

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

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

CIVIL APPLICATION NO. 450/16 OF 2018

PRIME CATCH EXPORTS LIMITED ----- 1<sup>st</sup> APPLICANT

IRFAN JESSA ----- 2<sup>nd</sup> APPLICANT

ZULFICAR JESSA ----- 3<sup>rd</sup> APPLICANT

VERSUS

ONGUJO WAKIBARA NYAMARWA ----- RESPONDENT

(Arising from Appeal against the judgment and decree of the

High Court of Tanzania (Commercial Division)

at Dar es Salaam)

(Mruma, J.)

dated the 28<sup>th</sup> day of September, 2017

in

Commercial Case No. 80 of 2017

RULING OF THE COURT

11<sup>th</sup> February & 5<sup>th</sup> March, 2019

MWANGESI, J.A.:

The application herein which is by way of notice of motion, has been made under the provisions of Rule 11 (3), (4), (5) and (7), 48 (1) and (2) and 49 (1) of the Tanzania Court of Appeal Rules, 2009, GN No. 368 as amended by GN No. 362 of 2017 (**the Rules**), whereby the applicant is moving the Court for an order of stay of execution of the decree dated the

28<sup>th</sup> September, 2017 in Commercial Case No. 80 of 2016, pending hearing and determination of an intended appeal against the said decision. The notice of motion has been supported by affirmed affidavit of Zulficar Jessa, the applicant.

The grounds as to why the order for stay of execution of the decree in Commercial Case No. 80 of 2016 is being sought as contained in the notice of motion, are basically threefold namely.

***First**, that the applicant intends to appeal against the decision of the High Court of Tanzania whereby he has already lodged a notice of appeal and served the same on the respondent.*

***Second**, that the judgment intended to be challenged on appeal is tainted with serious issues of law that include that: (i) the trial Judge erred in law and fact in finding that there was novation of contract between the first applicant and W. E. Tilley (Muthaiga) Limited; (ii) the trial Judge erred in law and in fact in finding the respondent had a cause of action against the second and third applicants and; (iii) the trial Judge erred in law in entertaining a suit based on dishonored cheques whereby no notice of dishonor was issued to the drawer.*

*Three, that substantial loss may result to the applicant if the decree and judgment is executed, regard being to the fact that, (a) the amount awarded to the respondent is an exorbitant sum of money and (b) the respondent's financial position is unknown and therefore doubtful if he may be in a position to reimburse the applicants should the appeal succeed.*

On the date when the application was called on for hearing before us, Ms Samah Salah, learned counsel, entered appearance for the applicants, whereas representation on the part of the respondent was through Mr. Michael Kamba, also learned counsel. At the outset, Mr. Kamba intimated to withdraw the preliminary objection which he had lodged on the 9<sup>th</sup> October, 2018, a prayer which was granted after being not resisted by his learned friend.

In that regard, we proceeded with the hearing of the application for stay. To amplify the notice of motion after taking the floor, Ms Salah, prayed to adopt the written submission which was lodged by the applicant on the 30<sup>th</sup> day of November, 2018 in support of the notice of motion, to form part and parcel of her oral submission in Court. In essence, her brief oral submission before us, she implored the Court to grant the sought relief

by issuing an order of stay of execution of the execution of the decree, to await the outcome of the intended appeal for the reason that, the requirement for the grant of an order of stay of execution of a decree as stipulated under the provisions of Rule 11 (5) (a), (b) and (c) of **the Rules** have been met. To buttress her contention, she sought refuge from a plethora of decisions of the Court including, **National Bank of Commerce Vs Saoligo Holdings Limited and Joseph**, Civil Application No. 267 of 2015, **Nobel Motors Limited Vs Umoja wa Wakulima Wadogo Bonde la Kisere Uwaboke**, Civil Application No. 103 of 2013 and **Mantrac Tanzania Limited Vs Raymond Costa**, Civil Application No. 11 of 2010 (all unreported).

On his part, Mr. Kamba, on behalf of the respondent, also requested us to adopt the written submission by the respondent in opposition of the applicant's written submission, which was lodged on the 17<sup>th</sup> December, 2018, only that he asked us to sever the submission in respect of the notice of preliminary objection, which he had withdrawn as earlier indicated above. Principally, Mr. Kamba was not in opposition to the grant of the sought order of staying the execution of the decree and judgment. However, he requested the Court to order the applicants to deposit in

Court cash USD 605,000, which is the decretal sum as security for due performance of the decree as might ultimately be binding upon them. In so asserting, reliance was placed on the cases of **Kurjeet Singh Nahal Vs Inderjeet Kaul Nahal**, Civil Application No. 90 of 1998 and **Arusha International Conference Centre Vs Edwin William Shetto**, Civil Application No. 69 of 1998 (both unreported).

In the light of what was submitted by either counsel above, what stands for our deliberation and determination is whether the application by the applicant is founded. As agreed upon by both learned counsel, the requirement for the grant of an order of stay of execution of a decree and judgment has been provided under the provisions of Rule 11 (3) (5) and (7) of the Rules which stipulates *inter alia* thus:

*"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.*

*(4) An application for stay of execution shall be 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.*

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

*(a) substantial loss may 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.*

*(6) N/A*

*(7) An application for stay of 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."*

From what we could note in the records of the application before us, we are at one with what was submitted by Ms Salah that all the requirements for the grant of an order of stay of execution of a decree as stipulated under the above quoted provisions of law have been met in that, the application has been lodged timeously and further that, the applicant has exhibited that a substantial loss may result if stay is not granted. The only dispute is on the type of security that has to be provided by the applicants for due performance of the decree as might be binding upon them.

While under paragraph 5 of the notice of motion, the applicants have averred that they are willing and ready to provide a bank guarantee as security for the due performance of the decree, the view of Mr. Kamba, was that such mere commitment by the applicants was not enough. He argued that the only security which could give assurance to the respondent for satisfaction of the decree should the appeal by the applicants fail, was deposit in Court of the decretal sum by the applicants.

At this juncture, we had to ask ourselves if the stance presented by learned counsel for the respondent was the proper construction of Rule 11 (5) (c) of **the Rules**. Fortunately, the provision has been construed by the

Court in a number of cases. In **Mantrac Tanzania Limited Vs Raymond Costa** (supra), after due deliberations the Court held that:

*"... 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."*

In yet another case of **BP Tanzania Limited Vs Riakdit Barnabas**, Civil Application No. 75 of 2012 (unreported), where in asking the Court to stay the execution of the decree the applicant informed the Court that he was prepared to provide security in the form of a bank guarantee, the Court allowed him and stated thus:

*"We have given a careful thought to the arguments by the learned counsel on security for costs. In the end, we are satisfied and accordingly order that the applicant should provide security in the manner proposed above by the said applicant within two weeks of the date of delivery of this ruling."*



We note in the application before us that, the insistence of Mr. Kamba that the respondent has to deposit in Court the decretal sum is founded on the fact that, the type of undertaking which has been made by the applicant is in the nature of a mere promise, which in his view is not sufficient. While we agree with him that, a mere promise may look insufficient, from the practice Court as highlighted in the above holdings, a firm undertaking by the applicant has been taken to be sufficient provided that the applicant complies with the directives made by the Court.

In regard to the authorities which were relied upon by the learned counsel for the respondent, we noted that those decisions were given prior to the advent of the Tanzania Court of Appeal, Rules 2009 wherein, grant or otherwise of stay of execution of decrees by the Court was based on case law. Since currently there is a statutory provision governing grant of stay of execution of decrees of which we fully associate ourselves to the construction which was made in the decisions above, we hold that the application by the applicant is founded.

To that end, we grant the application by ordering that the execution of the decree and judgment in Commercial Case No. 80 of 2016 dated the 28<sup>th</sup> September, 2017, be stayed pending the outcome of the appeal to

impugn it. This order is however conditional upon the applicant depositing in Court the bank's guarantee covering the entire decretal sum within a period of three weeks of delivery of this ruling. We make no order as to costs.

Order accordingly.


**DATED at DAR ES SALAAM** this 28<sup>th</sup> day of February, 2019.

B. M. MMILLA  
**JUSTICE OF APPEAL**

S. S. MWANGESI  
**JUSTICE OF APPEAL**

J. C. M. MWAMBEGELE  
**JUSTICE OF APPEAL**

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

  
B. A. MPEPO  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**