

**IN THE COURT OF APPEAL OF TANZANIA  
AT MWANZA**

**CIVIL APPLICATION NO. 535/8 OF 2019**

**NICHOLAUS MWAIPYANA .....APPLICANT**

**VERSUS**

**THE REGISTERED TRUSTEES OF THE LITTLE  
SISTERS OF JESUS OF TANZANIA .....RESPONDENT**

**(Application for Extension of time in which to Apply for Stay of Execution  
in respect of the Judgment and Decree of the High Court  
of Tanzania at Mwanza)**

**(Rumanyika, J.)**

**dated the 11<sup>th</sup> day of March, 2019**

**in**

**Land Case No. 44 of 2016**

**RULING**

25<sup>th</sup> & 27<sup>th</sup> March, 2020

**MMILLA, J.A.:**

This application is brought by Nicholas Mwaipyana (the applicant). It is founded on Rule 10 of the Tanzania Court of Appeal Rules, 2009 as amended (the Rules). He is asking the Court to extend time within which he may file an application for stay of execution. It is supported by an affidavit sworn by Dr. George Mwaisondola, who is his advocate.

On the other hand, the Registered Trustees of The Little Sisters of Jesus of Tanzania are opposing the application. They filed an affidavit in reply sworn by one Pulkeria Kessy who is one of the trustees of the respondent, in which they have given explanation on why the Court should find no merit in it and dismiss it.

On the date of the hearing of this application, Dr. George Mwaisondola, learned advocate, represented the applicant; whereas Mr. Pauline Rugaimukamu and Mr. Innocent J. Kisigiro, learned advocates, appeared for and represented the respondent.

At the commencement of the hearing, Dr. Mwaisondola prayed to adopt the Notice of Motion and the affidavit in support of the application. Notably, according to paragraphs 3 and 4 of the accompanying affidavit, the applicant has advanced one key ground that he delayed to file an application for stay of execution because at the date he was served with the notice of execution, he was not supplied with a corrected copy of the judgment of the High Court after he had discovered that the previously supplied copy was incorrectly titled. In the earlier judgment, the name of the respondent was wrongly shown to be "The Little Sisters of Jesus of Tanzania" instead of the correct name of "The Registered Trustees of

The Little Sisters of Jesus of Tanzania.” Upon discovery of that error, a letter was written to the Registrar of the High Court asking for a correctly titled copy of judgment, but the same was not readily supplied to the applicant. According to the record, as well as Dr. Mwaisondola’s oral submission before me, the correct copy of that judgment was supplied to the applicant on 21.10.2019, long after the latter had received the notice of execution. In view of that snag, Dr. Mwaisondola contended, his client was forced to file the present application. He further argued that since a copy of judgment was amongst the necessary documents he ought to have annexed in an application for stay of execution in terms of Rule 11 (7) (a), (b), (c) and (d) of the Rules, he had no better option but to wait for it. He submitted therefore that the applicant has shown good cause for the delay.

On the other hand, the respondent’s learned counsel prayed likewise to adopt the affidavit in reply. As covered under paragraph 4 of the affidavit in reply and their oral submissions, they vehemently refute the fact that the delay was due to failure to be supplied with the corrected copy of the judgment of the High Court. According to them, the corrected copy of judgment was ready for collection since 2.3.2019.

Even, they emphasized, the notice of execution which was served on the applicant was accompanied with copies of the corrected copy of the judgment and decree, therefore that failure to collect it was a result of laxity and/or negligence on the applicant's part. They referred the Court to two authorities which supported their position that the applicant was negligent, therefore that no good cause has been shown for the delay. The cases relied upon were **Umoja Garage v. National Bank of Commerce** [1997] T.L.R 109 and **Said Issa Ambunda v. Tanzania Harbours Authority**, Civil Application No. 164 of 2005, CAT (unreported). They urged the Court to dismiss the application with costs.

In his brief rejoinder, Dr. Mwaisondola was eloquent that the corrected copy of judgment subject of execution could not have been ready by 2.3.2019 as quipped in paragraph 4 of the affidavit in reply because the said judgment was delivered on 11.3.2019. This, he said, is supported by the fact that his learned friends changed version in their oral submissions for which they said the corrected copy of the judgment was ready for collection on 29.5.2019 instead of the previously indicated date of 2.3.2019.

Dr. Mwaisondola challenged similarly their allegation that they attached copies of the judgment and decree to the notice of execution which was served on the applicant because the absence of a copy of judgment in the annexures to the notice of execution which was served on the applicant prompted him to file a preliminary objection in the High Court in respect of that application for execution. He contested likewise, that even, this aspect was not covered in the respondent's affidavit in reply.

Regarding the two cases which were relied upon by his colleagues, Dr. Mwaisondola maintained that both of them were distinguishable to the present case. He contended that the case of **Umoja Garage** (supra) was not relevant to the present case because in that case there was an element of negligence on the part of the advocate for the applicant, whereas there is nothing like that in the present case. Likewise, while the decision in the case of **Said Issa Ambunda** (supra) was predicated on the fact that the delay was inordinate, there is nothing of the sort in the present case because in the circumstances of the present case he took prompt actions at the earliest opportunity to avoid such a mistake.

After carefully considering the competing arguments of the counsel for the parties, I figure out that the main issue calling for determination is whether or not the applicant has shown good cause for the delay in the circumstances of this case.

There is no naysaying that in terms of Rule 10 of the Rules, a party seeking the Court to extend time within which to do an act beyond the time limited by law has to show good cause for the delay. Rule 10 of the Rules provides that:-

*"The Court may, **upon good cause shown**, extend the time limited by these Rules or by any decision of the High Court or tribunal, for the doing of any act authorized or required by these Rules, whether before or after the expiration of that time and whether before or after the doing of the act; and any reference in these Rules to any such time shall be construed as a reference to that time as so extended."* [The emphasis is added].

The power to extend time given under this provision is discretionary, but such discretion must be exercised judicially, meaning the making of a logically sound decision based on rules of law. That requires the attention of the court to all the relevant factors and materials

surrounding any particular case. These factors include the length of the delay, the reason for the delay, and whether or not there is an arguable case, among others – See the cases of **Ratnam v. Cumarasamy and Another** [1964] 3 All E.R. 933 and **Lyamuya Construction Company Limited v. Board of Registered Trustees of Young Women’s Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported).

In **Lyamuya Construction Company Limited** (supra), the Court said that factors to be considered would normally include the following:-

- (i). That, the applicant must account for all the period of delay.*
- (ii). That, the delay should not lie inordinate.*
- (iii). That, the applicant must show diligence and not apathy negligence or sloppiness in the prosecution of action that he intends to take.*
- (iv). That, if the Court feels that there are other sufficient reasons such as the existence of a point of law of sufficient of a point of law of sufficient importance; such as the illegality of the decision sought to be challenged.*

In the circumstances of the present case, the only ground given as being the cause for the delay is that after he was served with notice of execution on 26.8.2019, the applicant could not promptly file an application for stay of execution on the ground that as at that date, he was yet to be supplied with a corrected copy of the judgment subject of the execution because the previously supplied copy was incorrect.

I have considered the arguments of the respondent's learned counsel that the corrected copy of the alleged judgment was ready for collection earlier enough, but I am far from being convinced that they were correct on this. In the first place, it is inconceivable that it could have been ready by 2.3.2019 because as correctly pointed out by Dr. Mwaisondola, then the judgment subject of the execution had not been delivered. The annexed judgment shows that it was delivered on 11.3.2019. Also, I do not accept the respondent's changed oral version that it was ready for collection on 29.5.2019 because it contradicts their earlier version covered under oath in paragraph 4 of the affidavit in reply, which implies that Dr. Mwaisondola is truthful.

There is also that contention by the respondent's learned advocates that a copy of the corrected judgment was attached to the

notice of execution which was served on the applicant. Of course, this has been vehemently opposed by Dr. Mwaisondola who said that he even filed a notice of preliminary objection in the High Court in respect of the application for execution before that court challenging the competence of that application in view of their failure to annex a copy of the said judgment. Once again, I agree with Dr. Mwaisondola that, had the respondent's advocates covered that important aspect in the affidavit in reply, there would have been a wide room for the Court to weigh the pros and cons. Unfortunately, it was not covered, which means it is an afterthought, and a mere statement from the bar.

I furthermore note that the application for extension of time was not filed without an alarming delay, nor can anyone of us for sure say that any sort of negligence has been shown. As such, I agree with Dr. Mwaisondola that the cases of **Umoja Garage** and **Ambunda** (supra), are indeed distinguishable in the circumstances of the present case.

For reasons I have assigned, I am satisfied that the applicant managed to show good cause for the delay. Consequently, the application succeeds; time is hereby extended to give him chance to file an application for stay of execution as prayed. He should however, file

the intended application within a period of 14 days from the date of delivery of this ruling. Costs to be in the course.

**DATED** at **MWANZA** this 27<sup>th</sup> day of March, 2020.

B. M. MMILLA  
**JUSTICE OF APPEAL**

The Ruling delivered this 27<sup>th</sup> day of March 2020, in the Presence of Dr. George Mwaiondola, Counsel for the appellant and Mr. Innocent John Kisigiro Counsel for the Respondent, is hereby certified as a true copy of the original.



*S. J. Kainda*  
S. J. KAINDA  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**