

IN THE HIGH COURT OF TANZANIA

COMMERCIAL DIVISION

AT DAR ES SALAAM

Miscellaneous Commercial Application No. 218 of 2017

[Arising from Commercial Case No. 113 of 2011]

Between

RAJAB ATHMANI SALU.....1st APPLICANT

MWANAISHA ALLY.....2nd APPLICANT

Versus

NATIONAL BANK OF COMMERCE LIMITED.....1st RESPONDENT

NYANDA & CO. LTD.....2nd RESPONDENT

ISACK NYANDA.....3rd RESPONDENT

DANFORD. I. NYANDA.....4th RESPONDENT

JACQUELINE NYANDA.....5th RESPONDENT

VEDASTO LUKAGO.....6th RESPONDENT

HAPPYNESS KIHANDI.....7th RESPONDENT

RULING

MRUMA, J.

The applicants Rajab Athmani Salum and Mwanaisha Ally brought this omnibus application for orders that this court should stay the execution of the decree in Commercial Case No 113 of 2011 and all subsequent orders and/or proceedings up till the determination of their Miscellaneous Commercial Application No. 194 of 2017 and for orders

"extending time within which they can be granted" stay of execution of the decree in Commercial Case No. 113 of 2011.

The Application was brought by way of Chamber Summons made under Section 11(1) of the Appellate Jurisdiction Act CAP 141.R.E. 2002 Section 14(1) of the Law of Limitation Act [Cap 89 R.E. 2002], Order XXI Rule 24(1) and 27 and Section 68 (e) and 95 of the Civil Procedure Code [Cap 33 R.E. 2002] on the following grounds:-

- a. That the applicants were not aware of the existence of Commercial Case No. 113 of 2011.
- b. That the applicants have filed Miscellaneous Application No. 194 of 2017 for extension of time to lodge Notice of Appeal and leave to Appeal out of time against the whole judgment of this court in Commercial Case No. 113 of 2011.
- c. That for the whole period from June 2014, the first Applicant was sick and the second Applicant being his wife was busy assisting him.
- d. That the Applicants are in danger of suffering irreparable loss if the stay is refused because they are old persons and they whole depend on that property.
- e. That the Applicants' have arguable appeal which has has likelihood of success.
- f. That the applicants' appeal will be rendered nugatory if the order for stay of execution is not granted.
- g. That the application was brought without delay.

The application is supported by an affidavit sworn by the applicants on the 20th July, 2017 in which they substantially repeat the grounds set out above.

In her response, the Respondent's Advocate Ms. Dexa Mbapila, filed a counter- affidavit sworn on the 31st July 2017, opposing the application. The main thrust of his confession is that the Applicants were aware of Commercial Case No. 113 of 2011 as they entered appearance through an advocate.

It is necessary to give a brief background to this application so far as can be gathered from the record of Commercial Case No. 113 of 2011 which is the following;

In December 2011 the first Respondent, the National Bank of Commerce Limited instituted Commercial Case No. 113 of 2011 in this court against the Applicants and the 2nd to 7th Respondents in this application for payment of the outstanding sum of T.shs 219,376,205.03 being repayment of the overdraft facility granted by the 1st Respondent in favour of the 2nd Respondent herein which was secured by mortgages created over a property on Plot No. 33 Block Q Uhuru Street Mwanza CT No. 18290 and a property registered as CT No. 54614 on Plot No. 12 Block U Trade area Temeke Dar Es Salaam. It appears that the mortgaged properties belongs to the applicants.

The defendants were duly served and when the suit was called for orders on 22nd December 2012, Mr. Sylvester advocate for the Plaintiff informed the court that he was holding brief of advocate Hyera who was representing the Defendants. Later on Mr. Hyera acting for the

Defendants (including the Applicants) filed an application for leave to appear and defend the suit. Mr. Hyera's application was denied and it was dismissed on 6th March, 2011 and on 12th March 2012 a summary judgment was entered against all defendants (the applicants inclusive).

On 20th March 2017, which is over six (6) years after the summary judgment was passed, the 1st Respondent's bank lodged an application for execution of the decree in Commercial Case No. 113 of 2011 by attaching and selling of the mortgaged properties.

At the hearing of this application, Mr. Gideon Opondo represented the Applicants while Mr. Tarzan Mwaiteleke appeared for the 1st Respondent. They adopted their written skeleton arguments that had been filed.

From the submissions of the learned counsel, there are two issues for determination. The issues are:-

1. Whether there are grounds justifying extension of time within which the Applicants can be granted stay of execution and;
2. Whether the Applicants have demonstrated good cause to warrant this court to order stay of execution.

Regarding the first issue, it is trite law that in an application for extension of time the applicant must account for any delay in taking action. In the present application the only reason for the delay is that the Applicants were not aware of Commercial Case No. 113 of 2011. This has been challenged and I am inclined to believe the record in Commercial Case No. 113 of 2011 which shows that the Applicants jointly together with other Defendants entered appearance and they

were represented by advocate Hyera. The applicants didn't depose anything in respect of Mr. Hyera's representation. Thus, the contention that the Applicants entered appearance through advocate Hyera is not disputed. Accordingly I find the applicant have failed to demonstrate not only sufficient cause but any cause for the delay. In the circumstances the first limb of this application is bound to fail.

The second limb is a prayer for stay of execution of the decree. The jurisdiction of this Court to grant a stay of execution is set out under Rule 5(3)(a) (b) and (c) of Order 39 of the Civil Procedure Code which provides that:

"No order for stay of execution shall be made under sub rule (1) or sub rule (2) unless the High Court making it is satisfied:-

- (a) ***That substantial loss may result to the party applying for stay of execution unless the order is made;***
- (b) ***That the application has been made without unreasonable delay; and***
- (c) ***That security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him."***

It is the paramount duty of court to which an application for stay of execution pending appeal or pending any action is made to see to it that all three tests listed under Rule 5 (3) (a) (b) and (c) of Order 39 of the Civil Procedure Code are met. But in the present case there is no evidence that the Applicants will suffer substantially and no security has

been given by the Applicants for the due performance of the decree against them.

Thus, upon careful consideration of the submissions by counsel, the affidavits on record and the law, I find and conclude that this application was filed without any substance both in law and in fact. It is accordingly dismissed with costs.



A. R. Mruma,

Judge.

Dated at Dar Es Salaam this 8th Day of March 2018.