

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

CIVIL APPLICATION NO. 470/16 OF 2021

(CORAM: MWARIJA, J.A., SEHEL, J.A. And KAIRO, J.A.)

JUBILEE INSURANCE CO. (T) LTD.....APPLICANT

VERSUS

SALAAMAN HEALTH SERVICE..... RESPONDENT

**(Application for stay of execution from the Decree of the
High Court of Tanzania, Commercial Division
at Dar es Salaam)
(Magoiga, J.)**

dated the 19th day of August, 2021

in

Misc. Commercial Cause No. 23 of 2021

RULING OF THE COURT

13th & 21st June, 2022

SEHEL, J.A.:

The applicant, through the legal services of Shehzada Walli, learned advocate from Stallion Attorneys, filed a notice of motion seeking to stay execution of the decree of the High Court of Tanzania (Commercial Division) at Dar es Salaam dated 19th day of August, 2021 in Misc. Commercial Cause No. 23 of 2021 that registered the arbitral award as the decree of the court. The application is made 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 as amended ("the Rules") and

supported by an affidavit sworn by David Shoo, the Principal Officer of the applicant. The applicant has also filed written submissions to support the application. On the other hand, the respondent did not file any affidavit in reply.

When the application was called on for hearing, Mr. Walli appeared for the applicant and Mr. Juma Nassoro, learned advocate appeared for the respondent.

Upon being notified by Mr. Nassoro that he intended to oppose the application on a point of law, we invited him first, to address the Court on that point of law which is to the effect that the application is incompetent before the Court as it is lacking a notice of appeal. He pointed out that the Notice of Appeal attached to the affidavit in support of the application which is part of the Annexure JIT-2, is against Miscellaneous Commercial Cause No. 30 of 2021 and not Miscellaneous Commercial Cause No. 23 of 2021, the subject of the present application. It was his submission that, in terms of Rule 11 (7) (a) of the Rules, the notice of appeal is a vital document in an application for stay of execution and failure to attach it renders the application incompetent.

For that reason, he urged the Court to strike out the application with costs for being incompetent.

In his reply, Mr. Walli admitted that the Notice of Appeal attached to the affidavit in support of the application for stay of execution is against Misc. Commercial Cause No. 23 of 2021. He however argued that it was a mistake caused by a typing error. In trying to persuade the Court that it was typo error, he argued that all other contents in the Notice of Appeal relate to the decree which the applicant intends to stay. That, the names of the parties, the trial Judge together with the date tally with the decree appealed from. For that reason, he sought leave of the Court that the applicant be allowed to amend the Notice of Appeal to reflect the correct number of the case. Upon being probed as to whether it is a right forum to seek leave to amend the Notice of Appeal, he conceded that it was not the right forum.

The Court further invited the learned advocate for the applicant to address it as to whether the applicant complied with the provisions of Rule 11 (7) (c) of the Rules. On this, he conceded that it was not complied with since the copy of the ruling was not attached to the application. Mr. Walli explained that the applicant could not attach it to

the application because at the time they became aware of existence of the application for execution, the applicant was yet to be supplied with the requested copy of the ruling. He added that the documents attached in the application were obtained from the perusal of the file of the executing court. Given the circumstance, he sought leave of the Court to file a supplementary record to attach a copy of the ruling that was supplied to the applicant in November, 2021. He made his prayer under section 3A of the Appellate Jurisdiction Act, Cap. 141 R.E 2019, that the Court be pleased to apply the overriding objective.

In his brief rejoinder, Mr. Nassoro submitted that Rule 11 (7) of the Rules is couched in mandatory terms thus the applicant was required to have strictly complied with it. Failure to comply with the requirements of the Rules, he argued, rendered the application incompetent. It was his submission that an incompetent application cannot be withdrawn nor amended. He therefore reiterated his earlier prayer that the application be struck out with costs.

Having heard the parties' submissions, we wish to start with the failure by the applicant to attach a copy of the ruling in its application for stay of execution. It is not disputed by the counsel for the applicant that

a copy of the ruling appealed from is not attached in the application for stay of execution.

Rule 11 (7) of the Rules enumerates in clear terms the documents to be attached in an application for a stay of execution. That Rule provides:

"11 (7) An application for stay 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 provision of the law mandatorily requires that the enumerated four documents be attached in the application for stay of execution.

In the case of **Stanslaus Nganyagwa v. Seif Hamoud & Another**, Civil Application No. 110/12 of 2017 (unreported) the applicant failed to comply with that requirement by omitting to attach in

the application for stay of execution two copies; the notice of appeal and the decree. In striking out the application, the Court said:

*"...a notice of appeal is a vital document which ought to be attached in the record of the application for stay of the execution, because the Court cannot know whether the applicant has already filed his notice of appeal to show his intention to appeal.... Apart from the notice of appeal, **the applicant has also failed to attach a copy of decree subject to be stayed which is also a vital document in an application for stay of execution.** Where a decree subject to be stayed is not accompanied in the application for stay of execution, the Court is left with no other option but to find the application incompetent and hence strike it out."*
[emphasis added]

See also: **Seleman Zahoro & Two Others v. Faisal Ahmed Abdul (Legal Representative of the deceased Ahmed S. Abdul,** Civil Application No. 1 of 2008, **Alex Kyola vs. Twaha Said Massawe,** Civil Application No. 220 of 2013, **Naftary Petro v. Mary Protas,** Civil Application No. 8 of 2015 and **Niko Insurance (Tanzania) Ltd & 5**

Others v. Gulf Bulk Petroleum, Civil Application No. 51 of 2016 (All unreported).

In the same vein, we have no doubt that a copy of the ruling appealed from, being one of the four vital documents, ought to be attached in the application for stay of execution. In that regard, we find that the application before us is incompetent for failure by the applicant to attach a copy of the ruling of the Misc. Commercial Cause No. 23 of 2021.

On the way forward, Mr. Walli urged the Court to apply the overriding objection and grant the applicant time to file a supplementary affidavit to cure the anomaly.

Fortunately, this is not the first time when the Court was faced with similar scenario. In the case of **Niko Insurance (Tanzania) Ltd & 5 Others v. Gulf Bulk Petroleum** (supra), the counsel for the applicant beseeched the Court to apply the principle of the overriding objective and grant the applicant leave to file a supplementary affidavit to include the omitted decree and the notice of appeal. On that prayer, the Court had this to say:

"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."

According to the position of the law therefore, where the applicant fails to attach any of the vital documents listed under Rule 11 (7) of the Rules, the omission renders such application incompetent before the Court and the overriding objection cannot apply to salvage such an omission. For reasons we have stated, we are constrained to hold that we cannot apply overriding objection as there is nothing before the Court to act upon it.

Since the issue of a failure to annex a copy of the ruling in the application for stay of execution suffices to dispose the entire

application, we shall not belabour to determine the point raised by the counsel for the respondent.

With the foregoing, we find that the application is incompetent before the Court. Accordingly, we do hereby strike out the application. We make no order as to costs because the issue was raised by the Court.

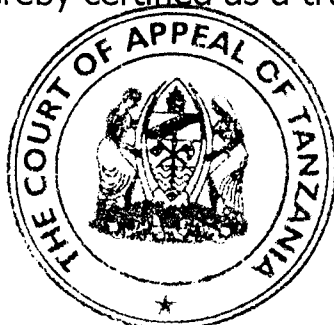
DATED at DAR ES SALAAM this 17th day of June, 2022.


A. G. MWARIJA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

The Judgment delivered on this 21st day June, 2022, in the presence of Mr. Shezada Walli, learned counsel for the applicant and Dr. Abdi Hirsi, Director of Respondent company, appeared for the respondent is hereby certified as a true copy of the original.




E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL