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. 418/16 OF 2019

LRM INVESTMENT COMPANY LIMITED ..... 1ST APPLICANT

CENTRAL PARIS COMPLEX COMPANY LIMITED ..... 2ND APPLICANT

DIDAS PATRICE MUSHI ..... 3RD APPLICANT

AZILA DIDAS MUSHI ..... 4TH APPLICANT

CALORINA DIDAS MUSHI ..... 5TH APPLICANT

LILIAN DIDAS MUSHI ..... 6TH APPLICANT

VERSUS

DIAMOND TRUST BANK TANZANIA LIMITED ..... 1ST RESPONDENT

MR. NEWTON G. MAKWALE t/a INDEPENDENT

AGENCIES & COURT BROKER LIMITED ..... 2ND RESPONDENT

(Application for stay of execution of the Judgment and Decree of the High Court of Tanzania, Commercial Division at Dar es Salaam)

(Sehel, J.)

dated the 14th day of November, 2018

in

Commercial Case No. 47 of 2017.

RULING OF THE COURT.

09th & 25th May, 2022

MWAMPASHI, J.A.:

The application before us is for stay of execution of the decree of the High Court of Tanzania at Dar es Salaam (Sehel, J. as she then was) dated 14.11.2018 in Commercial Case No. 47 of 2017 pending hearing and determination of Civil Appeal No. 111 of 2019. According to the

notice of motion, the grounds under which the application is premised are that:

(a) The amount involved in the decree is colossal

(b) If the decree is executed before Civil Appeal No 111 of 2019 which is pending before this Honourable Court is determined, it is likely to cause substantial injury/loss to the applicants.

(c) The applicants are readily willing to furnish security as the Honourable Court shall order for due performance of the decree as may ultimately be binding upon the applicants; and

(d) This application has been made without undue delay.

The application is by way of notice of motion and it is lodged under rule 11 (3), (4), (4A), (5)(a)(b), (6), (7)(b)(c) and (d) as well as rule 48(1), all of the Tanzania Court of Appeal Rules, 2009 (the Rules). Supporting the application are two affidavits; the first one is sworn by the third applicant Mr. Didas Patrice Mushi, the Director of the first and second applicants and it is for himself and on behalf of the first and second applicants, and the second one is sworn by the fourth applicant Ms. Azila Didas Mushi. In opposition, there is an affidavit in reply sworn by Mr. Ives Mlawi, the Head of Legal and Company Secretary of the first respondent. There are no affidavits by or for the fifth and sixth applicants.

Briefly, the historical background of the application is as follows; By way of a summary suit, the first respondent sued the applicants in the High Court of Tanzania, Commercial Division, at Dar es Salaam vide Commercial Case No. 47 of 2017 for TZS. 3,871,225,331.69. being the amount of the outstanding loan facility advanced to the first applicant and guaranteed by the rest of the applicants. In the suit, the first respondent did also pray for interest on the principal sum against the first applicant at the rate of 17.5% per annum from 04.03.2017 to the date of judgment amounting to TZS. 1,048,389,796.64., interest against the second applicant at the rate of 19% per annum from 04.03.2017 to the date of judgment amounting to TZS. 2,822,835,535.05, interest at the Court rate and for costs.

Upon being served with the plaint, the applicants applied for leave to appear and defend the suit vide Miscellaneous Commercial Application No. 290 of 2017 which application was however dismissed for being time barred. Having refused the applicants' application for leave to appear and defend, the High Court, on 14.11.2018, entered the summary judgment in favour of the first respondent and granted all the prayers sought. Aggrieved, the applicants on 29.04.2019 filed before this Court Civil Appeal No. 111 of 2019. On the other hand, in the process for realisation of the decree, the first respondent moved the Registrar of the

High Court of Tanzania, Commercial Division who on 02.09.2019 issued a prohibitory order against the property with Certificate No. 3, Block YY, Section III Area, Moshi Municipality registered in the name of the first applicant. This order was followed by a 15 days demand notice from the second respondent on 05.09.2019. The prohibitory order and the demand notice which allegedly came to the applicants' knowledge on 18.09.2019 are what prompted the applicants to file the instant application on 25.09.2019.

At the hearing of the application, the applicants were represented by Mr. Emmanuel William Kessy, learned counsel, whereas the first respondent had the services of Mr. Zacharia Daud, also learned counsel. The second respondent who was unrepresented appeared in person.

The application was greeted by a preliminary objection notice of which had been filed on 14.11.2019 by the first respondent. The objection was based on a single point that the application is incompetent for not being accompanied by a copy of a notice of appeal in contravention of rule 11 (7)(b) of the Rules. As the practice of the Court demand, we had to hear and determine the objection first.

Upon being invited to argue the preliminary objection, Mr. Daud briefly submitted that the application is incompetent because it is not

accompanied by a notice of appeal as it is mandatorily required by rule 11 (7)(a) of the Rules. He further argued that the fact that a memorandum of appeal is attached to the application does not prove that the required notice of appeal exists. Relying on the case of **Stanslaus Nganyagwa v. Seif Hamoud and Fax Auction Mart**, Civil Application No. 110/12 of 2017 (unreported), Mr. Daud prayed for the application to be struck out with costs.

Before resting his case, Mr. Daud did also point out that the application suffers another ailment for not being supported by affidavits of the fifth and sixth applicants hence rendering it incompetent. He also argued that there is even no indication that the two applicants who swore the two affidavits in support of the application did so on behalf of the fifth and sixth applicants let alone the fact that there is also no authorization to that effect from the said two applicants, that is, from the fifth and sixth applicants.

On its part, the second respondent joined hand with Mr. Daud that the application is competent and prayed for the same to be struck out with costs.

Mr. Kessy responded by arguing that the objection is misconceived. Though, it was conceded by him that the application is not accompanied

by a notice of appeal, it was however contended by him that a memorandum of appeal has been annexed to the application instead of the notice of appeal. He argued that under the circumstances of this matter where the memorandum of appeal is annexed to the application evidencing that an appeal has been filed and is pending for hearing, the failure to annex the notice of appeal to the application becomes insignificant and not fatal. He further contended that the purpose of annexing a notice of appeal to an application for stay of execution is to show that an applicant intends to appeal. That being the purpose, Mr. Kessy thus submitted that by annexing the memorandum of appeal to the instant application, the applicants have managed to exhibit not only an intention to appeal but also that the appeal has in fact been lodged. He therefore prayed that, for the interests of justice and in consideration of the circumstances of this matter, the requirement for a notice of appeal to accompany the application be dispensed with.

Regarding the missing affidavits of the fifth and sixth applicants, it was argued by Mr. Kessy that the two affidavits filed in support of the application are sufficient. He further argued that the fact that the application is not supported by affidavits of the fifth and sixth applicants is immaterial because the said two applicants were not served with the notice of motion. Finally, it was contended by Mr. Kessy that even the

notice of the execution which was served on him on 18.09.2018, was not served to the fifth and sixth applicants. He thus insisted that the application is competent and prayed for the preliminary objection to be overruled and that the hearing of the application should proceed on merit.

In his brief rejoinder, Mr. Daud reiterated the arguments in his submission in chief insisting that rule 11(7) of the Rules is couched in mandatory terms and further that a memorandum of appeal cannot replace a notice of appeal.

Considering the above submissions and bearing in mind that the fact that the application is not accompanied by a notice of appeal is not disputed, we think that the issue for our determination can be narrowed to whether the mandatory requirement under rule 11(3) and (7) that an application for stay of execution shall be accompanied by, among other things, a notice of appeal, can be dispensed with where an application is accompanied by a memorandum of appeal instead of the notice of appeal.

The Court derives its powers to order stay of execution of a decree or order from rule 11 (3) of the Rules under which it is provided as follows:

> *"11(3)* ***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".*** [Emphasis added]

From the above provisions, it is so vivid that for the Court to be clothed with jurisdiction to order stay of execution of a decree or order, a notice of appeal, in respect of a decree or order, of which its execution is sought to be stayed, must have been lodged in accordance with rule 83 of the Rules. A notice of appeal as envisaged under rule 11(3) of the Rules, is a mandatory prerequisite for an application for stay of execution so much so that the law requires that the same must be one of the documents accompanying an application for stay of execution as provided under rule 11(7) of the Rules, thus:

> *"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 the intended execution".

The Court, in a number of decisions, has repeatedly stated that a notice of appeal is a vital document which must accompany an application for stay of execution and further that, failure to do so, renders the application incompetent. In **Stanslaus Nganyagwa v. Seif Hamoud and Fax Auction Mart**, Civil Application No. 110/12 of 2019 (unreported) where the Court was confronted with an application for stay of execution which was not accompanied by a notice of appeal and a decree, it was held, among other things, that:

> *"The wording of Rule 11(2)(b) [Now Rule 11(3)] of the Rules implies that 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".*

In addition, in **Jane Machess Macharia v. Lucy Macharia Ess**, Civil Application No. 132 of 2009 (unreported) the application was not accompanied by a notice of appeal and the Court was urged to grant stay of execution on the basis of the notice filed against another decision involving same parties. In refusing to order stay of execution the Court observed thus:

> *"The issue confronting us now is, if the power of this Court to grant stay of execution under Rule 9(2) (b) [now rule 11(3) of the rules) is exercisable only upon there being a valid notice of appeal in Court, how do we circumvent the absence of a notice of appeal in this case to grant what Mr. Ukwong'a Is asking us. The answer is not far to fetch. It has been amply demonstrated by the Court in the case of Engen Petroleum Ltd and Sadik Abdallah Alawi, (supra) that the Court lacks jurisdiction to grant stay of execution in the absence of a Notice of Appeal".*

As to what are the effects of an application for stay of execution not accompanied by a notice of appeal, the Court in **NIKO Insurance (T) Limited and 5 Others v. Gulf Bulk Petroleum**, Civil Application No. 51 of 2016 (unreported) had these to say:

> *"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".*

Guided by the above settled position of the law and in consideration of the facts in the instant application, we find it very easy to hold that the instant application is incompetent for not being accompanied by a notice of appeal. It is clearly and mandatorily provided, under rule 11(3) and (7)(a) of the Rules, that a competent application for stay of execution

must be accompanied by a notice of appeal. In the absence of a notice of appeal the Court lacks jurisdiction. Annexing a notice of appeal to an application for stay of execution is one of the conditions which an applicant must comply with before being granted the order for stay of execution.

We are mindful of the fact that in his submissions Mr. Kessy urged us to find that the application is competent because it is accompanied by a memorandum of appeal. Much as Mr. Kessy's arguments may seem attractive, with respect, we are unable to agree with him because pursuant to rule 11(7)(a) of the Rules, an application for stay of execution should be accompanied by a notice of appeal and not by a memorandum of appeal. Further, since it is the lodgement of a notice of appeal which clothes the Court with jurisdiction to order stay of execution under rule 11(3) of the Rules, then the same must be annexed to an application for stay of execution. Without a notice of appeal being annexed to such an application it cannot certainly be known that the same has been lodged in accordance with rule 83 of the Rules. It is most unfortunate that, in the instant application, throughout the two affidavits in support of the application there is no any statement as to when the notice of appeal was lodged or as to whether it exits. On the contrary, paragraphs 4 of both affidavits talk of the existence of the appeal and the annexed

memorandum of appeal. More importantly, Mr. Kessy did not wish to comment anything on why the applicants opted not to annex the notice of appeal but simply insisted that the memorandum of appeal suffices.

In the light of the foregoing, we find the instant application which is accompanied by a copy of the memorandum of appeal instead of a notice of appeal as required by the law, incompetent.

Notwithstanding the above finding which sufficiently disposes the application, we still find the need to determine the other issue submitted by Mr. Daud in respect of the missing affidavits of the fifth and sixth applicants which, as it was for the first issue, has an effect of affecting the competence of the application. Admittedly, it is a mandatory requirement that every formal application to the Court must be supported by affidavit. Rule 49(1) of the Rules in clear terms provides thus:

> *"Every formal application to the Court shall be supported by one or more affidavits of the applicant or of some other person or persons having knowledge of the facts".*

It is clear from the above provision of law that any formal application to this Court must be supported by one or more affidavits of the applicant. However, if for any reason, an affidavit of the applicant cannot be procured, the law allows the application to be supported by an

affidavit of any other person or persons provided the said other person or persons are knowledgeable to the facts of the matter.

The instant application was filed by the counsel for the applicants, that is, Mr. Kessy, on behalf of all the six applicants. This is therefore, a joint application of six applicants which generally, ought to have been supported by affidavits of each of the six applicants or if not by each of them then by one or more of them on behalf of the others. In the application at hand, the two affidavits filed in support of the application have been filed by the third and fourth applicants on their own behalf and also on behalf of only the first and second applicants. The are no affidavits by or on behalf of the fifth and sixth applicants and the application is therefore not supported by affidavits of those two applicants contrary to rule 49(1) of the Rules.

It is also our considered view that since the fifth and sixth applicants are impleaded and made parties to the application, then the argument by Mr. Kessy that the notice of motion and the notice of execution were not served upon them, is immaterial.

The ailment of the application not being supported by affidavits of the fifth and sixth applicants renders the application incompetent. See- **N.B.C. Holding Corporation and Another v. Agricultural &**

Industrial Lubricants Supplies Limited and Two Others, Civil Application No. 42 of 2000 (unreported) where the application jointly filed by two applicants was held by the Court incompetent for not being supported by an affidavit of one of the applicants.

In the circumstances and for the above given reasons, the application is hereby struck out with costs for being incompetent.

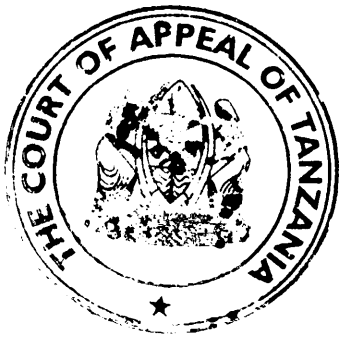
DATED at **DAR ES SALAAM** this 25th day of May, 2022.

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 Mr. Emmanuel Kessy, counsel for the Applicants and Mr. Zakharia Daniel, counsel for the Respondents is hereby certified as a true copy of the original.



A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL