

IN THE COURT OF APPEAL OF TANZANIA  
AT DAR ES SALAAM

(CORAM: MBAROUK, J.A., MMILLA, J.A., And LILA, J.A.)

CIVIL APPLICATION NO. 54/18 OF 2017

TANZANIA BUREAU OF STANDARDS .....APPLICANT

VERSUS

ANITA KAVEVA MARO ..... RESPONDENT

(Application of for stay of execution of the decision from the High  
Court of Tanzania (Labour Division) at Dar es Salaam)

(Mipawa, J.)

Dated 25<sup>th</sup> day of November, 2016

in

Revision No. 35 of 2016

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**RULING OF THE COURT**

15<sup>th</sup> & 25<sup>th</sup> May, 2017

**MBAROUK, J.A.:**

Aggrieved by the decision of the High Court of Tanzania (Labour Division) at Dar es Salaam (Mipawa, J.) dated 25<sup>th</sup> November, 2016 in Revision Application No. 35 of 2016, the applicant duly lodged a notice of appeal in terms of Rule 83 of the Tanzania Court of Appeal Rules, 2009 (the Rules) on 8<sup>th</sup> December, 2016. In the meantime, on 8<sup>th</sup> February, 2017, the applicant lodged this application by way of notice of motion in

terms of Rule 11(2) (b) of the Rules seeking for the order of this Court to stay the execution of the judgment and decree of the above mentioned case (Revision Application No. 35 of 2016). The notice of motion filed by the applicant is supported by an affidavit deponed by Baptister M. Bitahi, a Principal Legal Officer of the applicant.

In his notice of motion, the applicant has relied on the following grounds in seeking the stay of execution, namely:-

- (i) **THAT**, *the applicant has already lodged a notice of appeal to challenge the judgment in question.*
- (ii) **THAT**, *the respondent is now pursuing to execute the decree to which the applicant intend to appeal.*
- (iii) **THAT**, *the applicant has filed an application for leave to appeal to Court of Appeal which is now pending before the High Court of Tanzania (Labour Division) at Dar es Salaam.*
- (iv) **THAT**, *the amount intended for execution involve huge amount of money to which the*

*respondent being an ordinary employee would not be able to refund the same in case the intended appeal succeed.*

- (v) *And for an order that costs of an incidental to this application abide the results of the said intended appeal.*

In the affidavit in support of the notice of motion, we have found that the more relevant paragraphs therein were the last three, which read as follows:-

- " 5. **THAT** *the amount intended for execution involve extremely huge amount of money to which the respondent being an ordinary employee would not be able to refund the same in case the intended appeal succeed.*
6. **THAT** *unless the order prayed is granted, the intended appeal will be rendered nugatory.*
7. **THAT,** *in the event the execution proceeds, the respondent will suffer irrecoverable economic loss as a result thereof.*

In her affidavit in reply, the respondent strongly disputed the three main paragraphs deponed by the applicant's Principal Legal Officer and put him to strict proof thereof.

In this application, Mr. Killey Mwitasi, learned Senior State Attorney represented the applicant, whereas, Mr. Evold Mushi, learned advocate, represented the respondent.

At the hearing, Mr. Mwitasi prayed to adopt his written submissions filed earlier on in terms of Rule 106 (1) and (2) of the Rules. He also prayed to adopt the contents found in the affidavit in support of the notice of motion.

In his written submissions, the learned Senior State Attorney seems to have mainly relied upon the three issues mentioned in the affidavit in support of the application for determination in this application, namely:-

1. Whether its refusal is likely to cause substantial and irreparable injury to the applicant.
2. Whether the appeal has overwhelming chances of success.

3. Whether common sense and balance of convenience is in favour of the applicant.

In support of his submission, Mr. Mwitasi cited the decisions of this Court in **Ingazio Messina National Shipping Agencies v. Willow Investment & Costa Shinganya**, Civil Reference No. 8 of 1999 (unreported) as cited in the case of **SDV Transmi (Tanzania) Limited v. M/S STE DATCO** Civil Application No. 97 of 2004 (unreported). He submitted that, the cited decision is in support of the issue that, the Court will order a stay if refusal to do so would in the event the intended appeal succeeds, render the success nugatory.

Mr. Mwitasi also cited the decision of this Court in the case of **Ahmed Mbarak v. Mwananchi Engineering and Contracting Co. Ltd**, Civil Application No. 229 of 2014 (unreported), where he said that the Court interpreted the applicability and constitutionality of Rule 11(2) (b) and (c) of the Rules to mean that the executing court should not proceed with execution if there is a pending appeal on the same matter. He further submitted that, the Court went further to access the

constitutionality of Rule 11(2) (b) of the Rules which if it is allowed to be used as it stands, the same deprives the real meaning of the right of appeal as provided under Article 13(6) of the Constitution of the United Republic of Tanzania.

Mr. Mwitasi further cited the case of **Razia Jaffer Ali v. Ahmed Mohamed Ali Sewji & Five Others**, [2006] TLR 433, **Attorney General v. Mathias Ndyuki & Others**, Civil Appeal No. 32 of 2006 & **and Tanzania Electric Co. Ltd & Two Others v. Independent Power Tanzania Ltd Consolidated** Civil Application No. 17 and 27 of 1999 (both unreported) where the Court opined that, it would grant a stay if it is demonstrated that the intended appeal has a prima facie likelihood of success.

Having heard those submissions made by Mr. Mwitasi, the Court was forced to ask him as to whether he is aware of the conditions set for the Court to grant an order for stay of execution as stipulated in the current Tanzania Court of Appeal Rules, 2009 under Rule 11(2) (d) of the Rules, which specifically states as follows:

***"(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."* (Emphasis added).

We were forced to remind Mr. Mwitasi that unlike the position before the coming into force of the 2009 Rules, it is now settled that the preconditions stipulated under Rule 11 (2) (d) of the Rules must mandatorily be complied with cumulatively and not disjunctively before the Court grants a stay of execution order.

A plethora of authorities have elaborated the current position of the Court on the conditions precedent before it grants stay of execution. For example, see the decision of this Court in the case of **Ahmed Abdallah v. Maulid Athuman**, Civil Application No. 16 of 2012 (unreported) where the Court emphatically stated as follows:-

*"this Court in its recent decisions has taken a stance that the foregoing three preconditions stipulated under Rule 11 (2)(d) of the Rules, must be conjunctively and not disjunctively satisfied by the applicant before a stay of execution order can be granted. (See, for instance, Joseph Antony Soares @ Goha V. Hussein s/o Omary, Civil Application NO. 6 of 2012, Therod Fredrick v. Abdusamadu Salimu, Civil Application No. 7 of 2012 and Geita Gold Mining Limited v Twaib Ally, Civil Application No. 14 of 2012 , CAT" (all unreported). (Emphasis added).*



Looking at all the authorities relied upon by Mr. Mwitasi, we have found that with the exception of the case of **Ahmed Mbarak** (supra) all the remaining cases were in support of the position of granting an order of stay of execution before the coming into force of the Court of Appeal Rules, 2009. Whereas looking at the case of **Ahmed Mbarak** (supra), the Court seems to have just recommended by stating that:-

*"We also recommend to the Rules committee to harmonize article 13(6) (a) of the constitution with Rule 11(2) (b) of the Court of Appeal Rules."*

(Emphasis added).

At the time this Ruling of the Court was composed, our research found that the recommended harmonization was yet to be made. After all, we have found that observation made in the case of **Ahmed Mbarak** (supra) cited by Mr. Mwitasi was a mere orbiter dictum.

On his part, Mr. Mushi agreed with the contention raised by the Court and added that there is nothing found in the

affidavit in support of the application showing that the mandatory condition to provide security in terms of Rule 11(2)d(iii) of the Rules was undertaken by the applicant.

All said and done, in view of what we have endeavored to discuss above, and considering the current position of Rule 11(2) (d) of the Rules as the applicant has failed to comply with conditions cumulatively, we are obliged not to grant the order sought for stay of execution. Also considering the fact that Rules must be complied with and applied and as far as the same were not complied with, we therefore dismiss the application with no order as to costs as the issue was mainly raised by the Court.

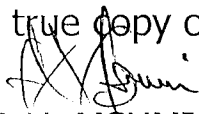
**DATED at DAR ES SALAAM** this 17<sup>th</sup> day of May, 2017.

M. S. MBAROUK  
**JUSTICE OF APPEAL**

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

S.A. LILA  
**JUSTICE OF APPEAL**

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

  
A.H. MSUMI  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**