

IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM

MISC COMMERCIAL CASE NO 213 OF 2016
(Arising from original Commercial Case No. 111 of 2012)
BEWTEEN

K.M PROSPECTING LIMITED -----APPLICANT
VERSUS
DR. REGINALD ABRAHAM MENGI -----1ST RESPONDENT
MUGANYIZI J. LUTAGWABA -----2ND RESPONDENT
ERICK MASHAURI ----- 3RD RESPONDENT
CHARLES XAVIER MNGUTO ----- 4TH RESPONDENT

RULING

Date: 12/12/2017
Date 5/3/2018

SONGORO, J

This is a ruling on application filed by KM Prospecting Limited the applicant applying for the following orders;-

- (a) The court be pleased to extend time for the applicant within which to file an application for stay of execution of decree dated on the 28th day of January, 2016.
- (b) Any other order as the Honourable shall deem fit to issue

Applicant`s application is made under Section 2(1) and (3) of the Judicature and Application of Laws Act Cap 358 and Section 14(1) of the Law of Limitation Act Cap 89 , Rule 2(2) and 4 of the High Court (Commercial Division) Procedure Rules GN 250 of 2012. The application is supported by an affidavit of Abdulkadir Mukri, the Principal officer of the applicant`s company.

Respondents in the application are Dr. Reginald Abraham Mengi, Muganyizi J Lutagwaba, Erick Mashauri, and Charles Xavier Mnguto, who the 1st 2nd 3rd and 4th Respondents respectively. In response to the application the 1st Respondent did not file any counter affidavit to oppose the application. On the part of the 2nd 3rd and 4th respondents they filed a joint counter affidavit and opposed the application. In the light of the application and counter affidavit opposing the application, parties were invited to pursue the application. So Mr. Samson Mbamba Learned Advocate appeared for the applicant while Ms. Invilata Wangoma appears holding a brief of Mr. Ringia, Learned Advocate of the 1st Respondent, and Mr. Alfred David, Learned Advocate appeared for 2nd 3rd and 4th Respondents.

In pursuing the applicant`s application Mr. Mbamba first briefed the court that, the application is for stay for extension of time within which the applicant may file an application for stay of execution of the judgment and decree of the court delivered on the 28th January, 2016.

Further, the applicant counsel prayed to adopt details and reasons contained in the applicant affidavit. In his further clarification, the applicant counsel stated that, the application at hand was filed simultaneously with an application for extension of time to issue a notice of appeal, to the Court of Appeal. So the court has jurisdiction to hear the application.

Next, Mr. Mbamba firmly stated that, the application was never opposed by Respondents because no counter affidavit was filed by respondents. Therefore the application should be granted. To substantiate his point the applicant counsel then drew the attention of the court to a decision in Civil Application No 120 of 2010 between Sheikh Issa Seif Gulu and Another Versus Rajabu Mangara Mtoro and 10 others CAT (Unreported) Dsm Registry which decided that, , if an affidavit in support of the application is not controverted, then the application and prayers made may be granted.

Turning on the reasons in support of the application, the counsel stated that, , the applicant intends to challenge a decision of the Commercial Case No 111 of 2012 on

the ground of *illegality*” in the sense the applicant witness statement was struck out during the trial thus the applicant was denied his right to be heard and that, , amount to denial of natural justice. The counsel further explained that, , is “sufficient reasons” to enable the court to make an order of extension of time within which to file an application for stay of the execution of the decree, pending determination of application for extension of time to file a notice of appeal. Finally, the applicant rest his submissions by praying to the court to grant an order of extension of time within which the applicant may file an application for stay of execution of the court decree. .

In very short response, Ms. Invilata Wangoma, Learned Advocate of the 1st applicant who did not file a counter affidavit humbly submitted that, is not opposing the application.

Then, Mr. Alfred David, Learned Advocate appeared for 2nd 3rd and 4th Respondents in his response, he firmly opposed the application and insisted that, , the application was controverted by joint “counter affidavit” of the 2nd 3rd and 4th Respondents filed on the 24/3/2017. It was his views of respondents counsel that, the applicant arguments that, , the applicant affidavit was not controverted and challenged are not true.

On the merit of the application, Mr Alfred clarified that, from the legal point an order of extension of time within which to file an application for stay of execution of court decree is granted on the basis of the court discretion.

He then faulted the application on the ground that, the applicant has not advanced any sufficient reasons to warrant the court to exercise its discretion and issue an order of extension of time within which to file an application of stay of the execution of court decree.

Then relying on a decision in the Misc Commercial Application No 206 of 2016 between Dr. Abraham Mengi and KM Prospecting Limited and 3 others (Unreported) the counsel argued that, in the application for extension of time *sufficient reasons* to support

the application must be assigned in order to move the court to grant an order of extension of time, but the applicant has not assigned sufficient reason.

On another point the respondent counsel argued that, the applicant has taken long period of time to file the application for extension of time within which to file an application to stay execution of the court decree. Thus the applicant application has been filed after a long delay.

So finally the counsel for the 2nd 3rd and 4th respondent opposed the application and prayed for its dismissal with costs.

In his brief rejoinder Mr. Mbamba took a new turn and informed the court that, he was not served with the respondent's counter affidavit. For that, reason, he prayed to withdrawal his submission which was insisting that, the 2nd 3rd and 4th Respondents did not file counter affidavit to oppose the application. He then emphasized that, , the applicant reasons in support of the application there are issue of illegality in the decision of the Commercial Case 111 of 2015 in which the applicant was not heard and that, amount to breach of natural justice which need to be addressed by the Court of Appeal. So he prayed that, an application for extension of time within which to file application for stay of execution of court decree be granted with costs.

The court has carefully considered the applicant application, details of counter affidavit filed by the 2nd 3rd and 4th Respondents and submissions made, and find pursuant to Section 14 of the Law of Limitation Act Cap 89 [R.E 2002] the court has discretionary power to grant an order of extension of time to file any application. Indeed, section 14(1) of the Law of Limitation Act Cap 89 [R.E 2002] provides that;-

Notwithstanding the provisions of this Act, the court may, "*for any reasonable or sufficient cause*", extend the period of limitation for the institution of an appeal or an application, other than an application for the execution of a decree, and an application for such extension may be made either before or after the expiry of the period of limitation prescribed for such appeal or application.

So, going by the wording of Section 14(1) of the Law of Limitation Act, Cap 89, cited above an order of extension of time to file an application may be granted even where the time limit has already expired. But I must emphasized that, , a court discretion must be exercised judiciously after assigning "*reasonable and sufficient cause*" which may enable the court to exercise it discretion and make an order of extension of time.

It may be recalled that, courts in several decisions has issued guidelines on how courts may exercises their discretion in determining application for extension of time. In the case of Mbogo Vs. Shah [1968] EA the defunct Court of Appeal for Eastern Africa highlighted some of factors to be considered, by saying that, , :-

All relevant factors must be taken into account in deciding how to exercise the discretion to extend time. These factors include the length of the delay, the reason for the delay, whether there is an arguable case on the appeal and the degree of prejudice to the defendant if time is extended."

Also, the Court of Appeal of Tanzania in Civil Application No 13 of 2016 between Kelo Madore Versus Mepukori Mbelekeni (AR)(Unreported) and another Hon. Mussa J.A stated that, :-

"As a matter of general principal, it is entirely in the discretion of the court whether to grant or refuse an application for extension of time. That, discretion is, however, judicial and so, it must be exercised according to the rules of reason and justice, the deciding factor being the showing of "good cause" by the applicant. As to what constitutes "good cause" is dependent upon a variety of factors which may include the length to the delay, the reasons for the delay, the chances of the appeal succeeding if the application is granted and; the degree of prejudice to the respondent if the application is granted"

So in the light of what is provided for in Section 14(1) of the Law of Limitation Act, Cap 89, arguments from both parties, details of applicant application, I find that, , there are two legal issues for determinations in the present application. The identified legal issues appears to be;-

- 1) Whether or not the applicant in his application has advanced "*any reasonable or sufficient cause*" to enable the court to exercise its discretion, and grant an extension of time within which to file an application for stay of execution of the court decree. .
- 2) The second key issue is whether the application has been lodged without undue delay or in-ordinate delay.

Now turning to the first key issue whether the applicant has assigned reasonable and sufficient reasons which may enable the court to exercise its discretion and grant extension of time, the court find in paragraph 4 of the applicant affidavit, it is stated that, the witness statements and written statement of defence of the applicant were struck out during the hearing. So the applicant was not denied to defend himself and that, was a breach of natural justice. Therefore, in the decision sought to be challenged in the Court of Appeal, there is an issue of illegality in the sense that, the applicant was not allowed to defend himself. For that, reason the applicant insist that, it is ideal the court grant an extension of time within which to file an application for stay of the court decree.

I have carefully considered the point of allegation of illegality raised in support of the application in line with the present application for extension of time within which to file an application for stay of court decree and honestly find that, , point and reason is relevant in prayer for extension of time within which to issue a notice of appeal or leave to appeal to the Court of Appeal. The above mentioned court finding are reinforced by a fact it only on appeal or review before the Court of Appeal where allegations of "illegality of judgment or decree" may be investigated and if proved are corrected.

However in the application for extension time within which an application for stay of execution of the court decree, even if the court grant an order of extension, and ultimately application for stay of a court decree is granted and heard, there is no likely hood that, allegations of illegality pointed by the applicant may be considered or addressed by this court. Always such allegations of illegality surrounding a decision of the High Court are addressed by a way of appeal in the Court of Appeal.

Admittedly, it was emphasized in the decision between Principal Secretary Ministry of defence and National Service Versus Devram Valambhia [1991] TLR 387, that, ;

"When the point at issue is one alleging illegality of the decision being challenged, the Court has a duty, even if it means extending the time for the purpose, to ascertain the point and if the alleged illegality be established, to take appropriate measures to put the matter and the record straight"

So going by the decision in the case of Principal Secretary Ministry of Defence and National Service Versus Devram Valambhia [1991] TLR 387 I find it plain stated that, allegations of illegality may be sufficient reason to warrant the court to exercise its discretion and grant an extension time within which to file an application to issue a notice of appeal or leave to appeal to Appeal Court.

It is my view that, the rule stated in a decision in the Principal Secretary Ministry of Defence and National Service Versus Devram Valambhia and many other that, "allegations of illegality" may be "sufficient reason" to warrant the court to exercise its discretion and grant an extension time is in my view limited to circumstances where the applicant is seeking an avenue to appeal or leave to appeal to the appellate court because it is only in appeal process where allegations of illegality may be considered and resolved by the Appellate Court .

In other words the rule in Valambhia case that, allegation of illegality are sufficient reasons for granting an extension of time to issue a notice of appeal, in my view may not be sufficient reasons for granting an extension within which to file an application for stay of the execution of court decree because in the application for stay of execution of court decree a complaint on allegations of illegality or natural justice contained in the delivered Judgment or decree may not be adjudicated in the application for stay of execution of the court decree.

So quite frankly, I find the reasons advanced by the applicant and Mr. Simon Mbamba that, there are allegations of illegality and denial of natural justice in the

Judgment and decree of court, with respect those are sufficient reasons for granting an extension time within which to apply an application for stay of execution of the court decree because on application for stay of execution because issues of allegation of illegality and natural justice may not be adjudicated in the application for stay of execution. The domain of adjudicating allegations of illegality or breach of natural justice is within the ambit of appellate court.

Even a fact pleaded in paragraph 5 of the applicant affidavit that, the applicant intends to challenge decision and decree of this court in the Court of Appeal in my view is not sufficient reasons to grant an extension of time to file an application for stay of execution.

Moving on the 2nd point of whether the application was lodged without undue delay the court find a judgment and decree of Commercial Case No. 111 of 2012 sought to be stayed was delivered on the 28th January, 2016. Further the court record shows the instant application for extension of time within which to file an application for stay of proceedings was filed on 19th September 2016. In simple mathematics the period which the applicant took to file the present application for extension of time indicate that, took the applicant more than seven months to file the present application.

The concise reasoning requires litigants to act diligently in pursuing their application. It may be recalled that, a relief of extension of time is available to a party who demonstrated that, he acted diligently, but was prevented by sufficient of reasonable cause to file his application.

Also, it is the trite law that, when there is inordinate delay in filing the application, reasons for delay must be assigned explaining why the application was not instituted within a reasonable period of time.

Taking into account there was in ordinate delay in filing the present application of about seven months plus the fact that, the applicant did not assign reasonable or sufficient cause in the sense the assigned reasons are only relevant to application of extension of time within which to file application of extension of notice of appeal or leave

to appeal, the court decline to exercise its discretion to grant an extension of time to file an application for stay of execution of the court decree. For reasons, explained above, the application and its prayers in the chamber summon fails and are hereby dismissed with costs in favour of respondents. The right of appeal is fully explained to the parties.

Dated and Delivered at Dar es Salaam this 5 day of March, 2018.



H.T.SONGORO
JUDGE

The Ruling was delivered in the presence of Mr. Mayenga, Learned Advocate holding a brief of Mr. Mbamba, Learned Advocate of the applicant, Ms. Involata Wagoma, Learned Advocate holding a brief of Mr. Ringia Learned Advocate of the 1st Respondent and Ms Proscovia Nugataile Learned Advocate of the 2nd, 3rd and 4th Respondents