IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: WAMBALI, J.A, KEREFU, J.A. And MWAMPASHI, J.A.)

CIVIL APPLICATION NO. 555/16 OF 2018

SHIRIKA LA USAFIRI DAR ES SALAAM LIMITED..... APPLICANT

VERSUS

FLAMINGO AUCTION MART CO. LIMITED ..... RESPONDENT

(Application for stay of execution of the Ruling and Drawn Order of the High Court of Tanzania, Commercial Division at Dar es Salaam)

(Sehel, J.)

Dated the 16th day of April, 2018

in

Miscellaneous Commercial Cause No. 280 of 2016

RULING OF THE COURT

6th & 25th May, 2022

WAMBALI, J.A.:

In this application, the applicant Shirika la Usafiri Dar es Salaam Limited is seeking the order of the Court for stay of execution of the ruling and order of the High Court of Tanzania, Commercial Division at Dar es Salaam dated 16th April, 2018 in Miscellaneous Commercial Cause No. 280 of 2016. Notably, the ruling and order of the High Court emanated from

the decision in respect of taxation of costs in Commercial Case No. 68 of 2011 and Miscellaneous Commercial Review No. 4 of 2016 between the parties to this application. Basically, the taxation of costs arose from the order of the High Court in Consolidated Miscellaneous Commercial Cause Nos. 37 and 43 of 2014 in which the respondent, Framingo Auction Mart Co. Limited was awarded costs. Having been aggrieved by the decision of the Taxing Master (Msumi, Deputy Registrar of the High Court), the applicant lodged before the High Court Miscellaneous Commercial Cause No. 280 of 2016 to contest the order.

As it were, after the High Court heard the parties' counsel submissions, it decided in favour of the respondent. The applicant was not satisfied with the decision of the High Court, hence she lodged a notice of appeal to this Court on 16th May, 2018. More importantly, as the appeal had not been lodged in Court, the applicant lodged the instant application for stay of execution of the High Court's order as intimated above. She did so after she was served with the notice on 23rd December, 2018 to appear before the executing officer (Deputy Registrar) on 7th December, 2018 to show cause why execution application should not be granted.

The application is through the notice of motion supported by the affidavit of Patrick Kissa Mtani, the Principal Officer of the applicant. In addition, the applicant lodged written submission in support of the application in terms of rule 106 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules).

The application is strenuously contested by the respondent who has lodged an affidavit in reply deposed by Deogratius Maganga Luziga, its Principal Officer. However, it is noted that the respondent has not lodged written submission in opposition to the applicant's written submission, but duly lodged the list of authorities to be relied upon during oral submission.

The grounds upon which the applicant seeks stay of execution are contained in the notice of motion and the supporting affidavit thus: -

> *"(a) That the notice of appeal has been lodged in Court on the 16th May, 2018.*
>
> *(b) The decision subject of execution and the intended appeal is so problematic in law therefore if the execution by the respondent ensures, the applicant stands to suffer substantial losses.*

(c) The applicant still awaits to be provided with the necessary documents forming part of the record of appeal to enable her file her appeal.

(d) That on the 23rd November, 2018 the applicant was served with a notice to show cause why execution should not issue dated the 22nd November, 2018, intending to grant execution orders in Commercial Case No. 68 of 2011, subject of the intended appeal.

(e) That the appeal is meritous (sic) and raises serious issues..."

It is noteworthy that in paragraph (e) the applicant raises *prima facie* issues to substantiate the contemplated merits of the appeal, which for the purpose of this ruling, we do not deem it appropriate to recite them herein.

At the hearing of the application, the applicant was represented by a consortium of state counsel from the office of the Solicitor General, namely; Ms. Mercy Kyamba, learned Principal State Attorney assisted by Mr. Andrew Rugarabamu, learned Principal State Attorney, Ms. Lightness Msuya and Ms. Sechelela Chitinka, both learned State Attorneys. On the adversary side, the respondent had the services of Mr. Alex Mashamba Balomi, learned counsel.

In her brief oral arguments in support of the application, Ms. Kyamba fully adopted the notice of motion, the affidavit, the written submission and the list of authorities lodged in Court earlier on. Briefly, she argued that the applicant has complied with the requirement of the law as stipulated under rule 11 (5) of the Rules in that: the application has been lodged within the prescribed period after the service upon the applicant of the intended notice of execution by the executing officer; there is an explanation that substantial loss will be suffered by the applicant if the stay order is not granted; and there is firm undertaking by the applicant to give security for the due performance of the order sought to be stayed if the intended appeal is not allowed. To support her submission with regard to the issue of substantial loss and firm undertaking, Ms. Kyamba referred us to the decisions of the Court in **CATS Tanzania Limited v. Sanio Fernandes**, Civil Application No. 108 of 2016 and **Indian Ocean Hotels Limited t/a Goldern Tulip Dar es Salaam v. Nitesh Suchake t/a Smart Dry Cleaners**, Civil Application No. 82 'A' of 2010 (both unreported) respectively.

In the end, the learned Principal State Attorney beseeched the Court to grant the stay order with costs.

Responding, Mr. Balomi categorically opposed the learned Principal State Attorney's submissions that the applicant has complied with the requirement of rule 11 (5) (a) and (b) of the Rules. The epicenter of his argument was premised on the contention that the applicant has not demonstrated through the notice of motion and the affidavit that she will suffer substantial loss if stay order is not granted, and that she has not made a firm undertaking to give security for the due performance of the order. Mr. Balomi added that Patrick Kissa Mtani who deposed the affidavit in support of the applicant's application is simply a junior officer who is not qualified to make a firm undertaking to give security for the due performance of the order on behalf of the applicant on a serious matter like the current issue involving a colossal amount of money. Besides, he argued, the undertaking indicated on paragraph 17 (e) (x) of the affidavit is not categorical on the kind of security, like bank guarantee or cash payment, which the applicant undertakes to give; and therefore, the Court cannot operate in a vacuum to grant the application in which a firm undertaking has not been shown by the applicant.

It was the further argument by Mr. Balomi that paragraph 17 (d) of the affidavit is too general to be taken seriously as substantiating the loss

intended to be suffered by the applicant, if a stay order is not granted as it only shows that the applicant will stand to suffer substantial losses without sufficient particulars and extent of the said loss.

To this end, the respondent's counsel urged the Court to dismiss the application with costs for failure of the applicant to meet the conditions stipulated in terms of rule 11 (5) (a) and (b) of the Rules.

In her brief rejoinder, Ms. Kyamba reiterated her earlier submission and maintained that the respondent's counsel has not sufficiently demonstrated that the application is baseless. She argued that the deponent of the applicant's affidavit is a principal officer who was duly authorized by the applicant to depose to the facts contained in the affidavit. She thus prayed as before that the application be granted with costs.

At this juncture, the crucial issue for our determination is whether the application is meritorious.

At the outset, we wish to state that according to the record of the application, there is no doubt that the applicant has met the requirement of rule 11 (4) and (7) (a) (b) (c) and (d) of the Rules. It is apparent that the

application was lodged within the prescribed period of fourteen days, that is from 23rd November, 2018 after the service of the notice by the executing officer to 6th December, 2018 when the application was lodged in this Court, and that it is accompanied by relevant copies of the requisite documents stipulated by the Rules.

The next question for consideration and determination is whether Rule 11 (5) of the Rules has been fully complied with by the applicant. To this question, we think it is appropriate to make reference to the provisions of the requisite rule which states as follows: -

> *"11 (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".*

Turning to the application at hand, we note from the record of the application through the notice of motion, the affidavit and the annexed

documents that, the amount of money involved in the envisaged execution is TZS. 1,204,042,277.70. It is this amount which is intended to be challenged on appeal which the applicant maintains that if the order of stay of execution is not granted, she will suffer substantial loss as stated in paragraph 17 (d) of the affidavit. We are however aware of the respondent's counsel argument that the averment in paragraph 17 (d) of the affidavit is not sufficient to move the Court to find that the applicant has shown good cause because she has failed to demonstrate that she will suffer greatly if an order for stay of execution is not granted. Indeed, Mr. Balomi is of the firm view that the applicant has not gave firm undertaking to give security for the due performance of the order as paragraph 17 (e) (x) of the affidavit is too general to be taken seriously as a promise to be bound.

On our part, having closely examined the applicant's statement in the notice of motion and the averment in the affidavit together with the attached documents, we are convinced that the applicant has demonstrated beyond vague assertion that in view of the colossal amount of money involved, great loss would be caused if execution is carried out by the respondent before the hearing of the intended appeal by this Court.

As stated by the learned Principal State Attorney, the colossal amount of money involved in the intended execution, may not be easily recoverable from the respondent if the intended appeal ends in the applicant's favour.

Therefore, the loss which might be incurred would be substantial and great pain will have to be encountered to recover the executed amount, though the respondent has maintained in paragraph 8 of the affidavit in reply that there is no explanation from the applicant if the envisaged loss cannot be compensated by payment of damages/money. Besides, taking into consideration the nature of the respondent's claim of 3% of the attached property costs in Commercial Cause No. 68 of 2011, in which the decree holder was Brands International, we are of the settled view that the applicant has shown that great loss may be incurred if stay order is not granted before the hearing of the appeal by the Court. In the circumstances, we accordingly find that the condition prescribed in rule 11 (5) (a) of the Rules has been met by the applicant.

Faced with an akin situation with regard to the involvement of colossal sum sought to be executed pending the appeal, the Court in **Mantrac Tanzania Limited v. Raymond Costa**, Civil Application No. 11 of 2011 (unreported) reasoned as follows: -

> *"There is no gainsaying...that the decretal amount is a colossal sum, being guided by the current financial turmoil and credit crunch worldwide. Not only will the applicant loose, in a split of a second, a huge amount of money thereby jeopardizing its business operations, as articulated by Mr. Malongo. The applicant, which has obtained a loan of USD 6,000,000, faces an imminent danger of losing its creditworthiness, a creditor's measure of ability to meet debt obligations, if it falls in default, as a result of the execution of the decree before the appeal is determined. To us, this eventuality amounts to irremediable substantial loss to the applicant..."*

(See also **BP Tanzania Limited v. Riakdi Burnabas**, Civil Application No. 75 of 2012 and **The New Forest Co. Ltd. v. Tinusha Bhunu**, Civil Application No. 1 of 2013 - both unreported).

We equally subscribe to the above reasoning in the circumstances of this application with respect to the colossal sum involved in the intended execution.

We now turn to consider whether the provisions of rule 11 (5) (b) of the Rules which concerns the giving of security by the applicant for the due

performance of the decree or order as might ultimately be binding upon her has been fulfilled.

It is noteworthy that, while the applicant maintains that she has sufficiently shown through the notice of motion and paragraph 17 (e) (x) of the affidavit that she is ready to give security for due performance of the order of the High Court; the respondent spiritedly contests the contention. It is settled that a firm undertaking by the applicant to provide security might prove sufficient to move the Court to grant a stay order. For this stance see the decisions of the Court in **The Registered Trustees of the University of Bagamoyo v. Robert Damian**, Civil Application No. 15/17 of 2017 (unreported) and **Mantrac Tanzania Limited v. Raymond Costa** (supra), among several decisions. Particularly, in the latter decision, the Court stated: -

> *"One of the condition is that, the applicant for a stay order must give security for the due performance of the decree against him. To meet this 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".

In the instant application, having carefully considered the averment of the applicant in paragraph 17 (e) (x) of the affidavit, we respectfully find that in the circumstances, the applicant has shown her preparedness to furnish security for the due performance of the order if required to do so by the Court. We thus respectfully take leave to differ with the respondent's counsel contention that there is no firm undertaking by the applicant to give security. We hold this view because despite the firm undertaking by the applicant, it is upon the Court to impose some conditions on the intended security to be furnished as stated in **Zanzibar University v Abdi A. Mwendambo & 2 Others**, Civil Application No. 92 of 2018 (unreported).

In this regard, we are satisfied that the applicant has cumulatively met the conditions for the grant of the order for stay of execution of the High Court Order as prescribed under rule 11 (5) (a) and (b) of the Rules.

In the circumstances, the application is meritorious as we are of the decided view that the interest of justice will be met if we grant the order

for stay of execution. The grant is subject to the applicant giving security for the due performance of the order in a form of a bank guarantee of the sum of TZS. 1,204,042,277.70 within sixty (60) days from the date of this ruling.

We further order that costs will be in the cause. We so order.

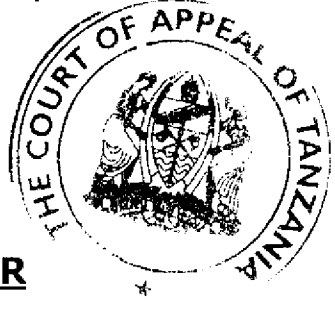
DATED at **DAR ES SALAAM** this 24th day of May, 2022.

F. L. K. WAMBALI
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Ruling delivered this 25th day of May, 2022 in the presence of Ms. Pauline Mdendemi, learned State Attorney for the applicant and Mr. Douglas Mmari, learned counsel for the respondent is hereby certified as a true copy of the original.



A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL