IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CIVIL APPLICATION NO. 506/17 OF 2019

GLORY SHIFWAYA SAMSON ..... APPLICANT

VERSUS

RAPHAEL JAMES MWINUKA ..... RESPONDENT

(Application for extension of time in which to apply for stay of execution of the Decree of the High Court of Tanzania, Land Division at Dar es Salaam)

(Mutungi, J.)

dated the 30th day of June, 2015
in
Land Case No. 247 of 2008

.....

RULING

9th & 24th February, 2021

NDIKA, J.A.:

Ms. Glory Shifwaya Samson ("the applicant") seeks an extension of time under Rule 10 of the Tanzania Court of Appeal Rules, 2009 ("the Rules") in which to apply for an order staying the execution of the decree of the High Court of Tanzania, Land Division (Mutungi, J.) dated 30th June, 2015 in Land Case No. 247 of 2008. The applicant swore an affidavit in support of the motion. In opposition to the application, an affidavit in reply deposed by Mr. Laurent Ntanga, an advocate acting for Mr. Raphael James Mwinuka ("the respondent"), was filed.

The applicant was the losing party in the High Court of Tanzania, Land Division in Land Case No. 247 of 2008 instituted against her by the respondent. Apart from her opponent being adjudged the lawful owner of the landed property in dispute (Plot No. 879 (2298), Block 'H', Mbezi Beach, Dar es Salaam), she was ordered to demolish the house she had built on the disputed land and yield up vacant possession thereof. Furthermore, she was condemned to pay general damages in the sum of TZS. 10,000,000.00 as well as costs of the suit.

Desirous of challenging the aforesaid decision, the applicant had her advocate at the time, Mr. Thomas Joseph Massawe, lodge in the High Court on 6th July, 2015 a request for copies of the judgment, decree and proceedings of the High Court. This was followed up with the filing of a notice of appeal on 10th July, 2015. Subsequently, the applicant was served with a notice issued on 21st May, 2018 to appear before the High Court on 15th August, 2018 to show cause why the judgment and decree should not be executed against him.

In terms of Rule 11 (4) of the Rules, the applicant, having been served with the notice of execution as acknowledged in the supporting affidavit, ought to have lodged in this Court an application for stay of execution within

fourteen days of service. For ready reference, I reproduce this provision as hereunder:

> *"(4) An application for stay of execution shall be made within* ***fourteen days of service of the notice of execution on the applicant*** *by the executing officer or from the date he is otherwise made aware of the existence of an application for execution."* [Emphasis added]

As the applicant did not seek any stay order within the prescribed time, she now applies for extension of time for that purpose. It is noticeable that this matter was lodged on 26th November, 2019 when the prescribed limitation period had long elapsed.

In seeking to explain the delay, the applicant avers as follows: one, that she could not apply for a stay due to not being supplied with copies of the impugned judgment and decree, which she had to attach to such an application. Two, that on 14th August, 2018 her then advocate, Mr. Massawe, instituted in the High Court an application for stay of execution (Miscellaneous Land Application No. 517 of 2018) in good faith but that matter was "dismissed" by Makani, J. on 8th November, 2019 for want of jurisdiction. Three, that following the dismissal as aforementioned, she

engaged her present advocates, RK Rweyongeza & Co. Advocates, who promptly lodged this matter. It is also stated on the notice of motion that the applicant has been occupying the landed property since 1990 and that she has developed it into a single-storey home now liable to be demolished should the execution of the impugned decree go ahead.

Conversely, the affidavit in reply quintessentially casts the blame on the applicant for failing to collect the documents requested from the High Court. In addition, apart from putting the applicant to strict proof of most of her main averments, the affidavit in reply charges that the present matter is a ploy intended to delay the respondent's enjoyment of the benefit of the decree.

Mr. Robert Rutaihwa, learned counsel, prosecuted the application for the applicant. In his argument, he repeated the contents of the supporting affidavit as summarized above and elaborated in the written submissions in support of the motion. He stressed that the applicant could not apply to this Court for an order of stay of execution because she was yet to be supplied copies of the judgment and decree. Moreover, he posited that the applicant was not to blame for the delay flowing from her advocate's pursuit of stay of execution in the High Court, which happened to be a wrong forum. Relying

on the Court's decision in **Yusufu Same & Another v. Hadija Yusufu**, Civil Appeal No. 1 of 2002 (unreported), he urged that the applicant be spared on the principle that a mistake or inadvertence of counsel ought not be visited upon the client who had left the matter to the hands of the counsel. He finally credited the applicant for acting promptly after her stay application in the High Court came to naught on 8th November, 2019, culminating with the present application being lodged without delay on 26th November, 2019.

Mr. Japhet Mmuru, learned counsel, who was accompanied by Mr. Laurent Ntanga, also learned counsel, replied for the respondent. Relying on the affidavit in reply and the written submissions in opposition to the application, Mr. Mmuru assailed the applicant for failing to disclose in Paragraph 6 of the supporting affidavit the date on which he was served with the notice of execution. That date was a necessary detail as it was the day from which the prescribed fourteen days was to be reckoned. The non-disclosure, he contended, meant that the applicant had failed to reveal and explain the degree of lateness. Citing the decision of the Court in **Bruno Wenceslaus Nyalifa v. The Permanent Secretary, Ministry of Home Affairs**, Civil Appeal No. 82 of 2017 (unreported), he submitted that time

may be enlarged if the delay involved is determined as not being inordinate. In the instant matter, he argued, the degree of delay cannot be assessed and determined as the point of reckoning of the limitation period is undisclosed. He further contended that, in effect, the applicant failed to account for each and every day of the whole delay involved from May 2018 to 26th November, 2019.

Furthermore, Mr. Mmuru disagreed with his learned friend casting the blame on the applicant's previous advocate for the pursuit of the ill-fated application for stay in the High Court. It was his contention that the alleged mistake of the advocate was not specifically pleaded in the application.

Rejoining, Mr. Rutaihwa conceded that the date of service of the notice of execution was not pleaded in both the founding and replying affidavits. He also acknowledged that the non-disclosure of that date disables the Court from determining the extent of the delay involved. Nonetheless, he beseeched that a favourable order be made in the interests of justice to allow the continuance of the applicant's long occupation of the landed property in dispute in the pendency of the hearing and determination of the intended appeal between the parties.

I have considered the notice of motion, the affidavits on record, the contending submissions of the parties and the authorities cited. The crisp question is whether this matter discloses a good cause to condone the delay involved and proceed to extend time to institute the intended application for stay of execution.

At this point, it is essential to reiterate that the Court's power for extending time under Rule 10 of the Rules is both wide-ranging and discretionary but it is exercisable judiciously upon good cause being shown. The phrase "good cause" may not have an invariable or constant definition but the Court consistently looks at factors such as the length of the delay involved; the reasons for the delay; the degree of prejudice, if any, that each party stands to suffer depending on how the Court exercises its discretion; the conduct of the parties; and the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal: see, for instance, this Court's unreported decisions in **Dar es Salaam City Council v. Jayantilal P. Rajani**, Civil Application No. 27 of 1987; **Tanga Cement Company Limited v. Jumanne D. Masangwa and Amos A. Mwalwanda**, Civil Application No. 6 of 2001; **Eliya Anderson v. Republic**, Criminal

Application No. 2 of 2013; and **William Ndingu @ Ngoso v. Republic**, Criminal Appeal No. 3 of 2014. Also to be considered is whether there is a point of law of sufficient importance such as the illegality of the decision sought to be challenged: see **Principal Secretary, Ministry of Defence and National Service v. Devram Valambhia** [1992] TLR 185; and **Lyamuya Construction Company Limited v. Board of Registered Trustees of Young Women Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported).

In the instant case, it is uncontested that following the delivery of the judgment the subject of the intended appeal, the applicant, through her previous advocate, duly applied on 6th July, 2015 for copies of the judgment, decree and proceedings of the High Court and, shortly thereafter, manifested her intention to appeal to this Court by the filing of a notice of appeal on 10th July, 2015. She was subsequently served with the notice of execution issued by the High Court on 21st May, 2018 to appear on 15th August, 2018 and show cause why the judgment and decree should not be executed against him. As rightly pointed out by Mr. Mmuru and acknowledged by Mr. Rutaihwa, the founding affidavit is startlingly silent as to when exactly the notice was so served. It only states that the applicant's response through

her previous advocate after receiving the notice was lodging the botched application for stay of execution in the High Court on 14th August, 2018.

Evidently, there is merit in Mr. Mmuru's high-pitched censure that the applicant's aforesaid non-disclosure obstructs the Court from assessing and judging the degree of the delay involved from the moment she was served with the notice at least until when she lodged the slipshod application in the High Court on 14th August, 2018. Whether the non-disclosure was deliberate or inadvertent remains a matter of conjecture. But its effect is certain; that the point of reckoning of the prescribed limitation period is now a mystery. In the premises, it is open to the Court to assume, for example, that if the notice, issued on 21st May, 2018, was served on the applicant with reasonable dispatch, the prescribed limitation period of fourteen days in terms of Rule 11 (4) of the Rules for filing the intended application, expired around the first week of June, 2015. It is highly probable, then, that by the time the applicant acted and lodged the ill-fated stay application in the High Court on 14th August, 2018, the delay had already clocked over two months. Inevitably, Mr. Mmuru is right in his submission that there is no explanation of each and every day of delay at least between the date on which the notice

of execution was served and 14th August, 2018. At any rate, the extent of delay involved would be plainly inordinate and cannot be glossed over.

Moreover, the non-disclosure brings the applicant's diligence to question. For, it is impossible to determine whether she pursued the matter diligently and acted expeditiously after she was served with the notice – see, for instance, **Royal Insurance Tanzania Ltd. v. Kiwengwa Strand Hotel Ltd.**, Civil Application No. 116 of 2008 (unreported).

There is a further disquieting aspect in this matter. It is in respect of applicant's claim that her intended quest for a stay order was frustrated by the High Court's failure to be supply with copies of the impugned judgment and decree, which she had to attach to the intended application. To appreciate the point, I find it imperative to reproduce Paragraphs 3 and 4 of the founding affidavit hereunder:

> "3. ***THAT***, *on 30th June, 2015, the High Court of Tanzania Madam Justice B.R. Mutungi, J., entered judgment in favour of the respondent. I was not satisfied with the decision. I instructed Mr. Thomas Joseph Massawe, learned advocate, to challenge the said decision. In turn the said advocate upon my instructions filed a Notice of Appeal and applied for certified copies of the judgment, decree and proceedings.* ***A copy of the said judgment,***

a copy of the notice of appeal and a copy of the letter applying for the proceedings, judgment and decree are appended herewith marked Annexure GSS (1), (2) and (3) respectively, to form part of this affidavit.

4. ***THAT****, up to the time I am swearing this affidavit I have yet to receive any of the said documents applied for as aforesaid."*

The two paragraphs above are manifestly contradictory and bring to question whether the applicant was truthful in her claim that her quest for a stay order was frustrated by the High Court's inaction in supplying the requested documents. For, while in Paragraph 3 as shown above she necessarily acknowledged having a copy of the impugned judgment which she attached to the founding affidavit as Annexure GSS (1), she went on to deny in Paragraph 4 having received from the High Court any of the requested documents (including a copy of the impugned judgment). The attachment of the copy of the impugned judgment, which must have been collected from the Registry of the High Court, effectively refutes the aforesaid denial. For obvious reasons, Mr. Rutaihwa was stunned when I drew his attention to this fact. It is elementary that an affidavit that contains falsehood should not be acted upon. On that basis, I find it unsafe to act on

the averment in Paragraph 4 of the supporting affidavit that manifestly contains a material untruth tending to muddy the waters but work in favour of the applicant.

It needs to be said, albeit very briefly, that on the authority of **Yusufu Same** (*supra*) relied upon by Mr. Rutahwa, I was prepared to ignore the delay directly arising from the applicant's pursuit, apparently in good faith, of the botched application for stay in the High Court between 14th August, 2018 and 8th November, 2019 when it was terminated by that Court for want of jurisdiction. I would agree that the mistake or inadvertence of the applicant's previous counsel in the pursuit of that matter ought not be visited upon the applicant who had left the matter to the hands of that counsel. But this finding would be inconsequential in the circumstances of this matter.

In sum, in view of my earlier finding that the applicant failed to account for each and every day of the delay involved from the moment she was served with the notice of execution until when she lodged the ill-fated application in the High Court, this matter must fail: see, for example, the unreported decisions of the Court on failure to account for every day of delay – **Bushiri Hassan v. Latifa Mashayo**, Civil Application No. 2 of 2007; **Bariki Israel v. Republic**, Criminal Application No. 4 of 2011; **Crispian**

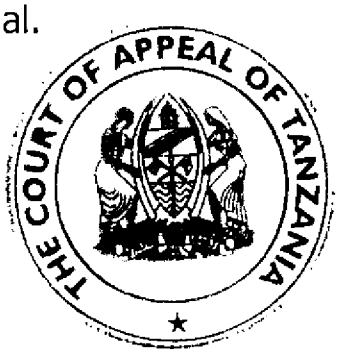
Juma Mkude v. Republic, Criminal Application No. 34 of 2012; and **Sebastian Ndaula v. Grace Rwamafa (Legal Representative of Joshwa Rwamafa)**, Civil Application No. 4 of 2014.

In the final analysis, I decline to exercise my discretion in favour of the applicant. Accordingly, I dismiss the application with costs.

DATED at **DAR ES SALAAM** this 19th day of February, 2021.

G. A. M. NDIKA
JUSTICE OF APPEAL

The ruling delivered on this 24th day February, 2021, in the presence of Ms. Rehema Samwel, learned counsel for the applicant and Mr. Laurent Mtanga, learned counsel for the respondent, is hereby certified as a true copy of the original.



S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL