

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

(CORAM: KOROSSO, J.A., RUMANYIKA, J.A. And MGONYA, J.A.)

CIVIL APPLICATION NO. 119/16 OF 2022

EXIM BANK (TANZANIA) LIMITED APPELLANT

VERSUS

THE M & FIVE B HOTELS AND TOURS LIMITED RESPONDENT

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

(Mruma, J.)

dated the 5th day of July, 2021

in

Commercial Case No. 104 of 2017

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RULING OF THE COURT

03rd & 6th October, 2023

KOROSSO, J.A.:

The ruling pertains to an application filed by the applicant pursuant to rules 11(3), (4), (5) (a), (6) and (7) (a), (b), (c) and (d) and 48 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules). The applicant, by way of notice of motion supported by an affidavit deposed by Mr. Edmund Mwasaga, a principal officer of the applicant, is moving the Court to stay execution of the judgment and decree of the High Court of Tanzania, Commercial Division (Mruma, J.) dated 5/7/2021 in Commercial Case No. 104 of 2017.

The grounds that found the application are: One, that the notice of appeal has been lodged in the Court on 13/7/2021. Two, the intended appeal to the Court has substantial grounds in facts and point of law with very high chances of success and if execution proceeds the appeal will be rendered futile.

The application arises from the decision of the High Court Commercial Division in Commercial Case No. 104 of 2017 which was in favour of the respondent who was awarded special damages of USD 11,021,018.0, interest on the special damages at the rate of 10% per annum from the date of institution of the suit to the date of judgment, punitive damages of USD1,000,000.0 and costs of the suit. Aggrieved by the decision, the applicant lodged a notice of appeal to the Court, a copy of which is attached to the supporting affidavit. While this was ongoing, the respondent initiated the process to execute the impugned decree and it was the service to the applicant of the notice to show cause why execution should not be granted that prompted the lodgment of the instant application.

On the day the application was called for hearing, Mr. Libent Rwazo and Ms. Hamisa Nkya, learned counsel represented the applicant whereas, the respondent enjoyed the services of Messrs. Mpaya Kamara and Edward Mwakingwe learned Advocates.

In his address to amplify the gist of the application, Mr. Rwazo commenced by adopting the notice of motion and its supporting affidavit. He also implored us to consider the written submission he filed on 24/5/2022 as part of his oral submission. He contended that the applicant has complied with the essential requirement to be granted the relief sought in the application as averred in paragraphs 3, 4, 7 and 9 of the affidavit supporting the notice of motion. In that, there have shown that if execution was to proceed, the applicant would suffer an irreparable loss; the application was filed within the requisite time upon being served with the notice of execution of the impugned decree; a notice of appeal has been filed, copies of requisite documents as required by rule 11(7) (a)-(d) of the Rules have been attached to form part of the affidavit supporting the application.

He further informed the Court that the applicant has in addition, undertaken to furnish security for due performance of the impugned decree and prayed that the Court order that it be by way of bank guarantee issued within ninety (90) days, taking account of the huge amount involved which will entail the applicant to seek assistance from other banks to effect a bank guarantee with such colossal amount. Moreover, the learned counsel cited the case of the **National Bank of Commerce Limited v. Alfred Mwita**, Civil Application No. 172 of 2015 to reinforce his arguments. He then concluded by entreating us to grant the applicant with costs.

On his part, Mr. Kamara submitted that the respondent was not opposing the application on condition that the applicant furnish security for the due performance of the decree by way of guarantee. He, however, objected to the prayer and proposal by the applicant's counsel that issuance of the bank guarantee should be within 90 days. He argued that 90 days was too long and granting such time would be a departure from the usual 30 days granted by the Court. He contended that the applicant had ample time to prepare himself since having filed the application he must have anticipated the need to furnish security for the due performance of the impugned decree and the amount involved.

Furthermore, he beseeched the Court when deliberating on the application, to be guided by the decisions of the Court in **National Housing Corporation v. Deepan Premji Dusara and Two others**, Civil Application No. 258/18 of 2019 and **Ongujo Wakibara Nyamarwa v. Beatrice Greyson Mmbaga**, Civil Application No. 200/17 of 2021 (both unreported). Mr. Kamara concluded by praying that the Court to give the applicant only 30 days to issue the bank guarantee for due performance of the decree, as security.

The learned counsel for the applicant's rejoinder was brief, reiterating his submission in chief and prayers and emphasizing the need for the 90 days requested, for reason that the amount in the decree is massive.

Suffice it to say, at this juncture, it is instructive to take note that the law and decisions of this Court are clear on the conditions that have to be fulfilled by an applicant for the grant of an order for stay of execution of a decree. Rule 11(4) of the Rules requires that such an application must be within 14 days from the date an applicant is served with a notice of intended execution or from when he is made aware of the existence of an application for execution. Rule 11(5)(a) of the Rules requires that the applicant must establish that a substantial loss may result if the order for stay of execution is not made and rule 11(5)(b) of the Rules requires an applicant to undertake to furnish security for the due performance of the decree or order. There is also rule 11(7)(a), (b), (c) and (d) of the Rules which expounds on what should be appended to the application for stay of execution, and it states the following: a notice of appeal; a decree or order appealed from; a judgment or ruling appealed from; and a notice of the intended execution.

Having gone through the notice of motion, supporting affidavit, the oral and written submissions by the counsel for the parties, the issue for our determination is whether the applicant has complied with the conditions stated above to be granted the order for stay of execution as prayed. As correctly stated by the counsel for the applicant and conceded by the respondent's counsel, the applicant has complied with the conditions precedent in granting an order for stay of execution. First, we are satisfied

that the applicant filed the application within 14 days since as averred in paragraph 7 of the affidavit, the applicant was served with the summons for hearing of the application for execution of the impugned decree on 17/3/2022 and the instant application was lodged on 28/3/2022.

Second, according to the averments in paragraph 8 (1)-(5) of the supporting affidavit, the applicant is at risk of suffering a substantial loss that may paralyze her banking business if the order for stay of execution of the decree is not made. Third, a copy of the notice of appeal for the intended appeal filed on 5/7/2021, copies of impugned judgment and decree and the notice of execution in paragraphs 3, 4 and 7 have been attached to the affidavit in support of the application. Fourth, the applicant in paragraph 9 of the supporting affidavit has undertaken to furnish security for the due performance of the application. (See **Tanzania Cotton Marketing Board v. Coecot Cotton Co. SA** [1997] T. L. R. 63, **East Africa Development Bank v. Blueline Enterprises Ltd and A. H. T. Mwakusa** [2005] T.L.R. 203; **Asha Juma Mansoor and 9 Others v. John Ashery Mbogoni**, Civil Application No. 122/03 of 2020 and **Mantract Tanzania Ltd v. Raymond Costa**, Civil Application No. 11 of 2020 (both unreported).

For the foregoing, certainly, the applicant has cumulatively satisfied all the statutory conditions to move us to grant the order of stay of execution as prayed. In the premises, the application is hereby granted. The execution

of the impugned judgment and decree of the High Court Commercial Division in Commercial Case No. 104 of 2017 dated 5/7/2021 is hereby stayed pending the determination of the applicant's appeal in Court.

For the avoidance of doubt, the order is conditional upon the applicant depositing the Bank guarantee covering the entire decretal amount within sixty (60) days of the delivery of this Ruling. Let costs be in the main cause.

Order Accordingly.

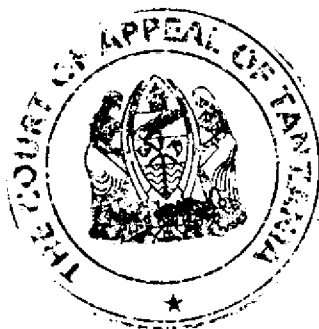
DATED at DAR ES SALAAM this 5th day of October, 2023.

W. B. KOROSSO
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

L. E. MGONYA
JUSTICE OF APPEAL

The Ruling delivered this 6th day of October, 2023 in the presence of Ms. Hamisa Nkya and Fatuma Mgunya, both learned advocate for the applicant also holding brief for Mr. Mpayia Kamara & Mr. Edward Mwakingwe, learned counsels for the Respondent, is hereby certified as a true copy of the original.




F.A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL