IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MWARIJA, J.A. KWARIKO, J.A., And MWANDAMBO, J.A.)

CIVIL APPLICATION NO. 475/16 OF 2018

REGISTERED TRUSTEES OF JHPIEGO
(AN AFFILIATE OF JOHNS HOPKINS UNIVERSITY) ..... APPLICANT

VERSUS

LIAISON TANZANIA LIMITED ..... RESPONDENT

[Application for an order of stay of execution of the Decree of the High Court of Tanzania at Dar es Salaam]

(Sehel, J.)

Dated the 3rd day of August, 2018
in
Commercial Case No. 139 of 2016

.....

RULING OF THE COURT

19th June & 26th July, 2019

MWARIJA, J.A.:

The applicant herein, the Registered Trustees of JHPIEGO (an affiliate of Johns Hopkins University) has by a notice of motion filed on 18/10/2018, moved the Court to issue an order staying execution of the decree of the High Court of Tanzania (Commercial Division) arising from Commercial Case No. 139 of 2016.

The notice of motion was brought under Rules 11 (3) – (7) and 48 (1) of the Tanzania Court of Appeal Rules, 2009 as amended by the Tanzania Court of Appeal (Amendments) Rules, 2017 (hereinafter "the

Rules"). It is supported by an affidavit affirmed by Abdallah Mashausi, the Director of Finance and Operations of the applicant company.

In the case giving rise to the decree which is the subject matter of this application, the respondent, Liaison Tanzania Limited sued the applicant claiming for a total amount of Tzs 106,587.895.00 being an outstanding amount of premiums which the respondent alleged to be due to it by virtue of the service agreement between it and the applicant. According to the record, the agreement was based on a Group Life Assurance Policy Covers issued to the applicant. The respondent claimed that the applicant had refused to pay the premiums.

In its decision dated 3/8/2018, the trial Court found that the respondent had proved its claim. It ordered the applicant to pay the respondent the claimed amount of Tzs 106,587,895.00 as the value of the premiums due in respect of the Group Life Assurance Covers issued to the applicant. The respondent was also awarded interest and costs of the case.

The applicant was aggrieved by the decision of the trial court. As a result, on 13/8/2018, it lodged a notice of appeal and later instituted

Civil Appeal No. 183 of 2018. Subsequently on 18/10/2018, it filed this application.

At the hearing of the application, the applicant was represented by Mr. Lusiu Peter, learned counsel while Ms. Annette Kirethi, learned counsel appeared for the respondent. Mr. Peter who had earlier on 17/12/2018 filed his written submission in compliance with Rule 106 (1) of the Rules, made a brief oral submission highlighting the arguments he advanced in his written submission. He reiterated his contention that the applicant had complied with the requisite conditions for grant of a stay order as stipulated under Rule 11(3) and (5) (a) – (c) of the Rules as they stood at the time of filing the application.

Before the amendment of the Rules by GN No. 344 of 2019, those provisions stated as follows:-

"11 – (1) .....

(2) .....

(3) In any Civil proceedings, where 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 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."

4. ....

5. No order for stay of execution shall be made under this rule unless the Court is satisfied that:-

(a) substantial loss may result to the party applying for stay of execution unless the order is made;

(b) the application has been made without unreasonable delay; and

(c) security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him."

With regard to the conditions laid down under Rule 11 (5) of the Rules, starting with condition (a), Mr. Peter argued that the applicant will suffer substantial loss if execution is not stayed. He contended that the decretal amount of Tzs 164, 511,104.08 is a colossal sum which, if paid to the respondent before the appeal is determined, the projects of the applicant which are financed by American people through the

applicant will be disrupted. He stressed that the implementation of the projects which are aimed at providing health services to the people of Tanzania through the applicant, will be brought to stand still because their implementation depends on that money. Furthermore, according to the learned counsel, if execution is carried out before the appeal is determined, the applicant will suffer irreparable substantial loss because it will not only fail to finance its projects but it will also be difficult to recover the money in the event the appeal succeeds.

On condition (b), Mr. Peter submitted that, whereas the notice of execution was served on the applicant on 4/10/2018, this application was lodged on 18/10/2018 hence within the period of 14 days from the date of service of the notice of execution. In the circumstances, the learned counsel argued that the applicant has also complied with the provisions of Rule 11(4) of the Rules.

As for condition (c), the learned counsel submitted that, since in paragraph 12 of the supporting affidavit the applicant has undertaken to provide security as may be ordered by the Court, that condition has equally been complied with. To bolster his argument, he cited the case

of **Mantrac Tanzania Limited v. Raymond Costa**, Civil Application No. 11 of 2010 (unreported).

The applicant's submission was opposed by the respondent. In her reply submission which was filed in terms of Rule 106 (8) of the Rules, Ms. Kirethi argued that the applicant has not fulfilled the requirements stipulated under Rule 11 (3) and (5) of the Rules. In her oral submission in Court, she adopted the contents of the reply submission and the affidavit in reply sworn by one Okoth Oloo, the Principal Officer of the respondent company.

It was the learned counsel's argument that, from the contents of the notice of motion, the applicant has not shown that good cause exists for grant of the sought order. As for the conditions stipulated under Rule 11(5) of the Rules, starting with condition (a), Ms. Kirethi contended that the applicant has not shown that it will suffer substantial loss if the sought order is not granted. She relied on the case of **Tanzania Cotton Marketing Board v. Cogecot Cotton Co. S.A**. [1997] TLR 63 which requires a party seeking a stay order to satisfy the Court, by establishing beyond mere assertion, that it would suffer substantial loss. To do so, the learned counsel argued, the applicant must give details and

particulars of the anticipated loss. According to the learned counsel, the fact that the decree involves a colossal amount of money by itself does not constitute a reasonable cause. She argued that the applicant was required to show that the loss may not be atoned by way of an award or damages. In support of her argument, she cited the cases of **Tanzania Posts and Telecommunication Corporation v. Ms B.S. Henrita Supplies** [1997] TLR 141 and **Stanbic Bank Tanzania Ltd v. Plexus Cotton**, Civil Application No. 111 of 2006 (unreported).

On condition (c) which requires the applicant to give security for the due performance of the decree, Ms. Kirethi submitted that, since the nature of the security and the manner in which the same would be provided is not stated either in the supporting affidavit or the notice of motion, the applicant has failed to comply with that condition. Alternatively, relying on the case of **Africa Medical Investment Tanzania Public Ltd v. Nautej Singh Bains**, Civil Application No. 185 of 2014 (unreported), she submitted that in the event the Court finds that the condition has been met, the applicant should be ordered to deposit in Court the whole decretal amount.

From the submissions of the learned counsel for the parties, there is no dispute that this application was filed within time. It was lodged within the period of fourteen days from the date on which the applicant was served with a notice of execution of the decree. As submitted by Mr. Peter, whereas the notice of execution was served on the applicant on 4/10/2018, the application was filed on 18/10/2018. That fact was not disputed by the respondent. Obviously therefore, the applicant complied with condition (b) of Rule 11(5) of the Rules.

The learned advocates had however, competing arguments on whether or not the applicant has met the other two conditions under that Rule. In opposing the application, Ms. Kirethi started by arguing that the applicant has not shown a good cause for grant of the stay order. We are with respect, unable to agree with the learned counsel.

In the application, the applicant contended ***inter alia,*** that the impugned decision is tainted with illegalities. It contends also that if execution is not stayed and the appeal ultimately succeeds, that success will be rendered nugatory. These factors have been considered by the Court to constitute good cause for grant of an order staying execution of

a decree. For instance, in the case of **Mantrac Tanzania Limited** (supra), the Court observed as follows:-

> *"The Rule, does not explain what amounts to good cause. However, it is our firm belief that it is less exacting than* ***showing sufficient cause****.*
>
> *In cases of applications for extension of time under Rule 10 of the Rules, this Court has consistently held that illegality in the impugned judgment constitutes good cause for extending time, although bare claims that the intended appeal has overwhelming chances of success have not always been successful in persuading Court to grant a stay order."*

In that case, having read the grounds upon which the impugned decision was being challenged, the Court went on to state as follows:-

> *"We are not in a positon now to say with any degree of certitude that they are farfetched. What will happen, for instance, if the stay order is denied, execution of the decree carried out and the Court eventually reduces the quantum of damages awarded or allows the entire appeal? Won't that success prove to be nugatory? From the facts of the case, it is our respectful finding that that would be the case. This,*

then is good cause for exercising our discretion in favour of the applicant..."

In a similar vein, on the basis of the contents of the notice of motion and the supporting affidavit, we find that in the present case, a reasonable cause exists for grant of a stay order so that in the event the applicant succeeds in the appeal, its success is not rendered nugatory. It is instructive to add here that, following the amendment of the Rules by GN No. 362 of 2017, the provisions of Rule 11 (3) of the Rules which require establishment of a reasonable cause must be read together with Rule 11(5) which as stated above, sets out the requisite conditions for grant of a stay order.

That being the position, we turn to consider whether or not the applicant has complied with the conditions stipulated under sub-rule 5 of Rule 11 of the Rules. With regard to condition (a) which requires the applicant to show that it will suffer substantial loss if execution of the decree is not stayed, we are of the considered view that the applicant has gone beyond assertion of that fact. Mr. Peter has submitted that from the nature of the applicant's business, if execution is carried out and the decretal amount is paid to the respondent, the operations of the applicant's projects will be disrupted. There is not gainsaying that if that

happens, the loss of benefits which the public would have received in terms of health services will not be atoned by way of damages. For that reason, we find that condition (a) of Rule 11 (5) of the Rules has been complied with.

With regards to condition (a), we are equally of the view that the same has been complied with. The applicant has undertaken to provide security for the due performance of the decree. That undertaking is contained in ground 5 of the notice of motion and paragraph 12 of the supporting affidavit in which the Principal Officer of the applicant states as follows:-

> *"12. That I confirm and warrant that the Applicant is able to, and will, timely honour the decree in the event the appeal fails. In addition, the Applicant undertakes to furnish any such additional security as the court may deem fit to order for the due performance of the judgment and decree."*

A firm undertaking by an applicant to furnish security for the due performance of a decree constitutes sufficient compliance with condition (c) of Rule 11 (5) of the Rules. In the case of **Mantrac Tanzania Limited** (supra), the Court stated as follows as regards compliance with that requirement:-

> *"To meet this 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 stay order provided the Court sets a reasonable time limit within which the applicant should give the same."*

We wish to state at this point that, when the applicant makes a firm undertaking to furnish security, it is the Court which, depending on the particular circumstances of each case, determines the nature of the security and the manner in which the applicant is to provide it.

As stated above, Ms. Kirethi submitted in the alternative to her argument that in the event the Court finds that the undertaking by the applicant is sufficient compliance with the requirement of giving security, then it should order the applicant to deposit in Court the amount which is equal to the value of the decree. Indeed, that has been the practice because the purpose of giving security is to ensure that the decree holder does not fail to fully realize the decretal amount in the event the appeal fails.

Having found that the applicant has complied with the requisite conditions for grant of a stay order, the application is obviously meritorious. In the event, the same is hereby granted. It is hereby ordered that execution of the impugned decree of the High Court be stayed pending hearing and determination of Civil Appeal No. 183 of 2018. The order is conditional upon a deposit by the applicant in Court, of a bank guarantee in the sum of Tzs 164,511,104.08 within thirty (30) days from the date of delivery of this ruling.

Costs to abide the outcome of the appeal.

DATED at **DAR ES SALAAM** this 18th day of July, 2019.

A. G. MWARIJA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

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

B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL