

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

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

CIVIL APPLICATION NO. 116/01 OF 2018

BRITAM INSURANCE (T) LIMITED APPLICANT

VERSUS

OCEANIC BAY HOTEL LIMITED RESPONDENT

**(Application for stay of execution of the judgment and decree of the High
Court of Tanzania**

at Dar es Salaam)

(Dyansobera, J.)

dated 3rd day of July, 2017

in

Civil Case No. 113 of 2010

RULING OF THE COURT

28th August & 13th September, 2018

MMILLA, J.A.:

This is an application for stay of execution. It is brought under Rule 11 (3) (4) and (5) (a), (b), (c) of the Tanzania Court of Appeal Rules, 2009 (the Rules) as amended by the Tanzania Court of Appeal (Amendment) Rules, 2017. It is supported by an affidavit sworn by one Venance Minja, said to be one of the applicant's legal counsel.

This application was prompted by an application for execution of the decree of the High Court of Tanzania, Dar es Salaam Registry, in Civil Case No. 113 of 2010, filed on 10.4.2018 by the respondent, Oceanic Bay Hotel Ltd., upon emerging the winner against the applicant, Britam Insurance (T) Ltd., formerly known as Real Insurance (T) Ltd. Before the High Court, the case had proceeded *ex parte* after the applicant's written statement of defence was expunged on the ground that it was filed out of time. The applicant was aggrieved; her advocate filed a notice of intention to appeal, and subsequently filed Civil Appeal No. 41 of 2018 which is pending before the Court.

Apart from the averment of imminent threat to execute the decree if no order for stay will be granted; the applicant's advocates have likewise stated in paragraph 8 of the accompanying affidavit, among other things, that the applicant stands to suffer irreparable loss if the decree will be executed to the extent and manner applied for involving a colossal amount of US\$ 8,664,361.00 equal to T.shs 20 billion. It is also contended that execution of that decree threatens a going concern of the company because the said amount will definitely affect the applicant company's minimum capital requirement of US\$ 936,161, similarly that there will be a

risk for the applicant company to be declared insolvent as a result of increased liabilities caused by the rise of reserves which have been made by it on outstanding claims. It is further stated that the execution threatens 39,831 other policy holders who entrusted the applicant by insuring various risks and medical health insurance. It is on this background that they are forced to seek for an order for stay of execution of the decree of that court in order to brave those risks.

On the date of hearing of this application on 28.8.2018, Mr. Oscar Msechu and Gaspar Nyika, learned advocates, represented the applicant company; whereas the respondent company enjoyed the services of Mr. James Bwana, learned advocate.

As it were, the application was faced with a preliminary obstacle in that on 30.5.2018, learned advocate Mr. Bwana filed a Notice of Preliminary Objection which raised a sole ground that the applicant had no legal standing in this application as it was not a party in Civil Case No. 113 of 2010. It was clarified that the record in Civil Case No. 113 of 2010 reflected the applicant's former name of Real Insurance (T) Ltd., whereas in the present application it has used its current name of Britam Insurance (T) Ltd. However, upon the Court referring him to the application for

execution which they filed in the High Court on 10.4.2018 (same appended to the present application) in which they cited the applicant's current name thereof, Mr. Bwana withdrew the said Notice of Preliminary Objection, thus paving way for the application to proceed on merit.

At the inception of hearing, Mr. Nyika urged the Court to adopt the Notice of Motion, the affidavit in support of the application and the written submission thereof.

At that juncture, Mr. Bwana rose to address the Court. After asking the Court to adopt their affidavit in reply, he informed it that he was not contesting the application. He nevertheless asked the Court to require the applicant to commit herself to the kind of security she intended to deposit in Court; whether it be a bank guarantee or deposit in cash, and to require them to observe punctuality in effecting the deposit as may be directed.

While appreciating his learned friend's consideration, Mr. Nyika requested the Court to allow the applicant to deposit a bank guarantee as security in the circumstances of this case.

We wish to begin by expressing the obvious that according to Rule 11 (5) (a) (b) and (c) of the Rules, an order for stay of execution will not

be granted unless the cumulative conditions enumerated thereunder exist.

Those conditions are as follows:-

- (a) That substantial loss may result to a party applying for stay of execution unless the order is made;
- (b) That the application has been made without delay; and
- (c) That security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him.

In the present application, basing on the Notice of Motion, the accompanying affidavit, and the written submission, these conditions have been cumulatively met. It is clear that the applicant lodged the notice of appeal in compliance with Rule 83 of the Rules which instructs it to be lodged within a period of 30 days. Also, this application was instituted without delay from the time the application for execution in the High Court came to their knowledge. Furthermore, apart from making an undertaking to provide security for due performance of such decree or order as may ultimately be binding upon her as required under sub-rule (5) (a) of Rule 11 of the Rules, the applicant has demonstrated that she stands to suffer substantial loss if the application is not granted.

In the final analysis, and since learned counsel Bwana declined to contest the application, we are persuaded that the application has merit and we grant it. We order that the execution of the assailed decree be stayed pending the determination of the applicant's appeal in this Court. This order is conditional upon the applicant depositing a Bank's Guarantee covering the entire decretal amount within a period 30 days counted from the date of delivery of this ruling.

We accordingly order.

DATED at DAR ES SALAAM this 10th day of September, 2018.

B. M. MMILLA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

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


S.J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL