

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

(CORAM: NDIKA, J.A., KITUSI, J.A., And MASHAKA, J.A.)

CIVIL APPLICATION NO. 758/16 OF 2022

WANG SHENGJU FIRST APPLICANT

WANG WENQIAN SECOND APPLICANT

VERSUS

**MOHAMED SAID KILUWA (SUING IN THE NAME
OF KILUWA STEEL GROUP COMPANY LTD.) RESPONDENT**

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

(Nangela, J.)

Dated the 21st day of October, 2022

in

Commercial Case No. 23 of 2022

RULING OF THE COURT

21st & 23RD March, 2023

NDIKA, J.A.:

The applicants, Wang Shengju and Wang Wenqian, lost in a shareholder derivative action, Commercial Case No. 23 of 2022 in the High Court of Tanzania, Commercial Division at Dar es Salaam, instituted by the respondent, Mohamed Said Kiluwa. By its judgment dated 21st October, 2022, the said court (Nangela, J.) awarded the respondent the following reliefs:

"(1) That, owing to the shortcomings revealed in Exh. P.1, the 1st and 2nd Defendants are hereby ordered to vacate their managerial positions in the Company and the remaining Directors are hereby directed to, and within three months from the date of this judgment, convene a general meeting of all shareholders wherein the Company shall as part of their agenda, appoint a new management team to manage the affairs of the Company.

(2) That, the 1st and 2nd Defendants are hereby permanently barred from managing or running the affairs of the Company.

(3) That, the Plaintiff shall, in the meantime, manage the operations of the Company till when the Company appoints a new Management team.

(4) That, the 1st and 2nd Defendants are hereby ordered to repay TZS. 33,984,394,221.00 to the Company since the monies are properties of the Company owing to the fact that utilization of that amount has not been fully supported with sufficient evidence.

(5) That, in the alternative to orders given in No. 1, 2, 3 and 4 above, the Company's remaining shareholders are to purchase the 55,500 shares of the Plaintiff for a payment of TZS 12,970,406,318.00 being a value of such 55,500 fully paid-up ordinary shares held by the Plaintiff pursuant to the valuation

Report Exh. P1 and the Plaintiff shall forthwith exit from or cease to be a member of the Company.

(6) Further, that, in the alternative to Paragraph 4 herein above, if the Company chooses to implement what is stated in paragraph 5 hereinabove, the 1st and 2nd Defendants should pay the Plaintiff the sum of TZS. 8,596,098,555.25, being the Plaintiff's proportionate fair share entitlement from illegally withdrawn cash/funds from accounts of the Company.

(7) That, if the Company chooses to implement what is stated in paragraphs 5 and 6 herein above, the Company shall cease forthwith from using the name of "Kiluwa" and exit of the Plaintiff from the Company.

(8) That, the Plaintiff is entitled to payment of Director's remuneration in the sum of TZS. 10,000,000.00 per month from January, 2016 to the date of Judgment, till the date of his exit from the Company (if he exits).

(9) That, in case the Company chooses to implement what is stated in No. 5, 6, and 7 hereabove, the Plaintiff shall be entitled to a payment of TZS 12,853,555,810.00 being "Goodwill" entitlement for his efforts to raise the Company and for the use of his family name by the Company.

(10) That, given the circumstances pertaining to the conduct of affairs of the Company as per the availed evidence before this Court, the Plaintiff is to be paid general damages equal to TZS 20,000,000.00 as general damages.

(11) That, the Defendants shall pay interest at a commercial rate of 14 % p.a, on the amounts stated in paragraphs 6, 8 and 10 hereabove, from the date of filing of the case until satisfaction of the Decree.

(12) That, the Defendants shall pay interest at a Court rate of 7% on the amounts stated in paragraphs 6, 8 and 10 hereabove, from the date of this judgment till full satisfaction of the Decree.

(13) The Defendants are liable to pay costs of this suit."

Resenting the aforesaid judgment and decree, the applicants duly lodged a notice of appeal on 25th October, 2022 manifesting their intention to appeal to this Court. On 16th December, 2022, the applicants learnt through their advocates that the respondent had applied to the court for execution of the aforesaid decree and that he had procured a prohibitory order against their 107,400 paid up ordinary shares in the aforesaid company worth TZS. 36,131,696,548.40 with the view to selling them off. Three days

later the applicants duly lodged the present application seeking stay of execution.

At the hearing of the matter, Mr. Roman S.L. Masumbuko, learned counsel appeared for the applicants whereas Messrs. Alex Balomi and Imam Daffa, learned advocates, stood for the respondent. After a short dialogue between the Court and the learned counsel, it became apparent that the disputation between the parties narrowed down to whether the applicants had firmly undertaken to furnish sufficient security for the due performance and satisfaction of the decree as it may ultimately be binding on them in compliance with rule 11 (5) (b) of the Tanzania Court of Appeal Rules, 2009 ("the Rules").

Submitting on the issue, Mr. Masumbuko was positive that the applicants have made in their joint affidavit a firm undertaking to furnish security as shall be ordered by the Court. However, he urged us to consider two issues in determining security to be furnished: first, that the applicants' 107,400 paid up ordinary shares in the company worth TZS. 36,131,696,548.40 have been attached upon the High Court's order in execution of the decree in favour of the respondent. We understood him to

mean that the said shares were good security for the due performance and satisfaction of the impugned decree. Secondly, that since the respondent had moved the High Court to execute only a part of the decree (that is, monetary reliefs itemized in Paragraphs 6, 8 and 10 of the decree) whose aggregate value stood at TZS. 830,000,000,000.00, security to be ordered should cover not more than the said sum.

Replying, Mr. Balomi submitted somewhat brusquely that his learned friend's argument demonstrated that the applicants were not ready and willing to furnish sufficient security. Mr. Daffa weighed in insisting that the pending application for execution concerned the enforcement of payment of the monetary reliefs itemized in Paragraphs 5, 6, 8, 9 and 10 plus 7% interest on the amounts in Paragraphs 6, 8 and 10 of the decree totalling TZS. 36,131,696,548.40. He clarified further that the respondent was seeking execution as aforesaid in alternative to the substantive reliefs mentioned in Paragraphs 1, 2, 3 and 4 of the decree. He implored us to withhold the stay sought if the applicants cannot furnish adequate security.

Rejoining, Mr. Masumbuko reiterated his earlier submission that the applicants' undertaking to furnish security as required is firm and sufficient

and that the attached shares are themselves a guarantee that the impugned decree would be fully satisfied.

On our part, having gone through the notice of motion, the supporting affidavit and the respondent's affidavit in reply in the light of the contending submissions of the learned counsel, we are satisfied that it has met all the threshold requirements for the grant of stay of execution in terms of rule 11 of the Rules despite the disparity between the learned counsel over the form and scope of security fitting the circumstances of this matter. We so hold since the applicants' statement in the notice of motion and paragraph 13 of the supporting affidavit on their readiness and willingness to offer security as shall be ordered is, in our view, a firm covenant – see **Mantrac Tanzania Limited v. Raymond Costa**, Civil Application No. 11 of 2010 (unreported).

Frankly, we were astounded that the question about the form and scope of security required in the circumstances of this matter drew a hot contest between the learned counsel. Since the impugned decree contains substantive reliefs (reliefs itemized in paragraphs 1 to 4 of the decree) and alternative reliefs (monetary reliefs listed as paragraphs 5 to 10), the respondent was entitled to choose to enforce the latter category of reliefs

whose aggregate value at the time of filing the application for execution was TZS. 36,131,696,548.40. On that basis, we uphold Mr. Daffa's submission that the aforesaid amount of money should determine the form and breadth of the security required.

Dealing head on with the determination of the security required, we would agree with Mr. Masumbuko that the applicants' 107,400 paid up ordinary shares in the company, whose value met the decreed sum of TZS. 36,131,696,548.40 as at the time the application for execution was lodged, are an acceptable security for the due performance and satisfaction of the impugned decree. Logically, if the shares were not good security the respondent would not have gone after them in the first place.

In the final analysis, we grant the application and order a stay of execution of the decree of the High Court, Commercial Division in Commercial Case No. 23 of 2022 dated 21st October, 2022 pending the hearing and determination of the intended appeal. The stay is made upon the condition that the applicants deposit in this Court the share certificates, in respect of their 107,400 paid up ordinary shares in the company, within thirty days of the date hereof. Until the intended appeal is finalized, the

applicants are prohibited and restrained from transferring or charging the shares by sale, gift or otherwise in any other form of disposition, and that any other persons are prohibited from receiving the shares by purchase, gift or otherwise. Costs shall be in the cause.

It is so ordered.

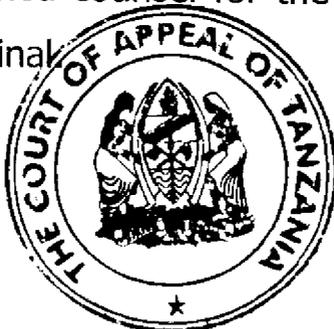
DATED at DAR ES SALAAM this 23rd day of March, 2023.

G. A. M. NDIKA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Ruling delivered this 23rd day of March, 2023 in the presence of Mr. Fraterine Munale, learned counsel for the Applicants and Mr. Alex Balomi, learned counsel for the Respondent is hereby certified as a true copy of the original.




R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL