

**IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA**

(CORAM: MWARIJA, J.A., KOROSSO, J.A., And KITUSI J.A.)

CIVIL APPLICATION NO. 427 OF 2018

**1. MWANZA REGIONAL CRIMES OFFICER]
2. SSP GOODLUCK MONGI]APPELICANTS
3. THE ATTORNEY GENERAL]**

VERSUS

PROTAS KASHUMBA.....RESPONDENT

(Arising from the Decision of the High Court of Tanzania at Mwanza)

(Mwangesi, J.)

Dated 11th day of June, 2015

in

Civil Case No. 19 of 2010

RULING OF THE COURT

5th & 8th November, 2019.

KITUSI, J.A.:

The respondent successfully sued the appellant before the High Court of Tanzania at Mwanza, for the tort of unlawful imprisonment, in Civil Case No. 19 of 2010, claiming Tshs. 300,000,000/= in damages. The Court awarded him Tshs. 15,000,000/=.

Aggrieved by the decision, the appellants took steps towards appealing and have instantly made this application for stay of execution

pending hearing and final determination of the intended appeal. The application is by Notice of Motion drawn under Rule 11(4) and (5) of the Tanzania Court of Appeal Rules as amended in 2017. (The Rules).

The application is supported by a joint affidavit taken by Ms. Bibiana Kileo, a State Attorney, as well as written and oral submissions. The respondent filed an affidavit in reply but did not file any written submissions. At the instance of the respondent we proceeded with the hearing even though the copy of the applicants written submissions was belatedly served on him.

At the hearing the applicants were represented by Ms. Subira Mwandambo, learned State Attorney, whereas the respondent appeared in person without legal representation. Ms Mwandambo briefly addressed the Court in elaboration of the written submissions pointing out that the application meets the conditions for a grant of stay of execution as stipulated under the Rules. It is submitted that if execution is not stayed and payment of Tshs. 15,000,000/= or execution of that decree is carried out, the applicants will suffer irreparable loss because the respondent, whose employment has come to an end and whose fixed abode is unknown, may not be able to refund the money in the event the appeal is

finally determined in favour of the applicants. She cited the case of **Tanzania Breweries Limited v. Antony Nyingi**, Civil Appeal No. 12 of 2014 (unreported). Further in their joint affidavit the applicants have undertaken to furnish security for the due performance of the decree in a form that may be directed by the Court.

The respondent was opposed to the application and prayer for stay of execution. He maintained that the applicants will not suffer any irreparable substantial loss if execution is left to proceed because they may eventually recover the money as he owns a house and he has fixed abode.

In an application like the present, our primary duty is to gauge if it meets the statutory requirements after which we may consider other factors such as the merits. In this application there is a Notice of Appeal in compliance with Rule 11(3) of the Rules, and there is a notice of execution as required by Rule 11(4) of the Rules, which was served on the applicants on 15th May, 2018. The application was filed timeously on 25th May, 2018 below the 14 days stipulated under the Rules. Lastly, in compliance with Rule 11(7) (a), (b), (c) and (d) the following documents have been attached; a copy of notice of appeal, a copy of the decree in Civil Case No. 19/2010, a copy of judgment in the Civil Case No. 19/2010 and notice of

execution. We are wholly satisfied that the applicants have crossed the thresholds and this paves the way for us to take a look into the merits.

To begin with, we take substantial loss to be a matter that has to be determined in a case to case basis depending on the circumstances. [See the case of **Zanzibar University Vs. Abdi A. Mwendambo & 2 others**, Civil Application No. 92/15 of 2018(unreported) where USD 10,346.80 was held to be colossal for an individual]. In this case the amount of Tshs. 15,000,000/= to an individual who has no known employment or business as source of income, is colossal such that it may not be possible for him to refund if the appeal is determined against him. On the other hand we entertain no doubt that the respondent's interests are secured by the applicants undertaking to furnish security. [See the case of **Africhick Hatchers Limited v. CRDB Bank PLC**, Civil Application No. 98 of 2010(unreported)]. On a balance, the respondent's stakes are more secured if execution is stayed than the applicants if execution is carried out.

In the end it is our conclusion that the applicants have made a case for issuance of the order of stay of execution because they have met the statutory conditions under Rule 11 of the Rules and that the scale is in

favour of the applicants who may suffer substantial loss if execution is not stayed. Consequently we order stay of execution of the decree in Civil Case No. 19 of 2010 High Court at Mwanza, pending hearing and final determination of the intended appeal. This order is conditional upon the applicants furnishing in Court a banker's guarantee, for the decretal amount, within sixty (60) days of the delivery of this order.

It is so ordered.

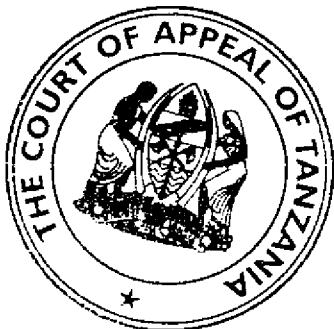
DATED at **MWANZA** this 7th day of November, 2019.

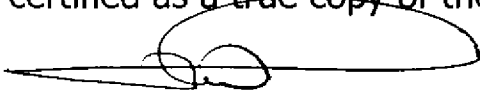
A. G. MWARIJA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

The Judgment delivered this 6th day of November, 2019 in absent by Notice for the Respondent and Ms. Subira Mwandambo learned State Attorney for the Applicant is hereby certified as a true copy of the original.




J. E. Fovo
DEPUTY REGISTRAR
COURT OF APPEAL