

**IN THE HIGH COURT OF TANZANIA  
(COMMERCIAL DIVISION)  
AT DAR ES SALAAM**

**MISCELLANEOUS COMMERCIAL CAUSE NO. 98 OF 2015  
(Arising From Commercial Case No. 13 of 2012)**

<b>CONVERGENCE WIRELESS NETWORKS (MAURITIUS) LIMITED CONVERGENCE PARTNERS INVESTMENTS (PTY) LIMITED ANDILE NGCABA BRANDON DOYLE</b>	}	..... <b>APPLICANTS</b>
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**VERSUS**

<b>WiA GROUP LIMITED ABDULRAHMAN OMAR KINANA ERIC MWENDA</b>	}	..... <b>RESPONDENTS</b>
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16<sup>th</sup> & 29<sup>th</sup> June, 2015

**RULING**

**MWAMBEGELE, J.:**

The respondents have raised two points of preliminary objection against an application for stay of execution raised by the applicants. The points of objection run as follows:

1. The application for stay of execution intended to stay the execution of a judgment and decree in Commercial Case No. 13 of 2012 is time barred; and

2. The present application is an abuse of the court process as the proper procedure would have been to apply for a stay of execution pending determination of an application for extension of time to file notice of intention to appeal against an order of the Honourable Court dated 19.12.2014, which dismissed Application No. 145 of 2013, filed by the applicants with a view of setting aside the default judgment dated 01.10.2013.

The preliminary points of objection (hereinafter “the PO”) were argued before me on 16.05.2015. The respondents were represented by a team of renowned advocates of this court and courts subordinate thereto (except the Primary Court); Messrs Josiah, Mallya and Mambosho while the applicants were represented by Mr. Nyika, learned advocate; a reputed officer of this court. Both parties had filed their skeleton written arguments prior to the oral hearing as dictated by rule 64 of the High Court (Commercial Division) Procedure Rules, 2012 – GN No. 250 of 2012.

On the first point of the PO, Mr. Josiah, learned counsel, speaking on behalf of his colleagues, submitted that the application was barred by time in that the limit within which an application for stay of execution must be filed, in terms of Item 21 of Part III to the First Schedule to the Law of Limitation Act, Cap. 89 of the Revised Edition, 2002 (hereinafter “the Law of Limitation”), is 60 days. To bolster up this point, the learned counsel, cited ***Israel Solomon Kivuyo Vs Wayani Langoi & Naishooki Wayani*** [1989] TLR 140 and ***Muhoni Kitege Vs Issa Elias***, Civil Application No. 5 of 2011 (unreported); both decisions of the Court of Appeal. The learned counsel added that, in terms of section 6 (m) of the Law of Limitation Act, accrual of rights of action

in matters of this nature is deemed to have accrued on the date on which the decree was passed. In the premises, argued the learned counsel, the present application which was filed some 19 months after the decree was passed, is time barred and thus should be dismissed in terms of section 3 (1) of the Law of Limitation.

On the second point of the PO, Mr. Josiah, learned counsel argued that the application at hand is an abuse of the court process because the proper course to have been taken by the applicant ought to have been to apply for stay orders pending determination of an application for extension of time to file notice of intention to appeal against the order of this court dated 19.12.2014 which dismissed Application No. 145 of 2013 for setting aside the default judgment complained of. Mr. Josiah, reiterated that the applicants ought to have challenged the order of this court dated 19.12.2014 and not Commercial Case No. 13 of 2012 which they never defended. He stated that the fact that they failed to set aside the default judgment and now they come to court to attempt to appeal against it is an abuse of the court process which should not be condoned by this court. The cases of ***Manager NBC Tarime Vs Enock M. Chacha*** [1993] TLR 228, ***Muniu Vs Giovanni*** [1995-1998] 1 EA 218 and ***Baiywo Vs Bach*** [1986-1989] 1 EA 27 were cited in support of this proposition.

Mr. Nyika, learned counsel for the applicants, resisted the PO by submitting that the application is not time barred. The learned counsel stated that for an application of stay of execution to succeed, there must be fulfilled three requirements in terms of Order XXXIX rule 5 (3) of the Civil Procedure Code, Cap. 33 of the Revised Edition, 2002 (henceforth "the CPC"): first; that

substantial loss may result to the party applying for stay of execution unless the order is made; secondly, that the application has been made without unreasonable delay; and thirdly, that security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him.

Mr. Nyika, learned counsel, submitted further that they learnt on 19.01.2015 that their application for setting aside the default judgment was dismissed on 19.12.2014 and that they were engaged on 06.02.2015. The present application was filed on 27.04.2015 which action was, he submitted, prompt. Alternatively, if there was any delay which he submits there was none, then the same was not unreasonable.

On the second point of PO, Mr. Nyika, learned counsel stated that the objection has no basis as the applicants are seeking stay of execution after they have filed an application for extension of time is a different application. Alternatively, the learned counsel attacked the second point of PO as not qualifying to be a PO as prescribed by the often cited case of ***Mukisa Biscuit Manufacturing Limited Vs West End Distributors Limited*** [1969] EA 696. He also cited the case of ***Citibank Tanzania Ltd Vs Tanzania Telecommunications Co. Ltd & 4 Others***, Civil Application No. 64 of 2003 (unreported) and ***Mechmar Corporation (Malaysia) Berhad of Malaysia (In Liquidation) Vs VIP Engineering And Marketing Limited & 3 Others***, Consolidated Civil Applications Nos. 190 and 206 of 2013 in support of this argument.

Let me start with the first point of the PO; that the application is time barred. The bone of contention here revolves around the issue whether or not an application for stay of execution should be filed within sixty days, in terms of item 21 of Part III of the First Schedule to the Law of Limitation Act or should be filed without unreasonable delay in terms of Order XXXIX rule 5 (3) (b) of the CPC. It is Mr. Josiah's contention that the former position must prevail, for the time limit within which to file an application for stay of execution has not provided by any law. To the contrary, Mr. Nyika, learned counsel for the applicants, is of the view that the time limit within which to file an application for stay of execution has been provided for by the provisions of Order XXXIX rule 5 (3) (b) of the CPC and this is limit is that it should be made without unreasonable delay.

Mr. Nyika's argument seems very convincing at first sight. However, having subjected the same to proper consideration, I find myself unable to accept it. I have had an opportunity to deal with the issue in ***Jactan Sigala Vs Elly Ngole & 2 Others***, DC Civil Appeal No. 18 of 2008 (unreported) when confronted with a somewhat identical situation. In that case, at the expense of being challenged for quoting my own decision, this is what I stated at page 12 of the typed judgment:

"... an application for stay of execution must be made within sixty days after delivery of judgment against the applicant. The limitation period is sixty days. Time starts to run against an aggrieved party which wishes to stay the execution of the

decree of that judgment right from the date of judgment which irritated the applicant.”

I hold the same position today. The decree the applicants wish to stay was passed on 01.10.2013. The applicant in the present matter ought to have filed its application for stay of execution within sixty days after the decree which aggrieved it was passed. The sum total of the foregoing discussion is that the present application was filed out of the prescribed time and with no leave of the court. It deserves the wrath of being dismissed in terms of section 3 (1) of, read together with para 21 of the First Schedule to, the Law of the Law of Limitation.

Having so found and held, I do not see the point in discussing the second point of PO as it will not serve any useful purpose.

It is for the foregoing reasons that I sustain the first point of the PO and find the application for stay of execution filed by the applicant incompetent for being filed out of time and without leave of this court and consequently proceed to dismiss it with costs.

Order accordingly.

DATED at DAR ES SALAAM this 29<sup>th</sup> day of June, 2015.

**J. C. M. MWAMBEGELE**  
**JUDGE**