

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

CIVIL APPLICATION NO. 481/16 OF 2021

AFRICAN BANKING CORPORATION LIMITED APPLICANT

VERSUS

T-BETTER HOLDING COMPANY LIMITED RESPONDENT

(An application for Extension of time to file an Application for Stay of Execution of the Judgment and Decree of the High Court of Tanzania (Commercial Division) at Dar es Salaam)

(Mwambegele, J.)

dated the 10 day of November, 2016

in

Commercial Case No. 3 of 2015

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RULING

21st & 31st March, 2023

LEVIRA, J.A.:

The applicant is seeking extension of time within which to file an application for stay of execution of the Judgment and Decree of the High Court of Tanzania (Commercial Division) at Dar es Salaam (the trial Court) in Commercial Case No. 3 of 2015. The application is brought under Rule 10 of the Tanzania Court of Appeal Rules, 2009 (the Rules) and it is supported by the affidavit of Peter Kibatata, learned counsel for the applicant. The respondent filed affidavit in reply against the application.

It is on record that in the year 2013, the applicant and the respondent had entered banker – customer relationship. However, in 2015 the respondent successfully sued the applicant for breach of the banking contract before the trial court. Aggrieved, the applicant filed a notice of appeal to the Court and subsequently filed an appeal registered as Civil Appeal No. 207 of 2017 now pending before the Court. The applicant also filed Civil Application No. 23/16 of 2017 for stay of execution which however on 14th September, 2021 was struck out by the Court following an objection raised by the respondent. The applicant's counsel became aware of the ruling striking out the application for stay of execution on 16th September, 2021 and he informed his client about the said ruling on 17th September, 2021. He was re-instructed on 7th October, 2021, hence this application which was filed on 11th October, 2021.

At the hearing of the application, Mr. Peter Kibatala, learned advocate appeared for the applicant, whereas, Mr. Edward Peter Chuwa, also learned advocate represented the respondent.

Mr. Kibatala adopted his affidavit in support of the application as part of his oral submission and stated that, when he became aware of the ruling of the Court of 14th September, 2021 striking out Civil

Application No. 23/16 of 2017, he informed his client on 17th September, 2021 who in turn had to consult regarding his instruction as a counsel. The process had to pass through Board Meeting for approval and thus he was approved on 7th October, 2017. He submitted further that upon his approval, he acted promptly as he was able to present for filling this application on 8th October, 2017 and the same was registered on 11th October, 2021.

Mr. Kibatala went on to state that there are some illegalities in the impugned decision of the High Court which need to be addressed by the Court. In addition, he said, an execution of the decree of the High Court has not yet taken place and thus, he prayed for the application to be granted because it is the only caveat against the execution of the decree under consideration.

It was Mr. Kibatala's argument that the delay has not been inordinate and the counsel for the applicant acted diligently. He insisted that he did not have instructions from his client that is why he delayed in filing this application. Finally, he prayed for the application to be granted.

In reply, Mr. Chuwa submitted at the outset that the application has no merit. He referred me to paragraph five of the affidavit in reply

where he stated that, the applicant has not accounted for the twenty (20) days of the delay from 16th October, 2021 when he became aware of the decision of the Court striking out the application for stay of execution to 7th October, 2021 when they became wise to instruct the lawyer. According to him, while the established principle requires each day of delay to be accounted for, the applicant has failed to furnish sufficient ground for the delay. He cited the cases of **Dar es Salaam City Council v. Group Security Co. Ltd**, Civil Application No. 234 of 2015 and **Juma Shomari v. Kabwere Mambo**, Civil Application No. 330/17 of 2020 (both unreported) to support his position.

Mr. Chuwa argued that, it is the applicant who is supposed to account for the delay and not an advocate. Therefore, the reason that the applicant's counsel could not file the application on time because the applicant was waiting for Board resolution is not a good cause. For the sake of argument, he said, even if the Court could agree with the counsel for the applicant, still, this reason could not stand because the said Board resolution was not attached with the affidavit in support of the application to form part of the record. Therefore, the argument remained to be an argument from the bar which cannot be relied upon, he insisted.

Regarding the illegality of the impugned decision, Mr. Chuwa submitted that the applicant did not show the points of the alleged illegality. Therefore, he argued that, this is not a good cause for extending time as the said illegality is farfetched.

Regarding the pending appeal before the Court, Mr. Chuwa replied that, there is no pending appeal before the Court since the applicant failed to comply with the order of the Court of 29th June, 2021 requiring her to file supplementary record of appeal within thirty (30) days of the date of that order. For that reason, he argued that it is as good as there is no pending appeal. According to him, this application is nothing but a delaying tactic to deny the decree holder the right to enjoy the fruits of his decree.

He concluded by submitting that the applicant has failed to account for the delay to file the intended application for stay of execution and thus urged me to dismiss this application with costs.

Mr. Kibatata made a very brief rejoinder to the effect that Civil Appeal No. 207 of 2017 which Mr. Chuwa said that it does not exist following failure by the applicant to file supplementary record of appeal, is still pending in Court. That aside, the decision of the trial court subject

of the intended appeal contains illegalities which need to be addressed by the Court.

As regards his re-instruction to represent the applicant, he submitted that his client could not come to the Court except through him as an advocate. He thus faulted Mr. Chuwa's argument that the applicant ought to have applied for extension of time and not necessarily through an advocate. He insisted that the reason for delay has been explained out. Therefore, the applicant has to be given the benefit of doubt. According to Mr. Kibatala, the cases cited by Mr. Chuwa are distinguishable from the circumstances of the current application because for instance, in the first case of **Dar es Salaam City Council** (*supra*), the reasons for delay were not stated. He concluded by insisting that he acted promptly after being re-instructed to file the current application, as stated under paragraphs 4, 5, 6 and 7 of the supporting affidavit.

Having thoroughly gone through the submissions by the parties and their respective affidavits, the issue calling for my determination is whether the applicant has advanced good cause for me to exercise my discretionary powers to grant this application.

As introduced above, this application has been preferred under Rule 10 of the Rules, which provides as follows:

"The Court may, upon good cause shown, extend the time limited by these Rules or by any decision of the High Court or tribunal, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act; and any reference in these Rules to any such time shall be construed as a reference to that time as so extended."

The main reason for the delay advanced by Mr. Kibatata in this application is that he was waiting to be re-instructed by the applicant after the ruling of the Court of 14th September, 2021 which struck out the initial application for stay of execution. He stated under paragraph four of his affidavit that he became aware of the said ruling of the Court on 16th September, 2021 and immediately, he communicated the same to his client on 17th September, 2021. At paragraph Six he stated the reason for the delay to be re-instructed. The following are his words:

"That the delay in confirmation was predicated by the unhappiness at the striking out of the application vide the afore-said Ruling."

The ground for the delay raised by Mr. Kibatata was vehemently opposed by Mr. Chuwa. According to him, the applicant has failed to

advance good cause for extension of time because it is the applicant and not an advocate who is supposed to file the application for extension of time. Therefore, delay of the applicant to reinstruct her advocate for whatever reason should not be considered as a good cause. I agree with Mr. Chuwa that the reason for the delay advanced by Mr. Kibatala does not amount to good cause. At any rate, disappointment of a party to a case by a decision of the court has never been made a special circumstance constituting a good cause in terms of Rule 10 of the Rules.

The term good cause has no single definition. It can be defined in accordance with the peculiar circumstances of each case. Therefore, genuine reasons for the delay may, among other factors, amount to good cause. The requirement to account for a delay is stated in a number of decisions of the Court, including, **Oswald Masatu Mwaizaburi v. Tanzania Fish Processing Ltd**, Civil Application No. 13 of 2010 and **Ludger Bernard Nyoni v. National Housing Corporation**, Civil Application No. 372/10 of 2018 (both unreported), to mention, but a few.

In the present case, the applicant's application for stay of execution was struck out on 14th September, 2021. The applicant was informed by his advocate about the decision of the Court on 17th

September, 2021 as per paragraph 5 of the supporting affidavit. However, the application at hand was filed on 11th October, 2021 after lapse of about 24 days from the date when she became aware. The applicant has failed to account for those days of the delay.

In terms of Rule 11 (4) of the Rules, an application for stay of execution is supposed to be made within fourteen days of service of notice of execution on the applicant by the executing officer. The applicant's initial application for stay of execution was struck out but he did not act promptly to re-institute it. In my considered opinion, the twenty-four days which lapsed from the date when the applicant became of the order striking out the application to the date of filing this application, is an inordinate delay. In **Judge Bernard Nyoni** (supra), it was stated that:

"It is settled that in an application for enlargement of time, the applicant has to account for every day of the delay involved and that failure to do so would result in the dismissal of the application."

As intimated above, the applicant's advanced reason for the delay does not constitute good cause to justify grant of the application.

I take note that Mr. Kibatala argued that the appeal which is pending (Civil Appeal No. 207 of 2017) intends to address some illegalities in the impugned decision of the High Court. I further note that Mr. Chuwa urged me to consider that the said appeal does not exist following failure of the applicant to comply with the order of the Court of 29th June, 2021, which required the applicant to file supplementary record of appeal.

I wish to state that illegality committed by the lower court when properly raised and shown in the application for extension of time, may constitute good cause – see: **Principal Secretary, Ministry of Defence, National Services v. Devran Valambhia** [1992] T.L.R. 185. However, with due respect, I find that, the allegation of illegality has been raised out of context in the current application. Besides, contrary to what has been submitted by Mr. Chuwa, I agree with Mr. Kibatala that there is a pending appeal before the Court for one reason that, although the applicant did not file supplementary record of appeal as per the Court order, currently there is no order of the Court in respect of such failure. Nevertheless, the fact that the appeal is still pending is not a good cause for extending time for the applicant to file application for stay of execution. I am saying so for two reasons; **first**, pendency of an appeal in Court, is not a bar to execution of a decree of the court

unless there is an order for stay of execution, which the applicant is yet to apply in the current case. **Second**, the illegality which was alleged by Mr. Kibatala in his oral submission was not reflected anywhere in the record, as correctly stated by Mr. Chuwa. I may add that, even if the said illegality would have been shown by the applicant, still grant or otherwise of this application does not depend on it.

Having so stated, I find this application without merit as the applicant has failed to show good cause for me to exercise my discretionary powers to enlarge time for the applicant to file application for stay of execution out of time. Consequently, I dismiss the application with costs.

DATED at DAR ES SALAAM this 27th day of March, 2023.

M. C. LEVIRA
JUSTICE OF APPEAL

The Ruling delivered this 31st day of March, 2023 in the presence of Ms. Faith Mwakikoti, Counsel for the Applicant, and holding brief for Mr. Edward Peter Chuwa Counsel for the Respondent is hereby certified as a true copy of the original.




S. P. MWAISEJE
DEPUTY REGISTRAR
COURT OF APPEAL