

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

**(CORAM: LUANDA, J.A., MMILLA, J.A., And MZIRAY, J.A.)**

**CIVIL APPLICATION NO. 137 OF 2016**

**NATIONAL BANK OF COMMERCE LTD ..... APPLICANT**

**VERSUS**

**1. SAOLIGO HOLDING LTD**

**2. MAGRETH JOSEPH**

**..... RESPONDENTS**

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

**(Mgetta, J.)**

**dated the 1<sup>st</sup> day of December, 2015**

**in**

**Civil Appeal No. 79 of 2006**

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**RULING OF THE COURT**

29<sup>th</sup> July & 18<sup>th</sup> August, 2016

**MMILLA, J.A.:**

This application has been instituted by IMMA Advocates, on behalf of the National Bank of Commerce (the applicant). It is seeking the Court's indulgence to stay the execution of the decree of the High Court of Tanzania (Land Division) dated 30.9.2014 in Land Case No. 79 of 2006 pending the hearing and determination of the intended appeal in that

respect. It is brought by way of notice of motion and is made under Rules 11(2) (b), (c) and (d), 48 (1) (2) and 49 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules). It is supported by an affidavit sworn by Antonia Kilama, counsel for the applicant. Essentially, it grounded on three grounds; **one** that, there is good cause to order stay of the execution of the said decree because the judgment subject of the intended appeal is tainted with illegality; **two** that, substantial loss may result to the applicant if the decree is executed; **three** that, the application for stay of execution has been made without unreasonable delay; and **four** that, the applicant is willing and financially able to provide a bank guarantee as security for the due performance of a decree or order which may ultimately be binding on the applicant.

At the hearing, the applicant was represented by Ms Samah Salah, learned advocate, while Ms Aneth Kireithi and Mr. Living Kimaro, learned advocates, represented the first and second respondents respectively.

Ms Salah has basically submitted that they are seeking stay of execution of the subject decree on the ground that there are serious issues

of law which need to be determined by the Court on appeal, including the following:-

- (a) *Whether the trial judge erred in law in entertaining an application for leave to bring a third party notice which was time barred.*
- (b) *Whether the third party proceedings are a nullity because the trial judge erred in law in failing to issue directions on how to proceed with the third party proceedings as required by law.*
- (c) *Whether the trial judge erred in law in failing to distinguish the liability of the second respondent to the first respondent and that of the applicant to the second respondent, if any.*
- (d) *Whether, the trial judge erred in law in holding the applicant was liable to indemnify the second respondent's liability to the first respondent. In doing so the learned judge erred in law in failing to note*

*and appreciate the fact that the second respondent had misrepresented to the first respondent that the property was being leased free from encumbrance.*

*(e) Whether the trial judge erred in law and in fact in failing to note and appreciate the fact that the applicant could not have been liable in law for the second respondent's misrepresentations to the first respondent.*

*(f) Whether the trial judge erred in law in awarding special damages that was not strictly proved by evidence.*

Apart from her contention that the applicant stands to suffer substantial loss if the execution of that decree is not stayed on account that the respondent's financial position is unknown, Ms Salah submitted as well that they have filed this application without unreasonable delays. Furthermore, she has submitted that they have made the necessary undertaking as regards the question of security for costs.

Like her learned friend for the applicant, Ms Kireithi had similarly filed written submissions and prayed to be allowed them. To begin with however, she briefly submitted that the applicant did not properly move the Court to entertain this application. She contended that the notice of motion ought to have cited the sub-sections under clause (d) of Rule 11 (2) of the Rules.

On another point, she raised concern on whether the applicant has shown that she will suffer substantial loss if the Court declines to grant the order for stay of execution. She contended that the applicant does not claim that loss would result to him if the application is not granted. Relying on the case of **Tanzania Cotton Marketing Board v. Cogecot Cotton Co. SA** [1999] T.L.R. 63, she urged the Court to dismiss the application.

Ms Kireithi submitted as well on the aspect of security for due performance, should at the end of the day the Court uphold the decision of the High Court. She contended that the applicant's mere assertion without tangible or substantive proof may not suffice. Relying on the case of **Geita Gold Mining Ltd v. Twalib Ally**, Civil Application No. 14 of 2012 CAT

(unreported), she submitted that the applicant ought to have duly deposited the security for due performance.

In a brief rejoinder, Ms Salah submitted that the contention of her learned friend that the Court is not properly moved by citing Rule 11 (2) (b) (c) and (d) without specifying the sub-provision under clause (d) thereof is not fatal because clause (d) alone is sufficient.

On another point, Ms Salah submitted similarly that the respondents' allegation that the applicant delayed to file the application is also baseless because leave to file the application was granted on 21.4.2016 and they filed it on 5.5.2016. Thus, there were no delays as alleged. She further submitted that they averred the question of substantial loss under paragraphs 3 of the notice of motion and 14 of the supporting affidavit. As such, the allegation to the contrary is baseless. She contended similarly that the cases relied upon by Ms Kireithi are distinguishable because they were all decided prior the 2009 Court of Appeal Rules.

As regards the aspect of security for the due performance, Ms Salah submitted that the applicant has undertaken to provide a bank guarantee as

security for the due performance. She referred the Court to paragraph 5 of the notice of motion. In the premise, she urged the Court to grant the application.

On our part, after solemnly considering the rival submissions by counsel for the parties, we rush to point out that actually prior to the year 2009, the grant or otherwise of a prayer for stay of execution solely depended on case law. That includes the cases of **Tanzania Cotton Marketing Board v. Cogecot Cotton Co. SA** (supra) and **Geita Gold Mining Ltd v. Twalib Ally** (supra) authorities cited by Ms Kireithi. However, with the advent of the Tanzania Court of Appeal Rules, 2009, emphasis has shifted from case law and is placed on matters expressed under Rule 11 (2) (b) (c) and (d) thereof. That Rule provides that:-

*"(2) 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) .....

*(b) in any civil proceedings, where a notice of appeal has been lodged in accordance with Rule 83, an appeal, shall not operate as a stay of execution of the decree or order appealed from except so far as the High court or tribunal may order, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree or order; but the Court, may upon good cause shown, order stay of execution of such decree or order.*

*(c ) Where an application is made for stay of execution of an appealable decree or order before the expiration of the time allowed for appealing therefrom, the Court, may upon good cause shown, order the execution to be stayed.*

*(d) No order for stay of execution shall be made under this rule 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) 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."*

As aforesaid, the counsel for the first respondent submitted that the Court has not been properly moved because the applicant did not cite the sub-sections under clause (d) thereof. We hold firm that this aspect should not detain us. The reason is clear that as submitted by Ms Salah, the Court is properly moved by citing rule 11 (2) (b) (c) and (d) of the Rules without Romans (i) (ii) and (iii) under clause (d) because that clause does not move the Court, it merely lays down the necessary conditions to be fulfilled by the applicant in an endeavour to convince the Court to exercise its discretion, and that if they are not fulfilled, the Court will decline to grant the application. As such, this point is baseless.

To recap the position already explained above, Rule 11(2) (b) of the Rules, empowers the Court, in its absolute discretion, to order a stay of

execution of the decree or order appealed from if the following conditions are fulfilled by the applicant:-

- i. after the lodging of a Notice of Appeal in accordance with Rule 83,*
- ii. showing good cause, and*
- iii. complying with the provisions of item (d) of sub-rule 2.*

The immediate issue is whether the applicant in the present matter fulfilled these statutory requirements.

It is not in dispute that the applicant has already lodged the notice of appeal. There is similarly no controversy that the application has been made without unreasonable delay.

On whether or not sufficient cause has been shown, we agree with Ms Salah that since there is an allegation of illegality in the decision of the High Court which the applicant is intending to challenge on appeal, the applicant has shown good cause for the Court to consider the application. This is especially so after considering the grounds for illegality reproduced above.

We are fortified on this by the decision of the Court in **Mantrac Tanzania Ltd v. Raymond Costa**, Civil Application No. 11 of 2010 CAT (unreported) in which this point was clearly made. The Court stated in that regard that:-

*"We have carefully read the grounds upon which the challenge on the soundness of the judgments of the two courts below are based. We are not in a position now to say with any degree of certitude that they are far-fetched. What will happen, for instance, if the stay order is denied, execution of the decree carried out and the Court eventually reduces the quantum of damages awarded or allows the entire appeal? Won't that success prove to be nugatory? From the facts of this case, it is our respectful finding that that would be the case. This, then, is good cause for exercising our discretion in favour of the applicant, hoping that the appeal will be instituted without undue delay, if it is yet to be instituted. Given the current Court annual calendar arrangement, the appeal won't take long to be disposed of."*

We, once again agree with Ms Salah that the aspect of substantial loss is very clearly covered under paragraph 3 of the notice of motion and also paragraph 14 of the supporting affidavit. The applicant pressed that it will suffer substantial loss in its business if the stay order is not given. Paragraph 3 of the notice of motion provides:-

*"Substantial loss may result to the Applicant if the decree and the judgment is executed on the basis that;*

- a. The respondent's financial position is unknown therefore it is unknown whether the respondent has the financial means to reimburse the Applicant the decretal sum, if the Applicant's appeal is successful.*
- b. The amount awarded to the Respondent is an exorbitant sum of money."*

In view thereof, the respondent's allegation that the applicant did not cover that aspect is, *ipso facto*, unfounded.

Regarding the aspect of the security for due performance, we likewise concur with the learned counsel for the applicant that the same was also complied with under paragraph 5 of the notice of motion which reads:-

*"The applicant is willing and financially able to provide a bank guarantee as a security for the due performance of a Decree Order which may ultimately be binding on the applicant."*

We note that Ms Kireithi is challenging that aspect because it is in the nature of a promise. Her views are that the applicant ought to have proved before the Court that it has actually provided such bank guarantee and not a mere commitment to do so. With due respect, the law does not strictly demand that the said security must be given prior to the grant of the stay order – See the case of **Mantrac Tanzania Ltd v. Raymond Costa** (supra).

In that case, the applicant had committed itself to give security in the form of Bank Guarantee for a sum to be determined by this Honourable Court. The Court stated that:-

*"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 stay order provided the Court sets a reasonable time limit within which the applicant should give the same."*

Since we have showed that the applicant in our present matter had similarly undertaken to provide a Bank Guarantee as security for the due performance, we are, guided with the case above, of the opinion that the applicant has properly complied with the requirement of the law in that regard.

In conclusion, we allow the application. We order that the execution of the challenged High Court decree be stayed pending the determination of the applicant's appeal in this Court. However, this order is conditional upon

the applicant depositing the Bank's Guarantee covering the entire decretal amount within two (2) weeks of the delivery of this ruling.

**DATED at DAR ES SALAAM this 15<sup>th</sup> day of August, 2016.**

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

B.M.K. MMILLA  
**JUSTICE OF APPEAL**

R.E. MZIRAY  
**JUSTICE OF APPEAL**

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



  
E.F. FUSSI  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**