

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

CIVIL APPLICATION NO. 547/16 OF 2022

MOHAMED ABDILLAH NUR 1ST APPLICANT
UMMUL KHERI MOHAMED 2ND APPLICANT
WINGS FLIGHT SERVICES LTD 3RD APPLICANT
AFRICA FLIGH SERVICES 4TH APPLICANT

VERSUS

HAMAD MASAUNI 1ST RESPONDENT
ARTHUR MOSHA 2ND RESPONDENT
JUMA MABAKILA 3RD RESPONDENT

**(Application for extension of time to file an application for stay of
execution of the ruling and order of the High Court of Tanzania,
(Commercial Division) at Dar es Salaam)**

(Magoiga, J.)

dated the 8th July, 2022

in

Misc. Commercial Cause No. 33 of 2021

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RULING

3rd & 6th November, 2023

ISSA, J.A.:

This is an application made by the way of notice of motion under Rule 10 of the Tanzania Court of Appeal Rules, 2009 (the Rules) seeking extension of time to file an application for stay of execution of the ruling and order of the High Court of Tanzania (Commercial Division) at Dar es Salaam (Magoiga, J.) dated 8/7/2022 in Misc. Commercial Cause No. 33

of 2021. The application is supported by separate affidavits affirmed by Abdillahi Nur Guled, the Principal Officer of the 3rd and 4th applicants, Mohamed Abdillah Nur, the 1st applicant, and Ummul Kheri Mohamed, the 2nd applicant.

From the three affidavits of the applicants, and from the affidavit in reply of Arthur Mosha, there is no dispute that Misc. Commercial Cause No. 33 of 2021 ended in favour of the respondents, and the applicants being aggrieved lodged a notice of appeal and applied for proceedings, ruling and drawn order on 11/7/2022 within time. Further, they applied for leave to appeal on 18/7/2022 well within time. There is also no dispute that, the respondents initiated execution proceedings on 13/7/2022 which was granted on 18/7/2022.

Furthermore, there is no dispute that, the applicants on 15/7/2022 filed in this Court an application for stay of execution in Civil Application No. 336/16 of 2022. The application was filed within time and it was called for hearing on 22/8/2022, but the Court struck out the application on the ground that the affidavits of the 1st and 2nd applicants were missing. The decision was delivered on 7/9/2022, and the copy of the ruling and order were supplied to the applicants on 9/9/2022. The

applicants on 13/9/2022 filed this application for extension of time within which to file an application for stay of execution.

At the hearing of the application, Mr. Deogratius Kiriita, learned advocate for the applicants adopted the contents of the notice of motion, and the affidavits which he had earlier filed. He submitted that, the earlier application for stay of execution was filed in time allowed by the rules and when it was struck out, they immediately filed an application for extension of time. He added that, the application for stay of execution was made after the execution proceeding started and the respondents executed one of the orders granted by the High Court. The respondents took over the office of the 4th applicant but other orders have not been executed, hence this application for extension of time.

Mr. Alex Mgongolwa, learned advocate for respondents, raised all manner of resistance both by affidavit in reply and oral submissions at the hearing. He argued that, the application before the Court is misconceived and has no merit. He advanced two reasons to support his position. The first is that the execution of the High Court orders has already been granted after the applicants' application for stay of execution was struck out, and the order which is executable has been executed. At the moment, there is no pending application for execution

which is capable of being stayed. The second reason is that, if the extension is granted, it will not serve any meaningful purpose as there is nothing to be stayed. He prayed for this application to be dismissed with costs. To support his arguments, Mr. Mgongolwa cited a number of cases. Specifically he cited two cases of this Court. The first is **Juto Ally v. Lucas Komba and Another**, Civil Application No. 84 of 2017 (Unreported) where on page 6 the Court said:

"We are firmly of the view that since execution has been carried out, we cannot make an order to stay it and that if it caused substantial loss to the applicant, there is no order that can undo that."

The second case cited is that of **Felix Emmanuel Mkongwa v. Andrew Kimwaga**, Civil Application No. 249 of 2016 (Unreported) where on page 7 the Court held:

"... the circumstances in respect of which the stay of execution was sought by the applicant in this application have gone beyond the stage at which a stay order would meaningfully serve any purpose to restrain the respondent. The application has been overtaken by events. Whenever it is shown that the application will no longer serve the purpose it was intended to or that an application has been overtaken by

events, the Court has in a number of cases dismissed such application.”

In rejoinder, Mr. Kirita submitted that the arguments advanced by Mr. Mgongolwa are misplaced since the application is for extension of time on which the applicants have explained away the delay. The arguments raised would have a place once the application for stay has been filed. In addition, he submitted that the issue that the execution was finalized is a new fact which was raised from the bar.

I shall now proceed to determine the matter on the basis of the arguments and legal principles raised. The application was brought under Rule 10 of the Rules which empowers the Court to grant extension of time. It has been stated in various decisions of this Court that, the power of the Court to extend time under rule 10 of the Rules, is both broad and discretionary. The discretion is judicial and it must be exercised according to the rule of reason and justice and not according to private opinion or arbitrary. See: **Lyamuya Construction Co. Ltd v. Board of Registered Trustees of Young Women’s Christians Association of Tanzania**, Civil Application No. 2 of 2010 (unreported).

Further, the power under Rule 10 is only exercisable if good cause is shown. Whereas there is no universal definition of what constitutes good cause, in exercising its discretion under the said Rule, the Court is

bound to consider the prevailing circumstances of the particular case and should also be guided by a number of factors such as the length of the delay, the reasons for the delay, the degree of prejudice the respondent stands to suffer if time is extended, whether the applicant was diligent and whether there is a point of law of sufficient importance such as illegality of the decision sought to be challenged. This position of law has been restated by the Court in a number of cases including; **The Principal Secretary, Ministry of Defence and National Service v. Devram P. Valambhia** [1992] T.L.R. 387 and **Lyamuya Construction Co. Ltd** (supra).

In this application, the applicants have demonstrated diligence and promptness in pursuing their rights. The earlier application for stay of execution was filed in time only to be struck out for failure to file the affidavits of the 1st and 2nd applicants. But immediately after it was struck out, they came back for extension of time. Therefore, in principle the delay is technical and they have established a good cause for extension of time.

The respondents' advocate, on the other hand, did not oppose the application on the ground of lack of good cause. Rather, he resisted the application on the ground that execution has already taken place and

the extension will not serve any purpose. It cannot undo what has already been done.

Now, the issue is whether a single Justice can determine the merits of those arguments. I am of the considered view that, the determination would entail seeking further proof on the status of the execution proceedings, which I cannot do. My jurisdiction as a single justice in an application at hand is to ascertain whether the applicants have advanced good cause for grant of extension of time. I have no jurisdiction to sit, hear, examine and determine the substantive grounds for granting stay of execution. My position is fortified by the decision of this Court in the case of Tanzania **Portland Cement Company Limited v. Khadija Kuziwa**, Civil Application No. 437/01 of 2017 (Unreported) where it was stated in clear terms at page 6 of that ruling that:

"In an application for extension of time, the Court is primarily concerned with ascertaining whether or not good cause has been shown to support a grant. The Court, more so, a Single Justice, may not venture so far as to speculate the merits of the desired application for revision before granting an extension of time."

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 14 days of the delivery of this ruling.

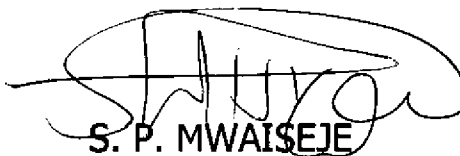
It is so ordered.

DATED at DAR ES SALAAM this 15th day of November, 2023.

A. A. ISSA
JUSTICE OF APPEAL

The Ruling delivered this 16th day of November, 2023 in the presence of Mr. Alfred Kilita and Ms. Suzan Michael, learned advocates for the applicants, and Mr. Kennedy Mgongolwa, learned advocate for the Respondents, is hereby certified as a true copy of the original.




S. P. MWAISEJE
DEPUTY REGISTRAR
COURT OF APPEAL