

IN THE COURT OF APPEAL OF TANZANIA
AT ZANZIBAR

CIVIL APPLICATION NO. 900/15 OF 2021

OKECH BOAZ OTHIAMBO1ST APPLICANT
K & A COMPANY LIMITED 2ND APPLICANT

VERSUS

SALAMA IDI KANYOROTA RESPONDENT

**(Application for Extension of Time to lodge an Application for Stay of
Execution of the Judgment and Decree of the High Court of Zanzibar
at Tunguu)**

(KAZI, J.)

dated the 18th day of July, 2023

in

Civil Case No. 41 of 2021

R U L I N G

22nd April & 2nd May, 2024

MLACHA, J.A.:

The applicants, Okech Boaz Othiambo and K & A Company Limited, have filed this application under a certificate of extreme urgency seeking orders for extension of time within which to file an application for stay of execution of the decision of the High Court of Zanzibar made in Civil Case No. 41 of 2021 (Kazi, J.) dated 18th July, 2023. The application is brought by way of notice of motion lodged on 16th October, 2023 under rules 10 and 48(1) of the Tanzania Court of Appeal Rules, 2009 (the Rules) and supported by the affidavit of Slim Said Abdallah, learned counsel for the

applicants. The respondent, Salama Idi Kanyorota is objecting the application and has lodged an affidavit in reply.

The grounds upon which the application is made can be put to read as under:

1. That, the delay is not deliberate and or inordinate since the applicants filed Civil Application No.732/15 of 2023 seeking stay of execution of the judgment of the High Court in time.
2. That, unless extension of time is granted, the applicants will not be able to file an application for stay of execution before the Court and will suffer irreparable loss from the execution of the decree.
3. That, unless extension of time to file an application for stay of execution is granted, the applicant's appeal will be rendered nugatory for the execution of the decree will dispose of the suit property.

The facts leading to this application are not complicated. They can be put as follows: The parties had legal relations based on some contracts which were declared void by the High Court of Zanzibar on 18th July, 2023. The High Court entered judgment in favour of the respondent who was declared the lawful owner of two pieces of land. One, located at

Manawanu area along Jambiani road, South District comprising of a two - storey building and two, a piece of land located at Kizingitini (Kite active), Paje, South District, Zanzibar which has a hotel. The first applicant occupies the building at Mwanawanu where he runs 4 shop frames while the second applicant occupies the hotel buildings at Kizingitini (Kite Active), Paje, South District where they run a hotel. They were both ordered to vacate and give vacant possession to the respondent. The respondent was ordered to return TZS. 120,000,000.00 which had passed to her under the void contract. The applicants were aggrieved by the decision and lodged a notice of appeal.

The respondent lodged an application for execution which was served to the applicants on 22nd August, 2023. The respondent reacted by filing Civil Application No.732/15 of 2023 before the Court seeking stay of execution. This application was withdrawn after noting defects in the enabling provisions.

The application for stay of execution was lodged on 4th September, 2023 and served to the respondents on 22nd August, 2023. It was withdrawn on 10th October, 2023. It is the applicants' case that, the period from 4th September, 2023 to 10th October, 2023 is excusable as it was used in pursuing the application for stay of execution. The period which

followed, that is from 10th October, 2023 to 16th October, 2023 is also excusable as it was used for obtaining a copy of the ruling of this Court.

The respondent accused the applicants for being negligent in handling their application for stay of execution for which they should not be given the benefit. It was stated that the applicants have failed to show good cause.

When the application was called for hearing, Messrs. Slim Abdallah and Ali Musa Nkangaa appeared for the applicants and respondent respectively. They adopted the contents of their respective affidavits earlier on filed to be part of their oral submissions. Their submissions were short and focused on two areas; the delay caused by the application which was withdrawn and the danger of disposing the properties.

Making reference to our decision made in **Yusufu Same v. Hawa Dada**, Civil Application No. 1 of 2002 [1006] TZCA 141:[20th October 2006: TanzLII] which was followed in **CRBD Bank PLC v. Victoria General Supply Co. LTD**, Civil Application No. 319/08 of 2019 [2019] TZCA 457: [3rd December 2019:TanzLII] counsel for the applicants contended that the duty to account for the delay was duly made by pointing out that the applicants were in court pursuing the application for stay of execution which was ultimately withdrawn. The period which

followed was spent while waiting for a copy of the ruling. He contended that the application was found to be defective on human errors, not negligence or sloppiness on the part of the applicant or his counsel. He added that this application was filed soon thereafter without delay in the spirit of the decision of this Court made in **Fortunatus Masha v. William Shija and another** (1997) TLR 154.

Counsel for the applicants contended further that, the applicants have already made substantial development in the suit premises and there is a business going on which will be affected greatly if this application is not granted for the applicant will not be able to file the application for stay of execution leading to irreparable loss for the respondent may end up disposing the suit property. The intended appeal will also be rendered nugatory. He urged me to grant the application.

Mr. Nkangaa was not in agreement with counsel for the applicants. He submitted that the application for stay of execution was withdrawn due to omission to cite the relevant provision of the law indicating negligence on the part of their counsel which is not a ground for extension of time. He cited the decision of this Court made in **Bahati M. Ngowi v. Paul Aidan Ulungi**, Civil Application No. 490/14 of 2020 [2023] TZCA 17503: [16th August 2023:TanzLII] to support his view. He added that the

respondent has no plan to demolish the houses or dispose them off in any way. He urged me to dismiss the application.

Mr. Abdallah made a rejoinder submission and reiterated his earlier position.

The Court's power of extending time under rule 10 of the Rules is wide and discretionary but must be exercised judiciously upon good cause being shown. What amounts to good cause is not located anywhere in the Rules but in practice the Court will look at factors like; the length of delay involved; the reasons for the delay; the degree of prejudice, if any, that 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 constitutently underpinned right of appeal. See **Bahati M. Ngowi** (supra), **Kalunga and Company Advocates Ltd v. National Bank of Commerce Ltd** [2006] TLR 235, **Dar es Salaam City Council v. Jayantlal P. Rajani**, Civil Application No. 20 of 1987 [1988] TZCA 26: [25th February 1988: TanzLII] and **Attorney General v. Tanzania Ports Authority and Another**, Civil Application No. 87 of 2016 [2016] TZCA 897: [12th October 2016: TanzLII], to mention a few. Whatever the situation, the applicant has to account for the delay on each day in order

for his application to stand. He can also base his application on illegality of the impugned decision, if any, as was said in the **Principal Secretary Ministry of Defence and National Service v. Dervam Vallambia** [1992] TLR 185 and **Motor Vessel Sepideh and Pemba Island Tours and Safaris v. Yusufu Moh'md Yusufu and Ahmad Abdallah**, Civil Application No. 91 of 2013 (unreported).

Looking through the record and submissions of the counsels for the parties, I find that the parties have no problem with the powers of Court to extend time under rule 10 of the Rules or the applicable principles. They are also not quarrelling on the existence of the application for execution and the orders which followed. Their dispute is on whether the time spent in conducting the application should be excused and whether there is danger of disposing the assets in the execution.

With respect to the counsel for the respondent, I don't share the view that if an application is withdrawn on some legal shortcomings, that should be branded as negligence on the counsel for the applicant which is not excusable. We are not angels. We are human beings and can make mistakes. People should not be punished for mistakes which they could not be foresee unless there is evidence that the mistakes were made deliberately with the view of getting some advantage out of it. I don't see

such a situation here but a technical delay. To the contrary, I see chances of disposing the properties which may render the appeal nugatory.

That said, I find merit in the application which is granted accordingly. The applicants are given 30 days within which to lodge their application for stay of execution. Costs to follow the outcome of the application for execution.


Order accordingly.

DATED at ZANZIBAR this 30th day of April, 2024.

L. M. MLACHA
JUSTICE OF APPEAL

The Ruling delivered this 2nd day of May, 2024 in the presence of the Mr. Slim Abdallah, counsel for the Applicant and Mr. Ibrahim Naftali Mndeme, counsel for the Respondent is hereby certified as a true copy of the original.




D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL