IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: KWARIKO, J.A., KEREFU, J.A. And KIHWELO, J.A.)

CIVIL APPLICATION NO. 89/01 OF 2020

DRTC TRADING COMPANY LTD..... .....APPLICANT

VERSUS

MALIMI LUBATULA NG'HOLO..... 1ST RESPONDENT

MPANDUJI MAKANGA.....2ND RESPONDENT

(An Application for stay of execution of the Decree of the High Court of Tanzania, Dar es Salaam District Registry at Dar es Salaam)

(Dyansobera, J.)

dated the 13th day of March, 2018
in
Civil Case No. 71 of 2011

.....

RULING OF THE COURT

3rd & 15th June , 2022

KIHWELO, JA.:

The applicant on 16th March, 2018 filed a notice of appeal seeking to challenge the decision of the High Court of Tanzania, Dar es Salaam District Registry at Dar es Salaam (the trial court), in Civil Case No. 71 of 2011. As the intended appeal was still pending, the applicant approached this Court by way of a notice of motion taken under Rules 11 (3) (4) (5) (a) (b) & (c) (6) (7) (a) (b) (c) & (d) and 48 (1) of the Tanzania Court of Appeal Rules, 2009 (henceforth "the Rules") for stay

of execution of the decree passed in that case, pending the final determination of the appeal.

The application is supported by the affidavit of Elias Magee Jandwa, an Administrative Manager of the applicant sworn on 20th March, 2020. The applicant also filed written submissions to fortify his quest. On the adversary side, the respondents did not file any affidavit in reply or written submissions but when given the floor to address the Court they gallantly contested the application.

What precipitated this application is contained under paragraph 3 of the applicant's affidavit in that, the respondents herein on 27th August, 2018 lodged an application for execution before the trial court seeking to execute the decree in Civil Case No. 71 of 2011 dated 13th March, 2018 pending hearing and determination of an appeal. The applicant feels that, if the said execution is not stayed, he stands to suffer irreparably and the intended appeal will be rendered nugatory.

In order to facilitate an easy appreciation of the matter before us we think, it is desirable to preface the ruling with a very brief factual and legal background of the application. The respondents are businessmen who are residing and working for gain in Magu District in Mwanza Region and at various dates in October, 2010 ordered a consignment of

sugar from the applicant worth Tshs. 38,400,000/= and they also paid transportation costs to the tune of Tshs. 2,000,000/=. Quite unfortunate, the applicant did not fulfil part of its bargain and failed to deliver the ordered consignment to the respondents, the results of which, they were compelled to institute a Civil Case No. 71 of 2011 before the trial court claiming among other things immediate refund of the payments they made. At the height of the trial, the trial court (Dyansobera,J) pronounced the judgment in favour of the respondents. Unhappy with the decision of the trial court, the appellant lodged the notice of appeal as hinted above and subsequently the instant application before this Court.

Before us, at the hearing of the application, the applicant appeared through Deiniol Joseph Msemwa, learned advocate; whereas the respondents appeared in person without legal representation.

Prior to the commencement of hearing, Mr. Msemwa prefaced his submission by fully adopting the notice of motion, the accompanying affidavit and the written submissions in support of the application. Submitting on the application, he was fairly brief and contended that, the respondents have lodged an application for execution seeking to execute the impugned decree dated 13th March, 2018 in Civil Case No.

71 of 2011 before the trial court through attachment and sale of the applicant's godown and head offices located at Plot No. 191 Nyerere Road, Dar es Salaam. Illustrating, he argued that, the applicant who earlier on lodged a notice of appeal on 16th March, 2018, has also filed this instant application praying to stay the execution of the impugned decree.

Mr. Msemwa contended further that, the applicant is prepared and ready to undertake to furnish security in the form of a bank guarantee within 90 days and that failure to grant the stay of execution, the applicant will suffer irreparable loss because in his opinion the respondents were mere natural persons with no proven financial capabilities to make good any loss likely to be incurred by the applicant in the event that the impending appeal is successful. He finally, rounded up by arguing that all the conditions for the grant of stay of execution under Rule 11 of Rules have been met.

In opposition, the respondents fiercely resisted the application and prayed that it should not be granted. They first of all, drew the attention of the Court to the fact that the application was frivolous and vexatious with the sole purpose of delaying the respondents from enjoying the fruits of their decree. Elaborating further, they argued that this matter

has been in Court corridors for years now and that the applicant's counsel has not even stated clearly the undertaking to furnish security. In response to the argument that they are mere individuals with no proven financial capabilities, the respondents argued that, they are businessmen with proper address and proved financial standing hence the issue of irreparable loss does not arise.

In a brief rejoinder, Mr. Msemwa reiterated his earlier submission and urged the Court to grant stay of execution of the High Court decree since he has demonstrated that the applicant is ready to undertake to furnish security in the form of a bank guarantee.

When prompted by the Court to explain on whether the affidavit in support of the notice of motion has expressly indicated any firm undertaking to furnish security, Mr. Msemwa had a ready answer, and a correct one in our view, that the affidavit was conspicuously silent on the undertaking to furnish security.

We have given due consideration to the rival arguments of the parties in support and opposition to the application as well as the applicant's affidavit and written submissions. At the outset, we wish to state that the mandate of this Court to grant a stay of execution of the decree like the applicant has sought this Court to do is founded under

Rule 11 (3) of the Rules, and the Court in exercising its discretion, under Rule 11 (5) (a) and (b), must satisfy itself that;

a) substantial loss may result to the party applying unless the order is made; and that

b) the applicant has given security for the due performance of the decree or order as may ultimately be binding upon him."

It is perfectly settled that, the conditions listed above, has to be met cumulatively by any party seeking to move the Court for an order for stay of execution of a decree. There is a considerable body of decided cases on this principle. See, for instance **Jomo Kenyatta Traders Limited and 5 Others v. National Bank of Commerce Limited**, Civil Application No. 259 of 2015, **David Mahende v. Salum Nassor Mattar and Foster Auctioneers and General Traders**, Civil Application No. 160/01 of 2018, **Joseph Anthony Soares @ Goha v. Hussein Omary**, Civil Application No. 6 of 2012, **Lawrent Kavishe v. Enely Hezron**, Civil Application No. 5 of 2012 (all unreported). In the case of **Joseph Soares @ Goha** (supra) in which the Court faced with an akin situation but under the previously amended Rules, religiously stated that:

> *"The Court no longer has the luxury of granting an order of stay of execution on such terms as the Court*

may think just; but it must find that the cumulative conditions enumerated in Rule 11 (2) (b), (c) and (d) exists before granting the order."

Corresponding observations were made in the case of **National Housing Corporation v. A. C. Gomes (1997) Ltd**, Civil Application No. 133 of 2009, **Mantrac Tanzania Limited v. Raymond Costa**, Civil Application No. 11 of 2010, **Mtakuja Kondo and Others v. Wendo Maliki**, Civil Application No. 74 of 2013 and **Therod Fredric v. Abdulsamudu Salim**, Civil Application No. 7 of 2012 (all unreported).

In the light of the above position of the law, we are now remained with the question on whether in the instant application the applicant has cumulatively complied with the conditions set out under Rule 11 (5) (a) and (b) of the Rules. In determining this matter, we shall be guided by the principles stated above.

We will start with the issue on whether the application was made within time prescribed by the law which, in terms of Rule 11(4) is fourteen days of the service of the notice of execution. Records bear out that the impugned judgment and decree were handed down on 13th March, 2018 and on 16th March, 2018 the applicant lodged the notice of appeal and later on she lodged an application for stay of execution Civil Application No. 407/01 of 2018 which was lodged promptly but

unfortunately it was struck out on 2nd October, 2019 and later, upon an application, an extension of time of 30 days was granted from 24th February, 2020 vide Civil Application No. 454/01 of 2019 to lodge the present application out of time and on 23rd March, 2020 the instant application was filed which is well within the time prescribed by the Court. Time without number, we have emphasized that, a party who wishes to have the execution of a decree stayed must therefore do so within time, see- for instance, **Loswaki Village Council and Another v. Shibesh Abebe** [2000] T.L.R. 204. It is therefore, not in dispute that the notice of motion in the present application was brought within time.

We will next examine whether or not the applicant has successfully demonstrated that he stands to suffer substantial loss if an order for stay of execution is not granted.

The applicant at paragraph 8 of the affidavit enumerates in part, what he thinks are worth consideration by the Court and in particular he averred that, if stay is not granted, the applicant stands to suffer irreparably. However, the applicant, rather surprising, and for an obscure cause did not state in details the particulars of substantial loss other than making mere assertion which is not enough. The Court has on numerous occasions, been reluctant to issue an order for stay where

the applicant does not sufficiently demonstrate in the affidavit in support of the notice of motion that they stand to suffer substantial loss if stay order is not granted. In the case of **Tanzania Cotton Marketing Board v. Cogecot Cotton Co. SA** [1997] T.L.R. 63 in which the applicant like in the present application merely asserted in the affidavit in support of the notice of motion that, if the amount awarded is to be executed, the applicant will suffer such great loss that the business of the applicant would be brought to a standstill, we observed at page 67 of the Ruling that:

> *"In this case from the deposition in the affidavit and the submission by the applicant's counsel at the hearing of this application, I am not convinced that the applicant has shown that in fact he would be subjected to substantial loss if stay order is not granted.* ***The matter has not, with respect, been taken beyond the stage of vague assertion that great loss would be incurred and that business would be brought to a standstill if stay order is not issued. That is not enough."*** [Emphasis added]

Back to the application before us, it is on record, and undisputed for that matter, that the affidavit in support of the notice of motion only provides scanty information if not skeletal averments by way of assertion that if stay is not granted, the applicant stands to suffer

irreparably. With great respect, therefore, we are of the considered opinion that, that by itself was not enough.

It is during the submission where in arguing that aspect, the learned counsel for the applicant contended that, "*in the likely event that the appeal succeeds recovery of the applicant's property so intended to be attached and sold which is a godown on Plot No. 191 Nyerere Road, Dar es Salaam will be a matter of grave doubt because, the decree holders are individual natural persons with no proven financial capabilities to make good of loss likely to occur to reverse the execution proceeds if execution is carried out with a successful appeal.*"

In our considered opinion, even if we assume for the sake of arguments, that the reasoning by the applicant in this respect was valid and helpful to the applicant which we don't think so, this was a point which was canvassed by counsel in his submission. It is now settled that as a matter of general principle submissions by counsel, as opposed to an affidavit, are not evidence. Luckily, this Court has had occasion to pronounce itself on a similar issue in the case of **The Registered Trustees of the Archdiocese of Dar es Salaam v. The Chairman of Bunju Village Government and Others**, Civil Appeal No. 147 of 2006 (unreported), when faced with analogous situation we stated that:

"With respect however, submissions are not evidence. Submissions are generally meant to reflect the general features of a party's case. They are elaborations or explanations on evidence already tendered. They are expected to contain arguments on the applicable law. They are not intended to be a substitute for evidence."

We will finally examine whether or not the applicant has given a firm undertaking to furnish security for the due performance of the decree sought to be stayed. It is a peremptory principle of law that, in dealing with the question of security for the due performance of the decree, the Court has to balance the interests of the applicant who is seeking the order for stay and those of the respondent(s) who is required to be paid in the event the decree becomes binding. Of course, most important is the fact that the respondent should not find it difficult or impossible to realize the decree in case the intended appeal fails. This is the cornerstone of the requirement for security. See, for instance, **Afrlchick Hatchers Limited v. CRDB Bank Plc**, Civil Application No. 98 of 2016 and **Anord L. Matemba v. Tanzania Breweries Ltd**, Civil Application No. 95 of 2012 (both unreported). In the latter case in which we had an opportunity to discuss at considerable length the importance of security in the determination of an application for stay of execution we observed that:

".....security among other reasons is meant to safeguard the interests of the judgment creditor in the event the judgment or decree appealed against is affirmed by the appellate court. It facilitates a post-appeal execution process."

Back to the present case, Mr. Msemwa contended that the applicant is prepared and ready to undertake to furnish security in the form of a bank guarantee within 90 days and upon our further inquiry, he admittedly, said that the affidavit was conspicuously silent on firm undertaking to furnish security. On their part, the respondents fiercely opposed the applicant's application on account that the applicant has not made any firm undertaking.

We hasten to state that, having scrutinized the notice of motion, supporting affidavit and the written submissions and after considering the rival submissions between the parties as well as the circumstances of this case, we are of the opinion that the applicant has been unable to provide any firm undertaking on the security for the due performance of the decree sought to be stayed.

In the light of our deliberation above, not all conditions have been met. On the whole, a person seeking to stay a decree of the court under Rule 11 (5) (a) and (b) of the Rules has to cumulatively demonstrate all

conditions stated under that Rule which is not the case in the application before us for the reasons stated above.

In these circumstances, we are satisfied that the applicant has failed to meet the three conditions as spelt out hereinabove and consequently, the application, therefore, lacks merit. It is accordingly dismissed with costs.

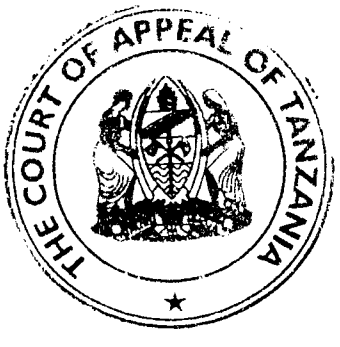
DATED at **DAR ES SALAAM** this 14th day of June, 2022.

M. A. KWARIKO
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The ruling delivered this 15th day of June, 2022 in the presence of the Mr. Deiniol Msemwa, learned counsel for the applicant and Mr. Steven Maganga, appeared for the 1st and 2nd respondents, is hereby certified as a true copy of the original.



F. A. Mtarania
DEPUTY REGISTRAR
COURT OF APPEAL