

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: WAMBALI, J.A., KEREFU, J.A. And RUMANYIKA, J.A.)

CIVIL APPLICATION NO. 580/16 OF 2021

**PRISTINE PROPERTIES LIMITED.....1ST APPLICANT
MUSLIM SHIVJI KARIM.....2ND APPLICANT
GULAM MOHAMEDALI PUNJANI.....3RD APPLICANT
SABRY ALLY SAAD4TH APPLICANT**

VERSUS

**ECOBANK TANZANIA LIMITED RESPONDENT
(Application for an order for stay of execution of the Judgment and
Decree of the High Court of Tanzania, Commercial Division
at Dar es Salaam)**

(Phillip, J.)

Dated the 19th day of April, 2021

in

Commercial Case No. 148 of 2018

RULING OF THE COURT

8th & 22nd May, 2023

WAMBALI, J.A.:

Ecobank Tanzania Limited, the respondent in this application was the plaintiff in Commercial Case No. 148 of 2018 which she lodged at the High Court of Tanzania, Commercial Division, Dar es Salaam against Pristine Properties Limited, Muslim Shivji Karim, Gulam Mohamedali Punjabi and Sabry Ally Said (the defendants) who are the first, second, third and fourth applicants respectively herein.

The case arose from credit facilities (term loan) extended to the first applicant. The said term loan of USD 3,000,000.00 in Tanzania Shillings equivalent was granted through a facility letter (first facility) dated 30th June 2015 for financing the completion of a project which included construction of ocean wave residential building located on plot No. 2406/5 Sea View Upanga Dar es Salaam. It is also in the record of the application that, later upon the request of the first applicant, the terms of the first facility was restructured vide a credit facility letter (the second facility) on 13th October 2015 and thus USD 900,000.00 was enhanced.

It is not out of place to point out that the medium term loan was secured by; one, personal guarantees and indemnity of the second, third and fourth respondents. Two, by a first ranking legal mortgage over landed property known as Plot No. 2406/5, Sea View, Ilala Municipality Dar es Salaam in the name of first applicant with a total of eight (8) sub-titles, namely, certificates of titles number; 186045/74/7, 186045/74/9, 186045/74/11, 186045/74/14, 186045/74/16, 189045/74/2, 186045/74/21 and 186045/74/44.

In that case, the respondent claimed that as of 30th September, 2018, the applicants' outstanding amount from the credit facilitation

rose to a total sum of TZS. 5,761,304,227.37 and USD 300,397.35 which included the defaulting interests, penalties and charges accrued on daily basis.

As the applicants contested the claim, the High Court conducted the trial and in the end, it found in favour of the respondent. Particularly, the High Court decreed that the applicants were liable to the respondent for a total of TZS. 3,708,134,236.45 and USD 292,120.35 being an outstanding amount together with defaulting interest, penalties and charges thereon as of 31st August, 2018. It also ordered payment of interest on the decretal amount at the rate of 19% and 8% per annum from due date to the date of judgment and payment of 7% interest of the decretal sum from the date of judgment to date of payment in full and the costs of the suit. More importantly, the High Court decreed that in case of the applicants' failure to pay the decreed amount of money, the property of the applicants on Plot No. 2406/5 Sea View, Ilala Municipality Dar es Salaam with a total of eight subtitles stated above, be auctioned to secure the decretal sum.

As the applicants were aggrieved with the decision of the High Court, they jointly lodged a notice of appeal on 12th May, 2021.

Nonetheless, on 2nd November, 2021 the applicants were served with an application for execution lodged by the respondent together with the summons to show cause why the decree should not be executed. Notably, the total amount indicated in the application for execution is TZS. 4,903,087,673.73 and USD 97,590.0 to be realized through an order for attachment and sale of the property on Plot No. 2406/5 stated above.

It is that application for execution which prompted the applicant to lodge the current application seeking stay of execution. The application is supported by the affidavit deposed by Gulam Mohamedali Punjani, the third applicant and one of the directors of the first applicant with authority from other directors (the second and fourth applicants). The grounds for seeking stay of execution as enumerated in the notice of motion are:

- "1. That there exist serious errors and illegalities amounting to injustice in proceedings, judgment and decree of the High Court of Tanzania (Commercial Division) sought to be challenged and to be examined by this Hon. Court in the intended appeal to this Court.*

2. The applicant is willing to furnish such security as may be ordered by the Court for the due performance of the Decree sought to be stayed."

The application is strongly contested by the respondent through the affidavit in reply deposed by Hope Liana, the Head of Legal and Company Secretary of the respondent.

At the hearing of the application, Mr. Ashiru Lugwisa and Mr. Joseph Nuwamanya, learned advocates entered appearance for the applicants and respondent respectively.

We wish to state at the outset that during the hearing of the application, counsel for the parties were not at issue on the compliance by the applicants with the provisions of rule 11(4) and (7) of the Tanzania Court of Appeal Rules, 2009 (the Rules) respectively with regard to the promptness of lodging the application within the prescribed period and attachment of relevant copies to the application. For clarity, the respective rule provides as follows:

"11 (4) An application for stay of execution shall be made within fourteen days of service of the notice of execution on the applicant by the executing officer or from the date he is

otherwise made aware of the existence of an application for execution.

11 (7) – 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 epicenter of the contest by the parties, therefore, is on the compliance with the conditions prescribed under the provisions of rule 11 (5) of the Rules, which we deem it appropriate to reproduce hereunder:

"11 (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."

We note from the affidavit in support of the application that on the issue of suffering substantial loss if an order is not granted by the Court, the applicants rely on the following explanation under paragraph 9:

"9. The intended execution will adversely and substantially affect the applicants if it is allowed to proceed because of the following factors;

- a. The properties/units sought to be attached and sold in execution of a decree comprise part of a commercial property at Sea View **on Plot No. 2406/5 Sea View, Ilala Municipality Dar es Salaam;** their intended attachment would derail the continuation of the entire project which would be unnecessarily inconvenient to the applicants and would result into potential disputes with other suppliers/third party interests to the property.*

b. On the balance of convenience, the Applicants will suffer more than the Respondent if this order is withheld because if the said properties are attached it will prompt other third parties like suppliers of construction materials to file suit in court. But on the other hand, if the order is granted, the respondent would still be able to proceed with execution by other means since the 1st applicant is a locally established company whose directors are well known and can easily be traced.”

Submitting in support of the application on the issue of suffering loss by the applicants, essentially, Mr. Lugwisa reiterated the averment contained in paragraph 9 of the affidavit reproduced above. He submitted that as the issue of explanation of substantial loss depends on the fact of each case, in this application, the applicants have demonstrated through paragraph 9 of the affidavit that they will suffer adversely if an order for stay of execution is not granted by the Court. To support his submission, he made reference to the decision of the Court in **Romayan Langaramu v.**

Christopher Pelo, Civil Application No. 452/02 of 2018 [2021] TZCA 35 [25 February, 2021: TANZLII]. He added that, if the eight units on plot No. 2406/5 which are still under construction of a business hub are attached and sold, great inconvenience will be caused as several prayers are involved in the process of construction as stated in paragraph 9 (b) of the affidavit. To stress his argument, he urged us to consider an akin situation confronted by the Court in **The Registered Trustees of Chama cha Mapinduzi and 3 Others v. Mehboob Ibrahim Alibhai (as a Legal Representative of the late Ibrahim Gulamhussein Alibhai**, Civil Application No. 117/17 of 2018 [2021] TZCA 444: [26 August 2021] TANZLII].

Mr. Lugwisa concluded his submission on this matter by arguing that on the balance of convenience, there is no doubt that the applicant will suffer more than the respondent if the order is withheld.

With regard to the requirement to furnish security, Mr. Lugwisa basically made reference and adopted the applicants' undertaking under paragraph 11 of the affidavit in which it is averred that:

"11. The Applicants are willing and ready to furnish security for due performance as it may be required by this Court. Additionally, the Respondents have registered mortgages over certain properties and these can also serve as sufficient security for this application."

The learned counsel thus argued and emphasized that the averment of the applicants in paragraph 11 of the affidavit which also supports the statement on the grounds for seeking stay of execution as reflected in the notice of motion constitute a firm undertaking to give security as may be ordered by the Court. Relying on the decision of the Court in **Africhic Hatchers Limited v. CRDB PLC**, Civil Application No. 98 of 2016 [2019] TZCA 148: [14 March, 2019: TANZLII] and **Ongujo Wakibara Nyamara v. Beatrice Greyson Mmbaga**, Civil Application No. 200/17 of 2021 [2022] TZCA 732: [21 November, 2022: TANZLII], he argued that firm undertaking by the applicants is sufficient to show their readiness to be bound by the order of the Court on the issue of security for due performance of the decree.

In the circumstances, the learned counsel submitted that the applicants have established that they deserve consideration of the Court for an order for stay of execution as they have fulfilled the requisite conditions. He thus prayed that the application be granted with costs.

Countering the submission of the applicants' counsel on the compliance with the conditions for stay of execution, Mr. Nuwamanya fully adopted and reiterated the averments of the respondent contained in paragraphs 9, 10 and 11 of the affidavit in reply. For clarity, we reproduce the respective paragraphs hereunder:

"9. That the contents of Paragraph 9 of the 3rd Applicant's Affidavit are vehemently disputed. The Respondent states that the intended execution will not adversely affect the applicants but rather entitle the Respondent to enjoy its legal right to realize the fruits of the decree and judgment made in its favour. The respondent further states that it has been more than two years since judgment was entered in her favour, thus the Application for stay of execution is a mere

tactic to delay the Respondent from pursuing their legal right. That to date, the Respondent (sic) has failed to take the necessary steps in prosecuting the appeal and is only using the appellate proceedings to deny the Respondent from recovering the outstanding amounts on account of the credit facilities extended to them.

10. That in furtherance to the above, it is stated that the said project has not been under any construction for the last three years. That it is disputed that this execution would therefore hinder the completion of the project.

11. It is also disputed that there are other third party interests in the property. The properties sought to be attached by the Respondent are those which were mortgaged to the Respondent and therefore, there are no other third party interests.”

The learned counsel argued further that gauging from paragraph 9 of the applicants' affidavit and the response of the respondent in the affidavit in reply, it cannot be firmly concluded that the applicants have demonstrated to the required standard the

nature of the loss which they are likely to suffer if the order for stay of execution will not be made. He thus argued that the decision of the Court in **The Registered Trustees of Chama cha Mapinduzi and 3 Others** (supra), relied upon by the applicants' counsel to support his argument on the issue of the nature of substantial loss is inapplicable because the facts in the two cases are distinguishable.

On the other hand, Mr. Nuwamanya submitted that contrary to the argument of the applicants' counsel, on the balance of convenience, it is the respondent who will suffer greatly than the applicants if an order for stay of execution is issued. This is because, he stated, being a banking institution, its business of serving the community will be impacted as the amount claimed from the applicants is colossal.

With regard to the issue of furnishing security, Mr. Nuwamanya submitted that, though the applicant has undertaken to comply with the order which may be made by the Court, if the Court decides to grant the application, the security to be ordered should be in a form of a bank guarantee to the tune of TZS 4, 903, 087,673.73 and USD 97,590.8 indicated in the notice of application

for execution submitted to the High Court and attached to this application. He argued that the property in dispute which is part of the mortgage deed will not be fit to constitute security. In the end, he prayed that the application be dismissed with costs.

In a brief rejoinder, Mr. Lugwisa emphasized that the case of **The Registered Trustees of Chama Cha Mapinduzi and 3 Others** (supra) is applicable in the circumstances of this application. He also stated that if the Court decides to grant the application, consideration of the security to be furnished should be on the decretal sum and not the one contained in the application for execution as argued by the counsel for the respondent.

Having heard the contending submissions of the counsel for the parties, firstly, we wish to state that while it is an acknowledged principle that the decree holder is entitled to enjoy the fruits of the litigation, it is also the position of law as provided under rule 11 (3) of the Rules, that, the Court may upon good cause shown, order stay of execution of such decree and order. Indeed, consideration on how good cause is taken to have been shown depends on the circumstances of each case.

In this regard, the issue for our determination is whether the applicant has complied with the conditions set out under rule 11 (5) (a) and (b) of the Rules.

We have thoroughly scrutinized the applicants' notice of motion, the averments in paragraphs 9 of the affidavit in support of the application and the counsel's submission amid the contending submission of the respondent's counsel and the affidavit in reply. Basically, we are satisfied that the reasons advanced by the applicants constitute good cause to be eligible for the Court consideration in their favour. Considering the materials in the record of the application placed before us, we entertain no doubt that in view of the amount involved and the targeted landed properties to be attached and sold in case of failure by the applicants to satisfy the decree, substantial loss may be suffered if stay of execution is not granted. We therefore hold that the first condition for the grant of the order for stay of execution has been met by the applicants.

On the other hand, we are satisfied that in terms of paragraph 11 of the affidavit, there is firm undertaking by the applicants to furnish security for the due performance of the decree if the order

is granted. We have emphasized in several decisions in which we have followed our decision in **Mantrac Tanzania Limited v. Raymond Costa**, Civil Application No. 11 of 2010 (unreported), that a firm undertaking by the applicant to furnish security for due performance of a decree is sufficient to constitute compliance with the second condition for granting an order for stay of execution. Particularly, in that case, the Court stated as follows:

"... To meet this condition, the law does not strictly demand that the said security must be given prior to the grant of the stay order. To us, a firm undertaking by the applicant to provide security might prove sufficient to move the Court, all things being equal, to grant stay order provided the Court sets a reasonable time limit within which the applicant should give the same."

In the circumstances, we hold that the applicant has met the second condition enumerated under rule 11 (5) (b) of the Rules. Indeed, it is trite law that in order for the Court to grant the application for stay of execution, all the two conditions must be cumulatively fulfilled. For this position, see for instance the decision of the Court in **David Mahende v. Salum Nassor Mattar and**

Another, Civil Application No. 160/01 of 2018 [2019] TZCA 71: [04 February, 2019: TANZLII].

In the instant application, considering the affidavit in support of the application we have no hesitation to conclude that the applicants have cumulatively fulfilled the conditions stipulated by the law to deserve the order for stay of execution. We are however alive to the argument by the respondent's counsel that, if we grant the order, the security for due performance should be the sum of TZS 4,903,087.73 and USD 97,590.8 indicated in the application for execution of the decree and not the decretal sum, that is, TZS. 3,708,134.45 and USD 292,120.35. For our part, we are of the view that in the circumstances of this application, the amount to be ordered as a security must be the decretal sum.

In the event, we grant the application. Consequently, we order that execution of a judgment and decree of the High Court in Commercial Case No. 148 of 2018 be stayed pending the final determination of the appeal. The order is conditional upon the applicants depositing a bank guarantee of TZS. 3,708,134, 236.45 and USD 292,120.35 as security for due performance of the decree

within thirty (30) days from the date of delivery of this ruling. We further order that costs should abide the outcome of the appeal.

DATED at **DAR ES SALAAM** this 18th day of May, 2023.

F. L. K. WAMBALI
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

The Judgment delivered this 22nd day of May, 2023 in the presence of Mr. Joseph Nuwamanya for the Respondent also holding brief of Mr. Ashiru Lugwisa, learned advocate for the applicant, is hereby certified as a true copy of the original.




C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL