

**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. 591/18 OF 2021

AFRICAN BANKING CORPORATION (T) LTD.....APPLICANT

VERSUS

MUSSA MASEMBO..... RESPONDENT

**(Application for Stay of Execution of the Judgment and Decree of the
High Court of Tanzania, Labour Division at Dar es Salaam)**

(Luvanda, J.)

Dated the 26th Day of October, 2020

in

Labour Revision No. 505 of 2019

RULING OF THE COURT

8th & 18th May, 2023

KEREFU, J.A.:

The applicant, African Banking Corporation (T) Ltd, on 6th November, 2020 filed a notice of appeal seeking to challenge the decision of the High Court (Luvanda, J.), in Labour Revision No. 505 of 2019 dated 26th October, 2020. As the intended appeal is still pending, the applicant has approached this Court by way of a notice of motion made under Rules 11 (3), (4), (4A), (5) (a), (b), (6), (7) (a), (b), (c), (d) and 48 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules) for stay of execution of the decree passed in that case, pending the final

determination of the appeal. The grounds indicated in the notice of motion are as follows, that:

- (i) Substantial and irreparable loss shall result to the applicant if the decree is executed as the applicant is running a financial institution which is in operation of providing service to the community;*
- (ii) The applicant undertakes to satisfy the judgment and decree through bank guarantee in the event the appeal and subsequent applications or appeals are unsuccessful;*
- (iii) The application has been made without unreasonable delay on the basis that the judgment was delivered on 26th October, 2020. The applicant became aware of the application for execution on 9th November, 2021;*
- (iv) As evidenced in the contents of the affidavit in support of the notice of motion, there is good cause to order stay of execution of the said decree;*
- (v) The intended appeal will be rendered nugatory; and*
- (vi) The judgment was delivered with irregularities and illegalities.*

The notice of motion is supported by an affidavit duly sworn by the principal officer of the applicant, namely, Nyanjala Mtebe. The great part of the said affidavit reiterated the above grounds stated in the

notice of motion by way of emphasis including attachment of relevant documents thereto.

It is noteworthy that, in his affidavit in reply, the respondent has taken note of all what has been stated in the applicant's affidavit in support of the application with one condition that the security of the bank guarantee to be furnished by the applicant, for the due performance of the decree sought to be stayed, must be issued within seven (7) days from the date of the order of stay of execution.

The background facts giving rise to the judgment and decree sought to be stayed, as obtained from the record of application, are very brief. They go thus, the respondent was an employee of the applicant at the position of a Regional Manager from 21st November, 2013 until October, 2016 when his employment was terminated.

Aggrieved by the said termination, the respondent referred the matter to the Commission for Mediation and Arbitration (CMA) vide Labour Dispute No. CMA/DSM/ILA/R.1044/16/922 claiming that he was unfairly terminated from service and prayed for orders of reinstatement, payment of terminal benefits, damages, subsistence allowance, compensation, repatriation allowance and sales commission. In defence,

the applicant denied the respondent's claim, hence the suit proceeded into a full trial.

Having heard the parties and considered the evidence adduced before him, the CMA arbitrator found that the respondent was unfairly terminated from his employment and thus, issued an award dated 29th March, 2019 by which the applicant was ordered to pay the respondent:

- (a) Compensation of eighteen (18) months salaries at the tune of TZS 68,400,000.00 as provided for under section 40(1)(c) of the Employment and Labour Relations Act, [Cap.336, Act No.6 of 2004] (the ELRA);*
- (b) Terminal benefits in terms of section 44 of the ELRA including;*
 - (i) Remuneration for work done before termination TZS 2,776,923.08;*
 - (ii) accrued leave pay for fifteen (15) days TZS 2,192,307.69;*
 - (iii) One month salary in lieu of notice TZS 3,800,000.00;*
 - (iv) severance pay TZS 3,069,230.77;*
 - (v) Transport and subsistence allowance from the date of termination to the date of repatriation as per section 43 (1) of the ELRA; and*
 - (vi) certificate of service.*

Aggrieved by the above CMA's award, the applicant moved the High Court, Labour Division vide Labour Revision No. 505 of 2019 to

revise the said decision. Upon hearing the parties, the High Court (Luvanda, J), on 26th October, 2020, varied item (a) above in the CMA's award by ordering the applicant to pay the respondent compensation of twelve (12) months' salaries at the tune of TZS 45,600,000.00. However, the terminal benefits under items (i) to (vi) above were not disturbed as they were all upheld.

Still dissatisfied, the applicant, on 6th November, 2020, lodged the notice of appeal to challenge the decision of the High Court. Meanwhile, the respondent, on 27th October, 2021 approached the High Court, Labour Division at Dar es Salaam seeking execution of the impugned decree. Subsequently, on 9th November, 2021, the applicant was served with the notice to show cause why the decree of the High Court should not be executed against her. The said notice also required the applicant to appear for hearing of the Execution Application No. 443 of 2021 on 20th January, 2022. The notice prompted the applicant to lodge the current application on 22nd November, 2021 as indicated above.

When the application was placed before us for hearing, the applicant and the respondent were represented by Mr. Mohamed Muya and Mr. Raphael Dismas, both learned counsel respectively.

In support of the application, Mr. Muya adopted the notice of motion as well as its accompanying affidavit. He then submitted that the applicant has fulfilled the mandatory requirements for grant of an application of this nature. To clarify, the learned counsel referred us to Rule 11(4) of the Rules and argued that the application was filed within the prescribed time as the applicant was served with the notice on 9th November, 2021 and lodged this application on 22nd November, 2021 after lapse of only thirteen (13) days. He also referred us to paragraphs 3, 4 and 5 of the applicant's affidavit in support of the application and stated that the applicant has attached all the necessary documents, such as; copies of impugned judgment and decree (annexture ABC 1); a copy of the notice of appeal (annexture ABC 2); and notice of execution (annexture ABC 3) as required by Rule 11 (7) of the Rules.

He further submitted that the applicant has also complied with two conditions stipulated under Rule 11 (5) of the Rules as he indicated in ground (i) of the notice of motion and deposed under paragraph 6 that, substantial and irreparable loss shall result to the applicant if the order of stay is not granted because the applicant is running a financial institution which is providing services to the community. That, the said execution is in the form of arrest and detention of one Imani John Bgoya

the Managing Director of the applicant who operates and supervises all the activities of the applicant.

On the firm undertaking to furnish security for the due performance of the decree, Mr. Muya referred us to paragraph 8 of the affidavit and submitted that the applicant has undertaken to furnish bank guarantee as will be ordered by the Court. He, however, argued that, although in the affidavit in reply, the respondent did not oppose the application, he had issued a condition to the effect that the bank guarantee should be availed within seven (7) days from the date of order of stay of execution. It was the argument of Mr. Muya that, the duration of seven (7) days is inadequate and not justified, as the applicant needs more time to process the bank guarantee. As such, Mr. Muya beseeched us to give the applicant, at least, thirty (30) days from the date of the stay order, which he said, is reasonable. To support his proposition, he referred us to the cases of **Junior Construction Company Limited & 2 Others v. Mantrac Tanzania Limited**, Civil Application No. 24/16 of 2021 [2021] TZCA 417: [26 August 2021: TANZLII] and **The Registered Trustees of the Chama cha Mapinduzi & 3 Others v. Mehboob Ibrahim Alibhai**, Civil Application No. 117/17 of 2018 [2021] TZCA 444: [26 August 2021:

TANZLII]. Finally, Mr. Muya submitted that, since the applicant has complied with all the conditions and had already lodged the notice of appeal, this application should be granted pending the hearing and determination of the appeal.

In response, Mr. Dismas submitted that he is not opposing the application, but was only concerned with the amount of money required to be stayed and duration to be taken by the applicant to issue the bank guarantee. He referred us to annexure ABC 3 attached under paragraph 5 of the applicant's affidavit and stated that, the amount to be stayed should be TZS 285,438,461.00. He then insisted that the duration of seven (7) days is adequate and the bank guarantee should be obtained from a reputable bank.

Upon being probed by the Court on whether the amount to be stayed is TZS 45,600,000.00 indicated in the High Court decree or TZS 285,438,461.00 shown in annexure ABC 3 which is based only on the calculations done by the respondent, Mr. Dismas responded that the amount to be stayed is the one indicated in annexure ABC 3 and not otherwise. He finally, also prayed for the application to be granted.

In a brief rejoinder, Mr. Muya challenged the submission by his learned friend on the amount to be stayed. He contended that, since the

amount of TZS 285,438,461.00 is not certain and based only on the calculations done by the respondent, the amount to be stayed is the total sum of TZS 45,600,000.00 indicated in the High Court decree.

We have examined the notice of motion, the supporting affidavit and the lists of authorities filed by the parties in the light of the oral arguments advanced by the learned counsel for the parties.

Notwithstanding the respondent's concession to the application, we are still enjoined to determine as to whether the applicant has cumulatively complied with the conditions stipulated under Rule 11 of the Rules. For the sake of clarity, Rule 11 provides that:

"11.- (1) to (3) [NA]

(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;

(4A) [NA];

(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.

(6) [NA]

(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."

It is evident from the record of the application that the applicant lodged this application on 22nd November, 2021 well within the prescribed period of fourteen (14) days in terms of sub-rule (4) of Rule 11 above, as it was filed on the thirteen (13) day after being served with the notice of execution. It is also noticeable that sub-rule (7) of Rule 11 above was fully complied with since the application is accompanied by mandatory copies of the notice of appeal, the High Court's judgment and decree appealed against and the notice of execution.

It is also evident that, to meet the requirement of sub-rule (5) (a) of Rule 11, the applicant had indicated in ground (i) of the notice of motion that, substantial and irreparable loss shall result to the applicant if the order of stay is not granted as the applicant is running a financial

institution which is in operation of providing service to the community. In addition, the applicant under paragraph 6 of the affidavit in support of application, has as well deponed that, in the said execution, the respondent is seeking for an order of arrest and detention of the applicant's managing director who operates and supervising all applicant's activities of providing service to the community. Though, we have noted that the applicant has not attached the Execution Application No. 443 of 2021 to enable us to ascertain the mode of execution sought by the respondent, since his claim was not disputed by the respondent, in the affidavit in reply, we have no doubt that, if the execution is allowed to proceed, the applicant's operations and services to the community may be paralyzed.

Furthermore, and taking into account that, the respondent has not indicated in his affidavit in reply, if he has the financial wherewithal to refund the decreed sum of TZS 45,600,000.00 in the event the appeal succeeds, we are inclined to find that the applicant would be exposed to substantial and irreparable loss should the impugned decree be executed.

As for the requirement to furnish security in terms of sub-rule (5) (b) of Rule 11, we note the applicant's undertaking, under paragraph 8

of the affidavit, to satisfy the impugned decree through bank guarantee which may ultimately be binding upon her. We take it as a sufficient undertaking to provide security for the due performance of the decree. See for instance our previous decisions in **Mantrac Tanzania Limited v. Raymond Costa**, Civil Application No. 11 of 2010; **Joseph Antony Soares @ Goha v. Hussein Omary**, Civil Application No. 6 of 2012 (both unreported) and **The Registered Trustees of the Chama cha Mapinduzi & 3 Others** (supra).

Therefore, the crucial point for determination at this juncture is the amount to be stayed and the duration to be given to the applicant to avail the said bank guarantee. It should be observed, at the outset, that the discretion to determine the kind of security to be furnished and the duration to be given to the applicant to do so, lies with the Court and not to the parties. We find solace in **Mantrac Tanzania Limited** (supra) where the Court gave the following guidance:

"One other condition is that the applicant for a stay order must give security for the due performance of the decree against him. 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 a stay order, provided the Court sets a reasonable time limit within which the applicant should give the same.”

In the instant application, we are mindful of the fact that, in his submission, Mr. Dismas argued that the amount to be stayed is TZS 285,438,461.00 indicated in annexure ABC 3 and not the total sum of TZS 45,600,000.00 indicated in the High Court’s decree. In the circumstances, and taking into account that the amount of TZS 285,438,461.00 is not certain as it only appears in the notice of execution based on the calculations made by the respondent, we agree with Mr. Muya that the amount to be stayed is the total sum of TZS 45,600,000.00 reflected in the impugned decree.

In the final analysis, we are satisfied that the applicant has cumulatively complied with all the statutory conditions warranting the grant of the stay order. Accordingly, we grant the application and stay execution of the decree of the High Court of Tanzania, Labour Division at Dar es Salaam in Labour Revision No. 505 of 2019 dated 26th October, 2020 on condition that the applicant deposit in the Court, within thirty (30) days from the date of delivery of this ruling, a bank guarantee for the decreed sum of TZS 45,600,000.00. The said

guarantee shall remain in force until full hearing and determination of the intended appeal. In default, the order of stay shall lapse automatically. Since this is a labour related matter, we make no order as to costs.

It is so ordered.

DATED at DAR ES SALAAM this 16th day of May, 2023.

F. L. K. WAMBALI
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

The Ruling delivered this 18th day of May, 2023 in the presence of Ms. Halima Semanda, learned counsel for the applicant also holding brief of Mr. Raphael Dismas, learned advocate for the Respondent, is hereby certified as a true copy of the original.




R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL