IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWANDAMBO, J.A., ISSA, J.A. And ISMAIL, J.A.)

CIVIL APPLICATION NO. 743/16 OF 2022

TULIP TANZANIA LIMITED.....1ST APPLICANT
SHEIKH SHAHID MAJEED.....2ND APPLICANT
ZAHID MAJEED.....3RD APPLICANT
MRS. KANWAL SALEEM SHAHID.....4TH APPLICANT
AM STEEL & IRON MILLS LIMITED.....5TH APPLICANT
S.S. TRADERS.....6TH APPLICANT

VERSUS

EXIM BANK TANZANIA LIMITED..... RESPONDENT

[Application for stay of execution from ruling and order of the High Court of Tanzania (Commercial Division) at Dar es Salaam]

(Mkeha, J.)

dated 1st day of November, 2022

in

Consolidated Commercial Case Nos. 120 & 121 of 2017

.....

RULING OF THE COURT

10th & 16th November, 2023

MWANDAMBO, J.A.:

The applicants were aggrieved by the order of the High Court (Commercial Division) made on 1st November, 2022 refusing to halt execution of two consent decrees in Consolidated Commercial case Nos. 120 and 121 of 2017. They accordingly lodged a notice of appeal against that order. Subsequently, they lodged this application predicated upon rule 11 (3), (4), (5) (a) and (b), (6) and (7) of the Tanzania Court of

Appeal Rules, 2009 (the Rules) for stay of execution of the consent decrees pending determination of their intended appeal to this Court.

The notice of motion sets out three grounds but all boil down to the claim that the trial court erred in not staying execution amidst ample evidence that the applicants are able to settle the decretal sum but for the delayed release of their money from the Bank of Tanzania (the BoT). The affidavit supporting the application was taken by the second applicant; Sheikh Shahid Majeed who is also the Managing Director of the first, fifth and sixth applicants. However, there is no affidavit by the third and fourth applicants.

The founding affidavit containing 10 paragraphs is, by and large, a narrative of what transpired before the trial court after the entering of the consent decrees on 13th November, 2017 and notification of receipt of Euro 26 million to be transferred to the 5th applicant's account with Standard Chartered Bank which, nonetheless, had not yet been transferred by the BoT as of the date of the application. It is averred further that, notwithstanding these facts indicating availability of money held by the BoT part of which meant to settle the consent decrees, the High Court refused to stay execution following explanation in a notice to show cause. Instead, it went ahead and appointed a court broker to

execute the decrees such that, if the said broker is not restrained, the applicants stand to suffer colossal damage which will be permanently detrimental to them. In a bid to meet the threshold for the grant of the order, the applicants have undertaken to pay for the security for costs involved in the matter.

Not amused, the respondent resists the application through an affidavit in reply deponed to by Edmund Aaron Mwasaga; her Principal Officer.

Messrs. Geofrey Ukwong'a and Captain Ibrahim Mbiu Bendera both learned advocates appeared at the hearing of the application representing the applicants. It was Captain Bendera who addressed the Court anchoring his arguments on the contents of the founding affidavit on the basis of which, he urged the Court to grant the application as prayed in the notice of motion.

On the adversary side was Mr. Elisa Abel Msuya, learned advocate who was resolute that the application was wanting in several respects; **one**, competence of the application for lack of affidavit of two of the applicants; **two**, failure to meet the requirements in applications for stay of execution set out under rule 11 (7) (a) and (b); **three**, absence of notice of appeal against the consent decrees rendering the application

incompetent on the authority of the Court's previous decisions in **Zanzibar University v. Abdi A. Mwendambo & 2 Others**, Civil Application No. 92/15 of 2018 and **Mwanza Regional Crimes Officer & 2 Others v. Protas Kashumba**, Civil Application No. 427 of 2018 (both unreported); **four**, unexplained substantial loss contrary to rule 11 (5) (a) of the Rules besides the mere mention that the execution will be permanently detrimental from consent decrees resulting from the applicants' default to settle such decrees. Mr. Msuya attacked the argument on the existence of money lying with BoT as irrelevant to the application it having been already determined and rejected by the High Court. It was his further submission that, the application is, but a disguised attempt to circumvent execution of unappealable consent decrees which have not been appealed against. Finally, the learned advocate argued that, in the absence of any particulars on the security for the due performance of the decrees should the intended appeal fail, the Court should dismiss the application with costs.

In a short rejoinder, Capt. Bendera was adamant that the applicants have sufficiently explained irreparable loss.

Having heard counsel's arguments for and against the application, and upon our examination of the notice of motion and the averments in

the founding affidavits, we do not wish to belabor on the issues raised by Mr. Msuya which appear to touch on the competence of the application. These are; lack of affidavits by some of the applicants and absence of notice of appeal against the consent decrees. We say so because had the learned advocate considered such issues to have bearing on the competence of the application, he should have raised them through a notice of preliminary objections in pursuance of rule 107 of the Rules and argued them as such. Raising them in the course of hearing was improper and at best took the applicant by a surprise which militates against the spirit behind rule 107 of the Rules.

That said, there can be no doubt that this is an unusual application. We say so mindful of the spirit behind the Court's power to order stay of execution of a decree or order upon the lodgment of a notice of appeal. It is common ground that, the decrees whose execution is sought to be stayed emanated from consent judgments. In terms of Section 5 (2) (a) of the Appellate Jurisdiction Act (the AJA), no appeal lies from a consent decree or order except with leave of the High Court. Needless to say, the application is not predicated upon the consent decrees but their execution. This is because, in the applicants' understanding, in view of the fact that they have money lying with the

BoT, it was an error on the part of the trial court to refuse their quest to halt the execution. Be it as it may, Mr. Msuya thinks that the application is, but an attempt to circumvent execution of unappealable consent decrees through the back door, so to speak. We are inclined to agree with him considering the fact that the applicants have no qualms with the decrees but their execution on the ground that they are able to settle the decrees through money lying with the BoT. That argument sounds attractive but legally untenable. We know no authority and none was cited to back up that argument. In our view, the fact that a judgment debtor has money lying somewhere has never been one of the grounds for exercising the Court's discretion to stay execution under rule 11 (3) of the Rules the more so an uncontested decree, as it were. Guided by the trite law that discretion must be exercised judiciously by taking into account all the relevant factors and leaving out the irrelevant ones, we are not persuaded that the applicants have placed before us relevant material for the Court's exercise of its discretion. That means that the existence of money with the Bank of Tanzania is irrelevant for the purpose of the instant application.

At any rate, it has not been shown that all the applicants are beneficiaries of the said money in view of the letter dated 8th April 2022

by the fifth applicant to Standard Chartered Bank (part of annex AMS-2). If we were to find such fact relevant, it would only apply to the consent decree in Commercial Case No. 121 of 2017 in which A. M. Steel & Iron Mills Ltd is the first judgment debtor. The problem is compounded by the absence of any affidavit by the third and fourth applicants.

In view of the above, we are hesitant to grant the application even if we were to find that the applicants had met the threshold for its grant prescribed under rule 11(5) of the Rules. In our view, doing so will have the effect of defeating the very intention of the legislature in restricting appeals from consent decrees or orders through section 5 (2) (a) of the AJA. It defeats logic as well that the legislature could have restricted appeals from consent decrees and yet the Rules made under section 12 of the AJA interpreted and applied to the effect that they empower the Court to stay execution of unappealable decrees. As submitted by Mr. Msuya, the application is, but an attempt to circumvent the execution of the unappealable consent decrees through the backdoor which cannot be allowed.

In view of the foregoing, we hold that the application is misconceived which spares us from considering whether or not the

applicants have met the threshold for its grant in terms of rule 11 (5) of the Rules. Consequently, the application is hereby dismissed with costs.

It is so ordered.

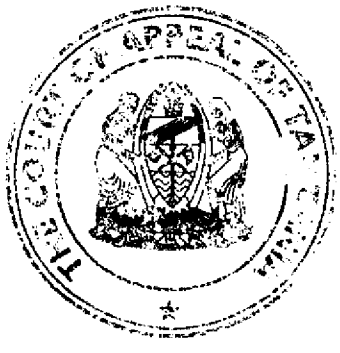
DATED at **DAR ES SALAAM** this 15th day of November, 2023.

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

A. A. ISSA
JUSTICE OF APPEAL

M. K. ISMAIL
JUSTICE OF APPEAL

The Ruling delivered this 16th day of November, 2023 in the presence of Ms. Irene Mchau, learned Counsel for the Respondent and also holding brief for Captain Ibrahim Mbiu Bendera, learned Counsel for the Applicants, is hereby certified as a true copy of the original.



S. P. MWAISEJE
DEPUTY REGISTRAR
COURT OF APPEAL