

IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM
MISC. LAND APPLICATION NO.586 OF 2022
(Arising from Execution No. 57 of 2022)

ESTHER NORMAN

(As Legal Representative of Magreth Peter) **APPLICANT**

VERSUS

SHOMARI S. SHOMARI **1ST RESPONDENT**

NORMAN MUTIA MAUNDU **2ND RESPONDENT**

RULING

Date of last Order: 01.12.2022

Date of Ruling: 05.12.2022

A.Z. MGEYEKWA, J

This is an application for stay of Execution No. 57 of 2022 pending the filing of an appeal at the Court of Appeal of Tanzania. The application is brought under Order XXI Rule 24 (1) and section 95 of Civil Procedure Code Cap. 33 [R.E 2019]. To support his application applicant filed an affidavit deponed by Esther Norman (As a legal representative of the late

Magreth Peter), the applicant. The applicant has set out the grounds on which an extension of time is sought. The respondent has stoutly opposed the application by filing a counter-affidavit deponed by Respicious R. S Mukandala, the learned counsel for the respondent. The suit stumbled upon preliminary objections from the Defendants who raised four points of Preliminary Objection as follows:-

1. The Application is incurable defective for a wrong citation of the law,
2. The Application is time-barred.
3. The Court has no jurisdiction to entertain the present application.

When the matter was called for hearing of the preliminary objection on 23rd November, 2022, the applicant had the legal service of Mr. Betaho Marco while the respondent enlisted the legal service of Mr. Respicious R. S Mukandala. By the consent of this court, the parties argued the application by way of written submissions whereas, the respondent's counsel filed their submission in chief on 25th November, 2022, the applicant's counsel filed his reply on 29th November, 2022 and the respondent's counsel filed their rejoinder on 30th November, 2022.

As the practice of the Court has it, we had to determine the preliminary objection first before going into the merits or demerits of the suit.

In support of the first limb of objections, Mr. Respicious contended that the application is incurable defective for wrong citation of the law. The

counsel for the respondent submitted that the application is brought under Order XXI Rule 24 of the Civil Procedure Code Cap. 33, that the application for stay of execution be made to the court to which the decree has been sent for execution, however, the provision is not pertinent to the present application because the decree which the applicant seeks to stay originates from the same Court while the provision caters for decrees which are sent from another court. To buttress his contention he cited the case of **Othuman M. Othuman & Another v Tanzania Investment Oil and Transport Co, Ltd**, Civil Appeal No. 134 of 2004 (unreported) CAT at Dar es Salaam. Mr. Kitare stressed that since the applicant did not cite a specific provision of the law, the same should face a similar consequence of being struck out.

On the second limb of objection, the learned counsel for the applicant contended that the application is filed out of time. The counsel submitted that the limitation period for application for stay of execution is governed by Court of Appeal Rules Cap. 141 [R.E 2019] which states that:-

“An application for stay of execution shall be made within 14 days of service of the notice of execution on the applicant by the executing officer or from the date he is otherwise made aware of the evidence of an application for execution.”

The counsel went on to submit that the applicant in the instant application served the Judgment Debtor with a notice of execution on 4th August, 2022, counting from the date of service the last date when he was supposed to file the instant application was on 8th August, 2022, but he has filed the same after a lapse of 74 days.

Submitting on the third limb of objection, the learned counsel for the applicant submitted that this court has no jurisdiction to determine the application at hand. To support his submission he cited Rule 11 of the Tanzania Court of Appeal Rules. He went on to submit that under paragraph 2 of the application the applicant stated that she filed a Notice of Appeal before the Court of Appeal of Tanzania, thus once a Notice of Appeal is lodged the High Court ceases to have jurisdiction. Fortifying his submission he cited the cases of **The Lake Ltd v Dorcus Martin Nyanda**, Civil Revision No. 1 of 2019, CAT (unreported), **Simon Kabaka Daniel v Mwita Marwa Nyang'anyi and 11 other** (1989) TLR 64 HC and **Awiniel Mtuo & three others v Stanley Ephata Kimambo (Attorney for Ephata Matahyo Kimambo)**, Civil Application No. 19 of 2014 (unreported). He also cited Order XXXIX Rule 5 of the Civil Procedure Code Cap. 33 which prevents an appeal to operate for stay of execution.

In conclusion, the learned counsel for the applicant urged this Court to dismiss the application with costs.

In reply thereto, on the first limb of objection, the applicant's Advocate conceded to the objection raised by the respondent's counsel and stated that the omission is not fatal as long as the same does not prejudice the respondent. He went on to state that for the interest of justice and for the sake of determining the real questions in controversy between the parties they prayed to cure the minor defect. To buttress his submission he cited the case of **Beatrice Mbilinyi v Ahmed Mabkhut Shabiby**, Civil Application No. 475/01 of 2020 CAT (unreported) and **Yakobo Magoiga Kichere v Peninah Yusuph**, Civil Application No. 55 of 2017 CAT at Mwanza (unreported).

Arguing on the second limb of objection, the counsel for the applicant simply stated that the application is not time barred. Mr. Bitaho stated that the court should not base on technicality. He cited the case of **VIP Engineering and Marketing Ltd v Said Salim Bakheresa Ltd** No. 47 of 1996.

Submitting on the last limb of objection, Mr. Bitaho argued that the applicant on his application clearly stated that the cause of action for stay is to prevent the house from being executed by the respondents pending the determination of the appeal and not because the applicant has filed a Notice of Appeal at the Court of Appeal of Tanzania.

In conclusion, Mr. Bitaho urged this Court to overrule the preliminary objection with costs.

In his brief rejoinder, the respondent's counsel reiterated his submission in chief. Stressing on the point of the wrong citation of law, Mr. Kitale argued that the wrong citation is not a slip of the pen. The counsel for the respondent did not subscribe that the omission of citing proper citation of law is not based on technicality as procedural and substantive rules are meant to promote the interest of justice. He went on to submit that the applicant did not dispute the fact that the present application is time-barred. Ending, he urged this Court to dismiss the instant application with costs.

I have given careful deliberation to the arguments for and against the preliminary objection herein advanced by both learned counsels. Having done so, it should be now opportune to determine the preliminary objection raised by the respondent's Advocate and the main issue for determination is ***whether the preliminary objection is meritorious.***

To begin with, from the factual setting, it is beyond question that having heard the respondent's Advocate's submission that the appeal is time-barred, I had to go through the court records to find out whether the appellant lodged the instant application within time. In the absence of any particular legislation that guides the time prescribed, the only known law

on time prescription is Cap. 89 and, in particular, the Schedule to the said law. The time limit for filing the instant appeal is prescribed under Item 21 of Part III of the Schedule of the Law of Limitation Act, Cap. 89. For ease of reference I reproduce Item 21 of the Act hereunder:-

“ Application under the Civil Procedure Code, the Magistrates’ Courts Act or other written law for which no period of limitation is provided in this Act or any other written law is sixty days.”

Based on the above provision of the law, an application emanating from such kind of decision is preferable within 60 days from the date the decision was made. I agree with the contention raised by Mr. Kitare and hold that the application was filed belatedly and, therefore, incompetent. The Court of Appeal of Tanzania in **Allison Xerox Sila v Tanzania Harbours Authority**, CAT in Reference No. 14 of 1998 (unreported) held that:-

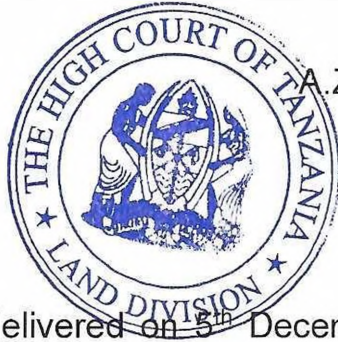
“Rules of limitation are ordained for a purpose. It does not seem just that an applicant who has no valid excuse for failure to utilize the prescribed time, but tardiness, negligence or ineptitude of counsel, should be extended extra time merely out of sympathy for his cause...”

For reasons canvassed above, I am settled that the applicant's application for stay of execution is time-barred. Therefore, I sustain the second

objection. Consequently, on this objection alone, the Misc. Application No. 686 of 2022 is dismissed for being time-barred without costs.

Order accordingly.

Dated at Dar es Salaam this date 5th December, 2022.




A.Z.MGEYEKWA
JUDGE
05.12.2022

Ruling delivered on 5th December, 2022 in the presence of Mr. Kelvin Lubogo, learned counsel holding brief for Mr. Bitaho, counsel for the applicant, and Mr. Respecious Mukandala holding brief for Mr. Kelvin Lupogo, learned counsel holding brief for the respondent.




A.Z.MGEYEKWA
JUDGE
05.12.2022