

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

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

CIVIL APPLICATION NO. 488/15 OF 2017

(ZNZ CAT.SUB/REGISTRY NO. 7/2017)

DIAMOND TRUST BANK TANZANIA LIMITED.....APPLICANT

VERSUS

IDRISA SHEHE MOHAMED.....RESPONDENT

**(Application for stay of execution from the Judgment and
Decree of the High Court of Tanzania at Zanzibar)**

(Sepetu, J.)

dated the 11th day of July, 2017

in

Civil Case No. 31 of 2016

RULING OF THE COURT

30th October & 9th November, 2018

MZIRAY, J.A.:

The applicant, Diamond Trust Bank Tanzania Limited, a banking institution, through the services of Mr. Salim Mnkonge learned advocate, brought a notice of motion under a certificate of urgency, seeking to stay the execution of the judgment and decree of the High Court of Zanzibar in

Civil Case No. 31 of 2016 which was delivered on the 11th July, 2017 pending the determination of the intended appeal, the notice of which was lodged on 17th July, 2017. The affidavit of Mr. Ives Selengia Mlawi, the Company Secretary and the Senior Legal Manager of the applicant bank is in support of the application. To buttress the motion, the applicant has filed written submission in compliance with 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. Salim Mnkonje, learned counsel and on the part of the respondent had the services of Mr. Rajab Abdallah Rajab, learned counsel. The learned counsel for the applicant fully adopted the Notice of Motion as well as its accompanying affidavit. In conclusion, he prayed the Court to exercise its discretionary powers and grant the application for the reasons advanced in the Notice of Motion, the accompanying affidavit and the written submission.

The adopted documents are predicated upon four substantive grounds: **First**, that the applicant lodged a Notice of Appeal to this Court well within time and in accordance with rule 83; **second**, that the intended

appeal stand good chances of success; **third**, that the applicant will suffer substantial loss if the respondent executes the judgment and the decree of the High Court and; **fourth**, that the applicant at paragraph 26 of the supporting affidavit has undertaken to furnish security for the due performance of the decree.

On his part, Mr Rajab Abdallah Rajab, learned counsel resisted the application mainly contending that reasonable security for the due performance of the decree has not been specifically elaborated and this, according to him was in violation of Rule 11 (2) of the Rules.

In rejoinder, the applicant's counsel submitted that, even if the applicant has not amplified the nature of security, still, paragraph 26 of the applicant's affidavit is an expression of the applicant's readiness to deposit the required security.

This Court is endowed with powers to grant or refuse to stay execution pending appeal in terms of Rule 11 (2) (b), (c) and (d) of the Rules. Rule 11 (2) partly provides:-

"(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 the Court may:-

- a) N/A*
- 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 therefrom, 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 decree or order as may ultimately be binding upon him."*
- [Emphasis supplied].*

By virtue of Rule 11 (2) (b), the Court may in its absolute discretion order a stay of execution of the decree intended to be appealed against

upon being satisfied that the following pre-requisite conditions have been met by the applicant; namely:-

- (i) Lodging a notice of appeal under Rule 83,
- (ii) Showing good cause, and
- (iii) Complying with the conditions set out under item (d) of sub-Rule 2 of Rule 11.

(See the Court's decisions in **Mantrac Tanzania Ltd vs. Raymond Costa**, Civil Application No. 11 of 2010 and **Awiniel Mtui and Three Others vs. Stanley Ephata Kimambo**, Civil Application No. 7 of 2013, (both unreported)).

In the instant case, the judgment of the High Court was delivered on 11/7/2017 and the requisite notice of appeal was filed on 17/7/2017, which was within the time prescribed in the Rules. Further the application for stay was filed on 14/8/2017, within the prescribed sixty (60) days. The applicant has explained in his affidavit and written submission that if execution is effected before the application for stay of execution is determined, the execution would be unfair and unjust since the applicant

will suffer irreparable loss and a lot of hardship because the amount to be paid will interfere with the bank capital base and its operations. The other condition that the applicant must satisfy is to give security for the due performance of the decree. In this connection, the applicant at paragraph 26 of the supporting affidavit has specifically undertaken to give security for the due performance of the decree. Having complied with the above conditions, we are satisfied that the applicant has shown good cause to justify the Court to grant a stay order. The applicant's proposal to deposit security for due performance of the decree meets the condition precedent for the grant of stay order under rule 11(2) (d) of the Rules so as to ensure that the applicant does not suffer loss should the appeal succeed.

That said and done, we think, this is a fit case to grant a stay of execution. We therefore allow the application for stay of execution of the judgment and decree of the High Court of Zanzibar dated the 11th day of July, 2017 until the intended appeal before the Court of Appeal is disposed on merit. We further order the applicant to furnish security by way of a

bank guarantee in the sum which is equal to the decretal sum. Costs be in the cause.

Order accordingly.


DATED at **DAR ES SALAAM** this 6th day of November, 2018.

A. G. MWARIJA
JUSTICE OF APPEAL

R. E. S. MZIRAY
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

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


E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL