

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

(CORAM: MBAROUK, J.A., MUGASHA, J.A. And MWAMBEGELE, J.A.)

CIVIL APPLICATION NO. 336/ 01 OF 2017

AIRTEL TANZANIA LIMITED.....APPLICANT

VERSUS

OSE POWER SOLUTIONS.....RESPONDENT

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

(Teemba, J.)

dated the 14th day of July, 2017

in

Civil Case No. 40 of 2012

.....

RULING OF THE COURT

11th & 20th October, 2017

MUGASHA, J.A.:

The respondent successfully sued the applicant for the alleged breach of contract of supply of goods and services. The claim constituted Tshs. 1,920,998,317.79 and USD 143,484.72 being cost of goods supplied and services rendered and damages at a tune of Tshs.300,000,000/= for the alleged breach of contract. The applicant's counterclaim raised in the Written Statement of Defence was dismissed for alleged lack of proof and thus, judgment was entered in favour of the respondent who was granted Tshs.1,920,473,771.79 and USD

143,484.72 being costs of goods and services supplied and Tshs. 20,000,000/= as general damages.

The applicant was aggrieved by the judgment and decree of the High Court (Teemba, J.) dated the 14th July, 2017 in Civil Case No. 20 of 2011. She filed a Notice of Appeal on 21st July, 2017 and on 31st July, 2017, and, in order to forestall the execution of the decree, the applicant is presently seeking an order of this Court for stay of the execution pending the hearing and determination of the intended appeal.

The application is by notice of motion under certificate of urgency brought under Rule 11 (2) (b), (c), (d) and 48(1) and (2) of the Tanzania Court of Appeal Rules, 2009 (the Rules). The grounds stated in the notice of motion are as follows:

1. That applicant has already filed a Notice of Appeal against the decision of the High Court in Civil Case No. 40 of 2012.
2. The amount involved in the process is in excess of Tanzania 4,000,000,000 (Tshs, 4 Billion) which is a colossal sum hence substantial loss will be incurred if execution will not be stayed.
3. The applicant is committing itself that it has willingness to furnish any such non-cash security as may be ordered by the

Court in the form of a bank guarantee or any other form of security as may be ordered by the Court to guarantee due performance of the Decree sought to be stayed.

4. That in case execution is left to take place and the Applicant wins the appeal, it will be impossible for the applicant to recover the decretal amount from the respondent, because the respondent company does not have any capital, it has suffered massive losses and it does not have any business.
5. The application has been filed without undue delay the application having been filed within time.

The application is supported by the affidavit of **DAVID MARCO LEMA**. Documents accompanying the application comprise of a copy of impugned judgment, the decree intended to be appealed against, the notice of appeal and the applicant's letter addressed to the Deputy Registrar of High Court seeking to be supplied with certified copies of the proceedings, judgment and the decree for the purposes of the appeal.

The application is opposed through the affidavit in reply of **TITO ELISANTE KINGU**, the Managing Director of the Respondent Company.

Parties filed written submissions as required by Rule 106 (1) of the Rules to support arguments for and against the application.

At the hearing of the application, the applicant was represented by Dr. Alex Nguluma and Mr. Zephrine Galeba learned counsel whereas the respondent had the services of Mr. Francis Mgare, learned counsel.

The application was confronted by the preliminary point of objection which was however; withdrawn by the respondent's counsel who urged us to dispense with costs because intention to withdraw was prior brought to the attention of the applicant's counsel. As the withdrawal was not objected by the applicant, we acceded to it and marked the application withdrawn with an order that, costs abide in the resultant main cause.

In support of the application, Dr. Nguluma fully adopted the notice of motion, the accompanying affidavit as well as the written submissions. He submitted that, the applicant is entitled to the relief sought as it stands to suffer substantial loss if stay to execute a sum of Tshs. 4,000,000,000/= is not granted. He pointed out that, the applicant will be forced to sell its properties including: leases, communication towers and equipment and other machineries to be able to pay the decretal amount. He added that, the application was made without delay meeting the requirements of the law. Besides, the applicant is willing to furnish non-cash security in the form of bank or insurance guarantee for the due

performance of the decree. It was further submitted that, the financial capability of the respondent company is in doldrums having failed to get other businesses and it would thus be difficult to recover the decretal amount if the appeal sails through. To back his propositions the learned counsel relied on the cases of **NATIONAL HOUSING CORPORATION VS AC GOMES**, Civil Application No.133 of 2009 and **INTERGRATED PROPERTY INVESTMENTS (T) LIMITED AND TWO OTHERS VS THE COMPANY FOR HABITAT AND HOUSING IN AFRICA SHETREAFRIQUE**, Civil Application No. 162 of 2015 (both unreported).

On the other hand, Mr. Mgare submitted that, apart from the application meeting the test stated under Rule 11(2) (d) (i) to (iii) of the Rules, the applicant has not paraded good cause as required under Rule 11(2) (b) and (c) of the Rules. As such, the learned counsel viewed the balance of convenience to tilt in favour of the respondent. He added that, even if the applicant will be forced to sell its assets to satisfy the court decree that is an obvious consequence to befall the judgment debtor for failure to honour contractual obligations. Finally, the learned counsel challenged the applicant's attack on the respondent's financial capability arguing the same is not backed by tangible evidence. Thus, the learned counsel argued, the respondent is entitled to enjoy the fruits of the decree. To back his propositions, he cited to us the cases of

MANTRAC TANZANIA LTD VS RAYMOND COSTA , Civil Application No. 11 of 2010, **TANZANIA FISHING PROCESSOR LTD VS CHRISTOPHER LUHANYIKA**, Civil Application No. 13 of 2003 which was cited in the case of **UNIVERSITY COMPUTING CENTRE LTD VS OYSTERBAY HOSPITAL LTD**, Civil Application No. 106 of 2007(all unreported).

We have given due consideration to the arguments for and against the application. At the outset, we wish to point out that, the mandate of the Court to grant stay of execution of a decree or order upon good cause being shown is articulated under Rule 11(2) of the Rules which provides:

"11 (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 may-

(a) ... (Not relevant)

(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 there from, 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 a decree or order as may ultimately be binding upon him."

This current position of the law has been clearly stated in numerous decisions of this Court. For the purposes of the present matter we need to recite some of those decisions. In the case of **THEROD FREDRICK VS ABDUSAMADU SALIM** Civil Application No. 7 of 2012 (unreported) we said:

" 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 fulfill the following cumulative requirements:-

- 1. Lodging a Notice of Appeal in accordance with Rule 83;*
- 2. Showing good cause; and*
- 3. Complying with the requirements of item d (i) (ii) and (iii)."*

The essence of an application for stay to meet all the laid down conditions was emphasized in the case of **MTAKUJA KONDO AND OTHERS VS WENDO MALIKI**, Civil Application No. 74 of 2013 (unreported) in which we said:

" ... The conditions which applicants have to satisfy so as to be granted the order for stay of

*the execution are laid out in Rule 11(2) (b) (c) and (d). All conditions must be satisfied. The applicant must show the following: **a notice of appeal was given; they have sufficient cause for praying for the order for stay, the application was filed within time; they will suffer substantial loss if the order is not granted; and they have furnished security.***

[Emphasis supplied.]

The manner of furnishing security was addressed by the Court in **MANTRAC TANZANIA LTD VS RAYMOND COSTA** (supra) where this Court said:

*"That, the other condition is that the applicant for stay order must give security for due performance of the decree against him. To meet this condition, the law does not strictly demand the said security must be given prior to the grant of 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.**"*

[Emphasis supplied]

Where security is not furnished and in the absence of any such firm undertaking, settled law requires the Court not to grant stay of execution sought. (See **JORAMU BISWALO VS HAMIS RICHARD**, Civil Application No. 11 of 2013 (unreported)).

We fully subscribe to the foregoing position. We further clarify that, the three conditions stipulated under Rule 11(2) (d) (i) to (iii) of the Rules must be conjunctively not disjunctively satisfied before and order of stay is granted.(See **ARUSHA HARDWARE TRADERS LIMITED AND TWO OTHERS VS M/S EXIM BANK OF TANZANIA LIMITED**, Civil Application No. 38 of 2015 (unreported)).

We shall be guided by the stated principles in determining this application.

In view of the respective settled position of the law, the rivaling contentions basically hinge on whether or not the applicant has shown good cause to be entitled to what is sought.

In the motion at hand, the application for stay of execution was lodged without unreasonable delay on 31st July, 2017 that is, ten days after the notice of appeal was filed on 21st July, 2017. In paragraphs 6, 7 and 9 of the affidavit, the applicant has deposed among other things

that, if stay is not granted the respondent will execute the decretal amount of Tshs. 4 billion which is colossal and as such, the applicant will suffer substantial loss and be compelled to sell its assets to pay the decretal sum. Besides, the applicant is desirous of inquiring into the propriety or otherwise of the impugned decision. Moreover, in paragraph 11 of the affidavit, the applicant undertakes to deposit security in the form of Bank guarantee or insurance for the due performance of the decree as the Court may deem fit to order.

Apart from the respondent opposing the decretal sum not colossal because the respondent is entitled to enjoy the fruits of the decree, she has not contested the mode of security to be furnished by the applicant having deposed in the affidavit in reply that, cash or bank guarantee would be appropriate in case stay is granted. The respondent as well argued on the balance of convenience tilting in favour of the respondent and relied on **TANZANIA FISHING PROCESSORS LTD VS CHRISTOPHER LUHANYILA** (supra). With respect, this is no longer a condition under the Rules whereby the manner of protecting the rights of the decree holder and the judgment debtor is the condition requiring the applicant to furnish security for the due performance of the decree as may ultimately be binding upon him. This has been sufficiently

addressed by the applicant and it was not seriously contested by the respondent. While we are aware that the respondent is entitled to enjoy the fruits of its decree; however, the applicant has a statutory right of appeal towards which she has already commenced the process through the lodged notice of appeal which in our considered view constitutes good cause.

On the cumulative requirements of Rule 11(2) (d) (i) to (iii) of the Rules, we are satisfied that the decretal sum is colossal and loss may result if stay is not granted. On account of the fact that this application was lodged only ten days from lodging the notice of appeal, it is beyond question that it was instituted without delay. Finally, in the absence of any serious contest by the respondent, we are satisfied with the security given by the applicant for the due performance of the decree as may be ultimately binding on her.

In view of the aforesaid, the application is merited and it is hereby granted. We therefore, order stay of execution of the decree of Hon. Teemba, J. dated 14th July, 2017 in Civil Case No. 40 of 2012 on condition that, the applicant provides security by depositing in Court the bank guarantee at a sum of Tshs. 4,000,000,000/= within thirty (30) days from the date of this Ruling so as to assure the satisfaction of the

judgment and the decree in the event the appeal fails. We order costs be
in the main cause.

DATED at DAR-ES-SALAAM this 18th day of October, 2017.

M. S. MBAROUK
JUSTICE OF APPEAL

S. E. A. MUGASHA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

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



A.H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL