

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

CORAM: MBAROUK, J.A., MASSATI, J.A., And ORIYO, J.A.

CIVIL APPLICATION NO. 185 OF 2014

**AFRICAN MEDICAL INVESTMENT
TANZANIA PUBLIC LTDAPPLICANT
VERSUS**

NAVTEJ SINGH BAINS RESPONDENT

**(Application for stay of execution from the judgment and
decree of the High Court of Tanzania Commercial Division
at Dar es Salaam)**

(Nyangarika J.)

**Dated 09th day of September, 2014
in
Commercial Case No. 104 of 2013**

RULING OF THE COURT

5th & 12th February, 2015

MBAROUK, J.A.:

Aggrieved by the decision of the High Court of Tanzania (Nyangarika, J) in Commercial Case No. 104 of 2003 dated 9th September, 2014, the applicant lodged a notice of appeal on 11th September, 2014 as per the requirements of Rule 83 of the Court of Appeal Rules, 2009 (the Rules). Thereafter, on 23rd October, 2014 the applicant filed this

application in terms of Rule 11, (2) (b) (c) and (d) (i) and (ii) and 4 (2) (b) of the Rules seeking for the order of this Court to stay the execution of the decree in the above mentioned case. The notice of motion is supported by an affidavit deposed by Lawrence Achola Principal Officer of the applicant.

In the notice of motion, the applicant gave four grounds in support of the application, which are as follows:-

- 1. That substantial loss may result to the applicant if execution of the decree is not stayed.*
- 2. That the application has been made without unreasonable delay.*
- 3. The applicant is ready and able to give security for the due performance of the order as may ultimately be binding upon it.*
- 4. That the intended appeal has enormous chances of success.*

The above stated grounds also appear in the affidavit in support of the application sworn by the principal officer of the applicant at paragraphs 16 and 17 of the said affidavit.

In this application, Mr. Onesmo Kyauke and Mr. Makarios Tairo, learned advocates, appeared for the applicant, whereas Mr. Dilip Kesaria, learned advocate appeared for the respondent.

At the hearing, Mr. Tairo prayed to adopt to what has been stated in his written submission and the affidavit in support of the application. He then submitted that, all the requirements under Rule 11(2) (d) of the Rules have been fulfilled. He added that, as there is no aspect of delay in filing this application and as the applicant is ready to pay security by paying USD 39,930 from January, 2013 to date minus the amount already paid to the respondent, he prayed for the application to be granted. He further submitted that the applicant is also ready to pay a monthly rent until the appeal is determined.

As on the issue of substantial loss, Mr. Tairo requested the Court to look the matter in this application to contain a unique scenario. He submitted that, the intended execution

is against a hospital which contains medical equipment in areas such as laboratory, intensive care unit (ICU), operation theater, radiology unit, pharmacy, ambulances and other important patients' data. He further submitted with emphasis that, if the execution is done upon the hospital equipment that may lead the hospital to be closed and hence that will cause a major damage and loss not only to the applicant but also to the life of patients and most probably some will die. He further emphasized that, the most serious loss which is expected is the loss of life of patients.

Mr. Tairo added and cautioned that the dismantling of the hospital equipment require special expertise, whereas in the execution process a Court Broker may not have such a knowledge. He further added that the order of vacant possession may lead to inconvenience on the part of the applicant, as it might be too difficult to get an alternative accommodation.

Finally, he urged the Court to grant the prayer for stay of execution pending the hearing and determination of the intended appeal.

On his part, Mr. Kesaria, submitted that, there is no dispute on the issue of debt accrued from the accumulation of rent due for payment, because the applicant admitted to that effect and the advocate for the applicant stated that his client is ready to pay. However, Mr. Kesaria stated that the security has to be given for the whole of the decretal amount and not part thereof, because even the notice of appeal shows that the applicant intends to appeal against the whole decision and not just part of it. He further submitted that, the admission of part payment of security has been raised at the hearing of this application from the bar and not in the sworn affidavit. He also submitted that even the issue of irreparable loss has not been supported by a sworn affidavit, hence the point deserves not to be considered and has to be rejected.

Mr. Kesaria requested the Court to consider the fact that, the applicant has stopped to pay the rent for more than twenty six (26) months while occupying the suit premises doing business. He said, the accumulation of the unpaid rent amounts to USD 1,664,000 which is equivalent to Tshs. Three billion which is substantial amount making the applicant to suffer and make him not to enjoy the fruits of the decree. He then urged us to find that, the applicant has failed to demonstrate that he is going to suffer substantial loss as that issue does not feature in the sworn affidavit.

For that reason, he prayed for the application to be dismissed with costs. In the alternative, Mr. Kesaria requested the Court to order the applicant to deposit the whole amount as per the decree, which is USD1,664,000 minus 150,000 within seven days of the delivery of this ruling and continue to deposit into Court a monthly rent of USD 64,000 until the determination of the appeal.

In support of his submission, Mr. Kesaria relied upon the following authorities, **Tanzania Cotton Marketing Board V. Cogecot Cotton Co. SA** (1997) TLR 63, **Mechmar Corporation (Malaysia) Berhad V. VIP Engineering and Marketing Limited and another** , Civil Application No. 184 of 2008 and **National Housing Corporation v AC Gomes (1997) Limited**, Civil Application No. 133 of 2009 (both unreported).

Having carefully examined the submissions from both sides in this application, we are obliged to consider the requirements of the current Court of Appeal Rules, 2009 (the Rules) before reaching our decision. Unlike the old legal regime in the Court of Appeal Rules, 1979, the coming into force of the Rules specifically Rule 11(2) (d) of the Rules, the Court has no longer a luxury of granting an order of stay of execution on such terms "*as the Court may think just.*" The Court must be satisfied that the conditions under Rule 11(2) (d) have been complied with.

For instance, see **Therod Fredrick v Abdusamadu Salim**, Civil Application No 7 of 2012, **Geita Gold Mining Limited v Twalib Ally**, Civil Application No. 14 of 2012 (both unreported) as authorities for the conditions to be fulfilled for the order of stay of execution to be issued by this Court. The crux of the matter starts with Rule 11(2) (d) of the Rules which stipulates, as follows:

" 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 relevant).....

(b) (not relevant).....

(c) (not relevant).....

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

- (i) *That the substantial loss may result to the party applying for stay of execution unless order is made,*
- (ii) *That the application has been made without unreasonable delay; and*
- (iii) *That security has been given by the applicant for due performance of such a decree or order as may ultimately be binding upon him."*

(Emphasis added).

Several decisions of this Court have emphasized the necessity of compliance of those requirements or conditions under Rule 11(2) (d) of the Rules and that they must also be conjunctively and not disjunctively be satisfied. See **Ahmed Abdallah v Maulid Athuman**, Civil Application No. 16 of 2012, **Noble Motors Limited v. Umoja wa Wakulima Wadogo Bonde la Mtera** (UWABOKE) Civil Application No. 103 **Joseph Antony Soares @ Goha v.**

Hussein s/o Omary, Civil Application No. 6 of 2012 (All unreported).

Considering the facts and circumstances in this application, there is no flicker of doubt that the applicant has satisfied the two first conditions i.e. (i) and (ii) under Rule 11(2) (d) of the Rules. However, as the conditions have to be complied with conjunctively and not disjunctively, we have to satisfy ourselves that the third condition has been complied with too before granting the order of stay of execution. This is because, we have to consider the position of the decree holder who is entitled to the immediate enjoyment of the fruits of the decree in his favour. In the decision in **Geita Gold Mining Limited** (supra) this Court held as follows:-

" if the respondent is to be denied the immediate enjoyment of this right, he is entitled, under the law, to a definite and/or tangible assurance or security from the

applicant for the due performance of the decree in his favour or "such decree or order as may ultimately be binding upon" it, in case the intended appeal fails either wholly or partly, that is indeed the spirit and thrusts behind condition (iii) in Rule 11(2) (d)."

It is not disputed that the respondent has been denied the enjoyment of the accumulation of his rent for more than twenty six months. For that reason, and considering the circumstances of this case, we are increasingly of the view that the order of security for the due performance of the decree is inevitable and cannot be avoided.

In view of what we have endeavored to discuss, we see it prudent to grant the application for stay of execution on condition that the applicant deposit into Court USD 1,664,000 minus USD 150,000 within a month from the date of the delivery of this ruling. The applicant should also

deposit into Court a monthly rent to the tune of USD 64,000 until the determination of the intended appeal. Hence, the application for stay of execution is granted subject to the fulfillment of the conditions stated above. It is so ordered.

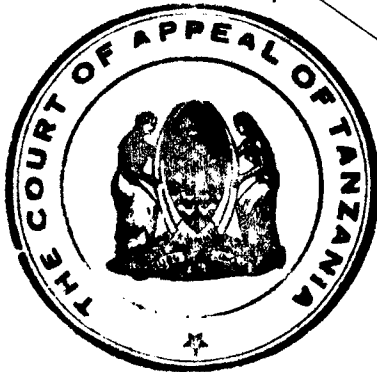
DATED at **DAR ES SALAAM** this 10th day of February, 2015.

M. S. MBAROUK
JUSTICE OF APPEAL

S.A. MASSATI
JUSTICE OF APPEAL

K.K. ORIYO
JUSTICE OF APPEAL

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



M.A. MALEWO
DEPUTY REGISTRAR
COURT OF APPEAL