

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
IN THE SUB-REGISTRY OF DAR ES SALAAM**

**AT DAR ES SALAAM**

**MISC. CIVIL APPLICATION NO. 302 OF 2022**

**MONICA MBALE ..... APPLICANT**

***VERSUS***

**BENEDICT SUDI ..... RESPONDENT**

**(Arising from the judgment and decree of this Court in Land  
Case No. 71 of 2014 and Execution No. 70 of 2021)**

**RULING**

22<sup>nd</sup> and 30<sup>th</sup> August, 2022

**KISANYA, J.:**

By chamber summons, the applicant is moving this Court for an order of stay of execution of its decision in Land Case No. 71 of 2014 pending determination of the application for extension of time to file a notice of appeal to the Court of Appeal which is also pending in this Court. Supporting the application is an affidavit sworn by the applicant, Monica Mbale.

Against the application, Benedict Sudi, the respondent herein, filed a notice of preliminary objection on the following point of law:

*(a) The application is misconceived and bad in law for hopelessly being time barred.*

When the matter came up for hearing of the preliminary objection, the respondent enjoyed the legal services of Mr. Raphael Rwezahula, learned

advocate. On the other side, Dr. Rugemeleza Nshala, learned advocate appeared for the applicant who was also present in person.

Arguing in support of the preliminary objection, Mr. Rwezahula submitted that the time within which to file an application for stay of execution is not provided for by the law. Making reference to item 21, Part II of the Schedule to the Law of Limitation Act [Cap. 89, R.E 2019, he argued that such application is required to be lodged within 60 days. It was also his further argument that, in terms of Order XXI, Rule 24(1) of the CPC, application for stay of execution is made when the decree has been sent for execution.

Mr. Rwezahula went on to cite the case of **Ally Absi Ally vs Ngoma Hassan Ally Kambi**, Misc. Land Application No. 610 of 2019 (unreported) where it was held that the time within which to file an application for stay of execution is determined basing on when the applicant was served with the application for execution. In that regard, he was of the view that this matter is time barred on the account that it was lodged in July, 2022 while the application for execution was served to the applicant on 14/12/2021. Therefore, the learned counsel moved this Court to dismiss the application for being filed out time.

Responding, Dr. Nshalla argued that a point of objection cannot arise if the statement on exclusion of the period of limitation has been averred in

the pleadings. His argument was based on the provision of Order VII, Rule 6 of the CPC and the cases of **Angeliki Lela Samara and Another vs The Minister for Lands and Human Settlement Development and 2 Others**, Land Case No. 157 of 2015, **Ms P&O International Ltd vs The Registered of Tanzania National Parks**, Civil Appeal No. 265 of 2020 (both unreported). In the latter case it was also held that the ground for exclusion of the time limitation should be deposed in the pleadings.

Dr. Nshala further submitted that the application has been brought under the ambit of Order VII, Rule 16 of the CPC. It was his view that the case of **Ally Absi Ally** (supra) is distinguishable from this case. He contended that the decision thereto applies to the decree sent to another court while the present matter is made under Order XXXIX, Rule 5 of the CPC.

The learned counsel went on submitting that exclusion of time is not a recognized fact. He relied on the case of **Alex Senkoro and 3 Others vs Eliambuya Lyimo (As Administrator of the Estate of Fredrick, Deceased)** Civil Appeal No. 16 of 2017, **Bukoba Municipal Council vs New Metro Merchandise**, Civil Appeal No. 374 of 2021 and **Methusala Enoka vs National Microfinance Bank Ltd**, Civil Appeal No. 266 of 2019.

He was of the firm view that since the applicant filed an application for stay of execution at the time when the respondent had not filed the

application for stay of execution, the present application was filed within the time prescribed by the law.

Having duly considered the rival submissions, it is not disputed that the judgment and decree sought to be stayed were issued on 26<sup>th</sup> day of May, 2021. Dr. Nshala did not respond to Mr. Rwezahula's argument that the time within which to apply for stay of execution of decree of this Court is not provided for under the CPC.

On my part, if the decree sought to be stayed was passed by this Court, the applicable provision is Order XXXIX, Rule 5(1) of the CPC which provides as follows:-

*"Where an application is made for stay of execution of an appealable decree before the expiration of the time allowed for appealing therefrom, the court which passed the decree may, on sufficient cause shown, order the execution to be stayed."*

Flowing from the above provision, the court which passed the decree can order the execution to be stayed if an application is made before expiration of the time within which to appeal. It is therefore, my considered view that, the time within which to apply for stay of execution before the court which passed the decree is determined by looking at the time within which the applicant is required to lodge the appeal.

Be as it may, it is common ground that this application was filed after expiration of the time within which the applicant was required to appeal against the decree sought to be stayed. This is evidenced by the fact that the applicant has applied for extension of time within which to file the notice of appeal. It is also the said application for extension of time which is the basis of the matter at hand.

Now, Dr. Nshala contends that the applicant has pleaded facts on exemption from time limitation. I agree with him that, pursuant to Order VII Rule 6 of the CPC, a party who relies on exemption from the time limitation is entitled to plead grounds for such exemption. This stance was stated in the case of **M/S P&O International Ltd** (supra) in which the Court of Appeal held that:-

*In terms of Order VII rule 6 of the CPC, a party who seeks to rely on exemption from time limitation has an obligation to plead grounds for such exemption. The grounds which are permitted for the purpose of exemption are specified under sections 20, 21, 22 and 23 of the Act."*

With regard to the ground for exemption, Dr. Nshala asked this Court to consider that the applicant pleaded to have been prosecuting an application for stay of execution which was struck out for being incompetent. In that regard, the ground alleged to have been fronted by the application

is exemption specified under section 21 of the LLA. Sub-section (2) of section 21 of the LLA is to the effect that, the time during which the applicant prosecuted, with due diligence, another civil proceeding, has to be excluded in computing the period of limitation prescribed for any application. It reads as follows:-

*"In computing the period of limitation prescribed for any application, the time during which the applicant has been prosecuting, with due diligence, another civil proceeding, whether in a court of first instance or in a court of appeal, against the same party, for the same relief, shall be excluded where such proceeding is prosecuted in good faith, in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it."*

Considering that section 21(2) of the LLA provides for ground upon which time limitation is exempted, I hold the view that an applicant who intends to rely on exemption from the time limitation is entitled to depose that fact in his application.

Therefore, since Dr. Nshala contends that the ground for exemption was deposed in the supporting affidavit, the issue whether the conditions for applicability of section 21 (2) of the LLA have been met cannot be determined without considering the evidence on record. As a result, being guided by the settled law, the issue whether the application is time barred

cannot be determined at this stage because it calls for consideration of evidence.

In view of the foresaid, the objection is hereby overruled for being premature. I will consider it in the course of determining the application on merit.

It is so ordered

DATED at DAR ES SALAAM this 30<sup>th</sup> day of August, 2022.



S.E. Kisanya  
JUDGE  
30/08/2022