

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

**(CORAM: MBAROUK, J.A., LUANDA, J.A., And MUSSA, J.A.)**

**CIVIL APPLICATION NO. 38 OF 2015**

<b>1. ARUSHA HARDWARE TRADERS LIMITED 2. ELLYSON KIRENGA SWAY 3. SIKUDHANI MWENDA SWAY</b>	}	<b>.....APPLICANTS</b>
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**VERSUS**

**M/S EXIM BANK TANZANIA LIMITED..... RESPONDENT**

**(Application for stay of execution of the Judgment and decree of the High  
Court of Tanzania  
(Commercial Division) at Arusha)**

**(Mansoor, J.)**

**Dated 23<sup>rd</sup> day of October, 2015  
in  
Commercial Case No. 20 of 2015**

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**RULING OF THE COURT**

10<sup>th</sup> & 15<sup>th</sup> February, 2016.

**MUSSA, J.A.:**

The applicants were aggrieved by the judgment and decree of the Commercial Division of the High Court (Mansoor, J.) dated the 23<sup>rd</sup> day of October, 2015 in Commercial Case No. 20 of 2011. They duly lodged a Notice of Appeal on the same date and, in order to forestall the execution of the decree, the applicants presently seek an order of this Court for stay of the execution pending the hearing and determination of the intended appeal.

The application is by way of a Notice of Motion which is predicated under Rules 11 (2) (b) and 48 (1) (2) of the Tanzania Court of Appeal Rules, 2009 (the Rules). The same is supported by an affidavit duly affirmed by the second applicant, to which the respondent did not reply.

When the application was called on for hearing before us, the respondent defaulted appearance despite being duly served on the 4<sup>th</sup> February, 2015. In the circumstances Mr. Akonaay Sang'ka, learned Advocate, who entered appearance for the applicants prayed that the application should proceed in the absence of the respondent. For our part, we entirely subscribed to the prayer and, there being no fit cause for an adjournment, we ordered the application to proceed in the absence of the respondent in terms of Rule 63 (2) of the Rules.

In support of the application, Mr. Sang'ka fully adopted the Notice of Motion as well as the accompanying affidavit. To supplement the two documents, the learned counsel strongly contended that the applicants are entitled to the relief sought much as, on a preponderance, they stand to suffer more inconvenience and hardship if the stay is not granted. In addition, counsel submitted that the application was made without delay and

that the applicants undertake to furnish security through the properties referred in the Notice of Motion and the affidavit, for the due performance of the decree as may ultimately be binding upon them.

We have given due consideration to the grounds raised in the application as well as the elaborative submissions of the learned counsel for the applicants. We propose to preface the determination of this application with an overview on how the law stands. The current position of the law on the subject of stay of execution has been elucidated upon numerous decisions of this Court but, in the matter under our consideration, we need only recite what was stated in Civil Application No. 7 of 2012 – **Therod Fredrick Vs. Abdusamadu Salim** (unreported):-

*"On the terms of the present Rules, the Court no longer has the luxury of granting an order of stay of execution on such terms as the Court may think just; rather, the Court must be satisfied, just as the applicant will be required to fulfil the following cumulative requirements:-*

- 1. Lodging a Notice of Appeal in accordance with Rule 83;*

*2. Showing good cause and ;*

*3. Complying with the provisions of item d (i), (ii) and (iii).”*

We stand by the foregoing proposition to which we wish to further elucidate that the three conditions stipulated in item (d) of Rule 11 (2) of the Rules must be conjunctively and not disjunctively satisfied by the applicant before an order of stay of execution is granted.

When all is said with respect to the current position of the law, in the matter at hand, we entertain no doubt whatsoever that a Notice of Appeal was duly lodged in accordance with Rule 83 of the Rules. As regards “good cause,” the same is deducible from the fact that the applicants have a statutory right of appeal towards which they have already initiated a process for its attainment through the lodging of the Notice of Appeal.

Coming now to the cumulative requirements stipulated in item (d), to begin with, upon the uncontested averments in the Notice of Motion and its accompanying affidavit, we are satisfied that substantial loss may result to the applicants if the requested stay is not granted. Furthermore, given the fact that the present application was lodged only five (5) days from the date

of the High Court decision, it is, indeed, beyond question that the same was instituted without unreasonable delay. Finally, we have no qualms with the security given by the applicants for the due performance of the decree as may ultimately be binding upon them.

To say the least, we are satisfied that the applicants have met all conditions required for the grant of an order of stay of execution. In the result, we, accordingly, grant the stay pending the hearing and determination of the intended appeal. Costs to abide by the result of the intended appeal. It is so ordered.

**DATED at ARUSHA** this 11<sup>th</sup> day of February, 2016.

M. S. MBAROUK  
**JUSTICE OF APPEAL**

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

K. M. MUSSA  
**JUSTICE OF APPEAL**

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

  
E. Y. MKWIZU  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**