

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

CIVIL APPLICATION NO. 455 OF 2019

**1. SALIM LAKHANI
2. NEVADA GOLDEN COINS LIMITED APPLICANTS
3. ISMAIL AHMED ABDULLAH**

VERSUS

**ISHFAQUE SHABIR YUSUFALI (As an Administrator of
the Estate of the Late SHABIR YUSUFALI) RESPONDENT**

**(Application for extension of time to lodge an application of stay of
execution out of time from the decision of the High Court of Tanzania
at Dar es Salaam)**

(Wambura J.)

Dated the 24th day of August, 2013

in

Land Appeal No. 202 of 2013

RULING

4th & 11th May, 2020

KITUSI, J.A.:

This is an application by way of Notice of Motion. There is no dispute from the affidavits of Abdon Rwegasira and that by Lugano Kibena both in support of the Motion and from the affidavit in reply taken by Mr. Ashiru Lugwisa, as well as the learned submissions at the hearing, that there is Civil Appel No. 237 of 2019 preferred by the applicants arising from the judgment and decree in Land Case No. 202 of 2013, High Court Land Division. While that appeal is pending, the applicants are desirous of having execution of the impugned judgment and decree stayed. But they are out of time.

This now is an application under rule 10 of the Tanzania Court of Appeal Rules, 2009 (the Rules) for an order of extension of time within which the applicants may apply for stay of execution.

At the hearing of the application, Mr. Abdon Rwegasira, learned advocate for the applicants, adopted the contents of the Notice of Motion, the affidavits and the written submissions which he had earlier filed. In addition to the written submissions he made a very brief address on two points. The first point to which he drew my attention is the obvious fact that this hearing was being conducted when there is pending in Court Civil Appeal No. 237 of 2019. The second point, also very plain, is the fact that execution proceedings are going on at the High Court Land Division, from which the appeal originates. The learned counsel argued that in the circumstances the order of extension of time will be in the interest of justice, and prayed for the same.

Mr. Ashiru Lugwisa, learned advocate for the respondents, raised all manner of resistance both by affidavit in reply and oral submissions at the hearing. He argued that nothing in the 22 paragraph affidavit of Abdon Rwegasira qualifies to be good cause for the delay as required by rule 10 of the Rules. He picked paragraph 18 for illustration, arguing that the fact that Mr. Rwegasira was stranded in Bukoba is both unsubstantiated because the attached air ticket does not suggest so, and inconsequential,

because the learned counsel's Firm of Lawyers is not supposed to have other advocates.

This was in response to the applicant's contention that an initial attempt for stay of execution at the trial High Court was struck out on 7th October, 2019 when the learned advocate had travelled to Bukoba to attend a family matter. He managed to fly back to Dar es Salaam on 15th October, 2019 after some hiccups. It was on 17th October, 2019 that his clients instructed him to prepare documents for this application which he lodged on 21st October, 2019.

The learned counsel for the applicants cited a number of cases to support his arguments. Specifically, he cited the case of **Mbogo v. Shah** [1908] EA cited in the case of **Ngao Godwin Losero v Julius Mwarabu**, Civil Application No. 10 of 2015 (unreported). In these cases four factors were identified as key in determining whether or not to grant extension of time. These are; length of the delay, reason for the delay, arguable points on appeal and degree of prejudice to the respondent if time is extended. Mr. Rwegasira submitted that all factors were in favour of the applicants.

He submitted that there is a span of 14 days from 7th October 2019 when the High Court struck out the application, to 21st October 2019 when

he lodged the instant application. He further submitted that he returned to Dar es Salaam on 15th October, 2019, and had a meeting with the applicants on 17th October, 2019. He pointed out that he had only 18th October 2019, a Friday, to prepare the requisite documents.

Mr. Lugwisa sought to distinguish the cases cited by the applicants' counsel by showing that the facts of this case make those cases inapplicable. He attacked the applicant's counsel for inaction which he submitted is not good cause for the delay as per the decision in **Citibank Tanzania Limited v. Tanzania Telecommunications Co. Ltd and 4 Others**, Civil Application No. 97 of 2003 (unreported) cited by the counsel for the applicants. The learned counsel also submitted that the respondents are being prejudiced for being denied the fruits of their decree.

In a short rejoined Mr. Rwegasira submitted that the respondents are not challenging the technical delay prior to the striking out of the previous application at the High Court. He pointed out that neither is Mr. Lugwisa challenging the fact that he Mr. Rwegasira was in Bukoba until 14th October 2019. He drew my attention to the principle in the case of **Ngao Godwin Losero** (supra) requiring use of reason in the exercise of the Court's discretion.

I shall now proceed to determine the matter on the basis of the rival arguments and legal principles. I have to restate two principles to pave way for my deliberations, which are; **One**, what amounts to good cause is yet to be defined [See **Philemon Mang'ehe t/a Bukine Traders v. Gesbo Hebron Bajuta**, Civil Application No. 8 of 2016 (unreported). It depends on the circumstances of each case. **Two**, the discretion under rule 10 of the Rules has to be "*exercised according to the rules of reason and justice*" [**Ngao Godwin Losero** (supra)].

With those principles in mind I consider the period before 7th October, 2019 as constituting what has come to be known as technical delay and now part of our jurisprudence [**Ally Ramadhani Kihyo v. The Commissioner for Customs and the Commissioner General Tanzania Revenue Authority**, Civil Application No. 29/01 of 2018 (unreported) **KABDECO v. WETCO LIMITED**, Civil Application No. 526/11 of 2017 (unreported)].

What remains now is the period from 7th October 2019 to 20th October 2019. I will proceed to examine if this period has been accounted for. The applicant's counsel has submitted that when the ruling was delivered on 7th October 2019 he had travelled to Bukoba. There seems to be no serious contention about that from the respondent's counsel except for the question why he did not return earlier. It is submitted by

the learned counsel for the applicant that he got back in Dar es Salaam on 15th October, 2019 because there were postponements of air travel. The attached air ticket supports that fact and it is accordingly my finding that the period from 7th to 15th October has been explained away.

In explaining the period that remains, counsel submitted that he received instructions to proceed with preparation of this application on 17th October 2019, a Thursday, and had only 18th October 2019, a Friday to work on it. He filed the application on 21st October 2019 the immediate Monday that followed.

My conclusion on the period of the delay is that in the end there are barely three days of that delay and given the fact that those days were towards the week end, it cannot be said that the counsel could have done better than that. I am satisfied that; One the applicant has accounted for the delay and two, the delay was not inordinate.

If I may add, I do not see how the respondents will suffer inconvenience as submitted by Mr. Lugwisa by not executing the decree, because they are aware that the decree is being challenged on appeal. In the peculiar circumstances of this matter there are bound to be more inconveniences if I uphold Mr. Lugwisa's argument than if I do not.

Accordingly and for the stated reasons, I grant the application with costs. I order the intended application for stay of execution to be lodged within fourteen (14) days of the delivery of this ruling.

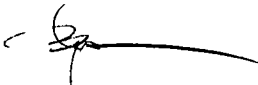
It is so ordered.

DATED at DAR ES SALAAM this 8th day of May, 2020.

I. P. KITUSI
JUSTICE OF APPEAL

Ruling delivered this 11th day of May, 2020 in the presence of Mr. Abdon Rwegasira, learned advocate for the applicants and Mr. Ashiru Lugwisa, learned advocate for the respondent, is hereby certified as a true copy of the original.




B.A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL