

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

CIVIL APPLICATION NO. 705/15 OF 2022

HUMPHREY SOKA APPLICANT

VERSUS

MOHAMED MUHIDIN RESPONDENT

(Application for extension of time to file an application for stay of

execution of the judgment and decree of the

High Court of Zanzibar, at Vuga)

(Mohamed, J.)

Dated the 9th day of August, 2021

in

Civil Case No. 55 of 2018

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RULING

14th & 23rd November, 2023

ISSA, J.A.:

This is an application made by 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 judgment and decree of the High Court of Zanzibar at Tunguu (Mohamed, J.) dated 9.8.2021 in Civil Case No. 55 of 2018. The application is supported by an affidavit sworn by Mr. Isaac Msengi, the learned advocate for the applicant.

Before getting down to the determination of the matter, I find it appropriate to narrate the factual background to the present application for extension of time. The factual background is ostensibly short. It goes thus: the respondent sued the applicant at the High Court of Zanzibar in Civil Case No. 55 of 2018 for recovering TZS 96,059,400 being the value of the construction materials received by the respondent but was not paid for. The High Court delivered a judgment in favour of the respondent on 9.8.2021. The applicant was aggrieved by that decision and he lodged a notice of appeal on 13.8.2021 and filed his appeal on 16.3.2022. The respondent, on the other hand, initiated execution proceedings and the applicant was served with the notice to show cause on 16.3.2022. The notice awakened the applicant who filed the application for stay of execution in this Court on 21.3.2022. Realising that his application was beset with some errors and omissions, the applicant lodged in Court notice to withdraw the said application on 20.10.2022. The application was registered as Civil Application No. 665/15 of 2022. When the application was called on for hearing on 1.6.2023 the applicant withdrew it and the Court marked the same withdrawn.

But before the Civil Application No. 665/15 of 2022 was marked withdrawn on 1.6.2023, very strangely, the applicant refreshed his application for stay of execution on 24.10.2022. Unfortunately, the registry officer refused to register that application as it was time-barred. The applicant then filed an application for extension of time within which to file for stay of execution on 15.11.2022 which was registered as Civil Application No. 705/15 of 2022, the present application.

At the hearing of the application Mr. John Ignace Laswai and Mr. Isaac Msengi, learned advocates who appeared for the applicant, adopted the contents of the notice of motion, and the affidavit sworn by Mr. Msengi. Mr. Laswai submitted that the earlier application for stay of execution was filed in time allowed by law and after they lodged a notice of withdrawal on 24.10.2022 they filed an application for extension of time within which to file an application for stay of execution. This was done even before the Court marked the application withdrawn on 1.6.2023. Therefore, they pursued their application without delay.

Mr. Laswai added that they have advanced two reasons in the affidavit to support their application for extension of time. One, their appeal has a high chance of success, and if extension is not granted the purpose of appeal will be defeated. Two, they have sufficient cause to

be granted extension of time as the applicant was held up in Court and found himself out of time. He bolstered his arguments by our decisions in **Benedicto Mumelo V. Bank of Tanzania**, Civil Appeal No. 12 of 2002, **Lyamuya Construction Company Limited V. Board of Registered Trustees of Young Women Christian Association**, Civil Application No. 2 of 2010, **Hyasinta Malisa V. John Malisa**, Civil Application No. 167/01 of 2021, **Reuben Lubanga V. Moza Gilbert Mushi and 2 Others**, Civil Application No. 553/01 of 2021 and **Hamza K. Sungura V. the Registered Trustees of Joy the Harvest**, Civil Application No. 90/11 of 2022 (all unreported). Mr. Msengi added a pinch of salt in the same pot. He submitted that the decision of the High Court contained illegality which needs to be rectified. To support this argument he relied on our decision in **CRDB Bank Pic V. Victoria General Supply Co. Ltd**, Civil Application No. 319/08 of 2019 (unreported).

Mr. Rajab Abdalla, the learned advocate for respondent, raised all manner of resistance both by affidavit in reply and oral submission at the hearing. He argued that before this application there was another application (Annex. HU5 of the applicant) which was pending in Court, and an attempt to withdraw that application did not bear any fruit as

there was no proof that the application was withdrawn. He is convinced that the application is still pending in Court. He submitted that what is happening is not allowed by the Rules. There is an application for stay of execution pending and now the applicant is applying for extension of time to file another application for stay of execution.

In addition, Mr. Rajab argued that the applicant failed to advance good cause for extension of time as he failed to file the application promptly. But it is not clear how long the delay was as we do not know the date of the withdrawal of the application. He assumed the date of the notice to withdraw the application (24.10.2022) was the date of withdrawal and since the present application was filed on 15.11.2022, there was a delay of 20 days, which he submitted was inordinate. He bolstered his argument by our decision in **Attorney General v. Oyster bay Villas Limited and Another**, Civil Application No. 299/16 of 2016 (Unreported). He further referred to the guidelines this Court set in **Lyamuya case** (supra) and submitted that the applicant was not diligent in filing the application. He prayed for this application to be dismissed with costs.

In rejoinder, Mr. Laswai clarified the position of the pending application for stay of execution. He submitted that there is no

application which is pending in Court. The notice of withdrawal (Annex. HU4) withdrew the application filed on 21.3.2022, and the Court marked it withdrawn on 1.6.2023. Regarding Annex. HU5 which is the application Mr. Rajab was referring to he said it was never registered, hence, it is not pending in Court.

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 rules of reason and justice and not according to private opinion or arbitrarily. See; **Lyamuya Construction Co. Ltd V. Board of Registered Trustees of Young Women's Christians Association of Tanzania** (supra).

Further, such powers are 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 a 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 applicant has demonstrated diligence and promptness in pursuing his right. The earlier application for stay of execution was filed on time. The notice to show cause was served on the applicant on 16.3.2022 and the application for stay of execution was filed on 21.3.2022, within 14 days as required by Rule 11(4) of the Rules. Realising that the application was beset with errors and omission the applicant gave notice of withdrawal of the application on 20.4.2022 before the said application was fixed for hearing. Then out of the ordinary, the applicant filed this application for extension of time on 15.11.2022 even before the earlier application was marked withdrawn by the Court.

This is unusual but since the Court marked the earlier application withdrawn there is nothing wrong in proceeding with this application for extension of time which was filed earlier. Therefore, this Court is of the view that the objection raised by Mr. Rajab has no merit and is hereby dismissed.

With respect to the issue of whether the applicant has shown good cause or not, this Court is of the view that he has demonstrated diligence and he promptly filed the application for extension of time long before the application was marked withdrawn. In principle, the delay is technical and the applicant has established a good cause for extension of time.

With respect to the confusion about whether there is an application for stay pending in Court, this can be resolved by looking at the applications themselves. On 21.3.2022 the applicant filed an application for stay of execution which was registered as Civil Application No. 661/15 of 2022. On 24.10.2022 he lodged a notice to withdraw that application, and on the same day he refreshed his application but it was not registered as it was barred by Rule 11(4) of the Rules. The application was supposed to be filed within 14 days of the service of the notice of execution. The notice was issued on

16.3.2022. This means, therefore, the second application for stay of execution was time barred. The applicant then filed the present application for extension of time, Civil Application No. 705/15 of 2022 on 15.11.2022. From the series of events, therefore, there is no confusion and there is no application for stay which is pending in Court.

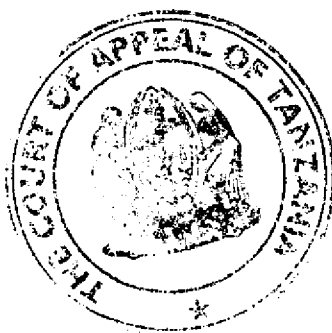
Accordingly and for the stated reasons, I grant the application with costs. I order the intended application for stay of execution to be lodged within 14 days of the delivery of this ruling.

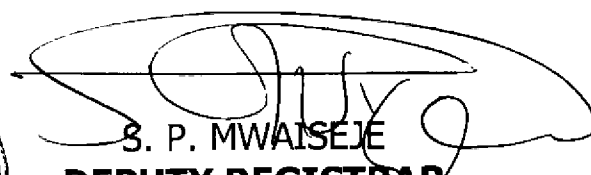
It is so ordered.

DATED at DAR ES SALAAM this 21st day of November, 2023.

A. A. ISSA
JUSTICE OF APPEAL

The Ruling delivered this 23rd day of November, 2023 in the presence of Mr. Mazoea Africa, learned Counsel for the Applicant, and also holding brief for Mr, Rajab Abdallah Rajabu, learned counsel for the Respondent is hereby certified as a true copy of the original.




S. P. MWAISEJE
DEPUTY REGISTRAR
COURT OF APPEAL