

**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. 471/01 OF 2022

IMPRESA DI COSTRUZIONI ING. E. MANTOVANI APPLICANT

VERSUS

D B SHAPRIYA & CO. LIMITED RESPONDENT

**(Application to stay execution of the Ruling and Drawn Orders of the High
Court of Tanzania at Dar es Salaam)**

(Miyambina, J.)

dated the 24th day of May, 2021

in

Civil Case No. 54 of 2018

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RULING OF THE COURT

04th & 10th October, 2023

KOROSSO, J.A.:

This ruling relates to an application for an order for stay of execution of the judgment and drawn order of the High Court at Dar es Salaam dated 24/05/2021 against the applicant, in Civil Case No. 54 of 2018. The application was filed by way of notice of motion pursuant to rules 11(2), (3), (4), (5) (a), (b), (c) and (d) and 48 (1) and (2) of the Tanzania Court of Appeal Rules, 2009 (the Rules). The application is supported by an affidavit sworn by Salim Juma Mushi, the applicant's advocate, which is accompanied by various documents including copies of the impugned

judgment and decree, notice of appeal, and garnishee order *nisi* served to the National Authorizing Officer for EDF among others.

Upon our perusal of the notice of motion we have discerned that the application arises from a garnishee order nisi issued by the Deputy Registrar of the High Court (DR) on 28/07/2022 addressed to the Deputy National Authorising Officer for EDF (DNAO) with the Ministry of Finance and Planning instructing him to hold sums of EURO 2,090,055.09 and Tshs. 183,041,095.89 as contractual proceeds due to the applicant and instructed to desist from transferring such sums of money until further directives from the DR. The grounds of the application are as follows:

- 1. That the applicant has lodged an appeal against the whole of the judgment and decree of the High Court in Civil Case No. 54 of 2018.*
- 2. That there exist serious errors and illegalities in the proceedings, judgment, and decree of the High Court to be challenged and examined by the Court in the intended appeal.*
- 3. That in the event execution is carried out, the applicant stands to suffer hardship, and substantial financial loss and render the intended appeal to the Court, nugatory and a mere academic exercise. Further, the government, the donors and the nation stand to suffer for the non-performance of the contract which is funded by the donors.*
- 4. In the event the money being held by the Deputy National Authorizing Officer of EDF (Ministry of Finance) is paid to the respondent, it would frustrate the project and render it impossible*

to be performed and in the event the appellant succeeds in the intended appeal, it will be impossible to recover the said amount.

5. That the balance of convenience, common sense and logic tilts in favour of granting stay.

6. That the application has been made without undue delay and

7. That the applicant is willing and ready to deposit additional security for the due performance of the decree as required and as directed by the Court.

At the hearing of the application, Mr. Roman S.L Masumbuko, learned counsel entered appearance for the respondent and the applicant was absent and unrepresented.

We are aware that in the record of the application there is a letter from Salim Juma Mushi from M/S Stratton, the counsel for the applicant to the Registrar of the Court, received on 14/9/2023 praying for the hearing of the present application to be adjourned since the learned counsel was unable to appear before us today, the 4/9/2023 for reason that he had to enter appearance before senior panel of the Court in Arusha to attend to Civil Application No. 86/02 of 2021 and Civil Review No. 127/02 of 2019.

Suffice it to say, Mr. Masumbuko adamantly objected to the prayer for adjournment on the following grounds; one, that the matter despite being filed under a certificate of urgency has been pending for a long time. Two, he argued that since the applicant has filed written submissions, thus,

there is no need for adjournment since the Court can invoke rule 106 (12) of the Rules and proceed to determine it by considering the written submission filed by the applicant's counsel.

Third, the learned counsel contended that, upon his perusal of the two notices of hearing for the cases the learned counsel for applicant claims he will appear in Arusha on the same day the instant application is set for hearing in Dar es Salaam, the law firm that stamped on the said notices acknowledging receipt is Dexter Attorneys P.O. Box 1976 and not M/S Stratton & Co. Advocates. He argued that since the record of the application shows that the applicant's legal firm for service is Stratton & Co. Advocates of Mikocheni Dar es Salaam then the learned counsel should not have relied on the said notices of hearing to support his prayer for adjournment. According to Mr. Masumbuko, in the absence of a notice for change of advocates on the part of the applicant on record, Apex Attorneys are strangers in this application and this should lead the Court not to consider the said notice as reinforcing the applicant's prayer for adjournment.

Four, in the alternative to argument number three, M/S Stratton Co. Advocates is a law firm that has more than one advocate as can be discerned from the fact the *ex parte* order pending hearing of the present application shows that the *ex parte* hearing was argued by Ms. Agnes

Dominick, learned counsel. Thus, in the absence of any information on why another advocate from the firm of advocates representing the applicant, failure to enter appearance today is without justifiable cause. Five, the respondent was not objecting to the application except to implore the Court to ensure that the applicant secures due performance of the decree through a bank guarantee from a reputable international bank with roots in Tanzania, and thus adjourning hearing of the application will just be delaying the process unnecessarily. He thus urged the Court to proceed with the hearing of the application under rule 106(12) of the Rules.

Having heard the objection by the learned counsel for the respondent, we find it prudent to commence by reproducing rule 106(12) of the Rules. It stipulates thus:

"Where an appeal or application is called on for hearing and written submissions have been duly filed and-

- (a) neither party nor their advocates appear to present oral arguments; or*
- (b) either party or his advocate appears to present oral arguments, the appeal shall be treated as having been argued and shall be considered as such:*

Provided that a party or his advocate who appears, shall be afforded an opportunity to present oral argument.”

Plainly, the provision envisages that upon the filing of written submissions by parties, the parties themselves or their counsel are expected to appear to present oral arguments if they so prefer, but where either of or their counsel do not appear to present oral arguments, the appeal shall be treated and considered as having been argued. In the instant application, on 17/10/2022, the applicant through its counsel filed written submission in terms of rule 106 (1) of the Rules. Therefore, in the absence of the applicant through a principal officer or his counsel, the issue before us is whether such circumstances warrant us to invoke rule 106 (12) of the Rules.

We granted the prayer by the respondent’s counsel and dismissed the prayer by the applicant’s counsel to adjourn the hearing of the application and ordered that hearing of the application proceed in the absence of the applicant or his counsel under rule 106 (12)(b) upon being satisfied that under the circumstances, interests of justice warrant proceeding in the absence of the applicant. In this, we were guided by previous decisions of the Court including one in the case of **Trade Union Congress of Tanzania (TUCTA) v. Engineering Systems**

Consultants Ltd and 2 Others, Civil Appeal No. 51 of 2016 (unreported), where faced with the non-appearance of the respondent who had filed his written submission under rule 10 (7) of the Rules the Court held:

"However, we noted that there were written submissions that have been filed by both sides as per rule 106(12) of the Rules. Under that rule where one or both parties do not appear but written submissions have been filed, hearing of an appeal and consideration thereof may proceed on the basis of those written submissions... we shall henceforth consider the written submissions."

[Also see, **Jutoram Kabelle Mahalla v. Vocational Education Training Authority**, Civil Appeal No. 63 of 2019 and **Patrick John Butabile v. Bakhresa Food Products Ltd, Civil Appeal No. 61 of 2019** (both unreported)].

Essentially, our decision to proceed with the hearing of the application and on the part of the applicant to consider only the pleadings and the written submission filed was prompted by the following reasons: One, notwithstanding the letter sent by the counsel for the applicant highlighted and the attachments therein and the reasons advanced for seeking an adjournment for hearing the application, we found the said

attachments confusing and questionable since in the notices of hearing what is shown is service having been effected to Dexter Attorneys of Arusha and not M/S Stratton Co. Advocates of Dar es Salaam for whom the record of the application shows are the attorneys for the applicant. Two, the applicant's counsel on 17/10/2022 filed detailed written submissions in terms of rule 106 (1) of the Rules. Three, we noted that the respondents who had originally resisted the application through the affidavit in reply filed were no longer objecting the application as submitted by Mr. Masumbuko in his oral submission. In the circumstances, we were of the firm view that the applicant would not be prejudiced in any way if hearing of the application is to proceed.

When called to expound on the application, Mr. Masumbuko reiterated his submissions that the respondent was not objecting to the application being satisfied that the applicant has fulfilled the conditions prerequisite to grant of stay of execution of a decree. He however, stressed that the support of the application is subject to the applicant providing security by way of bank guarantee for the due performance of the impugned decree.

As rightly pointed out by the learned counsel for the respondent, and upon perusal of the affidavit supporting the application, particularly,

paragraphs 11, 12, 14, 16, 17, 18 and 20 we are satisfied that the conditions for grant of stay of execution have been fulfilled.

Paragraph 14 of the affidavit supporting the application leaves no doubt that the application was filed within 14 days upon being notified of the initiation of the process to execute a decree in line with rule 11(4) of the Rules. Rule 11(7) (a)-(d) of the Rules has been complied with since copies of the notice of appeal of intended appeal, notification of execution and impugned judgment and decree are attached to the affidavit in support of the application. The applicant has also averred that the intended execution if it proceeds the risk of suffering irreparable loss including the frustration of the project to render it incapable of being executed is there as required by rule 11(5)(a) of the Rules. In compliance with rule 11(5)(b) of the Rules, as averred in paragraph 20 of the supporting affidavit, the applicant has undertaken to furnish security for the due performance of the decree.

On that basis, we find that the applicant has managed to cumulatively satisfy the conditions for the grant of the order of stay of execution of the decree. We thus order that, the execution of the decree of the High Court at Dar es Salaam in Civil Case No. 54 of 2018 be stayed pending the hearing and final determination of the intended appeal. The order is conditional upon deposit by the applicant in Court, of the decreed

sum in the form of a bank guarantee from a reputable bank within thirty (30) days from the date of delivery of this ruling. Costs of the application shall abide by the outcome of the intended appeal.

Order Accordingly.

DATED at DAR ES SALAAM this 6th 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 10th day of October, 2023 in the presence of Ms. Agnes Dominick, learned advocate for the applicant and Mr. Roman S.L. Masumbuko, learned counsel for the Respondent, is hereby certified as a true copy of the original.



F. A. Mtaranja
F.A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL