

**IN THE HIGH COURT OF TANZANIA
(DISTRICT REGISTRY)**

AT DAR ES SALAAM

EXECUTION NO. 690 OF 2022

*(Arising from Land Case No. 131 of 2019 and Misc. Land Application No.
373 of 2021)*

CRUCIAL INVESTMENT LIMITED APPLICANT

VERSUS

UNYANGA RABIKIRA MASAWE 1ST RESPONDENT

JEAN MOTO MILLIKEN 2ND RESPONDENT

RULING

Date of last Order: 10.11.2022

Date of Ruling: 10.11.2022

A.Z.MGEYEKWA, J

This is an omnibus application is brought under a Certificate of Urgency. The application is made under section 14 (1) of the Law of Limitation Act, Cap.89 [R.E 2019], Order XXI Rule 24 (1), (2) & (3), and 95 of the Civil Procedure

Code Cap. 33 [R.E 2019]. The application is applying for an extension of time to file a review and stay of execution. The application is supported by an affidavit deponed by Joanrachel Johnson Kitunga, the applicant. The application has encountered formidable opposition from the respondent and has demonstrated his resistance by filing a counter affidavit, deponed by Mr. Unyanga Rabikira Masawe and Jean Moyo Milliken, the respondents.

When the matter was called for hearing on 10th November, 2022, the applicant enlisted the legal service of Mr. Okare Emesu, learned counsel and the respondent enjoyed the legal service of Mr. James Laurean Evarist, learned counsel.

In his submission, the applicant's Advocate laid an elaborate introduction of the matter and what bred the instant application which I am not going to reproduce in this application. Mr. Okare submitted that this is an omnibus application whereas the applicant is praying for an extension of time to file a review and to halt the order or detention of Joanrachel Kitunga. On the first prayer, the counsel for the applicant states that the Ruling was delivered on 13th May, 2022 but the same was not served to the applicants instead it was served on 19th April. 2022 to one Glory, the applicant's employee to show cause why execution should not be effected. He went on to submit that the

applicant did not inform the applicants. He stated that they were expecting the summons could be served to the Directors. Mr. Okare continued to submit that the Deed of Settlement was signed by one Godson Simanga who is not a Director or shareholder of the applicants. The learned counsel stated that the applicant has a property worthy Tshs. 600,000,000/= and the Title is in the hands of the respondent. It was his view that the respondent's claims in paragraph 27 of their counter affidavit are unfounded because the Board of Resolution is not needed to approve the sale of the applicant's property. In his view, the applicant has the power to sell the property and pay debts. He submitted that the applicant is willing to pay the debt as to date she has paid Tshs. 85,000,000/=

Mr. Okare did not end there. He stated that execution by detaining a person as a civil prisoner is a last resort. To fortify his position he referred this Court to the case of **Simon Mwita Mlagani & Another v Kiribo Ltd**, Execution Case No. 56 of 2020, and **Zhang Zaiguo v Epoch Mining (T) Ltd**, Misc. Labour Execution No. 26 of 2021. He urged this Court to stay execution under Order XXI Rule 2 of the Civil Procedure Code Cap. 33 pending the determination of the application for review. He added that under Order XXIV Rule 39 (3) & (4) of the Civil Procedure Code Cap.33 this Court has the

power to release the applicant and order her to pay the debt failure to that the Court can order re-arrest.

On the strength of the above submission, the learned counsel for the applicant urged this Court to release the applicant pending other matters before this Court.

In reply, Mr. James' confutation was strenuous. The respondent's counsel came out forcefully and opposed the application. He urged this Court to adopt the respondent's counter-affidavit and form part of his submission. Mr. James urged this Court not to consider the grounds for extension of time and stay of execution. The learned counsel for the respondent contended that the applicant and the deponed are two different people since the affidavit of the deponent is based on the deponent not the applicant. He stressed that there is no any affidavit to support the applicant's application.

Mr. James further contended that the applicant was summoned to appear in Court in April, 2022, the applicant was served to appear in Execution No. 13 of 2022 and the Court order was served to Ernest Magessa, one of the Directors , the husband of Joanrachel. Thus, in his view, Joanrachel was aware that there is a Court order.

The learned counsel for the respondent continued to submit that on 21st June, 2022, the applicant paid Tshs. 25,000,000/= as part of the debt, on 16th September, 2022 they paid Tshs. 10,000,000/= and on 7th October, 2022 they paid Tshs. 50,000,000/= . Mr. James went on to submit that all the time the applicant knew that Execution No.13 of 2022 was finalized hence they were required to pay the debt. Besides rebutting the applicant's submissions, the learned advocate came up with the allegation that the applicant did not honour the deed of settlement. He went on to state that in settlement of the Land Case No. 71 of 2019, the applicant received Tshs. 273,000,000/= instead of paying the money to the Court they decided to use it.

In Mr. Mbwambo's contention, the prayer for stay of execution cannot be granted because the rest of the judgment debtors are hidden and they did not sign any affidavit. He argued that saying that the Deed of Settlement was not signed by Directors then they could not come forward. He lamented that the respondent has incurred loss since they have filed several applications because the applicant did not pay the outstanding amount.

On the strength of the above submission Mr. James urged this Court not to grant the applicant's application rather to dismiss the application and let the applicant pay the outstanding amount before her release from prison.

In his rejoinder, Mr. Okera reiterated his submission in chief. He stressed that the applicant in his affidavit has stated reasons for extension of time. He went on to state that there are only two Directors therefore the rest of them were not required to file their affidavits. Ending, Mr. Okera urged this Court to grant the applicant's application and released the applicant.

This is an omnibus application containing an application for an extension of time to file a review and a prayer for a stay of execution. Before I start to determine the applicant's prayers, I find it prudent to start with the argument raised by the learned counsel for the respondent that there is no any affidavit to support the applicant's application. I do differ with the counsel's submission because the applicant in the first paragraph of her affidavit has introduced herself as a Director of the applicant, therefore, the same suffices, therefore, the Court recognizes her as a Director of the applicant.

I now turn to the gist of the Application. I have opted to start with the first prayer, of extension of time. The applicant has prayed for an extension of time to file an application for review. The position of the law is settled and clear that an application for an extension of time is entirely the discretion of the Court. But, that discretion is judicial and so it must be exercised

according to the rules of reason and justice as was observed in the case of **Mbogo and Another v Shah** [1968] EALR 93.

Additionally, the Court will exercise its discretion in favour of an applicant only upon showing good cause for the delay. The term “good cause” having not been defined by the Rules, cannot be laid by any hard and fast rules but is dependent upon the facts obtained in each particular case. This stance has been taken by the Court of Appeal in the case of **Tanga Cement Company Ltd v Jumanne D. Massanga and another**, Civil Application No. 6 of 2001, **Vodacom Foundation v Commissioner General (TRA)**, Civil Application No. 107/20 of 2017 (all unreported).

I have scrutinized the applicant’s affidavit and noted she did not account for each day of delay from the date when this Court order was issued on 13th May, 2022 to 1st November, 2022. In paragraphs 5, 6, 7, and 9, the applicant did not state the exactly date when she became aware that there was a court order she just stated that she was aware of the ruling when she was in Segerea prison. The challenge to engage an advocate while in detention is a good reason but the same cannot stand because she did not state when exactly she engaged an advocate to file the instant application. The applicant was required to account for each day of delay, consistent with the position of

the Court of Appeal of Tanzania in the cases of **FINCA (T) Ltd and Another v Boniface Mwalukisa**, Civil Application No. 589/12 of 2018 (unreported) which was delivered in May, 2019 and the case of **Bushiri Hassan v Latifa Lukio Mashayo**, Civil Application No. 3 of 2007 (unreported), it held that:-

“Dismissal of an application is the consequence befalling an applicant seeking an extension of time who fails to account for every day of delay.”

Applying, the above authorities in the matter at hand is clear that the applicant and his counsel's grounds of delay are not *prima facie* panacea for a case of delay whenever it is pleaded.

On the alleged irregularities and illegalities, the argument raised by the Mr. Okare and the applicant is that the Ruling is tainted with irregularities that should not be left unchecked. The applicant in her affidavit in paragraph 11 raised two issues; whether an application for execution BY commitment to civil prison of a company Director can proceed against the Director in the absence of personal service of summons. And whether one can be committed to prison without being accorded an opportunity to be heard. In my considered view the reasons stated by the applicant and his counsel are not good grounds for the illegality

For the sake of clarity the cited case of **Simon Mwita** (supra) is distinguishable from the case at hand, in the case at hand failure for this Court to take other executing measures in lieu of arrest and detention in prison is unfounded since there is no conditions attached such that before the process is put in motion, the judge should first consider attaching and selling the properties of judgment debtor. See the case of **Mohamed H. Nassoro v Commercial Bank of Africa (T) Limited**, Civil Application No. 161 of 2014 Court of Appeal of Tanzania delivered on 1st November, 2017 (unreported).

It is worth noting although the issue of illegality is regarded as a sufficient ground in applications of extension of time, the same does not mean that any illegality raised by a party constitutes a point of law. In the case of **Moto Matiko Mabanga v Ophir Energy PLC and 2 Others**, Civil Application No.463/01 of 2017, delivered on 17th April, 2019, the Court of Appeal of Tanzania emphasized that:-

*“... for the ground of illegality to stand, the challenged **illegality of the decision must clearly be visible on the face of the record**, and the illegality in focus must be that of sufficient importance.” [Emphasis added].*

Guided by the above findings, it is clear that the question of illegality in the application at hand does not arise. It should be noted that 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 same was held by the Supreme Court of Kenya in the case of **Nicholas Kiptoo Arap Korir Salat v IEBC & 7 Others**, Sup. Ct. Application No. 16 of 2014. I recapitulate that I accede to Mr. James's views that the applicant's grounds for extension of time are devoid of merit.

With respect to the issue of stay of execution, from the outset, I have to state that this prayer does not hold water since the same is overtaken by the event. The conditions for granting an order for stay of execution takes into consideration that the execution is not carried out. In the matter at hand, the execution of Decree in Land Case No. 131 of 2019 was carried out, therefore, there is nothing to stay. However, I have considered the circumstance of the matter at hand and the fact that the applicant has paid part of their debt to the tune of Tshs. 85,000,000 /= and the outstanding balance is Tshs. 150,000,000/=. Therefore, I am satisfied with the commitment shown by the applicant to pay the outstanding debt. As rightly

stated by Mr. Okare this Court has power under Order XXI Rule 39 (3) of the Civil Procedure Code Cap.33 to release the applicant from prison.

For that reason, I proceed to order the immediate release of Ms. Joanrachel Johnson Kitunga from prison and order them to pay the outstanding balance within four months from the date of this Ruling.

Order accordingly.

DATED at Dar es Salaam this 10th November, 2022.




A.Z. MGEYEKWA
JUDGE
10.11.2022

Ruling delivered on the 10th November, 2022 via video conferencing whereas Mr. Okare Emesu, learned counsel for the applicant, and Mr. James Evarister, learned counsel for the respondent were remotely present.




A.Z. MGEYEKWA
JUDGE
10.11.2022