

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWARIJA, J.A., KITUSI, J.A., And MAKUNGU, J.A.)

CIVIL APPLICATION NO. 521/16 OF 2020

TANGANYIKA WATTLE COMPANY LIMITEDAPPLICANT

VERSUS

DOLPHIN BAY CHEMICALS (PTY) LTD RESPONDENT

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

(Magoiga, J.)

dated the 13th day of December, 2019

in

Commercial Cause No. 11 of 2019

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RULING OF THE COURT

15th & 18th August, 2022

MWARIJA, J.A.:

By a notice of motion lodged on 8/12/2020, the applicant, Tanganyika Wattle Company Limited moved the Court seeking an order staying execution of the decree of the High Court (Commercial Division) arising from the petition in which the applicant had challenged registration of foreign arbitral award made in favour of the respondent, Dolphin Bay Chemicals (PTY) Limited. In the arbitration which was

conducted in Cape Town, South Africa by Terene Matzdorff, Arbitrator, the respondent was awarded USD 90,215.00 with interest for the applicant's breach of agreement for purchase of preservatives from the respondent.

In its ruling, the High Court (Commercial Division) dismissed the petition and proceeded to give an order for registration of the award. It consequently issued a decree in respect of the awarded amount of USD 90,215.00 plus interest at the rate of 10% per annum. The respondent was also awarded costs. The applicant was aggrieved and therefore, filed a notice of appeal followed by the application at hand.

The application was brought under *inter alia*, Rule 11(3) and (5) of the Tanzania Court of Appeal Rules, 2009 as amended (the Rules). It is supported by an affidavit sworn by Mr. Melchior Saul Sanga, learned advocate. The grounds upon which the stay order is sought are that:

"1. Substantial loss may result to the applicant unless an order for stay of execution is granted as the Respondent has made an application for the attachment of the applicant's properties including Plywood Processing plant, wood treatment plant and main factory which are the main sources of the Applicant's income. Therefore, the court [should] stay the execution and make an order to the effect that, parties to

revert to their original position as before the attachment was made.

2. If the court [refuses] to grant an order for stay of execution, it will render the whole appeal academic as the substratum of the appeal, that is ownership of the attached properties will be gone by virtue of the execution of the decree. This would render the whole of the appeal nugatory, if the applicant would succeed in the appeal.

3. On the balance of convenience, the applicant is likely to suffer more if the grant of an order is refused as the attached properties will be sold and this, cannot be atoned by way of damages as the whole factory, plywood processing plant and wood treatment plant belonging to the applicant will be gone for life as will be the case for the respondent when the application [is] granted.”

Initially, the respondent had opposed the application through an affidavit in reply sworn by Mr. Gerald Shita Nangi, advocate contending, among other things, that the applicant has not met the requisite conditions for grant of the sought order. However, during the hearing, Mr. Nangi, learned counsel who appeared for the respondent conceded to the application and urged the Court to order the applicant to furnish security for the due performance of the decree. The learned counsel prayed also that the respondent be exempted from payment of the costs

of the application. Mr. Bakari Juma, learned counsel who appeared for the applicant welcomed the concession by the respondent's counsel and did not press for costs.

In terms of the provisions of Rule 11(5) of the Rules, an order for stay of execution of a decree may be issued by the Court upon establishment by the applicant of two conditions; **one**, that the party applying for the order will suffer substantial loss if a stay order is not granted and **two**, that the applicant has furnished security for the due performance of the decree. The provision states as follows:

"11 – (1)

(2)

(3)

(4)

(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."

On the first condition, that the applicant will suffer substantial loss, Mr. Sanga contends as follows in paragraph 18 of his affidavit:

"18. That, a substantial loss will [be occasioned] on the part of the applicant if the orders sought [will] not be granted as its plants have already been attached by the respondent and if sold by public auction, shall cause economic hardship to the applicant as the factory ... is the only source of income and has employed a number of Tanzanians and is a good contributor to the economy of the country."

With regard to the second condition of giving security for the due performance of the decree, the applicant asserts through paragraph 19 of the deponent's affidavit that:

"... the applicant is ready and prepared to provide security for the due performance of the decree as [may] be ordered by the Court."

Although as stated above, in his affidavit in reply, Mr. Nangi had disputed the applicant's contentions in paragraphs 18 and 19 of the supporting affidavit, later on during the hearing, he conceded that the application is meritorious.

On our part, after having gone through the record of the application, we agree with the learned counsel for the parties that the

application, which was not contested, has merit. We find that the applicant has met the requisite conditions stipulated under Rule 11(5) of the Rules. In the circumstances, we grant it and order that execution of the decree of the High Court (Commercial Division) in Miscellaneous Commercial Cause No. 11 of 2019 be stayed pending determination of the intended appeal. The stay order is conditional upon a deposit by the applicant, of a bank guarantee in the sum of USD 90,215.00 as security for the due performance of the decree.

Since the applicant did not press for costs, we make no order to that effect.

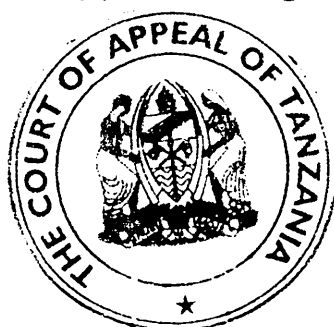
DATED at DAR ES SALAAM this 16th day of August, 2022.

A. G. MWARIJA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

O. O. MAKUNGU
JUSTICE OF APPEAL

The Ruling delivered this 18th day of August, 2022 in the presence of Ms. Hakme Abulrahman Pemba, learned counsel for the applicant and Mr. Gerald Nangi, counsel for the respondent, is hereby certified as a true copy of the original.




G.H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL