

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

(CORAM: MMILLA, J.A., MWARIJA, J.A. And MWANGESI, J.A.)

CIVIL APPLICATION NO. 384/20 OF 2017

ACCESS BANK LIMITED APPLICANT

VERSUS

COMMISSIONER GENERAL (TRA) RESPONDENT

**(An application for stay of execution from the judgment and decree of the
Tax Revenue Appeals Tribunal at Dar es Salaam)**

(Mjemmas, Chairperson)

Dated the 29th day of June, 2017

In

Tax Appeal No. 25 of 2015

RULING OF THE COURT

1st & 12th June, 2018

MMILLA, J.A.:

In this application, Access Bank Limited is requesting the Court to grant an order for stay of execution of the decree of the Tax Revenue Appeals Tribunal at Dar es Salaam dated 29.6.2017 in Tax Appeal No. 25 of 2015, pending the hearing and determination of the intended appeal, notice of which was lodged on 6.7.2017. The application is brought under Rule 11 (2) (b), (c), (d) (i), (ii), and (iii) of the Tanzania Court of Appeal Rules, 2009 (the Rules). It is supported by an affidavit sworn by Ms Grace

Joram Metta, the Principal Officer of the applicant company. On the day of hearing however, Ms Hadija Kinyaka, learned advocate, represented the applicant.

Though the notice of motion was served on the respondent, the Commissioner General Tanzania Revenue Authority, its responsible officers and/or counsel did not file any affidavit in reply. At a later stage however, they filed a document coined as "Arguments in reply". At the hearing Mr. Harold Gugami, learned advocate, appeared for them.

The undisputed facts in this case are that on 29.6.2012, the applicant was served with notice of assessment No. F. 420555555 and additional assessment No. F. 420700518, all of the year of income 2009. On 25.7.2013, the applicant raised an objection to that assessment. Among the grounds raised was the fact that the corporate tax assessment consisted of disallowed losses incurred by the former on borrowing costs (excluding interest expenses), officers tax provisions, impairment losses on loan, BB insurance expenses, provisions for bad and doubtful debts, and loss brought forward from the year of income tax 2008, in the sum of TAS 53,356,112, TAS 216,892,786.65, TAS 95,289,310.57, TAS 44,049,184, TAS 8,962,267.92 and TAS 1,195,109,270.25 respectively. The respondent

considered and determined the objection, whereupon it served the applicant with a notice of amended assessment on 27.1.2014. The applicant however, was still dissatisfied. Consequently, on 27.2.2014 she lodged an appeal with the Tax Revenue Appeals Board (the Board), and the statement of appeal whereof, was filed on 13.3.2014.

After considering the appeal before it, the Board delivered its judgment on 26.8.2014 and it dismissed the applicant's appeal. The Board found that the respondent was correct and justified to disallow the losses claimed by the applicant. Once again the applicant was aggrieved by that decision of the Board and appealed to the Tax Revenue Appeals Tribunal (the Tribunal).

In the decision rendered on 29.6.2015, the Tribunal upheld the decision of the Board and dismissed the said appeal. Undaunted, the applicant lodged a notice of appeal to the Court on 6.7.2015 vide which she intends to appeal against the decision of the Tribunal. The present application intends to prevent the process of execution during the pendency of the intended appeal.

The applicant's notice of motion has raised three grounds on the basis of which they seek the grant of the order for stay. Those grounds are

as follows; **one** that, the applicant stands to suffer substantial and irreparable financial loss if execution will not be stayed; **two** that, the appeal stands overwhelming chances of success on the issues, namely; the applicability and treatment of the law on impairment provisions *vis a vis* bad debts of a financial institution, Tribunal's wrong interpretation on the applicability of sections 18, 39 (d) and 25 (5) (a) and (b) of the Income Tax Act, 2004 in the circumstances of the present dispute, among others; and **three** that, the items under dispute are losses claimed by the applicant and disallowed by the respondent, therefore that even if the intended appeal will be determined in favour of the respondent, the applicant will not be in the tax paying position in the year of income 2009, hence no any danger of loss of revenue to the former in respect of the present dispute.

At the commencement of the hearing of this application, and upon the submission by Ms Kinyaka that she was ready to proceed, Mr. Gugami rose and prayed to abandon the said "Arguments in reply", and hastily added that they were not resisting the application. He however, urged the Court to make an order for the costs to be in the course.

On her part, Ms Kinyaka was delighted by Mr. Gugami's noble submission of no contest. She likewise shared the view that the Court makes an order that costs be in the course.

We desire to begin by re-stating the law that the power to grant or otherwise an order for stay of execution is discretionary as contemplated by the provisions of Rule 11 (2) of the Rules [before the 2017 Amendment thereof], provided the conditions stipulated under paragraph (d) (i) – (iii) of this Rule are satisfied. Our focus orbits on that aspect.

We have carefully considered the grounds raised in the notice of motion; the contents of the affidavit in support of the application; and the applicant's written submissions filed by their advocate in that regard. We have satisfied ourselves that all the conditions envisaged under Rule 11 (2) (d) (i) – (iii) of the Rules as aforesaid, have been complied with. It is vivid that the application has been filed without unreasonable delay, also that the applicant has demonstrated in the written submissions that they stand to suffer substantial and irreparable financial loss if execution will not be stayed. The applicant has similarly undertaken to give security for the performance of the decree as may ultimately be binding upon it.

On the basis of what we have explained above, and taking into consideration that the respondent did not resist the application, we find and hold that good cause has been shown to persuade us to grant the order sought. Consequently, we hereby grant the order for stay of execution as prayed on the condition that the applicant deposits the bank guarantee of the value equal to the decretal amount within a period of fourteen (14) days from the date of delivery of this ruling. Costs to be in the course.

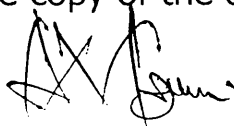
DATED at **DAR ES SALAAM** this 7th day of June, 2018.

B. M. MMILLA
JUSTICE OF APPEAL

A. G. MWARIJA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

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


A. H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL