

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

(CORAM: KIMARO, J.A., JUMA, J.A., And MZIRAY, J.A.)

CIVIL APPLICATION NO. 257 OF 2015

HAMOUD MOHAMED SUMRYAPPLICANT

VERSUS

- 1. MUSSA SHAIBU MSANGI**
2. SUMRY HIGH CLASS LTD
3. SUMRY BUS SERVICES LTD }RESPONDENTS

(Application for stay of execution of the ruling of the High Court of
Tanzania Commercial Division)
(Songoro, J.)

dated 30th October, 2012

in

Commercial Case No.20 of 2012

RULING OF THE COURT

24th February & 4th March, 2016

KIMARO, J.A.:

This application by notice of motion under Rule 11(2)(b), (c) and (d) of the Court of Appeal Rules, 2009 seeks for stay of the decision of the High Court of Tanzania, Commercial Division, (Songoro, J.) in which he ordered the applicant to pay the decretal amount the 1st respondent was granted in Commercial Case No. 20 of 2012. The decretal amount granted was Tanzania shillings 179, 379,980/= . The decree holder started the execution

process by attachment of the properties of the judgment debtors. He attached buses of the second and third respondents. He did not continue with that process to finality. He filed another application for arrest and detention of the applicant as a civil prisoner. The applicant contested the application. His point of contention is the distinction between a corporate personality and an individual person. After hearing the parties, the trial court lifted the corporate veil of the second and third respondents and ordered the applicant as a Managing Director of both respondents to individually pay to the 1st respondent the decretal sum. The applicant was granted thirty days within which to make the payment. The applicant was aggrieved by the order and he filed this application.

The notice of motion is filed under Rule 11(2) (b), (c) and (d) (i) (ii) and (iii) and (e) of the Court of Appeal Rules 2009. The grounds given are:

- (i) The balance of convenience, common sense and hardship weighs in favour of the Applicant who was not a party to the suit all along the trial.
- (ii) That if the order of the High Court is executed before the application for revision is yet to be determined it is likely to cause substantial and irreparable injury to the Applicant.

- (iii) The interest of justice in the circumstances of the case necessitates awaiting the results of the revision proceedings pending in this Court.
- (iv) The 1st respondent has filed an application for arrest and detention of the Applicant herein in execution of the decree in which the Applicant was not a party.

At the hearing of the application the applicant was represented by Mr. Evodi Mmanda assisted by Mr. Salim Abubakar learned advocates. The respondent was represented by Ms. Butamo Kasuka Phillip, learned advocate.

The application is supported by an affidavit affirmed by Salim Abubakar, an Advocate of the High Court and courts subordinate thereto. What he says in his affidavit is that the second and third respondents were aggrieved by the decision of the High Court and they initiated the appeal process by filing a notice of appeal and requesting for the copy of the proceedings. At the same time the 1st respondent applied for the execution of the decree. Although he had applied for the attachment of the second and third respondents' properties, he abandoned it and resorted to another mode of execution. It is the mode of execution he chose that led to the present application. The applicant says that if he is arrested and detained as

a civil prisoner, it will be an embarrassment both to himself and the family and the society at large because he will lose not only his freedom but also his integrity as a businessman will be affected. He prayed that the application be granted.

An affidavit in reply is sworn by Butamo Phillip, also an advocate of the same status as Salim Abubakar. In her affidavit she gave reasons why the execution by attachment of motor vehicles belonging to the two respondents could not be processed to finality. She said the properties to be attached could not be traced and that is the reason why the 1st respondent resorted to another mode of execution. She said the applicant is the Managing Director of both the first and second respondents and what the executing court did was to unveil the corporate personality of the two respondents and ordered him to personally pay the amount of the decree.

In as far as this application is concerned, the position of the law is now settled. The application is for stay of execution. The application was filed on 4th December, 2015. What governs the application now is the 2009 Court of Appeal Rules. The grounds for filing the application are based on the old 1979 Rules. Even the cases cited were decided before the 2009 Court Rules. The current position of the 2009 Court Rules has changed. All the conditions

given in Rule 11(2)(b),(c) and(d) must be satisfied. See the cases of **Mantrac Tanzania Limited V Raymond Costa**; Civil Application No.5 of 2012, **Laurent Kavishe V Enel Hexron** Civil Application; No. 6 of 2012 and that of **Joseph Soares @ V Hussein Omary** Civil Case No. 12 of 2012, all decided by the Court and they are unreported. In the case of **Joseph Soares @ Goha** supra the Court held that:

“ The Court no longer has the luxury of granting an order of stay of execution on such terms as the Court may think just; but it must find that the cumulative conditions enunciated in Rule 11(2)(b), (c) and (d) exist before granting the order. These conditions are:-

- (i) Lodging a notice of appeal in accordance with Rule 83;
- (ii) showing good cause
- (iii) Complying with the provisions of item (d) of sub-rule 2”.

Under item (d) of sub-rule 2 it is provided that an order for stay of execution should not be granted 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) The application has been made without delay; and
- (iii) That security has been given by the applicant for the due performance of the decree as may ultimately be binding upon him.

The case of **Frida Kalule Mwijage V. The Tanzania Building Agency** Civil Application No. 3 of 2011 (unreported) is relevant on this aspect.

In this application the applicant has not satisfied all the requirement of granting an application for stay of execution. The applicant has not mentioned anything in connection with the security for due performance of the decree if the application for revision fails. It is one of the conditions the applicant has to comply with.

Let us also add here that, the nature of the proceedings giving rise to this application are distinct from the ordinary application which arises from the proceedings before an application for execution is made. In this

application what has given rise to this application are proceedings for execution. That arose after the trial court unveiled the corporate personality of the 2nd and 3rd respondents and held the applicant accountable for the payment of the decretal amount in his personal capacity. But our observation here is that the unveiling of the corporate personality is among the modes of the decree holder realizing the amount of the decree. That is one mode of execution allowed under Order XXI Rule 10 of the Civil Procedure Code, [CAP 33 R.E.2002]. In the case of **Yusuphu Manji V. Edward Masanja and Abdallah Juma** [2006] T.L.R 127 the issue that was involved was that of execution. It was an execution by lifting the veil of incorporation and making the managing director of the company personally responsible. The Court held that:-

“Having regard to the relationship of the company at the time, with the appellant as the managing director, the alleged concealment of the assets of the company by the appellant, which was not denied in the counter-affidavit, this was a proper case in which the principle of lifting the veil of incorporation.”

The circumstance under which the case of **Yusuph Manji** supra was determined is similar to the present application. As the applicant has not fulfilled all the requirements laid down under Rule 11(d), the application is bound to fail and it is hereby dismissed with costs.

DATED at **DAR ES SALAAM** this 3rd day of March, 2016.

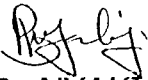
N.P.KIMARO
JUSTICE OF APPEAL

I.H.JUMA
JUSTICE OF APPEAL

R.S.MZIRAY
JUSTICE OF APPEAL



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


B.R. NYAKI
DEPUTY REGISTRAR
COURT OF APPEAL