

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MKUYE, J.A., LEVIRA, J.A. and MWAMPASHI, J.A.)

CIVIL APPLICATION NO. 71/17 OF 2020

NATIONAL BANK OF COMMERCEAPPLICANT

VERSUS

MAHMOUD SALUM CHIBANGO

@ MAHMOUD SALUM CHIBANGO MHINARESPONDENT

**[Application for stay of execution of the decree of the High
Court of Tanzania (Land Division) at Dar es Salaam]**

(Mgaya, J.)

Dated the 23rd day of March, 2016

In

Land Case No.299 of 2016

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RULING OF THE COURT

7th & 17th June, 2022

LEVIRA, J.A.:

This is Ruling is in respect of a preliminary point of objection (henceforth the P.O.) against the applicant's application for stay of execution of the Decree of the High Court of Tanzania (Land Division) in Land Case No. 299 of 2016 on account that the application is time barred.

At the hearing of the P.O., the applicant was represented by Mr. John Laswai, whereas the respondent had the services of Messrs. Jerome Msemwa and Deniol Msemwa, all learned advocates.

Upon taking the floor, Mr. Msemwa adopted the respondent's affidavit to be part of his submission. In support of the P.O., Mr. Msemwa stated that the decree of the High Court subject of the current application was issued on 23rd March, 2016 and the current application was lodged on 2nd March, 2020 far beyond the 14 days period of time prescribed by the law.

It is deposed in the affidavit in reply that as per the proceedings of the High Court, on 25th July, 2016, the applicant being represented by Rwazo Advocate appeared in court and prayed to file a counter affidavit in respect of the said application and the hearing was fixed to proceed on 19th September, 2016. Therefore, the counsel for the respondent urged us to consider that on that date the applicant was made aware of the existence of an application for execution and therefore that the period of 14 days of filing an application for stay should be reckoned right from that date. He further urged us to dismiss the application with costs.

In reply Mr. Laswai submitted that the application is within time because the applicant was served with the Notice of Execution on 17th February, 2020 and the application was lodged 2nd March, 2020 within 14 days as required by the law as stated under paragraph six of the supporting affidavit. He submitted further that the applicant was served with a Notice of Application for Execution on 17th February, 2020 that was filed on 20th June, 2016. Therefore, he argued that since the applicant was served personally on 17th February, 2020, the P.O. that the application is out of time is baseless and the same be dismissed with costs.

In his brief rejoinder, Mr. Msemwa submitted that initially, the applicant was represented by an advocate, so it cannot be said that he was not aware of the Execution Application and that is why he was able to attach a copy of it in this application.

Having heard the rival submissions by the counsel for the parties and perused the record before us, the sole issue for our consideration is, whether the application at hand is time barred or not.

Rule 11(4) of the Tanzania Court of Appeal Rules 2009 (the Rules) provides for a period of time within which an application for stay of execution can be made. It reads: -

"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."

Based on the above provision, Mr. Msemwa contended that the application was filed out of the period of fourteen days provided by the law. His argument relied on the execution proceedings attached to the affidavit in reply. Upon being prompted by the Court as to when exactly the applicant was served, Mr. Msemwa replied that he was not aware. But he was confident that the application is time barred relying on the execution proceedings which indicates that the application came for mention on 25th July, 2016 in the presence of the applicant's advocate one Rwazo. He had no any other proof except those proceedings.

We have thoroughly gone through the attached proceedings of the High Court of Tanzania (Land Division) in Misc. Land Application No. 55 of

2016 of 30th June, 2016 to 23rd November, 2016; we shall let the relevant part of it to speak for itself as hereunder: -

"Date: 25/07/2016

Coram: Hon. F.H. Mahimbali, DR

For D/Holder: Kipeche Advocate

For J/Debtor: Rwazo Advocate

C/C: Neema

Kipeche: Advocate

Your honour, the matter is for mention J/Debtors are duly served and present today under representation.

Rwazo

We pray to file counter affidavit in respect of the execution process not to proceed.

Order: *Hearing of the application*

- *On 19/9/2016 at 12:00hrs.*
- *C/A be filed within 14 days as prayed.*

F. H. Mahimbali

Deputy Registrar

25/07/2016

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Date: 26/9/2016

Coram: Hon. F. H. Mahimbali, DR

For D/Holder: Kipeche & Neema Mahuba

For J/Debtor: Nica Advocate

C/C: Neema

Nica Advocate

The matter is for hearing of the application. However, there are two applications pending before this Court before her Ladyship Justice Mgaya. The two applications are for leave to file notice of appeal out of time and another is stay of execution. Both applications are coming for ruling on 30th September, 2016.

Kipeche

Your honor, on 25th July, 2016 it was ordered by your office that the J /Debtor to file counter affidavit (if any) within 10 days as to why execution should not be carried out. To date we're not served.

Nica

Yes, your honor, that was prayed but the filing of the two applications which are pending in court

carry more legal weight than the proposed counter affidavit we pray for adjournment.

Order: *Mention on 10/10 2016 for necessary orders.*

F. H. Mahimbali
Deputy Registrar
26/09/2016

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Date: *14/11/2016*

Coram: Hon. F. H. Mahimbali, DR

For J/Holder: Kipeche Advocate

For J/ Debtor: Rwazo Advocate

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Court: *Just from the face of the current pending application purported to be stay of execution; it appears that there was duplicity of suits for no good reasons. As there is nothing holding this office from ordering execution process to proceed, I hereby order that execution process to proceed. The Court Broker will be*

appointed to carry out the execution process.

F. H. Mahimbali
Deputy Registrar
14/11/2016

Date: *23/11/2016*

Coram: Hon. F. H. Mahimbali, DR

Court: *For purposes of carrying out execution process as ordered on 14th November, 2016. The Court Broker by name of Nathaniel Tibaigana t/a Hope Auctioneers and Court Brokers is appointed to carry out the said execution as prayed and ordered.*

F. H. Mahimbali
Deputy Registrar
23/11/2016"

Following the sequence of the above proceedings it can be noticed that the proceedings which Mr. Msemwa urged us to rely upon to rule out that the application at hand was filed out of time cannot be safely relied upon. We say so because it seems that there was a confusion and if at all

we have to rely on them, it means that the "*intended stay of execution*" which the applicant is seeking is an empty exercise because the order for execution had already been granted and the Court Broker was appointed to carry out that exercise.

Moreover, according to the affidavit of the applicant, he was served with a Notice of Application for Execution of Decree Number 55 of 2016 on 17th February, 2020 before the High Court Land Division that was filed on 20th June, 2016. He attached a copy of the said notice to the supporting affidavit. If that is the case then, that was the date when the applicant was made aware of the existence of the Notice of Application for Execution. According to the record, this application was filed on 2nd March, 2020. Therefore, counting from 17th February, 2020 to 2nd March, 2020, it means the application was filed within 14 days as required by the law.

Weighing the version of Mr. Msemwa's arguments against that of the applicant's counsel, it is obvious that the probability of applicant's version to be correct is hinger than that of Mr. Msemwa. We say so because apart from alleging that the application was filed out of time, Mr. Msemwa presented no sufficient material to support his assertion. He acknowledged that he was not aware of the date of service to the applicant. He only

relied on the proceedings which we have reproduced. As it has been demonstrated above, the said proceedings take us nowhere because if at all the execution was ordered to be carried out on 23/11/2016 by Hon. Mahimbali, Deputy Registrar after appointing the Court Broker, why then was the applicant served with the Notice of Execution on 17th February, 2020?

In the circumstances, we find that in the interest of justice it is safe to hold that the application is not time barred as we accordingly do. Consequently, the P.O is hereby overruled.

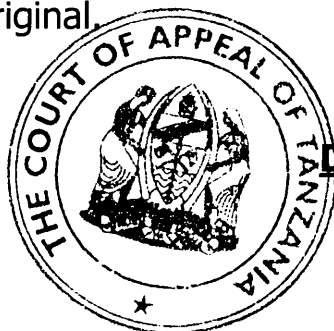
DATED at DAR ES SALAAM this 16th day of June, 2022.

R. K. MKUYE
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Ruling delivered this 17th day of June, 2022 in the presence of Mr. Makarios Tairo, learned counsel for the Applicant and Mr. Deniol Msemwa, learned counsel for the Respondent, is hereby certified as a true copy of original.




R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL