

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. 452/18/2022

ENIKON (T) LTD 1ST APPLICANT

ENIKON CONSTRUCTION CYPRUS LTD.....2ND APPLICANT

VERSUS

ABEID S. MAKAI & 15 OTHERS.....RESPONDENTS

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

(Rwizile, J.)

dated the 1st day of December, 2021

in

Labour Revision No. 869 of 2019

RULING OF THE COURT

25th September & 25th October, 2023

RUMANYIKA, J.A.:

On 27th July, 2013, Abeid S. Makai and Fifteen Others (“the respondents”) won a labour dispute, against Enikon (T) Ltd and Enikon Construction Cyprus Ltd, the 1st and 2nd applicants, respectively. The said dispute was No. CMA/DSM/KIN/R.503/13/1355, filed in the Commission for Mediation and Arbitration (“the CMA”). At the end, the CMA awarded the respondents a total sum of Euro 71,073.00 being compensation for unfair termination. Dissatisfied, the applicants challenged the award in

the High Court of Tanzania, at Dar es Salaam vide Labour Revision No. 869 of 2019 (Rwizile, J.), where again, the appellants lost that battle. Still disgruntled, on 1st February, 2022 they lodged Civil Appeal No. 37 of 2022 to challenge the said judgment and decree. However, the process and appeal apart, on 27th July, 2022, the respondents commenced the execution process, vide Execution Application No. 302 of 2022 which resulted into the filling of this application.

The application is by notice of motion taken out under rules 11(3), (4), (4A), (5)(a), (b), (6) and (7)(a), (b), (c), (d) and 48(1) of the Tanzania Court of Appeal Rules ("the Rules"), where the applicants are seeking for an order to stay the intended execution of the respective decree, pending the hearing and determination of the appeal. It is supported by an affidavit sworn by Mr. Wilson Moses Mafie who is the applicants' advocate in this application. On the other hand, the respondents have resisted the application, though they did not file affidavit(s) in reply.

This application has been brought mainly on four grounds, stated in paragraph 1(c) of the notice of motion and averred in the supporting affidavit. The grounds are as follows:

- 1. That, the whereabouts of the respondents are not known, therefore, if the execution is not stayed, the applicants will suffer*

- irreparable loss, as the former will not recover the money paid if the appeal succeeds.*
- 2. That, the applicants are ready and willing to give security for the due performance of the decree as may be ordered by the Court.*
 - 3. That, there has been no delay in filing this application, from 28th July 2022 when the applicants were served with the notice of execution and notice to show cause.*
 - 4. That the grant of an application for stay of execution will not prejudice the respondents because the applicants are economically capable of paying the decreed sum and all costs incurred to the respondents, in case the appeal fails.*

The applicants were represented by Messrs Japhet Mmuru and Wilson Mafie learned counsel while the respondents had the service of Mr. Benedict Chang'ambwe also learned counsel.

At the commencement of the hearing on 25/09/2023, Mr. Chang'ambwe rose to inform the Court that, the respondent is supporting the application. He conceded to it, provided that the applicant gives security for the due performance of the decree, as the Court may direct.

On his part, Mr. Mmuru commended and appreciated Mr. Chang'ambwe's concession. He then beseeched us to give an order staying the execution as sought by the applicant, with the direction that the latter give such security for the due performance of the impugned decree.

Having considered the notice of motion, the supporting affidavit and having heard the submissions of the learned counsel, the issue for our determination is whether the applicants have shown good cause, for the Court to order stay of execution.

In terms of rule 11(2) and (5) of the Court Rules, if a party is to succeed in an application for stay of execution of this nature, he has to satisfy all the conditions set out. The said rule provides thus:

"no order for stay of execution shall be made under this rule unless the Court is satisfied: -

- (i) That substantial loss may result to the party applying for stay of execution unless the order is made.*
- (ii) That security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon them."*

The applicants' affidavit supporting the application, the submission of his counsel and the concession of the respondents' counsel being considered together, the issue for our determination is whether the applicants have complied with the three conditions stated above cumulatively, as is mandatorily required. We have restated that legal principle in a number of cases including **Jomo Kenyatta Traders Limited and 5 others v. National Bank of Commerce Limited**, Civil

Application No. 259 of 2015 and **Geita Gold Mining Limited v. Twalib Ally**, Civil Application No. 14 of 2012 (both unreported).

Applying the principle referred above to the instant application, we are satisfied that the applicants have fulfilled the conditions set out under rule 11(2) (i) – (iii) of the Rules cumulatively. This is so, because, **One**; it is averred in paragraph 8 of the supporting affidavit that, the decreed amount is colossal such as, if, through the execution it is realized and the applicants' appeal succeeds, the respondents will not be traced to refund the money. Therefore, the applicants will suffer irreparable loss. The Court has defined the term "Irreparable loss" times without number. See- **Tanzania Ports Authority v. Pembe Flour Mills Ltd**, Civil Application No. 78 of 2007 (unreported) where we observed that;

"Irreparable loss must imply, among other things, loss which is irrecoverable in any form or manner, including damages or other monetary recompense."

The second condition concerns the issue of timing in the filing of this kind of application. What is averred in paragraph 10 of the supporting affidavit, and Mr. Chang'ambwe has conceded to it, is that, the application was filed within fourteen days prescribed under rule 11(4) of the Rules, as noted earlier on. For clarity, the fourteen days are counted from 28th July, 2022 when the applicants were served with the respective

application for execution and notice to show cause, to 2nd August, 2022 when they filed this application.

The third condition is about a firm undertaking to give security. The applicants, in paragraph 9 of their affidavit in support of the application, they have readily guaranteed it, undertaking to provide security for the due performance of the decree which may ultimately bind upon the parties, as the Court may direct.

We wish to stress on the rationale behind the requirement of giving security. The Court, in a plethora of its authorities, including in the case of **Anord L. Matemba v. Tanzania Breweries Ltd**, Civil Application No. 95 of 2012 (unreported), held that:

"security as one of the conditions for the due performance of the decree should an intended appeal fail, security among other reasons is meant to safeguard the interests of the judgment creditor in the event the judgment or decree appealed against is affirmed by the appellate court. It facilitates a post-appeal execution process."

As regards what form of the security that has to be given, the timing to furnish it, and its amount, the Court, in the case of **Mantrac Tanzania Ltd v. Raymond Costa**, Civil Application No. 11 of 2010 (unreported), stated that:-

*"...the applicant for a stay order must give security for the due performance of the decree against him. **To meet the condition, the law does not strictly demand that the said security must be given prior to the grant of 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.**"*

(Emphasis added).

In this application, the applicants have complied with it all, as averred in paragraph 9 of the supporting affidavit. That fact also, was not contested by the respondents. As noted above, Mr. Chang'ambwe expressed the respondents' no objection to the application staying execution if, by the Court order, the applicants give security for the due performance of the impugned decree, as may ultimately be binding upon them.

The respondents' concession to the application apart, we wish to stress that, when the Court is considering to issue or refuse a stay order pending determination of an appeal, as is in the instant application, it has to take the interests of the Judgment debtor and those of the decree

holder on board. More importantly, is to see, if the mode of security being ordered is less risky on the part of the respondent.

The position above was taken and conveniently summarized in **Rosengrens Limited v. Safe Deposit Centers Ltd.** [1984] 3 ALL ER. 198 at page 200 as follows:-

*"The process of giving security is one, which arises constantly. So long as the opposite party can be adequately protected, **it is right and proper that security should be given in a way, which is least disadvantageous to the party giving the security. It may take many forms. Bank guarantee and payment into court are, but two of them.....**"*(Emphasis added).

We have maintained the reasoning above, as we find it to be a just approach for it strikes a balance of convenience on the parties to the instant application.

We also note that, granting an staying execution is a two-way traffic exercise, much as, by so doing the Court demonstrates a double coincidence of wants: **One**, the applicant is assured of a constitutional right to appeal, exhausting the judicial vertical hierarchy, without fears of being preempted by the execution, **two**; the applicants' firm undertaking to give security for the due performance of the decree is an assurance to

the respondent in the end to get out of the Court not empty handed, if the applicants' appeal fails. Equally, we note that, if a combination of the two guidelines above safeguards the interest of the case, which we find to be an overriding objective, so much the better.

Moreover, we are aware of yet another mandatory requirement to append copies of the documents, to make an application of this nature competent, as stipulated under rule 11(7) of the Rules. That Rule reads as follows:

"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.*

We have noted that, the applicants have attached all the copies listed in the preceding quotation. For more clarity, the copies are **Annexures ISON-3, ISON-1, and -2** to the supporting affidavit. We reiterate that, in terms of competence and merits, the filling of, and the application itself have met the threshold conditions cumulatively.

In conclusion, the application is hereby granted. Consequently, we order a stay of execution of the decree of the High Court of Tanzania, at

Dar es Salaam, dated 1st December, 2021 in Labour Revision No. 869 of 2010, arising from Dispute No. CMA/DSM/KIN/R.503/13/1355 in the CMA. Meanwhile, we direct the applicants to deposit security in form of a bank guarantee, for Euro 71,073.00 within thirty days of this ruling. Costs in the course.

Order accordingly.

DATED at **DAR ES SALAAM** this 24th 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 25th day of October, 2023 in the presence of Mr. Benedict Pius, learned counsel for the Respondents also holding brief for Mr. Wilson Mafie, learned counsel for the Applicants, is hereby certified as a true copy of the original.




F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL