IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: LILA, J.A., MKUYE, J.A., And NDIKA, J.A.)

CIVIL APPLICATION NO. 172/01 OF 2019

MIC TANZANIA LIMITED.....APPLICANT

VERSUS

CXC AFRICA LIMITED .....RESPONDENT

(Application for stay of execution of the Judgment and Decree of the High Court of Tanzania at Dar es Salaam

(Mwandambo, J.)

dated 10th day of November, 2017
in
Civil Case No. 104 of 2011

JUDGMENT OF THE COURT

1st & 15th October, 2019

LILA, J.A.:

MIC TANZANIA LIMITED, the applicant, is seeking an order for stay of execution of the decree of the High Court in Civil Case No. 104 of 2011 which was rendered on 10/11/2017. In that case, CXC AFRICA LIMITED, the respondent, successfully sued the applicant for breach of contract and the applicant was condemned to pay general damages to the tune of TZS 90 Million and interests thereon at the court's rate of 7% per annum from the date of judgment to the date of full payment. Aggrieved, the applicant

lodged a notice of intention to appeal on 8/12/2017 seeking to challenge the aforesaid decision. While waiting for the appeal to be heard and determined, the applicant was served with an application for execution of the decree (Execution No. 26 of 2019) which was lodged on 12/4/2019. The modes of execution preferred by the respondent was delivery of the decreed sum or garnishee order absolute against the applicant's bank account and in the event the two modes fail, by arrest and detention in prison of the Directors of the Judgment Debtor as civil prisoners until the decree is fully satisfied.

Initiation of the execution proceedings by the respondent, prompted the institution of the present application by the applicant under Rule 11(3),(4),(5)(a)-(c),(6),(7)(b)(c) and Rule 48 of the Tanzania Court of Appeal Rules, 2009, Government Notice No.368 of 2009 as amended by the Tanzania Court of Appeal (Amendments) Rules, 2017 (Government Notice No. 362 of 2017) (the Rules). The application, which is supported by an affidavit sworn by the Principal Officer of the Applicant Company one Kay Ngalomba, is based on the following grounds:-

(i) That the applicant shall suffer substantial and irreparable loss that cannot be atoned by way of monetary compensation unless the order for stay is made;

(ii) That this application has been made timely and without unreasonable delay;

(iii) The applicant is willing to furnish necessary security for performance of the decree pending hearing of the intended appeal should this Honourable Court find it appropriate;

(iv) That balance of convenience, common sense and logic tilts in favour of granting stay."

Mr. Rosan Mbwambo and Mr. Mohamed Tibanyendera, learned advocates, appeared before us at the hearing of the application for and on behalf of the applicant and respondent, respectively.

It is worth noting at the outset that the respondent, despite being duly served with the notice of motion and the supporting affidavit, did not file a reply affidavit to controvert the factual averments in the affidavit in support of the application. Mr. Tibanyendera attributed that with the carelessness of the clerk of his own office who, instead of lodging the same in the Court's registry, filed the same in the High Court registry. On this,

we need not waste much of our time but out rightly underscore the legal consequences accruing from such inaction as we amply elaborated in our decision in the case of **Fweda Mwanajoma and Another vs. Republic**, Criminal Appeal No. 174 of 2004 (unreported) and followed in the recent case of **Irene Temu vs. Ngasa M. Dindi and Two Others**, Civil Application No. 278/17 of 2017 that, save for legal matters, the factual matters deposed in the affidavit are taken not to have been disputed. For certainty, this is what we said:-

> *"...What is worse in this case was that the appellants had advanced their reasons by way of affidavit. This was not opposed by any counter affidavit as should have been the case, but from the bar by the State Attorney furnishing different reason altogether. The High Court Judge fell into the trap and made a fatal error that is now justifiably being complained against."*
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> [See also **Jonas Betwel Temba vs. Paul Kisamo & Anor**, Civil Application No. 10 of 2013 (unreported)]"

Meanwhile, we shall stop here and reserve the rest to a later stage.

Amplifying on the grounds upon which this application is based, Mr. Mbwambo, briefly argued that after filing the notice of appeal, the applicant has met all the requisite considerations for grant of a stay order. He made reference to the applicant's averments in the affidavit which he fully adopted as part of his submissions, particularly paragraphs 11, 12, 13 and 14 which he said clearly indicate that the applicant stands to suffer irreparable loss which cannot be atoned by way of monetary compensation as the respondent has no known fixed/ immovable assets hence in the event the appeal succeeds, the applicant will not recover the money, the applicant is a reputable company able to satisfy the decree once it becomes binding on him and the application has been made without unreasonable delay. In addition, Mr. Mbwambo argued that under paragraph 14 of the affidavit, the applicant has made a firm undertaking to furnish security as will be determined by the Court for the due performance of the decree the execution proceedings of which has already been initiated by the respondent.

In opposition to the application, Mr. Tibanyendera's arguments were threefold. First, he contended that the applicant has not managed to

establish that he has good cause to apply for a stay order in terms of Rule 11(5) of the Rules. According to him, about two years lapsed from the date the applicant was served with requisite documents for appealing without lodging the appeal but filed the present application seeking for stay of execution. That laxity should be interpreted as constituting no good cause of action, he insisted even when his attention was drawn to the requirements for grant of the order sought in this application. Secondly, he asserted that the averments in the affidavit are insufficient to establish that the applicant will suffer substantial loss if the order for stay is not made. In bolstering his assertion he referred us to the Court's decision in the case of **Nicholas Nere Lekule vs. Independent Power (T) Ltd and Another** [1997] TLR 58 in which the Court said the loss had to be of an irreparable nature which could not be adequately compensated by way of damages. In his view, the averments in the applicant's affidavit fell short of establishing so. He further made reference to the case of **Tanzania Cotton Marketing Board vs. Cogecot Cotton Co SA** [1997] TLR 63 in which it was insisted that the applicant should provide details and particulars of the loss to be suffered instead of making vague and generalized assertions of substantial loss as the applicant did herein. Arguing in respect of security

which actually formed his third reason for resisting the application, Mr. Tibanyendera said that the applicant's assertion that he is a reputable company and capable of satisfying the decree at any time it would be binding on him is not good reason for the grant of the order for stay but is a sufficient testament that he stands not to suffer substantial loss. To cement his argument, he cited to us the case of **Tanzania Posts & Telecommunications Corporation vs. M/S B. S. Henrita Suppliers** [1997] TLR 141. In all, he urged the Court to disallow the application. That notwithstanding, Mr. Tibanyendera, hurriedly asked the Court, in the event the application is granted, to order a deposit in Court of an amount able to satisfy the decree in case the appeal fails.

In his short rejoinder, Mr. Mbwambo, apart from urging the Court not to order deposit of cash money as security for the due performance of the decree but make an order to deposit a bank guarantee of the sum decreed, he reiterated his earlier arguments.

We have given due consideration to the applicant's averments in his notice of motion and founding affidavit and the arguments before us by counsel for the parties. We have indicated that the present application was

predicated on the Tanzania Court of Appeal Rules, 2009 as was amended by Government Notice No. 362 of 2017. But, it manifest that the application was filed in Court on 10/5/2019 which is after the amendments of the Tanzania Court of Appeal Rules, 2009 by the Tanzania Court of Appeal (Amendment) Rules Government Notice No. 344 of 2019 which was published on26/4/2019. That error, invoking the overriding objective principle, is not fatal. Following such amendments, the law on the requirements for the grant of a stay order in civil matters has substantially changed. The requirements are now stipulated under Rule 11(3),(4), (5)(a)(b) and (7)(a)(b)(c)(d) of the Rules. The said provisions state:-

> *"(3) In any civil proceedings, where the 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 the decree be stayed by reason of 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) An application for stay of execution shall be made within fourteen days of the service of the notice of execution on the applicant by the executing officer or from the date he is otherwise made aware of the existence of an application for execution.

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

(7) An application for stay of execution shall be accompanied by copies of the following-

(a) notice of appeal;

(b) decree or order appealed from;

(c) judgment or ruling appealed from; and

(d) notice of the intended execution if any."

It is now clear, therefore, that for the Court to grant an order for stay of execution the following four conditions must cumulatively be met. These conditions are:-

1. Lodging a notice of appeal in accordance with rule 83;
2. That substantial loss may result to the party applying for stay of execution unless the order is made;

3. That security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him.
4. That the application is made within fourteen days of service of the notice of execution on the applicant by the executing officer or from the date he is otherwise made aware of the existence of an application for execution.

We are, however, alive of the legal position we set prior to the amendment of the Rules in the case of **Mantrac Tanzania Ltd vs. Raymond Costa,** Civil Application No.11 of 2010 (unreported) that even a firm undertaking by the applicant to furnish security is sufficient compliance with the requirement to furnish security. Given the nature of the amendments done and the relevant provision having been maintained, that position, in our view, was not changed. It, instead, survived the amendments and it is therefore still good law.

Presumably aware of the above legal position on the grant of a stay order, Mr. Mbwambo was very brief but to the point when arguing in support of the application. As demonstrated above, he was firm that the

application has met all the requirements by indicating that the applicant had already lodged a notice of appeal, that it stands to suffer substantial loss if the order of stay is not made and that it is ready to furnish security as will directed by the Court. Mr. Tibanyendera vehemently disputed those contentions fronting a tripartite set of reasons; first, that no good cause have been shown following a delay of two years to file an appeal after the applicant was served with the requisite appeal documents by the court, it has not been established that the loss will amount to irreparable loss and the same was not detailed and particularised enough, and, third, that the mere assertion by the applicant that he is able to furnish security is insufficient to move the Court to grant the order sought and that the respondent is also able to do so.

We wish to start with Mr. Tibanyendera's contention that the applicant has not shown good cause to warrant a grant of a stay order due to the delay exhibited by the applicant to lodge an appeal despite being served with the necessary appeal documents. With respect, we wish to remind him that the time limit for filling an application of this nature is well spelt in the cited Rule 11(4) of the Rules. Mr. Tibanyendera did not raise issue that the present application was lodged outside the prescribed time.

Consequently the delay in lodging an appeal is not a relevant factor to be considered in the determination of the present application. Neither can it be taken to be evidence of lack of good cause. Since the applicant has shown that he is aggrieved by the High Court decision and has lodged a notice of appeal to challenge that decision that is sufficient good cause for seeking an order for stay of execution.

With regard to substantial loss, we wish to reiterate our stance in the case of **Tanzania Cotton Marketing board vs. Cogecot Cotton Co SA** (supra) that granting of a stay order is a matter of discretion which is to be exercised on common sense and balance of advantage basis. In that regard, in deciding whether to order a stay, the Court should essentially weigh the pros and cons of granting or not granting the order (see **Global Tours & Travels Limited**; Nairobi HC, Winding-up Cause No. 43 of 2000). In the instant application, the applicant has firmly stated in the founding affidavit that he stands to suffer substantial loss if execution is to proceed and the money is paid to the respondent who has no known fixed or immovable asset. Unlike in a declaratory decree such as in ownership of a landed property of which its execution may result into eviction hence cause both social, psychological and economic hardships which may be

detailed and particularised, in money decrees parting with money without any assurance of easy and quick recovery is sufficient detail of the substantial loss to be suffered. This being a money decree, we think, no more details and particularisation is needed. All the same, the fact that the applicant stands to suffer substantial loss has not been controverted by the respondent through a reply affidavit. In the authority of **Fweda Mwanajoma & Anor vs. Republic** (supra) it is accordingly deemed to have been conceded.

We have taken note of Mr. Tibanyendera's assertion that even the respondent is able to repay the decreed sum in the event the decree is overturned hence the applicant will not suffer substantial loss. While we fully appreciate that the respondent is legally not obliged to furnish security, but so as to controvert the applicant's assertion in the founding affidavit that the respondent is unable to make good of the decreed sum paid to him after execution, that averment ought to be made in the affidavit in reply for its merits to be considered by the Court. Unfortunately, in the present case, that was a counsel's statement made from the bar. We cannot act on it. It deserves to be ignored. We are reinforced in that position by our finding in the case of **Fweda Mwamajoma & Anor vs.**

Republic (supra) and also by seeking inspiration from our finding in the case of **Alex Siriamara Machare & Two Others vs. Bryson Nalogwa Kituly**, Civil Application No. 3 of 2016 (unreported) in which the Court after making reference to the case of **Farm Equipment Company Limited vs. Festo Mkuta Mbuzu**, Civil Application No. 111 of 2014 (unreported) stated that:-

> *"In the particular circumstances of the present case however, we agree with Mr. Mpoki that* ***since the undertaking came from the counsel's statement made from the bar, the same cannot be taken to amount to a firm undertaking on the applicants."***
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> (Emphasis added).

In view of the above legal position, had the respondent intended to controvert the applicants factual assertion in the founding affidavit in that respect then he ought to have had filled a reply affidavit. Otherwise he cannot be heard asserting otherwise by making such a statement from the bar. We accordingly ignore that argument.

Lastly, we will consider the issue of furnishing security. As the provisions of Rule 11(5)(6) of the Rules clearly provide and as we restated in the case of **Mantrac Tanzania Ltd vs. Raymond Costa** (supra), a firm undertaking to furnish security for the due performance of the decree is sufficient compliance with the requirement of the law, we are inclined to agree with Mr. Mbwambo that the applicant has firmly committed itself to do so in the founding affidavit in support of the application. Even before us Mr. Mbwambo relayed to the Court the applicant's readiness to deposit with the Court a bank guarantee of the sum equal to the decreed amount. We think that is a serious commitment and a bank guarantee is sufficient assurance to the respondent that the decree would be satisfied as and when the appeal would be unsuccessful.

All said, we are satisfied that the application has met all the imperative considerations for the grant of an order for stay of execution. The application is hereby granted. The judgment and decree of the High Court in Civil Case No. 104 of 2011 is hereby stayed upon a condition that the applicant furnishes the Court with a bank guarantee of the sum of Tanzania Shillings Ninety Million (TZS. 90,000,000/=) within a period of

fourty five (45) days of the date of this ruling. Costs shall abide the outcome of the appeal.

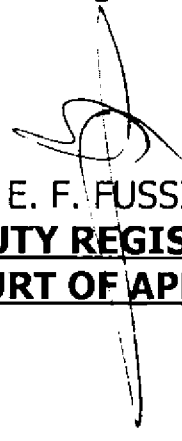
DATED at **DAR ES SALAAM** this 4th day of October, 2019.

S. A. LILA
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

The Judgment delivered this 15th day of October, 2019 in the presence of Mr. Mohamed Tibanyendera, learned counsel for the respondent and Mr. Rosan Mbwambo, learned advocate for the applicant is hereby certified as a true copy of the original.



E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL