

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MUGASHA, J.A., MZIRAY, J.A., And KWARIKO, J.A.)

CIVIL APPLICATION NO. 172 OF 2015

NATIONAL BANK OF COMMERCE LIMITED.....APPLICANT

VERSUS

ALFRED MWITA.....RESPONDENT

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

(Sheikh, J.)

dated the 18th day of September, 2014

in

Civil Case No. 287 of 2002

RULING OF THE COURT

27th August & 5th September, 2018

MUGASHA, J.A.:

The respondent successfully sued the applicant for damages for breach of contract resulted by the alleged applicant's negligence in allowing unlawful and unauthorized withdrawal of monies from the respondent's bank account without his instructions. In the wake of the alleged unauthorized withdrawals it was contended that, the respondent was suspected to be untrustworthy; subjected to

interrogations whereas his goodwill in business as he could no longer be trusted. Moreover, the respondent who contended to have imported goods from South Africa claimed to have failed to make timely payment of goods and was thus forced to pay taxes and additional charges since the applicant did not bother to make any intervention. The applicant emerged successful in a verdict pronounced on 18th August, 2014, and the trial court decreed in favour of the respondent as follows:-

- (a) General damages in the sum of Tshs. 50,000,000/=.
- (b) Interest at 5% per annum on the sum of tshs 4,500,000/= wrongly withdrawn from the plaintiff's savings account from 18/04/2002 to the date of its refund into the plaintiff's bank account on 10/06/2002.
- (c) Interest at the commercial rate of 5% on the total interest amount as stated in (b) from 10/06/2002 to the date of judgment.
- (d) Interest on the decretal amount at court rate (7%) from the date of judgment till payment in full.
- (e) The plaintiff will have his costs.

Aggrieved, on 24th September, 2014 the applicant lodged a Notice of Appeal to the Court. She as well successfully sought and obtained extension of time to apply for stay of execution and hence the present application. In the Notice of Motion the applicant is seeking for an order to stay the execution of the decree of the High Court upon following grounds:

1. The applicant intends to appeal against the decision of the High Court of Tanzania dated September, 18, 2014.
2. There is good cause to order stay of execution.
3. The application for stay has been made without unreasonable delay following the seeking and obtaining extension of time.
4. The applicant is willing and financially able to provide a bank guarantee as security for the due performance of such decree or order which may be ultimately binding on the applicant.

The application is supported by the affidavit sworn by **DESMOND ALEXANDER MALYI**, the applicant's legal counsel. The respondent challenged the application through his affidavit in reply sworn on 4th September, 2015. To buttress their arguments for and

against the application, parties filed written submissions as required by Rule 106(1) of the Tanzania Court of Appeal Rules, 2009 (the Rules).

At the hearing of the application the applicant was represented by Mr. Gasper Nyika, learned counsel whereas the respondent had the services of Mr. Francis Mgare, learned counsel.

Before determining the merits of the application, we had to determine the preliminary issues raised by respondent's advocate who challenged the propriety of the application on following aspects: **One** that, the omission of the middle name of the respondent in the present application is fatal rendering the application not competent. He relied on the case **CHRISTINA MRIMI VS COCACOLA KWANZA BOTTLES LIMITED**, EALR [2002] 2 EA. **Two**, that the affidavit in support bears erroneous date of filing the case which is a subject of the application. **Three**, the applicant's written submissions erroneously refer Mr. Nyika as deponent of the affidavit in support of the application instead of Mr. Desmond Alexander Malyi. **Four**, the applicant's written submissions wrongly mention the decree to be dated 20th August, 2015 instead of

18th September, 2014. As such, Mr. Mgare was of the view that, the cumulative effect of the pointed out errors vitiate the application and it is rendered not competent and he urged us to strike it out with costs.

On his part, Mr. Nyika submitted, that the omission to include the middle name of the respondent is a clerical error which is not fatal as the respondent has not been prejudiced in any way having managed to file an affidavit in reply, the written submissions in reply and entering appearance in Court. To back up his proposition he referred us to the case of **CRDB BANK LIMITED VS ISAACK B, MWAMASIKA AND TWO OTHERS**, Civil Appeal No, 139 of 2017 (unreported).

While Mr. Nyika conceded to the disparities appearing in the written submissions *vis a vis* the Notice of Motion, the affidavit in support in respect of the dates of filing civil case and the decree and the name of the deponent of the affidavit in support of the application, he argued that, those errors cannot defeat the Notice of Motion which is accompanied by requisite documents. He thus urged us to find the application competent and proceed to determine it on merit.

In our considered view, the complaint on missing middle name of the respondent in the Notice of Motion militates against him. We say so because he was not prevented from filing the affidavit in reply, the written submissions and entering appearance in Court. As such, we agree with Mr. Nyika that, the respondent was not prejudiced by the missing middle name. The case of **CHRISTINA MRIMI VS COCACOLA KWANZA BOTTLES LIMITED**, (supra) cited by Mr. Mgare, is no longer good law. Therein, the names of respondent were interchangeably referred to as "*Coca Cola Kwanza Bottles*" and *Coca Cola Kwanza Bottlers*". The Court initially struck out the appeal having declined to accept that those names referred to one and same entity. However, in **CHRISTINA MRIMI VS COCACOLA KWANZA BOTTLERS LIMITED**; Civil Application No.113 of 2011 (unreported) the Court reviewed and reversed earlier decision having accepted that after all there was no confusion over names because Coca Cola Kwanza was the only company in Tanzania which manufactured sprite, the drink that was subject of the tortious suit. Thus, the Court said:

"We are satisfied that it is just to correct the name of the respondent from Coca Cola Kwanza Bottlers to

Coca Cola Kwanza Ltd in the decision of the Court dated 19th February 2009 in Civil Appeal No 112 of 2008. The review is accordingly allowed."

The said decision was cited by the Court in the recent decision of the case of **CRDB BANK LIMITED Vs. MWAMASIKA** (supra) where the Court was confronted with a scenario where initials "D" and "G" in the name of the 3rd respondent were interchanged in the record of appeal. The Court concluded that, the inadvertence did not occasion any confusion as to the identity of the 3rd respondent, nor did it occasion any injustice to either party.

In the light of the stated position of the law, the inadvertently omitted middle name "Solobea" of the respondent has not occasioned confusion as to the identity of the respondent and neither has it occasioned injustice on his part.

We found the discrepancies in the written submission not vitiating the application considering that, the Notice of Motion is supported by an affidavit sworn by Mr. Desmond Alexander Malyi which is in accordance with the dictates of Rule 48 (1) of the Rules and it is

accompanied by a valid decree of the trial Court and a subject of the application for stay of execution.

We thus overrule the preliminary points raised by Mr. Mgare and proceed to determine the merits of the application.

At the hearing of the application, Mr. Gasper Nyika adopted the Notice of Motion, the accompanying affidavit and the written submission which basically hinge on four major grounds namely: **One**, the applicant has already lodged the Notice of Appeal to this Court; **Two**, the application for stay has been made without delay, **three**, if the decree is executed, the applicant is likely to suffer loss because the respondent is an individual with unknown financial means. **Four**, the applicant is willing to furnish security as may be ultimately binding for the due performance of the decree. He thus urged us to grant the application having relied on the cases of **EAST AFRICA DEVELOPMENT BANK VS BLUELINE ENTERPRISES LTD AND A.H.T MWAKYUSA (2005) TLR 203, UNIVERSITY COMPUTING CENTER LIMITED AND OYSTERBAY HOSPITAL LIMITED**, Civil Application No 107 of 2007 and **MANTRAC**

TANZANIA LIMITED AND RAYMOND COSTA, Civil Application No. 11 of 2010 (both unreported).

On the other hand, echoing what is contained in the affidavit in reply, Mr. Mgare submitted that, the applicant not likely to suffer loss if stay is not granted and if it is granted, it will inconvenience the respondent. He challenged the promised bank guarantee not sufficient in the absence of specified time to furnish the same. He challenged the application to have been filed late after expiry of 11 months from the date of impugned decision. He thus urged to dismiss the application having relied on the cases of **UNIVERSITY COMPUTING CENTRE VS OYSTERBAY HOSPITAL LTD** (supra), **MANTRAC TANZANIA LTD VS RAYMOND COSTA**, (supra), **TANZANIA FISHING PROCESS LTD VS CHRISTOPHER LUHANYILA**, Civil Application No 13 of 2003 (all unreported) and **TANZANIA POSTS TELECOMMUNICATIONS CORPORATION VS MS. BE HENRITA SUPPLIES** (1997) TLR 141.

Having carefully considered the submission of learned counsel, the issue for our determination is whether or not the applicant has fulfilled the conditions warranting the grant of the application.

The jurisdiction of the Court to determine the application for stay of execution is regulated by Rule 11 (2) (b), (c) and (d) (i), (ii) and (iii) of the Rules. In the case of **JOSEPH SOARES @ GOHA VS HUSSEIN OMARY**; Civil Application No. 12 of 2012 (unreported) the Court said:

"The Court no longer has the luxury of granting an order of stay of execution on such terms as the Court may think just; but it must find that the cumulative conditions enumerated in Rule 11(2)(b), (c) and (d) exist before granting the order. The conditions are:

- (i) Lodging 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."*

[See also the case of **JUMA HAMISI VS MWANAMKASI RAMADHANI**, Civil Application No. 34 of 2014 (unreported)].

To discern from the referred item (d) of sub rule 2, it is categorically provided therein that no order for stay of execution shall be granted unless the Court is satisfied that:-

- (i) substantial loss may result to the party applying for stay of execution unless the order is made;*
- (ii) the application is made without delay; and*
- (iii) security has been given by the applicant for the due performance of the decree or order as may ultimately be binding upon him/her."*

The modality of furnishing security was expounded by the Court in the case of **MANTRAC TANZANIA LTD VS RAYMOND COSTA**, Civil Application No. 11 of 2010 (unreported). Thus, the Court said:

*"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 the 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."

[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 the case of **JORAMU BISWALO VS HAMIS RICHARD**, Civil Application No.11 of 2013 (unreported)].

In the present application it is not in dispute that, it was brought without delay having been filed on 20th August, 2015 which is not beyond sixty (60) days after the applicant sought and obtained extension of time vide Civil Application No. Civil Application No. 226 of 2014 in which Mr. Mgare represented the respondent. As such, we are not in agreement with his assertion on the application being inordinately delayed.

The applicant also pressed that it will suffer substantial loss if stay order is not given. This is stated in para 8 (a) and (b) of the affidavit in support where it is deposed to the effect that: The sum of fifty million shillings awarded to the respondent is substantial and it is likely that,

the respondent with unknown financial position or business or assets which may be attached and sold to recover the amount may not be able to refund the amount in the event the appeal succeeds.

In response the respondent has deposed that the fear is unfounded and the grant of the stay order will adversely affect the respondent.

We are satisfied that, the decretal sum of more than Tshs. 50,000,000 is a colossal sum and if it falls in default as a result of the execution before the appeal is determined the loss is irremediable. As such, the applicant has on the balance of probabilities satisfied this requisite condition.

In paragraph 5 of the affidavit, the applicant specifically undertook to provide a bank guarantee as security for the due performance of the decree. This formal and firm commitment was not strongly opposed by the respondent who merely challenged its sufficiency and that it lacks specific time limit and we shall give it the consideration it deserves in our determination.

In view of what we have endeavoured to discuss, we are satisfied that the applicant has cumulatively satisfied all the statutory conditions warranting the ~~grant of stay~~ order. In the circumstances, we grant the application. We order that the execution of the impugned judgment be stayed pending determination of applicant's appeal in Court. The order is conditional upon the applicant depositing the Bank guarantee covering the entire decretal amount within thirty (30) days of the delivery of this Ruling. Costs be in the main event.

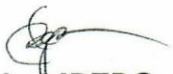
DATED at DAR ES SALAAM this 31st day of August, 2018.

S. E. A. MUGASHA
JUSTICE OF APPEAL

R. E. S. MZIRAY
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

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


B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL

