IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CIVIL APPLICATION NO. 600/16 OF 2021

ELIAS KIGUHA MARWA .....APPLICANT

VERSUS

STANDARD CHARTERED BANK TANZANIA LIMITED .....RESPONDENT

(Originating from the decision of the High Court of Tanzania (Commercial Division at Dar es Salaam)

(Hon. Phillip, J.)

Dated the 15th Day of March, 2021

in

Commercial Case No. 123 of 2018

.....

RULING

11th & 17TH July, 2023

MAIGE, J.A.:

On 15th March, 2021, the High Court of Tanzania, Commercial Division ("the Commercial Court") pronounced a judgment, in Commercial Case No. 123 of 2018, to the effect that the applicant should pay the respondent Tanzania Shillings 938,161,444.23 and USD 143,031.40 as an outstanding loan amount or else his properties at Plot No. 55 Block "G", Nyakato, Mwanza with Certificate of Title No. 8727 and Plot No. 2004 and 2005, Mbezi Beach area Kinondoni, Dar es salaam with certificate of title No. 13291 (together, "the suit properties") would be sold in realization of the said amount. Aggrieved, the applicant lodged a

notice of appeal and eventually instituted Civil Appeal No. 316 of 2021 which is pending at the Court.

On 24th August, 2021 while the notice of appeal had already been filed, it would appear, the applicant was served with a notice of execution in respect to the decree in question. Instead of filing an application for stay of the execution at the Court, the applicant filed a similar application at the Commercial Court on 17th September, 2021 and served it on the respondent on 21st September, 2021. On 26th October, 2021 when the application came for hearing and upon realising it was wrongly filed at the Commercial Court, the applicant withdrew the said application. As the time within which to apply for stay of execution had already expired, the applicant initiated, on 25th November, 2021, the instant application. It has been brought under rule 10 of the Tanzania Court of Appeal Rules, 2009 (the Rules) and is founded on the affidavit of Geoffrey Joseph Lugomo, the applicant's advocate which has been opposed by an affidavit in reply deposed on the respondent's behalf by advocate Edward Nelson Mwakingwe.

In accordance with the notice of motion and affidavit, the application is premised on two grounds namely; prosecution of the withdrawn application and illegalities in the judgment appealed against.

The application was heard in the presence of Mr. Geoffrey Joseph Lugomo, learned advocate who represented the applicant and Mr. Emmanuel Daniel Saghan, also learned advocate, who represented the respondent.

In his submissions in support of the motion, Mr. Lugomo fully adopted the facts in the notice of motion and affidavit. In respect to the first ground, it was his submission that, the delay in question was not associated with any inaction of the applicant and his counsel but for the reason of mistaken institution and prosecution of a similar application at the Commercial Court which was withdrawn on 26th October, 2021. The applicant, he further submitted, acted promptly and without negligence, in instituting this application after noting the defect in the previous application. In his contention thus, the delay was a mere excusable technical delay.

On the second ground, the applicant urged me to grant the application on account of illegality as per the well-known principle in **Principal Secretary, Ministry of Defence and National Survive v. Devran Valambia** [1992] TLR 185. The element of illegality which in his contention is apparent on the face of the record, is reflected at pages 10, 11 and 12 of the judgment of the Commercial Court. He clarified that, while the High Court Judge found as a point of fact that, there was no

evidence to prove the quantum of the outstanding loan, she proceeded, without evidential basis, to award the respondent half of the claim.

In rebuttal, Mr. Saghan submitted that sufficient cause for extension of time has not been established. On the first ground, he submitted, with all forces, that the applicant cannot take an asylum in the prosecution of the erroneous proceedings at the Commercial Court for two reasons. **First,** the institution of the said proceedings and service of the same to the applicant was after expiry of the 14 days period within which an application for stay of execution should have been filed. He clarified that, while the notice of execution according to the affidavit was served on the applicant on 24th August, 2021, the application at hand was filed on 17th September, 2021 hardly 24 days after. On top of that, he further clarified, the notice of motion attached in the affidavit indicates that it was served on the respondent on 21st September, 2021, being 28 days after the applicant's service of the notice of execution. In his contention, therefore, the delay to file the erroneous application at the Commercial Court has not been accounted for.

Second, in filing the application at the Commercial Court which had no jurisdiction to entertain the same, the applicant's advocate acted negligently. Negligence of an advocate, he submitted, has never been a ground for extension of time. To that effect, my attention was drawn to

the decision of a single Justice of the Court in **Jubilee Insurance Company (T) Limited v. Mohamed Sameer Khan,** Civil Application No. 439/01 of 2020 (unreported) to the effect that lack of diligence on the part of the counsel is not a sufficient ground for extension of time.

On illegality, the submission of Mr. Saghan was based on two propositions. The first one being that; for the court to extended time on the ground of illegality, the intended application should be capable of correcting the respective illegality. He submitted, therefore, as the intended action is for stay of execution which by itself cannot correct the alleged illegality, the ground is totally misconceived. His contention was based on the decision in **Sabena Technics Dar Limited v. Michael J. Luwunzu**, Civil Application No. 451/18 of 2020 (unreported) where a single Justice of the Court refused to extend time on account of illegality as the same could not be corrected in the intended action.

The second proposition has been deducted from the principle stated in **Lyamuya Construction Company Limited v. Board of Registered Trustees of Young Women Association of Tanzania, Civil Application No. 02 of 2010** (unreported) to the effect that, for illegality to amount as a good cause for the purpose of extension of time, it must be apparent on the face of the record with sufficient importance. The illegality raised in the instant case, he submitted, is neither apparent

on the face of record nor of sufficient importance. He, therefore, urged the Court to dismiss the application with costs.

In his rejoinder submissions, Mr. Lugomo reiterated his submissions in chief and further submitted that, though the alleged illegality cannot be corrected in the intended application, in a situation where the appeal has already been instituted and the quantum of the decretal sum is that which constitutes the element of illegality, justice requires that, the application be granted. Each case, the counsel insisted, has to be decided according to its own merit.

Having considered the rival submissions in line with the notice of motion and affidavit, I am bound to consider if good cause has been established as rule 10 of the Rules requires. In the first ground, the applicant has justified the delay on account of prosecution of a wrong application for stay of execution at the Commercial Court. It is now a settled position of law that; prosecution of an incompetent proceeding if filed within time amounts to a mere technical delay and if necessary steps to pursue the intended action are taken promptly and with due diligence, the same may amount to good cause for extension of time. See for instance, **Fortunatus Masha v. William Shija and Another** [1997] T.L.R. 154, **Bharya Engeneering & Contracting Co. Ltd vs. Hamoud Ahmed Nassor**, Civil Application No. 342/01 of 2017

(unreported), **Bank M (Tanzania) Limited v. Enock Mwakyusa**, Civil Application No. 520/18 of 2017 (unreported) and **Emmanuel Rurihafi and Another v. Janas Mrema**, Civil Appeal No. 314 of 2019 (unreported). It would suffice, for the purpose of this decision, to reproduce hereunder, the following statement in **Fortunatus Masha** (supra). Thus:

> *"A distinction had to be drawn between cases involving real or actual delay and those such as the present one which clearly only involved technical delays in the sense that the original appeal was lodged in time but had been found to be incompetent for one or other reason and a fresh appeal had been instituted. In the present case the applicant had acted immediately after the pronouncement of the ruling of the Court striking out the first appeal. In these circumstances an extension of time ought to be granted."*

The obvious question which follows, therefore, is whether the delay arising from the prosecution of a wrong application at the Commercial Court was by itself a technical delay. Mr. Saghan has submitted that in as much as the application was filed out of time, the time spent in its prosecution was not a technical delay. There was no comment from Mr. Lugomo in his rejoinder submissions.

In accordance with the affidavit and its supporting documents, the applicant was served with a notice of execution on 24th day of August, 2021. The time available for the applicant to apply for stay of execution under rule 11(4) of the Rules is fourteen days from the date when the judgment debtor was made aware of the application for execution. The incompetent application at the Commercial Court, Mr. Saghan is quite correct, was filed on 17th September, 2021 which is more than 20 days from the date of the notice of execution. Obviously, therefore, the delay is actual and not merely technical. It follows, therefore, that as the applicant has not accounted for the delay to initiate the incompetent application, the time spent in the prosecution of the same cannot constitute a good cause for extension of time.

This now takes us to the second ground of application as to illegality. There appears to be a common understanding by the counsel of the general rule in **The Principal Secretary, Ministry of Defence and National Service v. Devram Valambia** [1992] T.L.R 387 that an extension of time can, in fit cases, be solely granted on account of illegality. The debate is whether the principle is applicable in the instant application. For the respondent, it was submitted, the principle does not apply as the intended action is incapable of correcting the illegality if any.

In the alternative, it was submitted, the alleged illegality is not apparent on the face of the record. Neither of significant importance.

The illegality involved, according to the affidavit is that, the High Court Judge awarded half of the claim despite his finding that no evidence was adduced to establish the amount of the claim. From my quick reading of the judgment at page 12 and 13 thereof in line with the factual depositions in the affidavit, I cannot, unless I examine the judgment and proceedings of the Commercial Court, which is not within my power, dismiss the applicant's proposition that, there is a serious question of illegality involved in the intended appeal. I can say, without hesitation that, the same is apparent on the face of the record within the meaning of the principle in **Lyamuya's** Case (Supra).

I will now consider, if this is a fit case for a grant an extension of time on the ground of illegality. An issue like this was substantially discussed in the case of **Iron and Steel Limited v. Martin Kumalija and 117 Others**, Civil Application No. 292/18 of 2020 (unreported) which was referred in **Sabena Technics Dar Limited v. Michael J. Luwunzu** (supra) and the Court observed:

> *"... an illegality of the impugned decision will not be used to extend time in the circumstances of this case, for, no room is 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 ali applications for extension of time. It is only one in situations where, if the extension sought is granted, that illegality will be addressed"

Mr. Lugomo has submitted that the facts of this case are materially different with those obtaining in the decision in question in that, unlike in the said case, in the instant case, the appeal has already been instituted and the respondent is seeking to execute a decree which was awarded without there being evidence. I wish to state right from the outset that, as observed in the case just referred, the principle enunciated in the **Valambia's** Case on relevancy of illegality in an extension of time is based on the presupposition that, the extension of time is granted for the purpose of enabling the higher court to correct the illegality complained of. It would thus go without saying that, for the extension of time to be relevant, the intended action must be such that it can be the avenue for correcting the illegality. An illegality in the judgment of the lower court can in no way be corrected in a proceeding for stay of execution however serious it may be. It is only an appeal or revision which can do.

The loss and inconveniences that the applicant can suffer in relation to the intended execution, would, in my view, amount to good cause for the substantive application for stay of execution and not for

extension of time to apply for the same. To decide otherwise, am certain, is to disregard the clear principle which the Court has established as a guidance for the application of the rule under discussion. Therefore, unless it is necessary in the circumstances so to do, which is not, departure from a clear decision in a case involving similar facts is uncalled for, as it is likely to cause uncertainty, inconsistency and unpredictability in the courts decisions. Much as I am aware that the principle of stare decisis in the final courts like this should be applied with flexibility so to give room for accommodation of changes in the customs, habits and needs of the society, such departure where necessary, should be exercised after careful consideration of the implications of doing so. In this respect, the following statement of the Court of Appeal of East Africa in the case **Dodhia v. National & Grindlays Bank Ltd**. [1970] E.A. 195 which was recognised by the Court in **Jumuiya ya Wafanyakazi Tanzania v. Kiwanda cha Uchapishaji cha Taifa** [1988] TLR 146 may be pertinent:

> *" For these reasons, I am satisfied that as a matter of judicial policy this Court as the final Court of Appeal for Kenya, Tanzania and Uganda, while it would normally regard a previous decision of its own as binding, should be free in both civil and criminal cases to depart from such a previous decision when it appears right to do so. It will, of course, exercise this*

power only after careful consideration of the consequences of doing so and the circumstances of the particular case, but I would not seek to lay down any more detailed guide to the circumstances in which such a departure should take place as the matter would be left to the discretion of the Court at the time it was up for consideration."

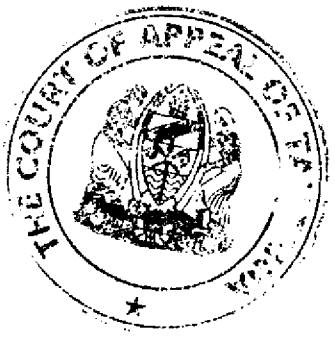
In my opinion, therefore, the application is devoid of any merit and I accordingly dismiss it with costs.

It is so ordered.

DATED at **DAR ES SALAAM** this 14th day of July, 2023.

I. J. MAIGE
JUSTICE OF APPEAL

The Ruling delivered this 17th day of July, 2023 in the absence of the Applicant and Mr. Emmanuel Daniel Saghan, learned Advocate for the Respondent, is hereby certified as a true copy of the original.



C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL