

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

**CIVIL APPLICATION NO. 95 OF 2012**

**(CORAM: OTHMAN, C.J., JUMA, J. A. And, MWARIJA, J. A.)**

**ANORD L. MATEMBA.....APPLICANT**

**VERSUS**

**TANZANIA BREWERIES LTD..... RESPONDENT**

**(Application for Stay of Execution from the Judgment and Decree of the High Court of Tanzania at Dar es Salaam)**

**(Nyangarika, J.)**

**dated the 11<sup>th</sup> day of June, 2012**

**in**

**Commercial Case No. 18 of 2008**

-----

**RULING OF THE COURT**

31<sup>st</sup> August & 03<sup>rd</sup> October, 2016

**OTHMAN, C.J.:**

The applicant, Arnord L. Matemba seeks a stay of execution of the decree arising out of the judgment of the High Court, Commercial Division (Nyangarika, J.) in Commercial Case No. 18 of 2008 delivered on 11<sup>th</sup> June, 2012. The respondent, Tanzania Breweries Limited resists the application.

At the hearing of the application on 31<sup>st</sup> August, 2016 Mr. Juma Nassoro, learned Advocate represented the applicant. On the other side, Mr. Felix Mbuya learned Advocate represented the respondent.

Relying on his written submissions and the applicant's affidavit, Mr. Nassoro's one and only essential point was that unless a stay of execution order pending the determination of the appeal is granted by the Court, the applicant (i.e. 3<sup>rd</sup> Defendant) will suffer irreparable loss because the High Court was wrong to hold him jointly and severally liable with the 1<sup>st</sup> Defendant, Antara Investment Co. Ltd. as it had found out that he had not traded with the respondent company in his person capacity.

Opposed, Mr. Mbuya relying on the Court's observation in **Tanzania Ports Authority v Pembe Flour Mills Ltd.**, Civil Application No 78 of 2007 (COA, unreported) that irreparable loss must imply, among other things, loss which is irrecoverable in any form or manner, including damages or other monetary recompense, submitted that the applicant had failed to establish any good or significant reason for the Court to exercise its discretion to grant a stay of execution of the decree.

The Court's power to grant a stay of execution of the decree is derived under Rule 11(2)(b) of the Court of Appeal Rules, 2009. In order to do so

properly the Court, under Rule 11(2)(d)(i)-(iii), must satisfy itself that, (a) substantial loss may result to the applicant unless the order is made, (b) the application for a stay of execution of the decree or order has been made without unreasonable delay and that (c), the applicant has given security for the due performance of the decree as may ultimately be binding on him should the intended appeal fail.

It is well settled law that the three conditions under Rule 11(2)(d)(i)-(iii) are cumulative (**Therod Fredrick V. Abdulsamudu Salim**, Civil Application No. 7 of 2012; **Geita Gold Mining Ltd; V. Twahib Ally**, Civil Application No. 14 of 2012; **Joramu Biswalo v. Hamis Rashid**, MZA Civil Application No. 11 of 2013, (All COA, unreported).

On stay of execution of a decree of the Court, it is relevant to observe that, **first**, a notice of appeal does not operate as a stay of execution of the decree or order appealed against (Rule 11(2)(b)). **Second**, as a stay of execution order deprives the decree holder of his or her entitlement to enjoy the fruits of the judgment or litigation in his favour, the law has considered it a reasonable and fair requirement for an applicant to meet the conditions precedent spelt out in Rule 11(2)(d)(i)-(iii) for the grant of a stay order. **Third**, security as one of the conditions for the due performance of the

decree should an intended appeal fail, among other reasons is meant to safeguard the interests of the judgment creditor in the event the judgment or decree appealed against is affirmed by the appellate court. It facilitates a post-appeal execution process. **Fourth**, additionally, or rather indirectly, this pre-condition discourages foot dragging of the appeal process by an applicant and encourages diligent compliance by him or her of the essential steps necessarily for the proper institution of the appeal.

That said, in our respectful view, it is not the debate between the parties over the suffering or not of irreparable loss or harm by the applicant that will ultimately anchor the grant or denial of the stay order that is now sought. Moreover, the applicant's submissions partly and prematurely encroaches on the merits of the appeal, which is not before us at this stage.

In this application and on the totality of the material available we have no hesitation in holding that the application filed on 10<sup>th</sup> July, 2012 was lodged within a reasonable time following the issuance of the judgment and the decree of the High Court on 11<sup>st</sup> June, 2012 for which a stay of execution is sought in terms of Rule 11(2)(d)(ii).

However, with respect, we are of the considered view that the applicant has neither met nor attempted to meet one of the crucial pre-

conditions for the Court's exercise of its discretion to grant a stay of execution order provided for in Rule 11(2)(d)(iii). Namely, security for the due performance of the decree should the applicant's intended appeal be unsuccessful. The onus is on the applicant to satisfactorily meet the three pre-conditions spelt under in Rule 11(2)(d)(i)-(iii).

With regard to security, in **Mantra Tanzania Limited v. Raymond Costa**, Civil Application No. 11 of 2011 (COA, unreported), the Court categorically stated:

*"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".*

The absence of any security or an adequate and firm undertaking by the applicant of the due performance of the decree should the intended appeal fail, seriously undermines the application's force and potency in favour of the Court's discretion to grant the stay order applied for.

All considered, we find no merit in the application and hereby dismiss it with costs. Ordered accordingly.

**DATED** at **DAR ES SALAAM** this 26<sup>th</sup> day of September, 2016.

M. C. OTHMAN  
**CHIEF JUSTICE**

I. H. JUMA  
**JUSTICE OF APPEAL**

A. G. MWARIJA  
**JUSTICE OF APPEAL**

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



  
B.R. NYAKI  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**