

TANZANIA / JUDGMENT

CIVIL APPLICATION NO 192 16 OF 2023 YUSUF MULLA ANOTHER VS INTERNATIONAL COMMERCIAL BANK T LIMITED

COURT
TANZLIIDECIDED
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IN THE COURT OF APPEAL OF TANZANIA AT DAR ES SALAAM CIVIL APPLICATION NO. 192/16 OF 2023 YUSUF MULLA..... 1st APPLICANT SHAHIDI MULLA..... 2ND APPLICANT VERSUS INTERNATIONAL COMMERCIAL BANK (T) LIMITED..... RESPONDENT (Application for extension of time to lodge application for stay of execution from the decision of the High Court of Tanzania, Commercial Division at Dar es Salaam) (Nangela, 3.) dated the 8th day of May, 2020 in Commercial Case No. 108 OF 2018

RULING

13th August & 4th September, 2024 KIHWELO. J.A.: On 22nd March, 2023 the applicants filed a Notice of Motion predicated on rules 10, 48 (1), (2) and 49 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules) for the following orders:

- (a) That this Court be pleased to extend time to file an application for stay of execution of judgment and decree of the High Court of Tanzania, Commercial Division at Dar es Salaam (Nangela, J.) in Commercial Case No. 108 of 2018 dated 8th May, 2018. i
- (b) An order that costs of and incidental to the application abide by the result of the application, In support of the application, the applicants lodged a joint affidavit which, on the basis of paragraphs 4, 5, 7, 11, 12, 13 and 14 of that affidavit and their written submissions lodged in Court on 19th May, 2023, the applicants urged me to find that, since they were honestly and diligently prosecuting the intended application then the delay was not negligence and/or inadvertence. Illustrating, the applicant's counsel Mr. Sosten Mbedule who teamed up with Mr. Kalaghe Rashid learned counsel contended that, aggrieved by the impugned decision the applicants lodged a notice of appeal, requested copies of the necessary documents for appeal purposes and later lodged Civil Appeal No. 34 of 2021 which is pending hearing and determination before the Court. It was Mr. Mbedule's further arguments that, apparently, while the applicants were preparing an appeal, the respondent initiated an application for execution which was duly served on the applicants on 29th June, 2020 that precipitated the applicants on 17th July, 2020 to lodge an application for stay of

execution in Civil Application No. 282/16 of 2020 which was later on 15th March, 2023 marked withdrawn following a preliminary objection raised by the respondent to which the applicants' counsel readily conceded. Mr. Mbedule further argued that, since the application for execution is still pending before the Court and because Civil Appeal No. 34 of 2021 is yet to be heard and determined the applicants were compelled to lodge the instant application seeking for enlargement of time to lodge an application for stay of execution which is out of time. Mr. Mbedule impressed upon me that, since the delay to lodge the application was not occasioned by the applicants' negligence but rather inevitable judicial processes, then this application be granted and costs abide by the results of the intended appeal. Reliance was placed in the case of *Lyamuya Construction Company Ltd v. Board of Registered Trustees of Young Women's Christian Association of Tanzania*, Civil Application No. 2 of 2010 and *Mathew T. Kitambala v. Rabson Grayson*, Criminal Appeal No. 330 of 2018 (both unreported) to demonstrate his proposition. The respondent who enjoyed the services of Mr. Zacharia Daudi, learned counsel on its part, strongly objected to the granting of the application mainly on the grounds that the applicants were negligent and no sufficient cause has been demonstrated to warrant the granting of the application. I think it is momentous that I should remark, in passing, that the respondent neither lodged an affidavit in reply nor any written submission opposing the application. It is not insignificant to state that, the position of the law is settled and clear that, where the respondent does not lodge an affidavit in reply despite being served, it is taken that he does not dispute the contents of the applicant's affidavit. See, for instance, *Finn Von Wurden Petersen and Another v. Arusha District Council*, Civil Application No. 562/17 of 2017 and *Ultimate Security (T) Limited v. Chande Ally Lubugile and Others*, Civil Application No. 428/01 of 2021 (both unreported). In *Finn Von Wurden Petersen* (supra), for instance, the Court relied on its previous decision in *Yokobeti Sanga v. Yohana Sanga*, Civil Application No. 1 of 2011 (unreported) in which the Court held: "...it is settled that where the respondent does not lodge an affidavit in reply despite being served, it is taken that he does not dispute the contents of the applicant's affidavit..... Therefore, the respondent who appears at the hearing without having lodged an affidavit in reply is precluded from challenging matters of fact, but he can challenge the application on matters of law." 4 The issue before me is whether the applicant has disclosed sufficient reasons for extension of time as required under rule 10 of the Rules. This calls for exercise of the Court's discretionary powers which has to be applied judiciously though. In so doing, the court has to look at the circumstances in each case guided only by principles of justice, equity and common sense. As such, it is neither possible nor desirable to lay down and follow any hard and fast rules as there is no-one-size-fits all criteria. In the instant application, I have been humbly requested to consider, whether the extension sought was occasioned by real or technical delay. The position of the law is long settled and clear that, a distinction has to be drawn between cases involving real or actual delays and those which involve technical delays. We held this position in the case of *Fortunatus Masha v. William Shija* [1997] T.L.R. 154. The application before me presents similar circumstances in that, the applicants on 17th July, 2020 lodged an application for stay of execution in Civil Application No. 282/16 of 2020 upon being served with notice of execution on 29th June,

2020. Unfortunately, that application was later on 15th March, 2023 marked withdrawn. Later, on 22nd March, 2023 the applicants lodged the instant application. The immediate issue for my deliberation is whether the applicants accounted for the period of delay. There is, in this regard, a considerable body of case law to the effect that, in an application for extension of time, the applicant has to account for each and every day of the delay. See, for instance, *Bushiri Hassan v. Latifa Lukio Mashayo*, Civil Application No. 3 of 2007 (unreported). Mr. Mbedule has assertively argued that, the applicants delayed for four (4) days to lodge the initial application from 29th June, 2020 when the notice of execution was served on them to 17th July, 2020 when Civil Application No. 282/16 of 2020 was lodged, and further four (4) days from 15th March, 2023 when the earlier application was marked withdrawn to 21st March, 2023 when the instant application was lodged. In his submission, he argued that these days were spent in the preparations and filing of the respective applications. He took the view that, apart from being accounted, the delay was not inordinate. To support his proposition, he paid homage to the case of *Vodacom Tanzania Public Limited Company v. Commissioner General Tanzania Revenue Authority*, Civil Application No. 101/20 of 2021 (unreported).⁶ The power of this Court to grant extension of time to an applicant is obtained in the provision of Rule 10 of the Rules which reads inter alia that: "The Court may, upon good cause shownf extend the tim e lim ited by these Rules o r by any decision o f the High Court o r tribunal, fo r the doing o f any act authorized o r required by these Rules, w hether before o r after the expiration o f that tim e and w hether before o r a fte r doing o f that a ct and any reference in these R ules to any such tim e sh all be construed as a reference to th at tim e as so extended." At the outset, I wish to point out that, the law is very settled and clear in this jurisdiction that, in order for an applicant to succeed to prompt the court to exercise its discretion under Rule 10 of the Rules to order an enlargement of time in applications of this nature, he must bring to the fore good cause for the delay. There is a plethora of authorities in this regard but to mention a few, *MumeNo v. Bank of Tanzania* [2006] 1 EA 227 and *Kalunga and Company Advocates v. National Bank of Commerce* [2006] TLR 235. Although Rule 10 do not go further to define as to what amounts to good cause. However, case law has it that extension of time being a matter within the Court's discretion, cannot be laid by any hard and fast⁷ rules but will be determined by reference to all the circumstances of each particular case. There is, in this regard, a long line of authority to that effect, if I may just cite the case of *Osward Masatu Mwizarubi v. Tanzania Fish Processing Ltd*, Civil Application No. 13 of 2010 in which this Court stated that: "W hat constitutes good cause cannot be la id down by any hard and fa st rules. The term "good cause" is relative one and is dependent upon the p arty seeking extension o f tim e to provide the relevant m aterial in order to m ove the court to exercise its discretion ." In the instant application the circumstances leading to the delay are clearly spelt out in paragraphs 4, 5, 7, 11, 12, 13 and 14 of the affidavit supporting the Notice of Motion. I find considerable merit in Mr. Mbedule's submission that the applicants have ably demonstrated that the delay was technical and that they accounted for that delay as required by the law. It is further to be stated that the delay was not inordinate. In my considered opinion to shut the doors for the applicants, will, in the circumstances, cause injustice. I am satisfied that

the applicants have been in and out of the court corridors in search for justice. 8 In the result, I grant the application for enlargement of time. The same should be lodged within fourteen days from the date of this ruling. Costs will be in the cause. DATED at DAR ES SALAAM this 2nd day of September, 2024. P. F. KIHWELO JUSTICE OF APPEAL The Ruling delivered this 4th day of September, in the presence of Mr. Kalaghe Rashid, learned counsel for the Applicants and Mr. Zacharia Daudi, learned Counsel for the Respondent, is hereby certified as a true copy of the original. 9

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