

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

(CORAM: LUANDA, J.A., MWARIJA, J.A. And MKUYE, J.A.)

CIVIL APPLICATION NO. 111 OF 2014

FARM EQUIPMENT COMPANY LIMITED APPLICANT

VERSUS

FESTO MKUTA MBUNZURESPONDENT

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

(Makaramba, J.)

**Dated the 2nd day of May, 2014
In
Commercial Case No. 137 of 2012**

RULING OF THE COURT

20th September, & 27th October, 2017

LUANDA, J.A.:

Before us is an application for stay of execution of a decree lodged by the above named applicant on 1/7/2014. It has been taken out under Rule 11(2) (b) (c) and (d) of the Court of Appeal Rules, 2009 (the Rules).

Briefly the background of the application as deponed by one Mr. Vivek Sheel, a Principal Officer of the applicant along with affidavit in reply of the respondent is to this effect.

Way back in November, 2012 the respondent, who was a businessman cum farmer, filed a suit in the High Court (Commercial Division) against the applicant jointly and together with one Ibrahim Yusuph Sanga (henceforth Sanga) for a breach of contract. The subject matter of the claim was that the two had sold him defective tractor make KUBOTA which was not new contrary to the agreement they had entered. The applicant was a dealer in farming equipments based in Dar Es Salaam; whereas Sanga who was trading as Lugano Stores was her agent at Rujewa within Mbarali District, Mbeya Region, the place where the said agreement was sealed. The respondent prayed that he either be given a new tractor in place of the defective one or he be refunded Tsh 50,000,000/= he had paid being the price of the tractor with interest, and other ancillary reliefs arising from the said contract.

It is further stated that on 20/2/2013 in terms of Rule 22 of the High Court (Commercial Division) Procedure Rules, 2012, default judgment was

entered against Sanga alone. The reason for doing so was that Sanga did not file his written Statement of defence. On the other hand as the applicant had not been served with summons by then, the High Court ordered that she be served.

On 19/11/2013 the respondent filed an amended plaint against the applicant as well as Sanga following an application to amend the same. The claim was Tsh. 1,300,000,000/= . However, on 2/5/2014 the trial High Court entered judgment to the tune of Tsh. 20,000,000/= against the applicant alone as general damages for loss of good will and loss of business opportunities.

The applicant is dissatisfied with the decision of the High Court handed down on 2/5/2014. She has lodged a notice of appeal on 12/5/2014 with a view to challenging that decision in this Court by way of an appeal. As institution of an appeal is not a bar to the execution of a decree, hence the application for stay of execution. However, the execution can be stayed pending hearing of the appeal if the intended appellant fulfils the following cumulative conditions as they are provided under Rule 11 (2) of the Rules, namely:-

- (i) the intended appellant to have lodged a notice of appeal as provided under Rule 83 of the Rules, and*
- (ii) he has to show there is good cause for doing so; and*
- (iii) to satisfy the Court that:-*
 - (a) he may suffer substantial loss if execution is not stayed and*
 - (b) the application has been made without unreasonable delay, and*
 - (c) that he has given security for the due performance of the decree.*

It is not in dispute in this application that the applicant had already filed a notice of appeal. The notice of appeal was filed on 12/5/2014 the 21st day after the delivery of judgment. In terms of Rule 83 of the Rules, the application was filed within the prescribed time of 30 days after the delivery of judgment. Further, this application for stay of execution was lodged on the 60th day, the last day of filing of such application vide item (c) of sub rule 2 of Rule 11 of the Rules. Like the notice of appeal, the application for stay of execution was filed within time. The applicant, therefore, fulfilled conditions (i) and (iii) (b) enumerated above.

Did the applicant fulfil the remaining conditions, namely good cause, substantial loss and security for due performance of the decree?

In this application, the applicant had the services of Mr. Jeremia Mtobesya learned Counsel; whereas the respondent was represented by Mr. Nduluma Majembe learned advocate.

In the notice of motion the grounds upon which the reliefs are sought read as follows:-

*"TAKE NOTICE that on the day of 2014 at O'clock in the morning/afternoon or as soon thereafter as he can be heard, **MR. ROSAN MBWAMBO**, Counsel for the above-named Applicant will move the Court for an Order that the execution of a Default Judgment and Decree of the High Court of Tanzania (Commercial Division), at Dar es Salaam [Hon. Makaramba, JJ] dated 2nd day of May, 2014 arising from Civil Case No. 137 of 2012 be stayed pending the hearing and final determination of an intended appeal against the whole of the said default judgment and decree on the following grounds:-*

1. *That the Respondent intends to execute the Decree against the Applicant and in the event the Decree is executed, the applicant will suffer substantial and irreparable loss;*
2. *That the balance of convenience, advantage, common sence and logic tilts in favour of granting the orders of stay of execution;*
3. *That the intended Appeal stands an overwhelming chance of success; and*
4. *That the Application has been made without undue delay."*

In his written submission, Mr. Mtobesya raised and discussed issues, save the issue of security for due performance of a decree, which to say the least is a hangover from the Old Court of Appeal Rules, 1979 which are no longer in use vide GN 368 published on 6/11/2009 and came into force on 1/2/2010.

The issues he had raised read as follows:-

"Honourable Justice of Appeal, from the facts material to the Application discerned from the Affidavit of VIVEK SHEEL the issues appearing to be

necessary for the Court's determination are, in the Applicant's view as follows:-

- (i) Whether or not the Applicant will suffer substantial and irreparable loss that cannot be atoned by way of monetary compensation if the execution proceeds.*
- (ii) Whether or not on the balance of convenience, advantage as well as common sense and logic it is just and fair that this Application be granted.*
- (iii) Whether or not the Judgment and Decree intended to be appealed against by the Applicant herein is tainted with irregularities and illegalities.*
- (iv) Whether or not there are overwhelming chances of success in the intended Appeal.*
- (v) Whether Security has been given by the Applicant for due performance of the decree."*

To our surprise Mr. Majembe did not point out that the issues raised and discussed by Mr. Mtobesya were no longer valid for an application for stay, following the coming into force of the new Court Rules, 2009 on

1/2/2010. The conditions for an application for stay of execution are as we had earlier on stated. In any case even the issue of security for due performance of a decree which was raised in the written submission was taken on board at the eleventh hour. It was neither stated in the notice of motion nor in the affidavit of Mr. Virek Sheel. We are of the considered view that the words "security has been given by the applicant for the due performance of a decree" as provided under Rule 11(2) (d) (iii) of the Rules in its plain meaning demands that security for due performance of a decree must have been given. If that has been done, then being a matter of fact, must be stated in the affidavit. The applicant may also undertake to give a security and in such a situation, he must state so in the notice of motion immediately after stating the prayers sought in the application. To indicate one's readiness to provide security for due performance of a decree in the submission is to go against the law because written submission consists basically of arguments.

In view of the foregoing, therefore, the applicant has failed to fulfil the three conditions of stay as we have stated above namely to show good cause, that she would suffer substantial loss and to give security for due performance of the decree. As the applicant has failed to meet the above

conditions which are condition precedent in granting an order of stay of execution, (conditio sine qua non) the application is dismissed. Since it is the Court which pointed out the shortcomings of the application, we award no costs.

It is so ordered

DATED at **DAR ES SALAAM** this 23rd day of October, 2017.

B. M. LUANDA
JUSTICE OF APPEAL

A. G. MWARIJA
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

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


E. Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL