**Japan International Co-operation Agency (JICA) v Khaki Complex Limited**

**Division:** Court of Appeal of Tanzania at Dar-es-Salaam

**Date of judgment:** 17 November 2005

**Case Number:** 151/05

**Before:** Munuo JA

**Sourced by:** LawAfrica

**Summarised by:** R Rogo

*[1] Civil procedure – Time within which application for stay of execution must be filed – When*

*limitation period starts counting – Grounds for staying execution pending appeal.*

**RULING**

**Munuo J:** The applicant, Japan International Co-operation Agency (JICA), brought the present application for stay of execution as well as raising a garnishee order attaching the applicant’s operational and development expenditure account on the ground that if execution is not stayed, the operations of the applicant will be paralysed. Mr *Mujulizi*, learned Advocate, represented the applicant judgment debtor in commercial case number 45 of 2003 in the Commercial Court Division of the High Court of Tanzania at Dar-Es-Salaam, in which Dr Bwana J decreed US$ 300 000 damages for breach of a tenancy agreement in favour of the respondent judgement creditor, Khaki Complex Limited, the landlord, on the 4 March 2004. In this application, Dr *Lamwai,* learned Advocate, represented the respondent whom he also represented in the Commercial Court. Counsel for the respondent filed a Notice of Preliminary Objection under rule 100 of the Court of Appeal Rules, 1979, to the effect that the application for stay of execution is time barred as it ought to be struck out with costs. Contending that the application for stay of execution has been filed out of the prescribed period of limitation of sixty days, he observed that the application ought to have been instituted within sixty days of the first application for stay of execution being struck out by the court on the 8 June 2005 for lack of a copy of the decree then sought to be stayed. There being no extension of time to file this application four months after the first application was struck out, the application is incompetent and should be struck out with costs, counsel for the respondent maintained. The applicable law, counsel pointed out, for the period of limitation for applications for stay of execution, is 60 days as provided for under the first schedule, item 21 of the Law of Limitation Act, 1971. Counsel for the respondent cited the case of *National Housing Corporation v Etienes Hotel* civil application number 175 of 2004 (CA) (UR), *Suleiman Ally Nyamalegi and others v Mwanza Engineering works Limited* civil application number 9 of 2002 (CA) (UR), *Laswaki Village Council and Paresoi Ole Shuaka v Shibesh Abebe* civil application number 23 of 1997 (CA) (UR), in which the court held that the period of limitation for applications for stay of execution is sixty days as stipulated in the first schedule, item 21 of the Law of Limitation Act, 1971. In view of the inordinate delay in filing the present application four months after the first application for stay of execution was struck out on the 8 June 2005, counsel for the respondent urged the court to uphold the preliminary objection and thence strike out the application with costs, underscoring the observation of the single judge in the *Loswaki Village Council* case (*supra*): Those who seek the aid of the law by instituting proceedings in a court of justice must file such proceedings within the period prescribed by law or, where no such period is prescribed, within reasonable time. This is an elementary rule of law. Refuting the respondent’s claim that the present application is time barred, counsel for the applicant pointed out that the first application which was struck out on the 8 June 2005, was filed within the prescribed period of sixty days so it was timeous. He contended that even the present application is within time because the respondent became aware of the fate of the first application from the Registrar’s letter dated the 27 September 2005 whereupon, the respondent filed this application for stay of execution on the 7 October 2005 within the prescribed period of sixty days. Although the first application was struck out on the 8 June 2005, counsel for the respondent asserted, the former counsel of the respondent did not notify the respondent and it was the Registrar’s letter of the 27 September 2005 which enabled the respondent to know that the first application for stay of execution had been struck out with costs on the 8 June 2005 so the period of limitation for the present application should be counted from the 27 September 2005. By so counting the period of limitation, counsel for the applicant contended, this application is timeous because it was filed within the statutory period of limitation of sixty days. Hence, the preliminary objection should be overruled, he maintained, adopting the affidavits deponed to by Toshihiro Obata to support the application. The question is whether the application for stay of execution is time barred. A scrutiny of the record shows that the applicant’s assertion that they became aware of the rejection of the first application for stay of execution upon receiving the Registrar’s letter of the 27 September 2005 is plausible. One, the letter from South Law Chambers, Annexure 3 to the notice of motion, was written on the 3 December 2004 advising the applicant that the ruling in the application for stay had been reserved. Two, there is no material in the record to show that the applicant had knowledge that the application for stay had been ruled upon by the court. It is therefore reasonable to count the registrar’s letter of the 27 September 2005 as the first information reaching the applicant alerting it that the first application for stay of execution had been stuck out with costs on the 8 June 2005. Three, the applicant cannot be blamed for the failure of South Law Chambers, the applicant’s former counsel, to follow up the matter and, or, communicate the striking out of the first application for stay of execution because it was not proved that the former advocates of the applicant had knowledge of the ruling. They might or might not have been present when the ruling was delivered on the 8 June 2005 because there is no indication one way or the other in this record. Under the circumstances the period of limitation shall be counted from the 27 September 2005 when the registrar notified the parties that stay of execution was rejected on the 8 June 2005. Upon the said letter of the registrar, the applicant instituted the present application on the 7 October 2005 about a fortnight from the 27 September 2005. In that respect, the present application is within the sixty days prescribed period of limitation for applying for stay of execution. For that reason I overrule the preliminary objection. With regard to the merits of the application for stay of execution, counsel for the applicant submitted that the applicant will suffer irreparable loss and greater hardship than the respondent if execution proceeds before the pending appeal is determined because the applicant operates a sole account for expenditure and development so if the said sole account is attached, the operations of the applicant will come to a halt causing irreparable loss in its operations. Counsel for the applicant contended that the respondent would not be able to refund the large decretal amount of US$ 300 000 if the appeal succeeds so on the balance of convenience, execution should be stayed pending the determination of the appeal. Counsel for the applicant cited the cases of *Tanzania Fishing Processors Limited v Christopher Lubunyula* civil application number 13 of 2003 (CA) (UR), *Permanent Secretary Ministry of Agriculture and the Attorney General v 21st Century Food and Packaging Limited and Sugar Board of Tanzania* civil application number 48 of 2004 (CA) (UR), *John D Kerenge v Joel Mabiba* civil application number 19 of 1998 (CA) (UR) and *Furaha Shao v National Bank of Commerce* civil application number 9 of 1999 (CA) in which the Court granted stay of execution on the grounds of irreparable loss and great hardship on the part of debtor *vis à vis* the judgment creditor. Dr *Lamwai* resisted the application for stay of execution principally because the respondent is entitled to reap the fruits of the decree so the application should be dismissed with costs so that execution can proceed outright. On the respondent’s ability to refund the decretal amount in the event of the appeal succeeding, counsel for the respondent contended that the building which was to be let to the applicant is sufficient security for guaranteeing the refund of the decretal amount of US$ 300 000 if the respondent loses the pending appeal. Furthermore, counsel for the respondent asserted that the applicant did not particularise the loss JICA would suffer if the application for stay is not granted. Bare assertions of suffering irreparable loss on the part of the applicant, do not establish irreparable loss, such loss has to be substantiated by the applicant, counsel for the respondent submitted. As for the authorities cited by counsel for the applicant urging the court to follow the same and grant stay of execution to avoid irreparable loss being occasioned to the applicant, counsel for the respondent contended that *John Kerenge*’s case (*supra*) is inapplicable here because in the said case, stay of execution was granted not to pre-empt irreparable loss if execution proceeded, but because the decretal sum was uncertain. The case of *Furaha Shao* (*supra*) counsel for the respondent contended, is distinguishable because the balance of convenience titled in favour of the applicant debtor rather than the respondent judgment creditor, in that the former would be deprived of the sole residence he had and thence be rendered homeless. All in all, counsel for the respondent prayed that the application for stay of execution be dismissed with cost for want of merit. The issue is whether there is sufficient ground for staying execution pending the determination of civil appeal number 107 of 2004. I hasten to hold that there is, indeed, sufficient ground for staying execution in this case pending the determination of the appeal. To begin with, the award of US$ 300 000 damages for breach of the construction and tenancy agreement is a serious triable issue in the pending appeal so the matter should be determined before the damages are paid to the landlord, the respondent. Besides, the balance of convenience tilts in favour of the applicant because the respondent remained with the building which the applicant declined to rent. The said building can be, and would consequent to the refusal of the applicant to occupy the same, be rented out to another party who will pay rent for the same thereby bringing in income for the respondent. On the contrary, if the applicant pays the decretal amount before the pending appeal is determined and later the pending appeal succeeds, the applicant would have to suffer the inconvenience of reclaiming the decretal amount from the respondent and there is no guarantee that the said money would be easily retrieved and restored to the applicant. On the balance of convenience therefore, the decretal amount and, or, any amount decreed in the pending appeal, ought to be paid after the determination of the appeal. Under the circumstances, I accordingly grant stay of execution pending the determination of civil appeal number 107 of 2004 against the decision in commercial case number 45 of 2003 in the Commercial Division of the High Court at Dar-Es-Salaam, resulting in the nullification of the garnishee order issued in the said case of the 3 October 2005. Costs to abide the result of the pending appeal. For the appellant:

Mr *Mujulizi*

For the respondent:

Dr *Lamwai*