

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

(CORAM: MWANGESI, J.A., KOROSSO, J.A., And LEVIRA, J.A.)

CIVIL APPLICATION NO. 275/15 OF 2020

KCB BANK TANZANIA LTD APPLICANT

VERSUS

ABDI AMOUR JECHA t/a SHENAY ENTERPRISES RESPONDENT

**(Application for Stay of Execution against the decision of the High Court of
Zanzibar at Vuga)**

(Mohamed, J.)

Dated the 20th day of June, 2019

in

Civil Case No. 55 of 2015

.....

RULING OF THE COURT

14th & 17th December, 2020

KOROSSO, J.A.:

The application has been filed by way of notice of motion supported by an affidavit sworn by Damas Mwangange, a Principal Officer of the applicant pursuant to Rule 11(3), (4), (5)(a), (b), (7)(a), (b), (c), (d), 48(1), (2) of the Tanzania Court of Appeal Rules, 2009 as amended (the Rules). The application seeks for an order of stay of execution of the decree of the High Court for Zanzibar, in Civil Case No. 55 of 2015 dated 20th June, 2019 pending an intended appeal which has been commenced by way of a notice of appeal filed on the 19th July, 2019.

The application is grounded on five grounds expounded in the notice of motion and reads as follows:

- (i) That the applicant has lodged a notice of appeal against the whole of the judgment and decree of the High Court for Zanzibar in Civil Case No. 55 of 2015 as decided.
- (ii) That in the event execution of the Judgment and Decree in Civil Case No. 55 of 2015 is carried out the Applicant stands to suffer substantial losses. Further any executions shall render the intended appeal to the Court, nugatory and a mere academic exercise.
- (iii) That the application has been made without undue/inordinate delays.
- (iv) That the appeal stands good chances of success and
- (v) The applicant is willing and ready to deposit security to give due performance of the decree as shall be directed by the Court.

On the other side, the respondent did not file an affidavit in reply as commonly expected, instead on the 20th February, 2020 through his counsel, filed a notice of no objection to the application premised on

Rule 4(2) of the Rules. In the said notice, the respondent has informed the Court that he does not resist the application.

At this juncture we find it important to provide albeit in brief the background to the current application. The respondent is a resident of Zanzibar who trades under the name Shenay Enterprise and the applicant is a corporate body engaged with banking business in Zanzibar. In the trial court, the respondent claims against the applicant were for recovery of a loss of US Dollars 189,846.16 from his forex account number 3300580161. The respondent alleged that on the 9th March, 2015 his account had a balance of USD 191,998.78 immediately after he had withdrawn USD 11000.0 through cheque No. 000034 at the applicant's Zanzibar branch. Thereafter, the respondent travelled to the United States of America (USA) and upon his return, his intention to withdraw USD 10000.0 was not honoured and he was informed by the applicant's teller that his account does not have enough money to service the intended withdrawal at the time there was only USD 1324.0 in the respondent's account.

When the respondent's (the plaintiff then) efforts to recover the money ran futile it led the respondent to file a case in court against the applicant (the defendant then) and upon conduct of a full trial, the High

Court's decision was in the respondent's favour. The High Court granted reliefs sought in the plaint as follows: -

1. The applicant to pay back/credit USD189646.0 in the respondent's account number 3300580161 situated at the applicant's bank.
2. The applicant shall pay the respondent USD 58275.0 as specific damages.
3. The applicant to pay the respondent general damages of USD 20000.0 granted for psychological and mental anguish, trauma, inconvenience and disturbance and loss of probable earnings from probable business opportunities.
4. Interest on the decretal amount from the date of judgment to the date of full settlement at the trial court's rate; and
5. Costs

Dissatisfied by the decision of the trial court, on the 19th July, 2019 the applicant filed a notice of appeal. On the 5th February, 2020 he was served with a notice of execution and summoned to appear in court for the hearing of execution proceedings. Subsequently, the applicant was prompted to file the current application to stay execution of the decree of the trial court in view of the above stated developments.

When the application came before us for hearing, the applicant appeared through Ms. Regina A. Kiumba, learned counsel, whereas the respondent was represented by Mr. Omar Said Shaban, learned Advocate.

As neither of the parties filed written submissions, with the leave of the Court, counsel for the parties proceeded to address us orally in terms of Rule 106(10)(b) of the Rules. When hearing commenced, the respondent counsel stood up and informed the Court that there was a notice of no objection to the application and prayers sought filed by the respondent and despite this, sought the Court to direct the applicant to provide sufficient security as shall be determined by the Court. The counsel also prayed that when the Court was deliberating on this issue, it should be inspired by the observations made by this Court in **Tanzania Sewing Machine Co. Ltd vs Njake Enterprises Ltd**, Civil Application No. 238 of 2014 (unreported). In this decision, the Court insisted on the importance of providing security in applications such as the one before the Court.

On the part of the applicant, Ms. Kiumba, commenced her submissions by adopting the contents of the chamber summons and the averments in the supporting affidavit and stated that the applicant was

ready to furnish security in a form of a bankers guarantee as stipulated in the notice of motion and averred in paragraph 13 of the supporting affidavit. The learned counsel also fronted and made available the references which she implored the Court to be inspired when deliberating on the matter before it. The cited cases include: **Tsere Selly vs Serikali ya Kijiji ya Chemchem**, Civil Application No. 40 of 2014; **CRDB Bank Limited vs Issack B. Mwamasika and 2 Others**, Civil Application No. 103/01 of 2017; and **Britam Insurance (Tanzania) vs Oceanic Bay Hotel Limited**, Civil Application No. 116/01 of 2018 (all unreported).

We have dispassionately scrutinized the notice of motion, the supporting affidavit, the notice of no objection to the application together with the oral submissions, we are of firm view that the main issue for our determination is whether the conditions prescribed to be met by the applicant in application such as the present one under Rule 11 (4), (5)(a), (b) and (7) of the Rules have been complied with, and done so cumulatively.

The relevant provision stipulates as follows:

“(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 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 ultimately be binding upon him.

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

(a) a notice of appeal;

(b) a decree or order appealed from;

(c) a judgment or ruling appealed from;

and

(d) a notice of the intended execution".

The above provisions being self-explanatory need not be further amplified but only need to be complied with cumulatively as stated earlier [See **Joseph Anthony Soares @Goha vs Hussein Omary**, Civil Application No. 6 of 2012; **Jomo Kenyatta Traders Limited and 5 Others vs National Bank of Commerce Limited**, Civil Application No. 259 of 2015 and **David Mahende vs Salum Nassor Mattar and**

Foster Auctioneers and General Traders, Civil Application No. 160/01 of 2018 (all unreported)].

It follows then, from the above reproduced provisions that the applicant must satisfy that; the application was filed within reasonable time, he will suffer substantial loss if he is not granted the order sought, and he has to furnish security for due performance of the decree sought to be stayed.

Indeed, for one to establish compliance of the conditions for stay of execution, the available record must be relied upon. In the present case, we are satisfied that the application was preferred within 14 days, this is discerned from the fact that it was on 5th February, 2020 when the applicant became aware of the intended execution proceedings upon being served with the notice of hearing of the initiated execution proceedings and from this, he then lodged the current application on the 14th February, 2020.

Suffice to say, the current application is accompanied with, the copy of notice of appeal, copy of the judgment and decree of the High Court, and copy of the notice of the intended execution. Again, we are mindful of the fact that in the affidavit supporting the application and the oral submission by the applicant's counsel, there is an undertaking

by the applicant of furnishing of security for due performance of the decree by way of a bank guarantee upon direction of the Court. This fact is averred in paragraph 13 of the supporting affidavit stating:

"The applicant is willing and ready to deposit security in due performance of the decreed sum in the manner/form that shall be dictated and or ordered by this Court but preferably in a form of a banker's guarantee".

This Court has had occasions to deliberate on when an undertaking to furnish security may be said to be sufficient, in **Prime Catch Exports Limited and 2 Others vs Ongujo Wakibara Nyamarwa**, Civil Application No. 450/16 of 2018 and **Mantrac Tanzania Limited vs Raymond Costa, Civil Application No. 1 of 2010** (both unreported), where it was stated that a person applying for an order of stay of execution may furnish security through an undertaking. In **Mantrac Tanzania Limited vs Raymond Costa** (supra) we observed:

"... the applicant for a stay order must give security for the due performance of the decree against him. To meet the 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 a stay order, provided the Court sets a reasonable time limit within which the applicant should give the same”.

Nevertheless, it is important to bear in mind the fact that as can be deduced from the decisions in the above cited cases, the duty to give directives regarding security remains with the courts.

For the foregoing, we are of firm view that, the applicant has complied with the requisite conditions outlined for a stay of execution order to be granted in this uncontested application. We thus find it proper to grant the application upon the applicant’s execution of security in the form of a bank guarantee to the amount that relates with due performance of the decree, so as to ensure the conditions remain the same as it was at the time when the decree was passed until hearing and determination of the intended appeal.

In the end, we order that, execution of the decree of the High Court in Civil Case No. 55 of 2015 shall be stayed pending determination of the intended appeal on condition that the applicant furnish security in the form of bank guarantee for due performance of the decree or

executes a bond in the same amount within fourteen (14) days from the day of delivery of this ruling.

Since neither the applicant nor the respondent did press for costs, we make no order to that effect. Order Accordingly.

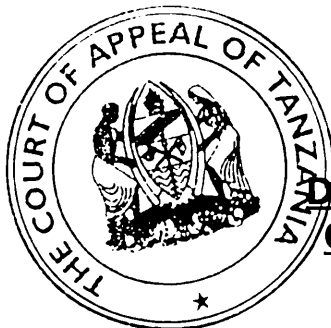
DATED at **ZANZIBAR** this 17th day of December, 2020.


S. S. MWANGESI
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

The Ruling delivered this 17th day of December, 2020 in the presence of Ms. Zena Juma Mohamed, learned counsel holding brief for Ms. Regina Kiumba, learned counsel for the Appellant and also holding brief for Mr. Omar Said Shaaban, learned counsel for the Respondent is hereby certified as a true copy of the original.




H. P. NDESAMBURO
DEPUTY REGISTRAR
COURT OF APPEAL