

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

(CORAM: MWANGESI, J.A, SEHEL, J.A., And KITUSI, J.A.)

CIVIL APPLICATION NO. 394/11 OF 2018

MOHAMED ENTERPRISES (T) LTD..... APPLICANT

VERSUS

MUSSA SHABAN CHEKECHEA RESPONDENT

**(An Application for stay of execution of the decision of the High Court of
Tanzania at Tabora)**

(Mkasimongwa, J)

**Dated 27th day of October, 2014
in**

Civil Case No. 6 of 2009

RULING OF THE COURT

18th Sept & 24th October, 2019

SEHEL, J.A

This is a ruling on an application for stay of execution. The applicant has brought a notice of motion supported by an affidavit sworn by Dr. Masumbuko Roman Mahunga Lamwai, learned advocate for the applicant, seeking to stay execution of the decree of the High Court of Tanzania at Tabora (Mkasimongwa, J) dated 27th day of October, 2014 in Civil Case No. 6 of 2009. The grounds stated in the notice of motion are that:

"The appeal has very good chances of success since the decision is problematic and illegal, and that the execution of the decree will render the intended appeal nugatory and that the respondent does not have the means to refund the money if the appeal succeeds while he is guaranteed to get his money since the decretal amount is deposited into court."

The application is made under rule 11 (3), (4), (5) (a), (b), and (c) of the Court of Appeal Rules of 2009 (the Rules). The applicant has also filed written submissions to support the application.

On the other hand, the respondent filed affidavit in reply and written submissions to oppose it. In his affidavit in reply, the respondent deposed that he is entitled to the fruits of his decree as given by the High Court as such if stay is granted the applicant stands to suffer financial problems including loss of value of the original decree.

The chronological events regarding the present application are captured in the affidavit in support of the application that the judgment and decree was entered against the applicant in Civil Case No. 6 of 2009.

Dissatisfied with the outcome, the applicant filed a notice of appeal followed by lodging Civil Appeal No. 64 of 2015. The applicant also sought and obtained an order of stay of execution of the decree in Civil Case No. 6 of 2009 with a condition of depositing cash in court of the decretal sum of TZS. 100,000,000.00. The applicant made that deposit. Unfortunately, the Civil Appeal No. 64 of 2015 was struck out on a ground that the respondent was not properly served. Consequently, the order of stay also went away with the striking out of the appeal. The applicant made efforts to resuscitate the appeal. Thus, Civil Appeal No. 51 of 2018 was filed against the same decree and now the applicant is before this Court seeking an order of stay of execution.

At the hearing of the application, Dr. Masumbuko Lamwai and Mr. Revocatus Mugaya Mtaki, learned advocates represented the applicant and the respondent, respectively.

Arguing the application, Dr. Lamwai first adopted the notice of motion, affidavit in support and written submissions of which he submitted that they lucidly explained the grounds and basis of the application. He however, wished to highlight a few things. First, he said the application in

respect of the decree sought to be stayed is not new application because a similar application was made and a stay order was granted by this Court with condition for deposit of TZS. 100 million as security for due performance of the decree of which the applicant did comply. Secondly, the application was made timely. It was made after receipt of notice of execution. Thirdly, the deposit made in Civil Application No. 6 of 2014 is still with the Court. Regarding the respondent's reply in his affidavit that he is entitled to the fruits of his decree, Dr. Lamwai contended that the respondent has failed to state on how he would refund the money if applicant's appeal succeeds. He pointed out that this Court in its earlier decision in Civil Application No. 6 of 2014 at page 7 noted that the amount involved in the decretal sum is colossal as such "the likelihood of substantial loss is real". In sum, Dr. Lamwai urged for the application to be granted without costs.

In reply, Mr. Mtaki initially submitted that the applicant did not satisfy all the conditions set under rule 11 (5) (a) to (c) of the Rules. In trying to show that the applicant has failed to satisfy the condition that it will suffer substantial loss, he contended that the applicant did not elaborate on the

substantial loss and that it neither mentioned it in the affidavit nor in the notice of motion. On delay, he pointed out that the second appeal was filed on 3rd March, 2018 while the present application was filed on 24th August, 2018 after a lapse of almost five months. Thus, to Mr. Mtaki's view the application was belatedly made. On security for due performance, he acknowledged that the applicant has satisfied the condition because there is already a deposit with the Court but he stressed that the value of money decreed is depreciating.

When Mr. Mtaki was reminded on sub-rule (4) of rule 11 of the Rules as amended by G.N. No. 362 of 2017 that requires for the application to be made within fourteen days of service of notice of execution, he changed his mind and conceded to the grant of the application.

It is clearly provided under rule 11 (3) of the Rules that the Court has discretionary powers to grant stay of execution of a decree or order, upon good cause being shown by the applicant who has lodged a notice of appeal. That rule provides:

"11 (3)- 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 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."

Apart from lodging the notice of appeal and showing good cause, the applicant must also satisfy cumulatively the conditions stated under rule 11 (4); (5); and (7) of the Rules that:

*"11 (4)- An application for stay of execution **shall be made within fourteen days of service of the notice** 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) 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 orders as may ultimately be binding upon him.*
- (6) not applicable*
- (7) An application for stay execution shall be accompanied by:-*
 - (a) A copy of a notice of appeal;*
 - (b) A decree or order appealed from;*
 - (c) A judgment; and*
 - (d) A copy of a notice of the intended execution."*

In the case of **Britam Insurance (T) Limited v. Oceanic Bay Hotel Limited**, Civil Application No. 116/01 of 2018 (unreported) this Court restated the conditions to be satisfied by the applicant thus:

"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 there under 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."

Further in **B.R Shindika t/a Stella Secondary School v. Kihonda Pitsa Makaroni Industries Ltd**, Civil Application No. 269 of 2015 (unreported) the Court observed that:

"In all, it is undisputed that the applications for stay of execution are governed by Rule 11 (2) (c) (d) (i) (ii) and (iii) of the Court of Appeal Rules. The conditions precedent to the grant of an application for stay of execution as spelt out in the above Rule can be summarized thus:

- 1. that the applicant must have filed a notice of appeal with this Court;*
- 2. the applicant must show good cause;*
- 3. that the applicant will suffer substantial loss if stay of execution is not granted;*
- 4. that the application for stay of execution have been made without unreasonable delay; and*
- 5. that security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him.”*

“Unreasonable delay” was not defined in the Rules but the amendments made in rule 11 of the Rules through G.N. No. 362 of 2017 the period within which an applicant can file an application for stay of execution has now been clearly stated that an application for stay of execution shall be made within fourteen days of service of notice of execution or from the date the applicant became aware of the existence of an application for execution (See rule 11 (4) of the Rules as amended by

G.N. No. 362 of 2017). In the present application, Mr. Mtaki argued that the application was belatedly lodged on 24th August, 2018 while the earlier appeal was struck out on 3rd March, 2018.

The period to be reckoned as per the provisions of rule 11 (4) of the Rules is within fourteen days from the issuance of notice of execution or becoming aware of the existence of the application for execution. The law does not make reference to the date when the last appeal was struck out or when a judgment or a ruling was pronounced. The applicant in its affidavit in support of the notice of motion for stay attached a copy of the notice of execution (annexure A-4) that was served on it. That copy is dated 21st August, 2018 meaning that it was issued on 21st August, 2018. Counting from the date the application was filed on 24th August, 2018 to the date the notice of execution was issued on 21st August, 2018, only three days have lapsed. Therefore it is obvious that the applicant's application was filed within reasonable time and it was made within the prescribed period of fourteen days from the date of issuance of the notice of execution.

Mr. Mtaki also raised the issue of substantial loss that the applicant under Paragraph 8 of its affidavit failed to give details of the loss to be suffered for the Court to be satisfied that that loss would not be adequately compensated by way of damages. To appreciate Mr. Mtaki's concern, we reproduce the contentious Paragraph that reads:

"8. Further, that in case execution is allowed to proceed and the monies transferred to the respondent's advocate for onward transmission to his client, there will be no possibility of recovering it in case appeal succeeds since the respondent is not a person who can return TZS. 100,000,000.00 after having spent it."

It follows then that the applicant has shown in its affidavit that the amount involved is colossal thus if the execution is allowed to proceed and the respondent pockets the decretal sum of TZS. 100 million then there will be no possibility of recovering it if the appeal succeeds. In our earlier decision in **Mohamed Enterprises (T) Lt vs. Mussa Shabani Chekechea**, Civil Application No. 6 of 2014 (unreported) we granted the

applicant an order of stay against the same decree after being satisfied that there is likelihood of substantial loss. We said:

"Mr. Mtaki's argued that, the applicant has not availed details of substantial loss and the incapability of respondent to repay if the appeal succeeds. In our view holds no ground because what the applicant is required to show under rule 11(2) d (i) is that substantial loss may result to the party applying for stay of execution unless the order is made. We are convinced that, the decretal amount is colossal and if it is paid out and the appeal succeeds but the respondent fails to reimburse it, the likelihood of substantial loss is real."

Up to this moment we still hold the same position that the applicant will suffer substantial loss if the execution of the decree is done.

At the end, we are satisfied that the applicant has shown good cause to warrant grant of the order for stay of execution. The application is therefore allowed and it is hereby ordered that the decree in Civil Case No.6 of 2009 dated the 27th day of October, 2014 (Mkasimongwa, J.) is

stayed pending the hearing and final determination of the appeal. It is further directed that the deposit of TZS. 100,000,000.00 made by the applicant in this Court in Civil Application No. 6 of 2014 shall continue to be the security for the due performance of the decree.

DATED at **DAR ES SALAAM** this 11th day of October, 2019.

S. S. MWANGESI
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

This Ruling delivered this 24th day of October in the presence of the Ms. Jackline Massawe, learned counsel for applicant and Ms. Jackline Massawe hold brief for Mr. Mugaya Mutaki, learned counsel for the respondent is hereby certify as a true copy of the original.


E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL