamba, or 18. 4.2019 if not on 2.7.2019, as submitted by Mr. Ngalo; whatever the case, that will not change the fact that Civil Application No. 482/17/2017, whose conclusion was being eagerly awaited to permit the applicants to file the application for revision, was then pending in Court. Since the existence of an application for revision was a determining factor in the circumstances of this case for them to validly file an application for stay of execution as forcefully and rightly submitted by Mr. Mbamba, I agree with the applicants that the pendency of that application constituted good cause for the delay.

I should add here that having said so, because all other days complained of as having not been accounted for spread from the time when Civil Application No. 482/17/2017 to the time the present application was instituted, it is certain that the applicants have accounted for all the days of delay.

I now proceed to deal with the second ground alleging that the judgment of the High Court which is the subject of the pending application for revision is tainted with illegality or irregularity. In a fit case, allegations of existence of illegalities or irregularities may attract the Court to find good cause in an application for extension of time. I am fortified by what the Court observed in the case of the **Principal Secretary Ministry of Defence and National Service v. Devram Valambhia** [1991] T.L.R. 387. It was held in that case that:-

> *"where the point of law at issue is the illegality or otherwise of the decision being challenged, that is a point of law of sufficient importance to constitute a sufficient reason within rule 8 of the Court of Appeal Rules to overlook non-compliance with the requirements of the Rules and to enlarge the time for such compliance."*

It is crucial to point out however, that for this ground to stand, the illegality of the assailed decision must clearly be visible on the face of the record, and as we said in **Lyamuya Construction Company Limited** (supra), such point of law must be that of sufficient importance. In **Lyamuya Construction Company Limited** the Court said:-

> *"Since every party intending to appeal seeks to challenge a decision either on points of law or facts,* ***it cannot in my view, be said that in Valambhia'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 also be apparent on the face of the record, such as the question of jurisdiction, (but) not one that would be discovered by a long drawn argument or process."*

As far as the present case is concerned, I am not in agreement with the applicants' learned counsel that this ground established good cause because the allegations are bear, they did not throw any light on the alleged illegality or irregularity to permit the Court to grasp its impact. Thus, this ground is baseless and I reject it.

Having said however, that the pendency of Civil Application No. 482/17/2017 which sought extension of time in which to file an application for revision at the time of service of the notice to show cause why execution could not be carried out constituted good cause for the delay, the application succeeds. Thus, time is hereby extended to give chance to the applicants to file an application for stay of execution as prayed. I further direct for the said application to be filed within a period of 14 days from the date of delivery of this ruling. Costs to be in the course.

DATED at **DAR ES SALAAM** this 15th day of October, 2019.

B. M. MMILLA
JUSTICE OF APPEAL

The Ruling delivered on this 30th day of October, 2019 in the presence of Mr. Emmanuel Hando holding brief for Mr. Samson Mbamba, learned counsel for the applicants and Mr. Emmanuel Hando, learned counsel for the respondent is hereby certified as a true copy of the original.

E.F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL