

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(LAND DIVISION)  
AT DAR ES SALAAM**

**MISC. LAND APPLICATION NO. 610 OF 2019**

*(Arising from the ex parte Judgment of his Lordship Nchimbi, Judge in Land Case No. 161 of 2013 which was delivered by Mahimbali, DR on the 23<sup>rd</sup> day of December, 2015 in the high Court of Tanzania Land Division at Dar es Salaam and in the matter of Amended execution Misc. Land Application No. 50 of 2017 dated the 9<sup>th</sup> October, 2019)*

**ALLY ABSI ALLY ..... APPLICANT**

**VERSUS**

**NAJMA HASSAN ALLY KANJI ..... RESPONDENT**

**RULING**

**S.M. MAGHIMBI, J:**

In this application lodged by way of a Chamber Summons under the provisions of Order XXXIX Rule 27 and Section 38(1) and Section 95 of the Civil Procedure Code Act, Cap 33 R.E. 2002 ("The CPC") and Section 2(1),(3)&(5) of the Judicature and Application of the Laws Act, Cap. 358 R.E 2002 and any other enabling provisions of Law, the applicant seeks for orders as hereunder:

- a) This Hon. Court be pleased to Stay the enforcement of amended execution No. 50/2019 which was filed in the High Court Land Division at Dar-es-salaam on the 09<sup>th</sup> October, 2019 in Execution of the Decree of his Lordship Nchimbi, J, dated 23<sup>rd</sup> day of October, 2015.
- b) Costs of this Application be in the cause.
- c) Any other relief that the Honorable Court deems proper to grant.

The application is supported by the Affidavit of Mr. Ally Abasi Ally, the Applicant herein dated 23/10/2019. On the 01/11/2019, the respondent

filed a notice of preliminary objection on point of law that the application is bad in law for being hopelessly time barred. On the 15<sup>th</sup> day of November, 2019, this court ordered the objection to be disposed by way of written submissions and both parties filed their submissions accordingly. In this application, Mr. Barnaba Luguwa represented the applicant while Ms. Aziza Msangi represented the respondent.

In her submissions to support the objection, Ms. Msangi submitted that this application, like any other application, is filed under the CPC. That no period of limitation is prescribed by any other written laws, its period of limitation is governed under Part III item 21 of the Law of Limitation Act, Cap. 89 R.E 2002 ("The Limitation Act") which prescribes the period of limitation where no period of limitation is provided under it or any other law to be sixty days. She argued that the judgment and decree subject of this application was delivered on 23<sup>rd</sup> December, 2015 therefore sixty days elapsed sometimes on 21<sup>st</sup> February, 2016 hence the application is out of time for three years.

Ms. Msangi submitted further that u/s 3 of the Limitation Act, the consequences of proceedings instituted out of time without leave of the court is to have the application dismissed. She supported her arguments by citing the case of **Hezron Nyachia Vs. Tanzania Union of Industrial and Commercial Workers & Another, Civil Appeal No. 79/2001** (unreported) where it was held that the application that was time barred deserved to be dismissed. She hence prayed that the application is dismissed with costs for being time barred.

In reply, Mr. Luguwa submitted that one can apply for stay of execution when the court which passed the decree has received an application for

execution from the decree holder and an order for execution has been made. That an appellate court, if execution has been issued thereby or application made thereto can admit the application for stay of execution and proceed to consider it. He emphasized that there must be either an application for execution in place or an order for execution has been issued that is when one can move the court for stay of execution.

Replying to Ms. Msangi's argument that the right to file the application for stay of execution accrued from the date when the judgment was delivered by the trial court, Mr. Luguwa submitted that the right to apply for stay of execution arise when an application is made and the same is served on the judgment debtor or when he is made aware of it. He pointed out that annexure "E" to the affidavit is a copy of an amended application for stay of execution filed on 09/10/2019 and the same was served to them on 10/10/2019 and the current application was filed on the 25/10/2019. He concluded that the application is within time, praying for the dismissal of the objection. Ms. Msangi did not make any rejoinder submissions.

My determination will start with the contending argument as to when the right to file an application for stay of execution accrued. Ms. Msangi's argument is that the right accrued from the date of pronouncement of the judgment by the trial court. On the other hand, Mr. Luguwa's argument is that the right accrued when an application for execution is made and the same is served on the judgment debtor or when the judgment debtor is made aware of the application.

In the decision of the Court of Appeal in the case of **Hatibu Omari Versus Belwisy Kuambaza Civil Application No. 35/17 of 2018**

(unreported), when determining whether the application for stay was filed late or not, the Court held:

*According to Rule 11(2) (c) of the Rules, an application for stay of execution must be filed within sixty (60) days from the date the notice of appeal was filed. In this case, **the judgment and decree sought to be stayed were handed down on 2/9/2016. The notice of appeal was filed on 15/9/2016 which was well within time.** However, the application for stay of execution was filed through a notice of motion on 18/4/2017 which, **by simple calculation was after seven months from when the notice of appeal was filed.** It is without question that the application for stay of execution was filed inordinately late."*

In calculating when the right accrued in the above case, the Court computed the time from when the notice of appeal was filed and not when the judgment of the trial court was delivered. Although the circumstances in that case do not tally with the current at hand given the fact that the application for stay at the Court of Appeal can only be filed after the notice to appeal is lodged as opposed to this court where the application for stay may be filed even if no appeal was filed, but the principle I am taking from the cited case is on the cut point of when to start computing the period for stay of execution because there has to be one. This is where the provisions of Order XXI Rule 24(1) of the CPC come in, the Order provides:

*24.-(1) The **court to which a decree has been sent for execution shall**, upon sufficient cause being shown, stay the execution of such decree for a reasonable time, to enable the judgment-debtor to apply to the court by which the decree was*


*passed or to any court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay execution or for any other order relating to the decree or execution 11 which might have been made by such court of first instance or appellate court if execution had been issued thereby, or if application for execution had been made thereto.*

The catching words here are the opening words, ***The court to which a decree has been sent for execution***". The words are clear that an application for stay of execution can be made to the court where the decree is sent for execution implying that it is after the decree has been sent to the executing court for execution that the application for stay can be made and not before that. Hence with respect, I don't agree with Ms. Msangi's contention that the right accrued from the date of judgment. It accrued from the date of filing of an application for execution. This takes me to Mr. Luguwa's argument that the right accrued after an application is made and the same is served on the judgment debtor or when he is made aware of it, the question here is, when was the applicant served or made aware of the existence of the application?

In determining the question above, I will rely on Mr. Luguwa's argument that he became aware of the existence of the application for execution on the 16/11/2018 and could not act because the application was fatally defective. He wants the court to compute the time from 09/10/2019 when the amended application was filed and not when he became aware of the application in November 2018. With respect to Mr. Luguwa, his argument is illogical as the computation of time cannot start at his pleasure. The computation will start from the very day that the applicant became aware

of the application for execution. Whether or not the application was fatally defective was not in his power to say, he had the right to point the defects out but it was purely upon the court to determine whether or not it was defective. If we are to take his argument that he had to wait for the amendment, the question will be how he was sure that the court was to uphold his objection and order amendment? Therefore the moment the applicant became aware of the existence of the application for execution his right to apply for stay accrued and that was on 16<sup>th</sup> November, 2018. It is an undisputed fact that the current application was filed on 25/10/2019 which is almost a year after the applicant's right accrued and the limitation period started to run. As correctly argued by Ms. Msangi, since the application is filed under the CPC and since no period of limitation is prescribed by the Limitation Act or any other written law, the period of limitation is governed under Part III item 21 of the Law of Limitation Act, Cap. 89 R.E 2002 which is 60 days. This application which was filed more than 11 months afterwards, is hopelessly time barred. Consequently it is hereby dismissed with costs.

Dated at Dar-es-salaam this 13<sup>th</sup> day of May, 2020

  
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**S.M. MAGHIMBI**  
**JUDGE**