

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

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

CIVIL APPLICATION NO. 51 OF 2016

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|--|---------------------------------|
| 1. NIKO INSURANCE (TANZANIA) LTD..... | 1ST APPLICANT |
| 2. TANZIDIA ASSURANCE COMPANY LTD..... | 2ND APPLICANT |
| 3. MGEN TANZANIA INSURANCE CO. LTD..... | 3RD APPLICANT |
| 4. REAL INSURANCE TANZANIA LTD..... | 4TH APPLICANT |
| 5. RELIANCE INSURANCE CO. TANZANIA LTD..... | 5TH APPLICANT |
| 6. ALLIANCE INSURANCE CORPORATION LTD..... | 6TH APPLICANT |

VERSUS

GULF BULK PETROLEUM..... RESPONDENT

**(Application from the decision of the High Court of Tanzania
at Dar-es-salaam)**

(Juma, J.)

Dated the 18th day of February, 2013

in

Civil Case No. 65 of 2010

RULING OF THE COURT

29th April & 7th May, 2020

MUGASHA, J.A.:

Before this Court, is an application for stay of execution of the decree of the High Court pending hearing and determination of the intended appeal on grounds that the execution of the judgment and decree will cause irreparable damage to the applicants rendering the intended appeal nugatory. The application is by way of notice of motion lodged under Rules 11(2), (b), (c) (d) and 48 (1) and (2) of the Tanzania Court of Appeal Rules,

2009 (the Rules) and is accompanied by the affidavit of Manasseh Kawokola the Chief Executive Officer of the 1st applicant.

When the application was called on for hearing today, Messrs. Zahran Sinare, Octavian Temu and Oscar Msechu, learned counsel represented the applicants whereas the respondent had the services of Mr. Ashiru Lugwisa, learned counsel.

Before the hearing could proceed, Mr. Sinare rose to inform the Court that, he has gathered that the application is not accompanied by the notice of appeal and the decree and thus, it is incompetent. However, he submitted that, since a condition of annexing the notice of appeal to the application of this nature is a recent requirement pursuant to amendment to the Court Rules, he prayed to be granted leave to file the supplementary affidavit under Rule 49 (2) of the Rules in order to bring on board the missing documents. On being probed by the Court if the anomaly can be cured by a supplementary affidavit, he maintained his stance to be granted requisite leave by invoking the overriding objective or oxygen principle.

On the other hand, Mr. Sinare's proposition was challenged by Mr. Lugwisa who submitted that, in the wake of fundamental defects on account of missing notice of appeal and the decree which are vital documents, the

present application is incompetent and it cannot be salvaged by a supplementary affidavit. He thus urged the Court to strike out the application with costs.

In rejoinder, apart from reiterating his earlier stance Mr. Sinare prayed to be spared costs in the event the application is struck out because the anomaly has been raised by the applicants.

Since the present application was lodged on 26/2/2016 by then, the mandate of the Court to grant stay of execution of a decree or order upon good cause being shown in terms of Rule 11(2) of the Rules which stipulated as follows:

" 11 (1) ... (not relevant)

11 (2) Subject to the provisions of sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution but may-

(a) ... (Not relevant)

(b) 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 except so far as the High Court or tribunal may order, 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.

(c) ... (Not relevant)

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

(i) that substantial loss may result to the party applying for stay of execution unless the order is made;

*(ii) that the application has been made without unreasonable delay;
and*

(iii) That security has been given by the applicant for the due performance of such a decree or order as may ultimately be binding upon him."

Following the amendment of the Rules vide Government Notice No. 344 of 2019, sub- rule 7 was added to Rule 11 now enlisting documents which must accompany an application for stay of execution as follows:

"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 intended execution."

In the light of the cited provisions, a notice of appeal continues to be a vital document which must accompany the application for stay of execution so as to enable the Court to know if the applicant has already filed the notice of appeal to express desire to appeal. Therefore, failure to annex the notice of appeal in an application for stay of execution renders the same incompetent and the remedy is to strike it out See - **STANSLAUS NGANYAGWA VS SEIF HAMOUD AND FAX AUCTION MART**, Civil Application No. 110/12 of 2017 and **ALEX KYOLA VS TWAHA SAID MASSAWE**, Civil Application No. 220 of 2013 (both unreported).

Apart from the notice of appeal, the applicants have failed to attach a copy of a decree a subject to be stayed which is also a vital document in the application of this nature. Where a decree intended to be stayed is not attached to the application for stay of execution, in essence before the Court there is nothing to be stayed and the application is rendered incompetent. See- **NAFTARY PETRO VS MARY PROTAS**, Civil Application No. 8 of 2015 and **SELEMAN ZAHORO AND TWO OTHERS VS FAISAL AHMED ABDUL** (Legal Representative of the deceased **AHMED S. ABDUL**, Civil Application No. 1 of

2008 (both unreported). In the latter case the Court among other things, observed as follows:

"We must out rightly say that the application before the Court is incompetent. Why? The application is seeking for an order for stay of execution. Rule 11 (2) (b) (c) and (d) of the Court Rules is clear on the conditions which the applicant must comply with before being granted the order for stay of execution. There must be a notice of appeal lodged in accordance with Rule 83 of the Court Rules.....the decree which forms the subject matter of the application must also accompany the application for stay of execution."

Thus, the requirement of attaching a notice of appeal in an application for stay of execution has been there throughout the pendency of the Rules and as such, it is not a new invention as suggested by Mr. Sinare.

Since it is not in dispute that the present application is incompetent on account of not being accompanied by the notice of appeal and the decree sought to be stayed, it cannot be remedied by a supplementary affidavit as suggested by Mr. Zahran.

Moreover, since the overriding objective principle cannot be blindly invoked, we decline to grant the applicants leave to file a supplementary

affidavit as it will not serve any useful purpose because there is nothing before the Court which can be acted upon to adjudicate and determine an application for stay of execution.

All said and done, we find the present application not competent on account of not being accompanied by a notice of appeal and the decree sought to be stayed and in the result we strike out the application with costs.

DATED at **DAR-ES-SALAAM** this 7th day of May, 2020.

S.E. MUGASHA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

The Ruling delivered this 7th day of May, 2020 in the presence of Mr. Octavian Temu, learned counsel for the Applicants and Mr. Ashiru Lugwisa learned counsel for the Respondent is hereby certified as a true copy of the original.

