IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MBAROUK, J.A., ORIYO, J.A., And MWARIJA, J.A.)

CIVIL APPLICATION NO. 238 OF 2014

TANZANIA SEWING MACHINE CO. LTD.....APPLICANT

VERSUS

NJAKE ENTERPRISES LTD.....RESPONDENT

(Application for stay of execution from the decision of the High Court of Tanzania at Arusha)

(Moshi, J.)

Dated 5th day of October, 2015
In
Land Case No. 22 of 2009

RULING OF THE COURT

1st & 16th December, 2015

MBAROUK, J.A.:

By way of notice of motion made under Rule 11(2) (b) (c) and (d) of the Court of Appeal Rules, 2009 (the Rules), the applicant seeks from this Court an order of stay of execution of the decree in the High Court Land Case No. 22 of 2009 held at Arusha pending the hearing and determination of the pending appeal. The notice of motion is supported by the affidavit of Job Mpingwa, the administrator of the Managing

Director of the applicant who is conversant with the facts deponed therein.

The applicant has preferred four grounds in his notice of motion, which are as follows:-

1. *If the execution is not stayed the house will be disposed and transferred to the third party and the applicant will stand to suffer irreparable loss.*
2. *If the execution is not stayed the intended appeal will be rendered nugatory.*
3. *The decision of the High Court is problematic to the effect that the Hon. Judge did not make any finding on what was before her.*
4. *The balance of convenience is in favour of the applicant.*

At the hearing, we had to deal with the preliminary objection first, notice of which was given earlier by Mr. Boniface Joseph, learned advocate for the respondent who

was assisted by Mr. Fidel Peter and Mr. Reginald Nkya learned advocates. The preliminary objection is to the following effect:

> *"That the application is bad in law and incompetent as the deponent has no locus standi to depose and to take conduct of the application No. 238 of 2014."*

In support of his objection, Mr. Boniface submitted that the deponent in the affidavit in support of the notice of motion has no *locus standi*. He gave the reason that, as the applicant is a corporate entity whose Managing Director has died, an Administrator of the deceased estate cannot step into the shoes of the Managing Director of the Company Juma Mpingwa who died in January, 2009. The learned advocate for the applicant added that, Job Mpingwa as an administrator of the estate of the late Juma Mpingwa had no *locus standi* to depose on behalf of the Company (Applicant) to which he does not hold any position.

Mr. Boniface further submitted that as on the issue of the appearance by corporation, Rule 30(3) of the Rules states that a corporation may appear either by advocate or by its

director or manager or secretary, who is appointed by resolution under the seal of the company. However, he said the deponent of the affidavit in this application does not hold any position. In support of his argument he cited the decision of this Court in the case of **Eliuther Philip Kweka v. Grace Woiso,** Civil Application No. 19 0f 2001(unreported).

Finally, Mr. Boniface urged us to find that, the affidavit sworn by such an incompetent person be found incompetent as the deponent had no *locus standi*. For that reason, he further urged us to find, that renders the notice of motion not to be supported by a valid affidavit as required by Rule 48(1) of the Rules and he therefore prayed for the application to be dismissed with costs.

On his part, Mr. Richard Rweyongeza responded by submitting that the preliminary objection filed by learned advocate for the applicant is misconceived for the reason that it should not have moved the Court by invoking Rule 107 of the Rules as the matter before the Court is not an appeal but an application. He further submitted that, according to the Court of Appeal Rules, 2009 all issues concerning applications

in the Court of Appeal are governed by part III of the Rules from Rule 44 – 64. He further added that according to Rule 49(1) of the Rules, **every formal application to the Court shall be supported by one or more affidavits of the applicant or some other person or persons having knowledge of the facts.** He said, looking at the verification part of the deponent's affidavit, it has been clearly stated that what appears in that affidavit is true to the best of his own knowledge.

Mr. Rweyongeza then urged us to find that Rule 30(3) of the Rules relied upon by his learned friend is concerning appearance, hence not applicable in this situation. He said, the relevant provision is Rule 49(1) of the Rules, which allows any person who has knowledge of the facts to depone in an affidavit in support of the formal application. For that reason, he prayed for the preliminary objection to be overruled.

In his rejoinder submission, the learned advocate for the respondent simply requested for further interpretation of Rule 49(1) of the Rules taking into account that the said provision is too general. This is because, he said, there is a danger for

any other person who is not a party in a company to misuse the provisions of Rule 49(1) of the Rules.

On our part, we fully agree with Mr. Rweyongeza that the preliminary objection is misconceived. This is because, Rule 49(1) of the Rules is very much clear that any person having knowledge of the facts can swear an affidavit in support of a formal application. We do not have any further interpretation other than that stated in that provision. We are of the view that if there was a need to restrict persons other than parties to an application it should have been clearly stated therein. Hence, we agree with Mr. Rweyongeza that Rule 30 (3) of the Rules relied upon by Mr. Boniface is not applicable in this matter and according to Rule 49(1) of the Rules Job Mpingwa having knowledge of the facts was competent to swear the affidavit in support of the application. For that reason, we overrule the preliminary objection filed by the learned advocate for the respondent.

Having overruled the preliminary objection, we then proceeded to the hearing of the application on merit, where Mr. Rweyongeza started his submission by praying to adopt

what has been stated in the affidavit in support of the application. He added that, the applicant has complied with all the conditions required to grant the stay of execution, except the issue of giving security as required by Rule 11(2) (d) (iii) of the Rules.

In his elaboration, he said, this application has been made without unreasonable delay and as shown in the grounds stated in the notice of motion if the execution is not stayed, the house will be disposed of and transferred to a third party and the applicant will suffer irreparable loss. Also he said, if execution is not stayed, the intended appeal will be rendered nugatory. He further added that, the decision sought to be appealed against is problematic to the effect that the Hon. Judge did not make any finding on what was before her.

As to compliance with Rule 11 (2) (d) (iii) of the Rules, Mr. Rweyongeza contended that since it is the applicant's house which is subject of sale in execution of the decree, the interests of the respondent is properly protected. For that reason Mr. Rweyongeza said, there is no need to give security because the money is over protected by the presence of the

house. He then prayed for the application to be granted as prayed and costs to be in course.

On his part, the learned advocate for the respondent vehemently argued against the application. He started by submitting that, this application has been made into total disregard of the requirement to furnish security in compliance with Rule 11(2) (d) (iii) of the Rules. He said, all the conditions stated under Rule 11(2) (d) of the Rules do mandatorily apply cumulatively. He added that, the affidavit in support of the application is completely silent with no undertaking to provide security. He further submitted that, it is not possible for the house subject to be executed to be made as security. In support of his argument, he cited to us the decision of this Court in the case of **Anthony Ngoo and Another v. Kitinda Kimaro,** Civil Application No. 12 of 2012 (unreported).

In addition to that, Mr. Boniface submitted that, even the facts on how a substantial loss would be incurred were not stated in the affidavit in support of the notice of motion. He said, for lack of such facts as to how the applicant is going to

suffer substantial loss and for his failure to furnish security that leads the applicant not to have cumulatively complied with the conditions stated under Rule 11 (2) (d) of the Rules. In support of his contention, he cited to us the decision of this Court in the case of **Jubilate Ulomi v. Mako Mining Co. Ltd,** Civil Application No. 5 of 2013 (unreported). For that reason, he prayed for the application to be dismissed with costs.

Unlike in the era of the Court of Appeal Rules, 1979 (the Old Rules), with the coming into force of the Court of Appeal Rules, 2009 (the Rules) the position now has changed on the issue of granting stay of execution. It is now trite law that the conditions stated under Rule 11(2) (d) of the Rules must be complied with before an order of stay of execution is issued. The Rule states that:-

> *"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."

That means, the current position of the law is that, unless those specific mandatory conditions are met cumulatively, the Court cannot grant stay of execution. To bolster and emphasize those requirements of the provisions under Rule 11(2)(d) of the Rules, this Court in the case of **Ahmed Abdallah v. Maulid Athuman,** Civil Appeal No. 16 of 2012 (unreported) emphatically stated as follows:-

" this Court in its recent decisions has taken a stance ***that the foregoing three preconditions stipulated under Rule 11***

(2)(d) of the Rules, must be conjunctively and not disjunctively satisfied by the applicant before a stay of execution order can be granted. *(See, for instance,* ***Joseph Antony Soares @ Goha V. Hussein s/o Omary,*** *Civil Application NO. 6 of 2012,* ***Therod Fredrick v Abdusamadu Salimu,*** *Civil Application No. 7 of 2012 and* ***Geita Gold Mining Limited v Twaib Ally,*** *Civil Application No. 14 of 2012 , CAT." (All unreported). [Emphasis added].*

In this application as shown above, the applicant has failed to give security as mandatorily required by Rule 11(2) (d) (iii) of the Rules. The requirement of furnishing security is currently not an optional condition on the applicant who applies for stay of execution. See the decision in the case of **Ahmed Abdallah** (supra) where it was stated that the conditions under Rule 11(2) (d) of the Rules have to be conjunctively and not disjunctively satisfied.

For the reason that one of the pre-condition under Rule 11(2) (d) (iii) of furnishing security has not been met by the applicant, we are constrained not to grant the order of stay of execution sought by him. Hence, we dismiss the application with costs.

DATED at **DAR ES SALAAM** this 11th day of December, 2015.

M.S. MBAROUK
JUSTICE OF APPEAL

K.K. ORIYO
JUSTICE OF APPEAL

A.G. MWARIJA
JUSTICE OF APPEAL

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

E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL