IN THE HIGH COURT OF TANZANIA

(MWANZA DISTRICT REGISTRY)

AT MWANZA

MISC. LAND APPLICATION NO. 32 OF 2020

MARY JOSEPH ..... APPLICANT

VERSUS

RACHEL ZEPHANIA ..... RESPONDENT

RULING

19th May, & 23rd June, 2020

ISMAIL, J.

This Court is called upon to pronounce itself on whether it should grant a stay of execution against the decision of the District Land and Housing Tribunal for Mwanza at Mwanza, pending determination of the matter which is in this Court.

The application has been preferred under the provisions of section 14 (1) of the Law of Limitation Act, Cap. 89 R.E. 2002 (now R.E. 2019); and section 95 and Order XXXIX Rule 5 (1) and (2) of the Civil Procedure Code, Cap. 33 R.E. 2002 (now R.E. 2019). Supporting the application is an affidavit sworn by Mary Joseph, the applicant, setting out grounds on

which the application is premised. Key among the grounds raised is the fact that the ex-parte decision passed by the Tribunal in respect of Appeal No. 126 of 2016, which was delivered on 24th November, 2017, is a subject of a challenge through Miscellaneous Land Application No. 19 of 2020, in which extension of time to file an appeal out of time is sought. The contention is that stay of execution could not be filed without filing the application for extension of time.

The application has encountered an opposition from the respondent, presented through an affidavit sworn by the respondent herself. She contends that the application is merely an afterthought and a delaying tactic since no illegality exists in the impugned decision as to warrant an appeal to this Court. The respondent contended that the matter has been placed in the hands of a court broker who was about to execute the decree and notices in respect thereof had been issued.

When the matter came up for hearing, the applicant enlisted services of Messrs Libent Rwazo and Kyariga Kyariga, learned counsel, while the respondent enjoyed the services of Ms. Haruna Hidaya, learned advocate. Submitting in support of the application, Mr. Kyariga first prayed to adopt the contents of the affidavit sworn in support of the application and

informed the Court that the application is predicated on the provisions of Section 14 (1) of Cap. 89; and Order XXXIX Rule 5 (1) and (2) of the CPC. He argued that the first prayer falls within the ambit of technical delays that came about because of the applicant's pursuit of a wrong application for revision which was thrown out by the Court after which she filed an application for review which was struck out by the Court on 15th October, 2019. The learned counsel submitted further after these back to back setbacks, the applicant was eager to engage the respondent in an out of court settlement but the plan was thrown into confusion when the respondent started to pursue an execution of the decree. It is at that point that the applicant instituted the instant application. Mr. Kyariga argued that since the applicant was pursuing the application diligently then the delay is in the realm of an acceptable delay, in terms of the holding in ***Fortunatus Masha v. William Shija & Another*** [1997] TLR 164.

Mr. Kyariga opened up another frontier in his argument. This was to the effect that the decision sought to be appealed was shrouded in illegality on the ground that the applicant was condemned unheard and that the DLHT granted orders which were not sought. Mr. Kyariga held the view, furthermore, that the Ward Tribunal entertained the matter while its

pecuniary value was far beyond its jurisdiction. The counsel considered this to be a ground for extension of time.

With respect to stay of execution, the learned counsel held the view that if stay of execution is granted, the intended appeal will be rendered nugatory. He prayed that the application be granted.

Ms. Haruna was opposed to the prayer and termed the application as unmaintainable. She contended that the application has been overtaken by events as execution of the decree has been effected and the court borker has already filed the report and the property is in the possession of the respondent. The learned counsel further contended that the application has been preferred under the wrong provision of the law. On this she meant that reference of the laws as revised edition of 2002 was erroneous, in view of the revision made to the law and published vide GN. No. 140 of 2020. She contended that the anomaly is fatal.

On the grounds cited, Ms. Haruna contended that the same would be better served if the applicant was applying for revision and not through the course of action taken by the applicant. In conclusion, she held that the applicant is incompetent and urged the Court to dismiss it.

Rejoining to the rebuttal submission, Mr. Kyariga urged the Court to disregard the respondent's submissions which were not reflected in the pleadings filed in Court. On the contention that the application has been overtaken by events, Mr. Kyariga submitted that part of the premises are yet to be occupied. He contended further that the order of the Court dated 17th April, 2020 was violated and that the disobedience has attracted contempt proceedings which are before Hon. Tiganga, J. The counsel maintained that the eviction was not carried out properly as there is still the property of the applicant in the premises.

On wrong citation of the law, Mr. Kyariga submitted that the omission is not fatal. On this he referred the Court to the decision of ***Samwel Munsiro v. Chacha Mwaikwabe***, CAT-Civil Application No. 539/8 of 2019 (Mwanza-unreported) in which it was held that the omission to cite the enabling provisions is inconsequential. In this case the citation is proper except that of the revision of the law. He prayed that this contention be rejected out of hand.

From these rival submssions two issues arise. These are as to whether sufficient cause has been established to warrant extension of time

within which to apply for stay of execution and; secondly, whether a case has been made out for grant of stay of execution.

With respect to the first issue, the law is quite settled, and it is to the effect that extension of time is granted where the applicant of the enlargement of time has demonstrated sufficient cause which allows grant of extension of time. In ***Nicholas Kiptoo Arap Korir Salat v. IEBC & 7 Others***, Sup. Ct. Application 16 of 2014, the Supreme Court of Kenyan laid down a persuasive position on the matter as follows:

> *"Extension of time being a creature of equity, one can only enjoy it if [one] acts equitably: he who seeks equity must do equity. Hence, one has to lay a basis that [one] was not at fault so as to let time lapse. Extension of time is not a right of a litigant against a Court, but a discretionary power of courts which litigants* ***have to lay a basis [for], where they seek [grant of it].***"

The foregoing position acknowledged the fact that extension of time is an equitable remedy whose grant involves the party moving the Court to grant its discretion by laying a basis for which to exercise such discretion. With respect to grant of such discretion, the incisive decision in ***Lyamuya Construction Company Ltd v. Board of Registered Trustees of***

Young Women's Christian Association of Tanzania, CAT-Civil Application No. 2 of 2010 (unreported), propounded key conditions that should guide a court in considering to grant or not to grant an application for extension of time were laid down. These are:

> *"(a) The applicant must account for all the period of delay.*
> *(b) The delay should not be inordinate.*
> *(c) The applicant must show diligence and not apathy, negligence or sloppiness in the prosecution of the action he intends to take.*
> *(d) If the Court feels that there are other sufficient reasons, such as the existence of a point of law of sufficient importance; such as illegality of the decision sought to be challenged."*

In the supporting affidavit, as well as the submissions made during the hearing, the applicant has given a detailed account of why the steps that she has taken were pursued belatedly. The reason given is that the applicant was involved in the proceedings which were adjudged defective. In the end, the applications filed in that process were struck out. The contention is that after that strayed process, an application for stay could not be pursued since such application would require the applicant filing an application for extension of time to file an appeal. That application is

pending. I find this reason resonating. It is plausible and, as the counsel for the applicant submitted, the delay that came as a result of the wrong pursuit of the proceedings, a justified delay. It is what is called, in legal parlance, a technical delay, which is acceptable and constitutes a sufficient cause for enlargement of time within which to institute proceedings such as the instant application. This significant point of departure from the 'norm' was lucidly espoused in ***Fortunatus Masha*** (supra), and restated in many other deceisions of the superior Court. In ***Amani Girls Home v. Isack Charles Kanela***, CAT-Civil Application No. 325/08 of 2019 (Mwanza – unreported), it was held that a diligent pursuit of the appeal through unsuccessful applications was deemed to be sufficient to warrant extension of time. The most recent subscription to this splendid position of the Court was accentuated in ***Victor Rweyemamu Binamungu v. Geofrey Kabaka & Another***, CAT- Civil Application No. 602/08 of 2017 (Mwanza-unreported). It was held:

> *"Be it as it, he first applied for revision which was however struck out on 4th December 2017 on account of time limit. This period from the date of the decision intended to be revised to the date of striking out Civil Application for revision No. 26 of 2017, is what has acquired the name of technical delay which*

cannot be blamed on the applicant. There are many decisions on that position such as ***Ally Ramadhani Kihiyo v. The Commissioner for Customs and the Commissioner General Tanzania Revenue Authority****, Civil Application No. 29/01 of 2018 (unreported),* ***Kabdeco v. Watco Limited****, Civil Application No. 526/11 of 2017 (unreported),* ***Salim Lakhani and 2 Others v. Ishfaque Shabir Yusufali (As an Administrator of the Estate of the Late Shabir Yusufali),*** *Civil Application No. 455 of 2019 (unreported)."*

Circumstances pointed out in the cited decisions are similar to the back to back setbacks the appellant suffered when she appeared before this Court (Madeha, J.,). The events that occurred before Hon. Madeha, J., do not have the effect of precluding the applicant from taking steps which will conserve her rights as she moves to battle it out on the substance of their contentions. In view thereof, I hold the view that the applicant has done enough to convince this Court to trigger discretion and extend time for applying for stay of execution. As I hold so, I don't find the ground of illegality, as advanced by the applicant a fitting criterion in an application for extension of time to stay execution. This is a subject for discussion in an application for extension of time to appeal out of time.

Moving on to the second issue the crucial question, is whether the applicant has satisfied the Court that the facts and circumstances of her case bring this application within the ambit of one or more of these principles for which stay of execution may be granted. It is common knowledge that stay of execution can only be granted where its applicant demonstrates that his application falls within any of or all of the principles that govern such grant. These are as enunciated in ***Ignazio Messina & National Shipping Agencies v. Willow Investment & Costa Shinganya,*** CAT-Civil Reference No. 8 of 1999 (DSM-unreported) in which it was stated:-

> *"It is now settled that*
>
> *(i) The Court will grant a stay of execution if the applicant can show that refusal to do so would cause substantial irreparable loss to him which cannot be atoned by any award of damage;*
>
> *(ii) It is equally settled that the Court will order a stay if refusal to do so would, in the event the intended appeal succeeds, render that success*

nugatory

(iii) *Again the Court will grant a stay if, in its opinion, it would be on a balance of convenience to the parties to do so."*

See also: ***SDV Transmi (Tanzania) Limited v. MS STE DATCO***, CAT-Civil Application No. 97 of 2004 (DSM-unreported).

Looking at the applicant's averments, as contained in paragraphs 24, 25 and 26 of the supporting affidavit, the applicant has alleged that the loss that she may suffer, if the application is not granted the stay, will be irreparable greater than what the respondent will suffer, should the application be granted. Related to this, as well, is the counsel's contention, in the course of hearing, that her intended appeal will be rendered nugatory if stay is not granted.

The respondent has not posed a formidable challenge on whether principles governing the stay have been established. Her contention is that the application has been overtaken by events since execution of the decree is complete and the suit premises are already in her possession. This contention is opposed by the applicant who contends that execution was

partially done as the premises are still unoccupied and the applicant has some of her items still locked in the premises.

These contending positions bring out a new discussion on when exactly can execution be said or deemed to be complete. In ***Shell and BP Tanzania Limited v. The University of Dar es Salaam***, CAT-Civil Appeal No. 68 of 1999 (DSM-unreported) a similar issue arose. The superior Bench had this to say:

> *".... Execution is the final act, that is, the satisfaction of the judgment .... The nature of the subject matter would dlctate the mode of execution."*

The above position mirrored what was decided in ***Re Overseas Aviation Engineering (G.R.) Ltd.*** (1963) 1 Ch. 24 at p. 39 where it was held:

> *"Execution .... is complete when the judgment creditor gets the money or the thing awarded to him by the judgment."*

While the Ms. Haruna contends that execution has been carried out to completion, what has been averred in paragraph 5 of the counter-affidavit defies that contention. The respondent averred that the execution was about to be executed, meaning that nothing had been done up until

the time the respondent swore the affidavit. This fact lends credence to the applicant's contention that the said execution is yet to be completed. The respondent's counsel did not seem to controvert the contention that there was partial execution with any serious effort which would build the impression that the applicant's efforts are a mere waste of time and resources. As I move to bring this point to a close, let me state here and now, that the nature of execution in the present matter would not enable execution of a decree being carried out in a single day. This is so because such execution entails several events such as issuance of notices for payment of decretal sum, issuance of notices to vacate and the actual execution. In such a case, execution would be deemed completed if all those stages had been surmounted without any impediment. If, for any reason, an adverse party is of the view that the Court's intervention should be called into action then a stay order can be granted. This is consistent with the holding in ***Tanzania Motor Services Ltd v. Tantrack Agencies Ltd***, CAT-Civil Application No. 86 of 2004 (DSM-unreported).

Given what has been stated by the counsel, my firm conclusion is that the application is still valid and intended to serve the purpose for

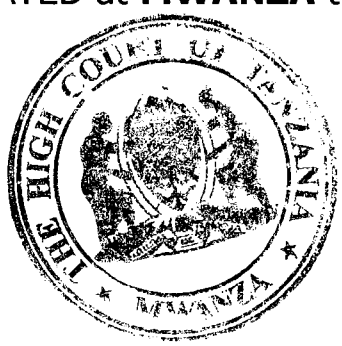
which it was filed, and I take the view that the applicant has demonstrated that grounds exist for its grant.

Before I conclude, I wish to state, albeit *en passant*, that the error in the citation of the laws as brought up by the counsel for the respondent is nothing more than a creation of a mountain out of a molehill. This is a trifling error which is inconsequential and tolerable. Applying the principle of overriding objective, I save the application from the respondent's onslaught and hold that the same is perfectly in order.

From all this, my conviction is that this Court is properly moved to grant an order for stay of execution of the DLHT decision, pending the ongoing proceedings. Accordingly the same is hereby granted. Each party to bear their own costs.

It is so ordered.

DATED at **MWANZA** this 23rd day of June, 2020.



M.K. ISMAIL

JUDGE

Date: 23/06/2020

Coram: Hon. M. K., Ismail, J

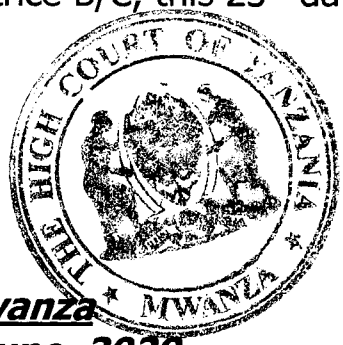
Applicant: Mr. Rwazo, Advocate for

Respondent: Present in person

B/C: B. France

Court:

Ruling delivered in chambers, in the presence of Mr. Rwazo, Advocate for the Applicant and respondent present in person and presence of Beatrice B/C, this 23rd day of June, 2020



M. K. Ismail
JUDGE

At Mwanza
23rd June, 2020