

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

(CORAM: KIMARO, J.A., MBAROUK, J.A., And MASSATI, J.A.)

MSH.CIVIL APPLICATION NO. 4 OF 2011

IRENE WILLIAM MKENGA.....APPLICANT

VERSUS

COSTA OTHINIEL AHIA RESPONDENT

**(Appeal from the decision of the High Court of Tanzania
(Land Division), at Moshi)**

(Teemba, J.)

**dated the 9th day of June, 2011
in
Misc. Land Case No. 1 of 2009**

RULING OF THE COURT

17th&20thSeptember, 2012

MASSATI, J.A.:

There is before us an application for stay of execution made under Rule 11 (2) (c) (d) (i) and (ii), of the Tanzania Court of Appeal Rules, 2009. It seeks to stay the execution of the judgment and decree of the High Court of Tanzania in Moshi Miscellaneous Land Case Appeal No. 1 of 2009 (Teemba, J.) dated 9th June, 2011.

The notice of motion does not contain any grounds, but it is supported by the affidavit of the applicant, IRENE WILLIAM MKENGA. According to paragraph 6 of the affidavit, the applicant has pleaded that she and members of her family stand to suffer untold hardship if stay of execution was not granted.

When the respondent was served with the Notice of Motion, he promptly filed a Notice of Preliminary Objections and an affidavit in reply. In the notice of preliminary objections the respondent challenged the competency of the application, basically on grounds of contravening section 5 (2) (c) of the Appellate Jurisdiction Act, as well as defective/non service of the notice of appeal, and the notice of motion itself.

At the hearing of the application, the parties appeared in person. When he was half way arguing his preliminary objections, the respondent realized that the objections were more suitable for the intended appeal than the application. So he withdrew them and they ended there. The applicant then proceeded to address the Court on

the merits of her application without adding much substance and prayed that her prayers be granted. On his part the respondent prayed that the application be dismissed, because it was devoid of substance.

After hearing the parties, we invited them to address us on whether the application was filed in time interms of Rule 11 (2) (c) of the Rules. After going through the sequence of events, the applicant admitted that she filed her notice of appeal on 30/6/2011 and filed the notice of motion on 8/9/2011 after 70 days. When it was brought to her attention that the Rules require that such application should be filed within 60 days, she conceded that the application was filed out of time but shifted the blame to the court clerks who contributed to the delay in supplying her with copies of the judgment and decree. She also pleaded that she was ignorant of the law, and so did not know that she first had to apply for extension of time before filing the application and thus deserved the Court's sympathy and let her application to be heard.

On his part, the respondent argued that it was obvious on the face of the record that the application was filed out of time. So it should be dismissed.

As indicated above the application is brought under Rule 11 (2) (c) etc of the Rules. The Rule provides:-

"11 (2) Subject to the provisions of sub rule 1, the institution of an appeal, shall not operate to suspend any sentence or to stay execution, but the Court

(a)

(b)

(c) Where an application is made for stay of execution of an appealable decree or order before the expiration of the time allowed for appealing therefrom, the Court, may upon good cause shown, order the execution to be stayed."

In order to get "**the time allowed for appealing "from" an appealable decree or order**", this paragraph must, of necessity be read with Rule 90 (1) of the Rules, which provides:-

"90 (1) subject to the provisions of Rule 128, an appeal shall be instituted by lodging in the appropriate registry within sixty days of the date when the notice of appeal was lodged with?....."

There is, of course, a proviso, which, in our view does not apply for the purposes of an application for stay, because such application does not have to be accompanied by a copy of "the proceedings," but only by a notice of appeal and a decree. (See **ANUEL KYAKA vs EMMANUEL KITOI**, Civil Application No. 19 of 2008 (unreported)).

It follows therefore that, in our view, an application under Rule 11 (2) (c) of the Court of Appeal Rules, 2009, must be filed within 60

days from the date of filing a notice of appeal. (See also, **MUHONI KITEGE vs ISSA ELIAS**, Civil Application No. 5 of 2011 (unreported)).

In the present, case the applicant has conceded that she has filed the application for stay, 70 days after lodging her notice of appeal. The applicant had nothing of substance to tell us why we should proceed with the application which is obviously time barred, and in the absence of any extension of time. This is enough to dispose of the application.

In the premises, the application is incompetent and it is accordingly struck out with costs.

DATED at ARUSHA this 19th day of September, 2012.

N. P. KIMARO
JUSTICE OF APPEAL

M. S. MBAROUK
JUSTICE OF APPEAL

S. A. MASSATI
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

M. A. MALEWO
DEPUTY REGISTRAR
COURT OF APPEAL