

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

CIVIL APPLICATION NO. 437/17 OF 2022

IBRAHIM TWAHIL KUSUNDWA1ST APPLICANT

IBRAHIM TWAHIL KUSUNDWA *(As an administrator of
the estate of the late TWAHIL SELEMANI KUSUNDWA)*.....**2ND APPLICANT**

VERSUS

EPIMAKI S. MAKOI1ST RESPONDENT

PRIM A. MUSHI.....2ND RESPONDENT

(Application for extension of time to apply for stay of execution of the
judgment and decree of the High Court of Tanzania,
Land Division at Dar es Salaam)

(Maghimbi, J.)

Dated the 31st Day of August, 2020
in
Land Case No. 274 of 2017

RULING

5th & 13th October, 2022

KEREFU, J.A.:

The applicants have lodged this application seeking an order 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, (Maghimbi, J.) dated 31st August, 2020 in Land Case No. 274 of 2017. The application is brought by way of notice of motion under Rule 10 of the Tanzania Court of Appeal Rules (the Rules). The grounds canvassed in the notice of motion are as follows, that:

- (a) The applicants had filed Civil Application No. 483/17 of 2020 which was struck out on 15th July, 2022 after it was found to be time barred;*
- (b) The applicants are still desirous to seek an order for stay of execution of a decree, as application for execution has been filed in the High Court vide Execution No. 61 of 2020, while the applicants have filed Civil Appeal No. 194 of 2021 now pending in this Court;*
- (c) The application for execution seeks vacant possession from the suit premises described as Plot No. 13 Block 30 situated at Nyamwezi Street, Kariakoo area within Ilala District in Dar es Salaam and seeking enforcement of payment of a colossal amount of money in the total sum of Tshs. 831,000,000/=;*
- (d) The appeal pending in this Court for determination of the propriety of the auction of the suit premises through powers of sale by a mortgagee as per a mortgage deed amidst a consent settlement decree which did not provide for sale of the suit premises; and*
- (e) There are points of law of significant importance for determination by the Court of Appeal and, therefore it is equitable and justifiable if an order for extension of time to apply for stay of execution is granted for the applicants to apply for the same to pave way for determination of the pending appeal.*

The application is supported by an affidavit deposed by the applicant. On the other hand, the respondents have filed a joint affidavit in reply opposing the application.

For a better appreciation of the issues raised herein, it is important to explore the background of the matter and the factual setting giving rise to this application. According to the affidavit in support of the application, the applicants unsuccessfully instituted a suit, Land Case No. 274 of 2017, in the High Court of Tanzania, Land Division at Dar es Salaam against the respondents and two others, who are not parties to this application. In that suit, the applicants sought for the following orders; (i) to nullify the purported auction of the suit premises, Plot No. 13 Block 30 situated at Nyamwezi Street, Kariakoo area within Ilala District in Dar es Salaam; (ii) that, the first applicant to continue to pay the principal sum and interest as per the residual repayment; (iii) a permanent injunction restraining the respondents from interfering with the applicants occupation and operations at the suit premises; and (iv) payment of general damages and costs of the suit.

The respondents resisted the suit and they as well raised a counter claim seeking an order to evict the applicants from the suit premises and claimed for payment of TZS 23,100,000.00 being amount of rent collected

by the applicants from the suit premises. The respondents also claimed for payment of costs of the suit.

After hearing the parties, the trial court dismissed the applicants' suit and allowed the respondents' counter claim by (i) declaring the respondents the lawful owners of the suit premises; (ii) ordering the applicants to immediately give vacant possession of the suit premises to the respondents; (iii) that, all monies collected from the tenants at the suit premises and all other proceeds of the suit premises at the tune of TZS 23,100,000.00 per month, from 1st August, 2017 to the date of judgment be paid to the respondents; and (iv) costs of the suit.

Aggrieved, the applicants lodged a notice of appeal in this Court on 1st September, 2020 which was registered as Civil Appeal No. 194 of 2021 and still pending in this Court. They also filed an application for stay of execution vide Civil Application No. 483 of 2021. However, the said application was struck out by the Court on 15th July, 2022 for being hopelessly time barred. Subsequently, on 19th July, 2022, the applicants lodged the current application.

At the hearing of the application, Mr. Thomas Brash and Mr. Godwin Mussa Mwapongo, both learned counsel entered appearance for the applicants and respondents, respectively.

Submitting in support of the application, Mr. Brash commenced his submission by fully adopting the contents of the notice of motion and the supporting affidavit. He thereafter, narrated the historical background to this application as indicated above and argued that, the applicant has taken various steps to challenge the impugned decision including, timely lodging of the notice of appeal. He said that the main reason for the delay is the struck out of the initial application, which they then, and immediately, after only four (4) days lodged the current application.

Upon being probed, if the applicants have accounted for delay of each day in the supporting affidavit, Mr. Brash, although conceded that the applicants have not accounted for the delay of each and every day of the delay in the supporting affidavit, he urged me to find that the extension of time is still warranted as under paragraphs 8 and 9 of the supporting affidavit the applicants have alleged issues of illegality in the impugned decision. He secured his stand by citing the case of **Lyamuya Construction Company Ltd v. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 02 of 2010 (unreported). He then argued that, when there is an allegation of illegality it constitutes a good cause for extension of time

regardless of the period of delay. He thus, finally, prayed for the application to be granted with costs.

In response, Mr. Mwapongo also commenced his submission by adopting the contents of the affidavit in reply. He then strenuously opposed the application by arguing that the applicants have failed to demonstrate good cause for extension of time. He clarified that, in the supporting affidavit the applicants have failed to account for the delay of each day as readily conceded by Mr. Brash.

On the alleged illegality, Mr. Mwapongo referred to paragraphs 8 and 9 of the support affidavit relied upon by Mr. Brash to have indicated issues of illegality and argued that the said paragraphs have not stated in clear terms the alleged illegalities. He contended that the applicants' claim that mediation was not conducted is not supported by the record as both parties attempted mediation but failed. He as well referred to the case of **Lyamuya Construction Company Ltd** (supra) relied upon by Mr. Brash and argued that, for an issue of illegality to constitute a sufficient reason for extension of time it must be apparent on the face of record. He said that, in **Lyamuya's** case, the application was dismissed on account of failure by the applicant to clearly state the alleged illegality in the supporting affidavit. He thus urged me to also find that, since the

applicants herein have failed to specify the alleged illegality in the affidavit in support of application, that ground cannot be relied upon to grant the application. He also challenged an attempt of his learned friend to clarify the said illegalities in his oral submission that the same is nothing but an afterthought. Based on his submission, Mr. Mwapongo urged me to dismiss the application with costs on account of failure by the applicants to demonstrate good cause for the delay.

Having heard the counsel for the parties, the main issue for my consideration is whether the applicants have submitted good cause for the delay to warrant grant of this application. It is essential to reiterate that the Court's power of extending time under Rule 10 of the Rules is both wide-ranging and discretionary but the same is exercisable judiciously upon good cause being shown. It may not be possible to lay down an invariable or constant definition of the phrase "good cause", but the Court consistently considers such factors like, the length of 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; **Kalunga &**

Company Advocates Ltd v. National Bank of Commerce Ltd (2006)

TLR 235, **Dar es Salaam City Council v. Jayantilal P. Rajani**, Civil

Application No. 27 of 1987 and **Attorney General v. Tanzania Ports**

Authority & Another, Civil Application No. 87 of 2016 (both unreported)

to mention but a few.

Now, in the application at hand, the two reasons advanced in the notice of motion, supporting affidavit and oral submission by Mr. Brash are; **first**, that, it was due to the struck out of the initial application for stay of execution; and **two**, that the impugned decision of the High Court is tainted with illegalities.

Starting with the first reason, it is on record that, the applicants' initial application for stay of execution was struck out by this Court on 15th July, 2022 for being time barred. Then, on 19th July, 2022, after lapse of four (4) days, the applicants lodged this application. However, and as well conceded by Mr. Brash, the applicants have failed to account for each and every day of the delay as required by the law. I am increasingly of the view that, since the applicants' previous application for stay of execution was also struck out for being time barred, the applicants were as well expected to account for such delay and give reasons for the said delay in the

supporting affidavit explaining why they did not lodge their application within the prescribed time. Unfortunately, that was not done.

It is a settled position that, any applicant seeking for extension of time under Rule 10 of the Rules is required to account for the delay of each day. Indeed, the Court has reiterated that position in numerous cases and I wish to refer to **Bushiri Hassan v. Latifa Lukio Mashayo**, Civil Application No. 03 of 2007, (unreported), where the Court emphasized that:

"...Delay of even a single day, has to be accounted for, otherwise there would be no point of having rules prescribing period within which certain steps have to be taken." [Emphasis added].

I fully subscribe to the above authority and reasoning and I thus agree with Mr. Mwapongo that, the applicants have completely failed to account for the delay of each day and as such, the first reason for the delay argued by Mr. Brash cannot stand.

As for the second ground, I am mindful of the fact that, in his submission, Mr. Brash had referred me to paragraphs 8 and 9 of the supporting affidavit and argued that, since the applicants have pleaded issues of illegality in the impugned decision, the same constitute sufficient

ground for grant of this application. For clarity, paragraphs 8 and 9 of the applicants' supporting affidavit state that:

"8. That, among the issues that will be determined by this Court during the hearing of the appeal is the propriety of the proceedings leading to the judgment now being executed, that is to say, whether all the procedures mandated by the law of civil procedure, including, but not limited to mediation was, in the circumstances of the case, conducted or not. Further that amidst the existence of the consent settlement of the matter, whether the sale of the suit premises by auction was proper.

9. Further that, the applicants in the intended appeal among other things complain that the trial judge did not consider the evidence adduced the deed of settlement entered by the first plaintiff and the 1st defendant did not resolve the dispute between them and the sale of the suit premises was unlawful."

It is clear from the above paragraphs that, issues of illegalities alleged by the applicants are in respect of the impugned decision. Admittedly, the law is settled in this jurisdiction that illegality of the impugned decision is good cause and may be used to extend time under Rule 10 of the Rules. I however doubts, if the said illegality raised herein, can as well constitute good cause to extend time in this current application.

This is so, because, under normal circumstances, the Court extends time on that account for purposes of rectifying the noted illegality in the intended application, appeal and or revision. See for instance **The Principal Secretary, Ministry of Defence and National Service v. Devram Valambhia** [1992] T.R.L. 387 and **Transport Equipment v. D.P. Valambhia** [1993] T.L.R. 91. Specifically, in the latter case, the Court reiterated that:

"...when the point at issue in one alleging illegality of the decision being challenged, the Court has a duty even if it means extending the time for the purposes to ascertain the point and, if the alleged illegality be established, to take appropriate measures to put the matter and the record right."

As intimated above, in the instant application, the applicants seek extension of time to file an application for stay of execution. It is therefore obvious that, even if I grant the current application and extend the time sought, the illegalities complained of, in the impugned decision, if any, will not be addressed and rectified at the instance of this application which is only for the applicants to apply for stay of execution of the decree in the impugned decision. This is not the first time this Court is faced with this dilemma. In **Iron and Steel Limited v. Martin Kumaliya and 117**

Others, Civil Application No. 292/18 of 2020 (unreported), where the Court was moved to extend time within which to file an application for stay of execution. The ground relied upon by the applicant was the illegality of the impugned decision in the intended appeal. In dismissing that application, the Court made the following observation:

*"...an illegality of the impugned decision will not be used to extend time in the circumstances of this case, for, no room will be available to rectify it in the application for stay of execution intended to be filed. **Illegality of the impugned decision is not a panacea for all applications for extension of time. It is only one in situations where, if the extension sought is granted, that illegality will be addressed.**" [Emphasis added].*

Likewise, in the instant application, since the extension of time sought is to enable the applicants to lodge an application for stay of execution, it goes without saying that the alleged illegality in the impugned decision will not be addressed. I thus agree with the submission of Mr. Mwapongo that, in the circumstances of this application, the ground of illegality relied upon by the applicants is misconceived. With respect, I am unable to go along with Mr. Brash on this ground and I equally find his submission on this point to be misconceived.

From the foregoing, it is clear that there are no good cause for extension of time can be said to have been shown in the circumstances of this application where, the applicants have completely failed to account for the delay of each day and the ground of illegality relied upon is misconceived.


In the event, I find no merit in the application and I hereby dismiss it with costs. It is so ordered.

DATED at DAR ES SALAAM this 11th day of October, 2022.

R. KEREFU
JUSTICE OF APPEAL

The Ruling delivered this 13th day of October, 2022 in the presence of Mr. Thomas Brash, learned counsel for the Appellant and Mr. Epimaki S. Makoi, 1st Respondent is hereby certified as a true copy of the original.




J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL