

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

**(CORAM: LUANDA, J.A., MASSATI, J.A. And MUGASHA, J.A.)**

**CIVIL APPLICATION NO. 6 OF 2014**

**MOHAMED ENTERPRISES (T) LTD .....APPLICANT  
VERSUS  
MUSSA SHABANI CHEKECHEA .....RESPONDENT  
(Appeal from the Judgment of the High Court of Tanzania  
At Tabora)**

**(Mkasimongwa, J.)**

**Dated the 27<sup>th</sup> day of October, 2014**

**In**

**Civil Case No. 6 of 2009**

**.....**

**RULING OF THE COURT**

8<sup>th</sup> & 9<sup>th</sup> December, 2015

**MUGASHA, J.A.:**

The application by notice of motion is brought under rule 11 (2) (b) of the Court of Appeal Rules. The applicant is seeking to stay execution of the Decree of the High Court (Tabora Registry) delivered on 27<sup>th</sup> October, 2014 pending the determination of the intended appeal the notice of which was lodged on 10<sup>th</sup> November, 2014. The main ground canvassed by the applicant is that she will suffer substantial loss if the respondent executes the judgment and the decree of the trial court. The affidavit of Mr. Kamaliza Kamoga Kayaga, is in support of the application. To buttress the motion, the applicant has filed written submissions. The application has been challenged by the respondent through the affidavit in reply of **REVOCATUS MUGAYA KAITILA MUTAKI**.

At the hearing of the application, the applicant was represented by Dr. Masumbuko Lamwai and Mr. Kamaliza Kayaga, learned counsel. The respondent was represented by Mr. Mugaya Mtaki, learned counsel.

The undisputed background to this application is briefly as follows: in the High Court of Tanzania (Tabora Registry) the respondent instituted a suit against the applicant claiming Tshs. 500,000,000/= as general damages for having caused the death of respondent's father, who was instructed to collect money physically from the clients of the applicant at Urambo to Tabora for banking purposes. However, no security guards were deployed to escort the deceased during the said collection and as a result while on the way bandits killed the deceased and took away the money. After a full trial, the respondent who was the administrator of the deceased was awarded compensation to a tune of Tshs. 100,000,000/= plus interest of 7% per cent from date of judgment to date of full payment.

The applicant has lodged the application at hand seeking stay of execution pending the determination of the intended appeal.

Arguing in support of the application, Dr. Lamwai, learned counsel submitted that, the application was filed without under delay and it is in compliance with the law. In addition he argued that the sum intended to be executed is very high and the applicant shall suffer irreparable loss in the event the intended appeal is allowed or the decretal sum is varied. He submitted on the applicant's readiness to furnish security of insurance bond

from a reliable insurance company within 14 days from the date of the order. When required to address the Court on the effects of not citing rule 11 (2) (c) as one of the enabling provisions, he replied that it is not fatal because the cited enabling provision is rule 11(2) (b) clothes the Court with requisite jurisdiction while sub-rules (c) and (d) specify the conditions to be complied with.

On the other hand, Mr. Mtaki, learned counsel challenged the application on the ground that, the details of substantial loss to be suffered are not stated in paragraph 6 of Mr. Kayaga's affidavit which essentially contains a sweeping statement. He added that, the applicant has not elaborated the respondent's incapability to pay the applicant in the event the appeal succeeds. As such, he urged the Court to dismiss the application as the applicant has not availed sufficient grounds to warrant grant of the order of stay.

Moreover, he argued that rule 11 (2) (c) ought to be cited because it is one of the enabling provisions mandating the Court to entertain the application. He urged the Court to dismiss the application with costs.

In rejoinder, Dr. Lamwai reiterated what he submitted in chief.

The mandate of the Court to grant stay of execution of a decree or order upon good cause being shown is articulated under rule 11 which provides:-

*11 (1) ..... not applicable*

*(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 may-*

*(a) ..... Not applicable.*

*(b) in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 83, an appeal shall not operate as stay of execution of decree or order appealed from except so far as the High Court or tribunal may order, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree or order, but the Court may upon good cause shown, order stay of execution of such decree or order.*

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

*(d) No order for stay of execution shall be made under this rule unless the Court is satisfied:*

*(i) That substantial loss may result to the party applying for stay of execution unless the order is made;*

*(ii) That the application has been made without unreasonable delay; and*

*(iii) That security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him."*

Decisions of this Court interpreting rule 11 are now abundant. The Court has discretion to stay execution, upon good cause being shown by the applicant. (**EUSTO NTAGALINDA VS TANZANIA FISH PROGRESS LTD**, Civil Application No. 8 of 2011 and **GEITA GOLD MINING LIMITED VS TWALIB ALLY**, Civil Application No. 14 of 2012 (all unreported).

We first wish to determine the effect of non-citation of rule 11 (2) (c) in addition to the already cited rule 11 (2) (b). Rule 48 (1) provides as follows:-

*"Subject to the provisions of sub rule 3 and any other rule allowing informal application, every application to the court should be by notice of motion supported by affidavit. It shall cite the specific rule under which it is brought and state the ground for relief sought."*

In **HASSAN SUNZU VS AHMAD ULEDI**, Civil Application No. 8 of 2013, a distinction was drawn between an enabling Law or rule and a prescriptive rule as follows:-

*"... Enabling provision/law is the one that gives jurisdiction to the court to entertain and determine a matter brought before it. But a prescribing rule, is one which sets out how to bring a matter before a court, which has jurisdiction. Once the court has jurisdiction, a party intending to take up a matter in that Court must do so in a prescribed manner. In such a case, while it is essential to cite an enabling provision/law/rule, it is not essential to cite prescribing rule provided its conditions are substantially complied with, although it may be desirable to do so."*

We fully subscribe to the said decision in that in an application for stay of execution, the enabling provision is rule 11 (2) (b) which mandates the Court to entertain an application for stay in accordance with rules 11 (2) (c) and (d) which are the prescribing provisions setting out conditions to be complied with in the determining whether or not to grant the stay of execution. In this regard, it is mandatory to cite the enabling rule 11 (2) (b) while not citing rule 11(2) (c) is not fatal but it is desirable.

In the motion at hand, it is not in dispute that the application for stay of execution was lodged without reasonable delay as the notice of appeal was filed on 10/11/2014 and the present application was filed within a period prescribed in rule 11(2) (d) (ii). The only question for our determination is whether the applicant has availed good cause as required under rule 11 (2) (c)

suffer substantial loss and the success of the intended appeal rendered nugatory as the respondent has no sufficient means to pay back the sum. In the submission, the applicant undertakes to deposit security of a reliable Insurance Company.

Mr. Mtaki's argued that, the applicant has not availed details of substantial loss and the incapability of respondent to repay if the appeal succeeds. In our view holds no ground because what the applicant is required to show under rule 11(2) d (i) is that substantial loss may result to the party applying for stay of execution unless the order is made. We are convinced that, the decretal amount is colossal and if it is paid out and the appeal succeeds but the respondent fails to reimburse it, the likelihood of substantial loss is real.

The second limb is that the Court must be satisfied that, there is good cause to warrant the stay of execution. Common sense dictates that, to ensure that the applicant does not suffer loss should the appeal succeed, we hereby grant the application. Subsequently, and in order to assure the satisfaction of the judgment in the event, the appeal fails, we predicate stay of execution on security.

We therefore, allow the application and the stay of execution of the decree of Hon. Mkasimongwa, J. dated 27/10/2014 in Civil Case No. 6 of 2009, provided that the applicant deposits in court the decretal amount of **Tshs. 100,000,000/=** (one hundred Million) within thirty (30) days from the date of this order.

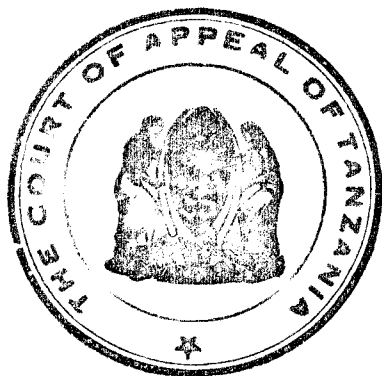
**DATED** at **TABORA** this 9<sup>th</sup> day of December, 2015.

B.M. LUANDA  
**JUSTICE OF APPEAL**

S.A. MASSATI  
**JUSTICE OF APPEAL**

S. MUGASHA  
**JUSTICE OF APPEAL**

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



  
P.W. Bampikya  
**SENIOR DEPUTY REGISTRAR**  
**COURT OF APPEAL**