

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

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

CIVIL APPLICATION NO. 554 OF 2019

NATIONAL MICROFINANCE BANK APPLICANT

VERSUS

JAPHET MACHUMU RESPONDENT

**(Appeal from the Judgment and Decree of the High Court of Tanzania,
(Labour Division) at Dar es Salaam)**

(Muruke, J.)

Dated the 6th day of September, 2019

in

Labour Revision No. 710 of 2018

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RULING OF THE COURT

5th & 25th May, 2022

MASHAKA, J.A.:

By way of notice of motion, the applicant National Microfinance Bank (the NMB) lodged the application under rule 11 (3), (4), (5), (a), (b) & (c), (6), (7) (a), (b), (c) & (d) and rule 48 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules). The applicant is moving the Court to stay the execution of the judgment and decree of the High Court of Tanzania, Labour Division sitting at Dar es Salaam dated 6th

September, 2018 in Labour Revision No. 710 of 2018 pending final determination of the intended appeal between the parties.

The ground advanced by the applicant as gleaned from the notice of motion is that she will suffer irreparable loss if the respondent executes the judgment and decree and he would not be capable to refund the decretal amount if it is paid in the execution proceedings which commenced at the High Court, Labour Division. Further she expanded that the judgment and decree of the High Court had serious irregularities which have prejudiced the applicant and in the event the appeal fails, she will be ready to honor the decree without any difficulty.

When the application was called for hearing, Mr. Sañas Shayo, learned advocate for the applicant entered appearance while the respondent who had been effectively served notice of hearing through Mr. James Evarister, advocate for the respondent, failed to enter appearance. As affirmed by Salum Edward, the process server, the notice was received on the 11/04/2022 by one I. L. Mugyabuso, the legal secretary of Mr. Evarister, who acknowledged receipt of the notice

by affixing his signature on the same. In accordance with rule 63.(2) of the Rules, the Court proceeded with hearing in his absence.

In his oral submissions, Mr. Shayo submitted that the Court in Civil Application No. 95/01 of 2020 between the same parties to this application struck out the notice of appeal on 5th April, 2022 which was lodged by the applicant on 30/9/2019. Further he argued that the applicant being dissatisfied with the said decision filed an application for review in Civil Review No. 9/01 of 2022 and the respondent was served on 02/5/2022. He further submitted that since this application had not been determined yet and as the notice of appeal which is a requisite document in terms of rule 11(7) (a) of the Rules does not accompany the application for the Court to consider and grant stay of execution of a decree, he beseeched us in terms of rule 4 (2) (a) and (b) of the Rules to consider that there is a pending application for review and be pleased to adjourn the hearing of the application until the final determination of the said application.

As we contemplate the submissions and prayer made by Mr. Shayo, we are guided by the notice of motion moving the Court under rule 11(3), (4), (5) (a), (b) & (c), (6), (7) (a), (b), (c) & (d) and rule 48

(1) of the Rules to stay execution of the decree in Labour Revision No. 710 of 2018 pending determination of the intended appeal between the parties. The notice of motion was lodged on the 19th December, 2019 while the notice of appeal had been lodged on 30/9/2019.

Rule 11(3) of the Rules specifies that: -

"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".

Further, rule 11 (7) (a), (b), (c) and (d) of the Rules provides for the mandatory documents to accompany an application for stay of execution, which are copies of a notice of appeal; a decree or order appealed from; a judgment or ruling appealed from; and a notice of the intended execution.

The applicant made the application seeking to stay execution of the judgment and decree in Labour Revision No. 710 of 2018 pending determination of the intended appeal. In his oral submissions, Mr. Shayo informed us that in Civil Application No. 95/01 of 2020, the notice of appeal lodged on the 30/9/2019 against the impugned decision mentioned above was struck out on 5th April, 2022, hence there is no pending appeal for the application to qualify for the consideration by the Court. As much as Mr. Shayo understands the relevance of rule 11(7) (a) of the Rules, he has beseeched us to invoke rule 4 (2) (a) and (b) of the Rules to grant adjournment pending hearing and determination of an application for review.

This application is made under rule 11 of the Rules, relying on the mandatory documents required in terms of rule 11(7) of the Rules to stay execution of a decree pending the hearing of an appeal and not as reasoned by Mr. Shayo. At the same time, this application was lodged before the inception of the application for review. The appropriate procedure would have been for Mr. Shayo to follow the Rules and prefer an application to stay the execution of decree pending hearing and determination of the Civil Review No. 9/01 of 2022.

Thus, under the circumstances, we decline the invitation to invoke rule 4 (2) (a) and (b) of the Rules. The notice of appeal which is one of the requisite documents to enable us to grant stay execution in terms of rule 11 (7) (a) of the Rules was struck out, hence there is no pending appeal. Thus, the application has been overtaken by events. We find the application incompetent and is accordingly struck out, with no order as to costs.

It is so ordered.

DATED at DAR ES SALAAM, this 24th day of May, 2022

W. B. KOROSSO
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Ruling delivered this 25th day of May, 2022 in the presence of Ms. Grace Kubaleo holding brief for Mr. Kamala, Advocate, counsel for the Applicant and Mr. Japhet Machumu, the Respondent appear in person, is hereby certified as a true copy of the original.


F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL