

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

(CORAM: LUANDA, J.A., MUSSA, J.A., And MZIRAY, J.A.)

CIVIL APPLICATION NO. 108 OF 2016

CATS TANZANIA LIMITED.....APPLICANT

VERSUS

SAVIO FERNANDESRESPONDENT

**(Application for stay of Execution from the decision of the
High Court of Tanzania at Dar es Salaam)**

(Nyerere, J.)

Dated the 22nd day of March 2016

In

Civil Revision No. 34 of 2015

RULING OF THE COURT

5th & 20th December, 2016

MUSSA, J.A.:

The respondent was an employee of the applicant up until February, 2010 when his services were allegedly terminated by the latter. The respondent was aggrieved by the termination following which he instituted a labour dispute in the Commission for Mediation and Arbitration (CMA) at Dar es Salaam. Upon being summoned, the applicant defaulted appearance, whereupon the CMA heard the respondent *ex parte* and, on the 24th June,

2014, the CMA granted him an arbitral award to the tune of USD 178,100 plus unpaid salaries amounting to Tshs. 1,500,000/=.

Discontented by *the* award, the applicant re-approached the CMA pleading with it to set it aside. Nonetheless, the application was refused and dismissed on account that the applicant did not assign good cause for her non-appearance at the hearing of the arbitration proceedings. It is perhaps, noteworthy that the dismissed order was handed down by the CMA on the 25th August, 2014.

Undaunted, the applicant lodged Revision No. 34 of 2015 in the High Court of Tanzania (Labour Division) with which she asked the court to call for and revise the June 24th CMA award. In a brief judgment which was pronounced on the 22nd March, 2016 the Labour Division of the High Court (Nyerere, J.) declined the applicant's invitation for the reason that it lacked jurisdiction to entertain the quest. As it were, the court took the position that the only viable recourse open to the applicant was for her to first challenge the CMA August 25th decision which dismissed her application to set aside the *ex parte* award. In the result, the application was adjudged premature, misconceived and, accordingly, dismissed.

Dissatisfied, on the 24th March, 2016 the applicant lodged a Notice of Appeal before this Court with a desire to impugn the March, 22nd verdict of the High Court. A little later, on the 14th April, 2016 she preferred the present application through which she seeks an order to stay the execution of the decree of the High Court pending the hearing and determination of the desired appeal. The application is by a Notice of Motion which is taken out under the provisions of Rule 11(2) (b), (c) (d) and (e) of the Tanzania Court of Appeal Rules, 2009 (the Rules). The same is supported by an affidavit, duly sworn by Mr. Stemius Salvatory who happens to be the Director of the Legal Service Department of the applicant. The application is, however, resisted by the respondent in an affidavit in reply, also duly sworn by a certain Jonathan Lulinga who held himself as an Advocate of the High Court of Tanzania with instructions to depose for and on behalf of the applicant.

At the hearing before us, the applicant entered appearance through the referred Mr. Salvatory pursuant to Rule 30 (3) of the Rules, whereas the respondent had the services of Mr. Juvenalis Ngowi, learned Advocate.

In arguing the application, Mr. Salvatory fully adopted the Notice of Motion as well as the affidavit in support. The affidavit is unnecessarily

verbose, but it is materially stated therein that the applicant has mounted a Notice of appeal (paragraph 31); that substantial loss may result to the applicant unless the order for stay is made (paragraphs 11, 12, and 13); and that the applicant is a solvent corporate entity which is able to satisfy the decretal sum in the event the desired appeal fails (paragraph 17). In his oral submissions, Mr. Salvatory added a detail to the effect that the application was lodged without unreasonable delay.

In reply, Mr. Ngowi similarly fully adopted the affidavit in reply which countered all the material depositions of the applicant. More particularly, the learned counsel for the respondent contended that the applicant's solvency is, after all, not as rosy as depicted by Mr. Salvatory in his affidavit. To fortify his claim, Mr. Ngowi referred to a letter written by the applicant's Advocate and addressed to the respondent's Advocate which is attached to the affidavit in reply. In the letter, the applicant's Advocate openly conceded that the applicant was virtually in a financial coma. As regards the solvency of his client, the learned counsel undertook that the respondent will be in a position to meet any order to pay back the money in the event the applicant wins the appeal. With respect to security, Mr. Ngowi submitted that the

applicant did not clearly furnish security for the due performance of the decree as may ultimately be binding upon her.

Dealing with the learned rival arguments, we deem it apt to preface our determination with an observation that our understanding of the present state of the law with regard to stay of execution is that, before granting an order for stay of execution, the Court must find that the conditions enumerated under Rule 11(2) (b) and (d) cumulatively exist. The conditions are:-

- (1) Lodging a Notice of Appeal in accordance with Rule 83;
- (2) Showing good cause; and
- (3) Complying with the provisions of item (d) of sub-rule (2) which require the Court to be 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.

The foregoing pre-conditions have been consistently reiterated by the Court upon numerous decisions (see, for instance, the unreported decisions comprised in Civil Application No. 11 of 2010 – **Mantrac Tanzania Ltd Vs Raymond Costa**; Civil Application No. 82 A of 2010 – **Indian Ocean Hotel Ltd, t/a Golden Tulip, Dar es Salaam Vs Nitesh Suchak, t/a Smart Dry Cleaners**; Civil Application No. 5 of 2012 – **Laurent Kavishe Vs Enely Hezron**; and Civil Application No. 6 of 2012 – **Joseph Anthony Soares @ Goha Vs Hussein Omary**).

When all is said regarding the governing law, we are not in difficulty finding that a Notice of Appeal has, indeed, been lodged; that the applicant has demonstrated good cause for her quest; that substantial loss may result to the applicant in the event the respondent executes the decree; and that being made barely a month after delivery of the High Court decision the application has been made without unreasonable delay. That will suffice, to meet the requirements comprised in items (b) and (c) as well as item (d) (i) and (ii) of sub-rule (2).

Coming to the requirement to give security under item (d) (iii) of the sub-rule, we need only reiterate what we observed in the case **Mantrac** (supra):-

"One other condition is that the applicant for a stay order must give security for the due performance of the decree against him. To meet this condition, the law does not strictly demand that the said security must be given prior to the grant of the stay order. To us, a firm undertaking by the applicant to provide security might prove sufficient to move the Court, all things being equal, to grant a stay order provided the Court sets a reasonable time limit within which the applicant should give the same."

Going by the foregoing proposition, to us, with respect to the learned counsel for the respondent, the applicant gave a firm undertaking in paragraph 17 of her affidavit that she was prepared to give security for the due performance of the decree. To that extent, we also find that the condition to give security was sufficiently met.

In the end result, we are of the settled view that the interests of justice will be met if we allow the application subject to giving security, by way of a

Bank guarantee, a sum of commensurate to the decretal amount within twenty one (21) days from the date of this Ruling. Order accordingly.

DATED at DAR ES SALAAM this 13th day of December, 2016.

B.M. LUANDA
JUSTICE OF APPEAL

K.M. MUSSA
JUSTICE OF APPEAL

R.E.S. MZIRAY
JUSTICE OF APPEAL

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


E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL