

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM

MISC CIVIL APPLICATION NO. 186 OF 2020

**[Origin; Execution No. 22 of 2018 of High Court of
Tanzania at Dar es Salaam, District Registry]**

BARRETO HAULIERS (T) LTD.....APPLICANT

VERSUS

JOSEPHINE E. MWANYIKA.....1st RESPONDENT

PHILIP E. MWANYIKA.....2nd RESPONDENT

RULING

25th May, 2021 & 28th March, 2022.

S.M. KULITA, J.

This is a civil application for stay of execution. It has been filed by the Applicant by way of chamber summons in terms of the provisions of sections 68 (e), 95 and Order XXI Rule 24(1) of the Civil Procedure Code [Cap. 33 RE 2002]. In the chamber summons, the Applicant prays for this Court to stay execution of

the consent decree of the High Court of Tanzania at Dar es Salaam in Civil Case No. 81 of 2016 pending determination of appeal preferred in court of appeal against the ruling of the High Court of Dar es Salaam dated 10th March, 2020.

In a nut shell, the information as can be gathered from the available records, it appears the parties had a case at the High Court of Tanzania at Dar es Salaam, that was Civil Case No. 81 of 2016. The said case, on 17th day of October, 2016 was before Hon. Teemba. J, specifically for mediation. The record shows that, on that date, mediation was marked to have been successful. Thus, Civil Case No. 81 of 2016 was marked to have been settled and thereby the resultant decree was drawn. Owing to that consent decree, on 21 day of November 2018 the Respondent filed application for Execution No. 22 of 2018. Responding to that move, the Applicant herein filed this Misc. Civil Application No. 186 of 2018 seeking for stay of Execution pending appeal to the Court of Appeal.

In reply to the application for stay, the Respondents attacked it with three preliminary objections. But in the course of submitting, the Respondents prayed to abandon two preliminary objections, thus remained with only one, which is to the effect that, the application for stay of execution is time barred.

As the law requires preliminary objections be argued first, on 23rd February, 2021 the preliminary objections were scheduled to be argued by way of written submissions. Both parties complied with. Mr. Magusu Mugoka Advocate, represented the Applicant, whereas Mr. Mafuru, Advocate represented the Respondents.

Submitting in support of the preliminary objection Mr. Mafuru stated that, this applicant's application for stay was filed on 17th April, 2020 while the consent decree that the applicant seeks to stay was issued on 17th October, 2016. He went on stating that, the respondents filed application for execution proceedings No. 22 of 2018 on 12th November, 2019. With that

information, Mr. Mafuru was of views that, the applicant's application for stay of execution is time barred. To him, the applicant's application was to be filed within 60 days from 17th October, 2016 the date that the consent decree was issued. To cement his argument, Mr. Mafuru cited section 3(1) of the Law of Limitation Act, item 21 of part III to the schedule and Order XXXIX Rule 5 of the Civil Procedure Code.

Mr. Mafuru went further submitting that, when the respondents filed the execution proceedings No. 22 of 2018, in response to that, the applicant filed Misc. Civil Application No. 17 of 2018 for stay of execution of the same consent decree. He added that, that applicant's application for stay No. 17 of 2018 was dismissed. He submitted further that, following that dismissal, the applicant never challenged it. He contended that, a Notice of appeal that the applicant stands on this application, is not a wakening call for this court to grant stay of execution as the application is time barred and borders a line of being *res judicata*.

Mr. Mafuru contended further that, the Notice of Appeal that the applicant relies on in this application, is against the dismissal of an application for extension of time for review. To that end, he formed a considered opinion that, the Notice of Appeal originates from a different matter, and that, it has nothing to do with the application for stay of execution. To him, relation could be if the Notice of Appeal would concern the dismissed applicant's application for stay of execution No. 17 of 2018 dated 16 March, 2020.

Mr. Mafuru insisted his earlier submission that, time to file application for stay of execution started to run when the consent decree was issued on 17th October, 2016. He added that, as the applicant has filed this application for stay of execution on 17th April, 2020, then he was of views that, the same is time barred and prayed it be dismissed with costs. He cited the cases of **Stephene Masatu Wasira v. Joseph Sinde Warioba (1999) TLR 334** and **M/S Sopa Management Ltd v. M/S**

**Tanzania Revenue Authority, Civil Appeal No. 25 of 2010,
CAT at Arusha** to bolster his assertion.

In his reply, Mr. Magusu submitted that, the respondents filed their application for execution sometimes in November, 2019 without serving the applicant. He contended that, that act is contrary to Order XXI Rule 20(1)(a). He added that, the applicant became aware of the respondents' application for execution sometimes in April, 2010 while attending Misc. Civil Application No. 17 of 2018 and Misc. Civil Application No. 806 of 2018. With that information, Mr. Magusu was of considered views that, as the applicant was not served with application for execution, then the applicant's application is not time barred. Mr. Magusu went further urging this court not to entertain technicalities where justice is infringed. He asserted further that, the authorities as cited by the respondents are irrelevant and prayed for the preliminary objections be overruled with costs.

In rejoinder Mr. Mafuru submitted that, notice to show cause under Order XXI Rule 20(1)(a) of the CPC is one matter

and filling an application for stay within time is another matter. He argued that, the applicant was to seek leave for an extension of time while advancing reasons for delay including requirement for issuance of notice if any. He added that, by lodging this application for stay not within time as required by law makes the matter to be time barred and invites sanction of the court.

I have taken into consideration both parties' submissions. I have also read the available records as well. The issue for determination is whether the applicant's application for stay of execution is time barred.

According to both parties' submissions, they all do not dispute that, item 21 of part III to the schedule of The Law of Limitation Act, sets a 60 days' time limit to file the applicant's application for stay of execution. The Court of Appeal, in the case of **Suleiman Ally Nyamalegi and 2 Others v. Mwanza Engineering works limited, Civil Application No. 9 of 2002, CAT at Mwanza (unrepoerted)** while quoting for approval the reported High Court case of **Israel Solomon**

Kivuyo v. Wayani Langoi and Naishooki (1989) TLR 140

also set a 60 days' time limit to file application for stay of execution. With that observation, I am in all fours with both parties to this case concerning this issue.

However, the parties differ as to when those 60 days' time limit start to run. As per respondent's submission, Mr. Mafuru was of the views that, the 60 days' time limit starts to run from the date when the consent decree was delivered, that is 17/10/2016. Meanwhile, Mr. Magusu for the applicant, calculated the 60 days' time limit from 12/11/2019 when the respondent filed the execution proceedings No. 22 of 2018.

The peculiar thing is, for whatever date one may take that the 60 days' time limit starts to run, whether 17/10/2016 or 12/11/2019 still the applicant's application for stay of execution looks to have been filed out of time. And for this fact too, both parties are not in dispute as well.

However, the applicant in his submission has shifted the blame for his application being filed out of time to the Respondents. He was of the views that, had the respondents followed the dictates of Order XX1 Rule 20(1)(a) of CPC by serving the applicant with a notice to show cause by the time they were filing their execution proceedings, the applicant would not have delayed to file their application for stay for execution. With this argument, the applicant concluded that their application is not time barred.

Even if it is to be taken that the 60 days' time limit starts to run on 12/11/2019, the date when the respondents filed their execution proceedings No 22 of 2018 which is not correct as per the case of **Suleiman Ally Nyamalegi and 2 Others v. Mwanza Engineering works limited, Civil Application No. 9 of 2002, CAT at Mwanza** and the dictates of Order XXXIX Rule 5 of Civil Procedure Code, yet that line of argument is totally misplaced. That line of argument could be used in the application

for extension of time to file the present applicant's application but not here.

As the applicant's application has been filed out of time and the applicant does not dispute that fact, and as long as the applicant has not sought for extension of time before filing this application then I am well settled that the applicant's application for stay of execution is time barred. See, **Tanzania Cigarette Company (TCC) v. Hassan Marua, Civil Application No. 49/01 of 2018, CAT at DSM (unreported)** and **K.M. Prospecting limited v. Dr. Reginald Abraham Mengi and 3 Others, Misc. Commercial Case No. 213 of 2016, High Court, Commercial Division at DSM (unreported)**.

As per the case of **Stephene Masatu Wasira v. Joseph Sinde Warioba (1999) TLR 334** and as per section 3(1) of The Law of Limitation Act, the remedy is one, as **I hereby do, dismissing the applicant's application for being filed out of time, and I add, with costs.**

However, I think I have to say a word on the issue of technicalities. The preliminary objection that has been argued, concerns time limit. It therefore directly touches jurisdiction of the court. To me, it is not among the ones that can be disregarded. On that stance, the applicant's invitation to ignore it, fails.

It is so ordered.



S.M. Kulita
JUDGE
28/03/2022

DATED at Dar es Salaam this 28th day of March, 2022.



S.M. Kulita
JUDGE
28/03/2022

