

**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. 58/16 OF 2020**

**NATIONAL BANK OF COMMERCIAL LTD .....APPLICANT  
VERSUS**

**ATHANASIA T. MASSINDE .....1<sup>ST</sup> RESPONDENT  
ABETI COMPANY LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**[Application for stay of execution from the decision of the High  
Court of Tanzania at Dar es Salaam]**

**(Makani, J.)**

**dated the 12<sup>th</sup> day of April, 2019  
in  
Commercial Case No. 92 of 2016**

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**RULING OF THE COURT**

17<sup>th</sup> & 25<sup>th</sup> August, 2022

**KITUSI, J.A.:**

At the hearing of this application for stay of execution, Dr. Onesmo Kyauke and Mr. Jeremiah Mtobesya, both learned advocates represented the applicant and respondents, respectively.

However, at the very outset, Mr. Mtobesya intimated that, although he had earlier filed an affidavit in reply contesting the application, he was, on reflection, not resisting it. He prayed that the application be granted with an order that parties bear their own costs.

Dr. Kyauke welcomed the concession as well as the suggestion that each party should bear own costs.

This ruling is only in respect of the security for the due performance of the decree, a requirement under rule 11 (5) (b) of the Court of Appeal Rules, 2009 (the Rules). Here, a brief background of the matter becomes necessary.

In Commercial Case No. 92 of 2016 before the Commercial Division of the High Court, the respondents preferred the suit alleging that they had paid the loan they had earlier obtained from the applicant by executing a mortgage deed but the latter had refused to discharge the collateral. They prayed for an order compelling the applicant to discharge it and for payment of damages suffered for the refusal to discharge it. The trial court entered judgment for the respondents and ordered payment of TZS 70,000,000.00 by the applicant to the respondents. The applicant is aggrieved and having filed a notice of appeal has preferred this application by a notice of motion under rule 11 (4), (5), (6) and (7) of the Rules, seeking an order of stay of execution.

Paragraphs 7 and 8 of the supporting affidavit taken by one Desmond Malyi, the applicant's company secretary, are relevant in our views. Paragraph 7 demonstrates the substantial loss that the applicant may suffer if the order of stay is not granted, while in paragraph 8 the

applicant undertakes to give security for the due performance of the decree.

Thus, we order stay of execution of the decree in Commercial Case No. 92 of 2016 High Court Commercial Division, pending hearing and determination of the intended appeal. Aware that the applicant is, itself, a bank, we order it to execute with any other Bank, a guarantee for payment of TZS 70,000,000.00 for the due performance of the decree should the intended appeal be in favour of the respondents.

As agreed by the parties, they shall bear their own costs.

It is so ordered.

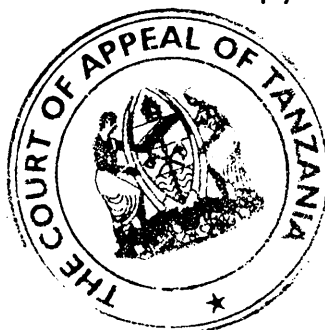
**DATED at DAR ES SALAAM** this 18<sup>th</sup> day of August, 2022.

A. G. MWARIJA  
**JUSTICE OF APPEAL**

I. P. KITUSI  
**JUSTICE OF APPEAL**

O. O. MAKUNGU  
**JUSTICE OF APPEAL**

The ruling delivered this 25<sup>th</sup> day of August, 2022 in the presence of Mr. John Laswai, learned counsel for the applicant, also holding brief of Mr. Jeremiah Mtobesya, learned counsel for the Respondents, is hereby certified as a true copy of the original.



  
G. H. HERBERT  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**