IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: MWAMBEGELE, J.A., KOROSSO, J.A. And KITUSI, J.A.)

CIVIL APPLICATION NO. 85/02 OF 2023

NMB BANK PLC ..... APPLICANT

VERSUS

M/S ROIKA TOURS & SAFARIS LIMITED ..... RESPONDENT

(Application for Stay of Execution of the Decree of the High Court of Tanzania at Arusha)

(Kamuzora, J.)

dated the 19th day of April, 2022
in
Civil Case No. 13 of 2018

RULING OF THE COURT

14th & 16th November 2023

KITUSI, J.A.:

This is a fiercely contested application for stay of execution lodged under a notice of motion citing rule 11 of the Tanzania Court of Appeal Rules, 2009 (the Rules) and the relevant sub-rules. Mr. Sabato Ngogo, learned advocate for the applicant was down to earth and disclosed to us during the hearing, that he had hardly expected such resistance from Mr. Elvaison Maro, learned advocate for the respondent.

To the extent that it is relevant for the determination of this application, here is its brief background; the respondent won Civil Case No. 13 of 2018 High Court of Tanzania sitting at Arusha and was awarded a decree worth Tshs 908,335,569.00 which she now wants to

execute. On 18/1/2023 the respondent served the applicant with a notice of the intended execution.

On receipt of that notice of execution, the applicant acted within 14 days by filing this application seeking an order of stay of that intended execution. She has demonstrated, through an affidavit of Said Pharseko a principal officer of the applicant, that she lodged a notice of appeal and has done all what is within her means to secure documents for filing the intended appeal.

The gravamen of the application is that the applicant is willing and ready to furnish security for the due performance of the decree as may ultimately be binding on her in the event the appeal is not successful. However, it is deponed and submitted by learned counsel that if the order of stay of execution sought is not granted, the intended appeal will be rendered nugatory and the applicant will suffer irreparable loss.

The respondent took an affidavit in reply through Lucas Roika Mollel its principal officer. In that affidavit in reply, as well as in Mr. Maro's submissions, the main issue of contention is whether or not the applicant has established that she will suffer irreparable loss. So, the scope of the contention is narrow but the arguments are intense.

While Mr. Ngogo has submitted that the application meets all requirements under rule 11 of the Rules in that; there is a notice of appeal; this application has been filed within 14 days as per rule 11 (4) of the Rules and further that the applicant has undertaken his willingness to furnish security, Mr. Maro has maintained that he does not dispute all that except that the applicant has not demonstrated how she is going to suffer irreparable loss, which is a requirement under sub – rule 5 (a) of rule 11 of the Rules.

Mr Ngogo referred us to parts of paragraphs 6 and 7 of the supporting affidavit to show that the applicant has established that she will suffer irreparable loss if the execution is left to proceed. The learned counsel referred us to our decision in the case of **Enikon (T) Ltd & Another v. Abeid S. Makai & 15 Others,** Civil Application No. 452/18 of 2022 (unreported), showing the balance between a party's constitutional right to appeal and the other's need to be secured.

We have read the contents of paragraphs 6 and 7 of the affidavit of Said Pharseko which, in essence, aver that the decretal amount involved is colossal and if execution is not stayed and that money is taken by the respondent, the applicant will suffer irreparable loss *which cannot be compensated by the respondent immediately.*

Arguing that substantial loss must be established, Mr. Maro submitted that the affidavit must bring out that alleged loss but, he submitted, that has not been done in the instant case. He also submitted that the assertion that the respondent may not refund the money *immediately* is not the same thing as saying that the respondent cannot refund. The learned counsel cited three cases to argue that the decretal sum is too paltry to shake a financial eagle such as the applicant with a net balance of over 10 trillion shillings. The cases cited define the breath of what constitutes irreparable loss. The first case is **National Housing Corporation v. Deepan Premji Dusara and Others**, Civil Application No. 258/18 of 2019 (unreported). He drew our attention to the following excerpt:

> *"In the case of **Tanzania Ports Authority v. Pembe Flour Mills Ltd** Civil Application No. 78 of 2007 (unreported), we illustrated how substantial and irreparable loss could be gauged, observing that irreparable loss must imply among other things, the loss which is irrecoverable in any form or manner including damages or other monetary compensation".*

The second case cited by learned counsel is **Tanzania Cotton Marketing Board v. Cogecot Cotton Co. SA** [1997] T.L.R 63. In the relevant part to which we were referred, the Court stated:-

> *"Then there is the question of whether the loss is irreparable. I have already held that in this case the applicant has not advanced the case beyond the vague and generalized assertion of substantial loss in the event a stay order is not granted. That is, granted that there was such a loss to be incurred by the applicant, would such a loss be adequately compensated by an award of damages? In a number of cases, this Court has held that stay order is not normally granted, unless the Court is satisfied that the applicant has suffered an irreparable loss that cannot be atoned by way of damages..."*

The third case cited by Mr. Maro to support his submissions is **Aidan George Nyongo v. Magese Machenja & Others**, Civil Application No. 237/17 of 2016 (unreported) where the application for stay of execution was dismissed because thus:-

> *"...having failed to establish substantial loss to be suffered, the applicant has not met the crucial condition and key element under rule 11 (2) (d) (i) of the Rules".*

Responding to the contention that the respondent has no sufficient means to refund the money if execution is left to take place, Mr. Maro referred us to paragraph 8 of the affidavit in reply and page 6 of the financial statement annexed to the affidavit as R-4. There is an

averment that the respondent's non-current assets alone are worth Tshs 1.8 billion which is well above the decretal amount. He also alluded to the fact that the judgment in question, though entered for the respondent, did not bear interest which, he argued, exposes the said monetary decree to the danger of depreciation so that by the time the money is finally handed over to the decree holder, it will be less in terms of its value.

In rejoinder, Mr. Ngogo pointed out that what appears to be the net profit of the applicant is in fact not her money but shareholders' money considering that it is a public entity. He also submitted that the case of **Tanzania Cotton Marketing Board** (supra), represents the old law which required a party to have suffered loss. The learned counsel insisted that under the current rule 11 of the Rules, what is required is establishment that the applicant may suffer irreparable loss. The learned counsel also sought to distinguish the case of **Aidan George Nyongo v. Magese Machenja & Others** (supra) arguing that the applicant in that case, unlike in this one, had also failed to establish an undertaking to furnish security as per the Rules. On the contention that the value of the decreed sum will keep depreciating, Mr. Ngogo submitted that on appeal, the Court may reconsider whether the decreed amount is legally justified or not.

Having heard the competing arguments of the parties in this matter we are aware that we are being called upon to pronounce ourselves on a delicate balance between the interest of a decree holder to enjoy the fruits of the judgment on the one hand, against those of the judgment debtor to exercise her constitutional right of appeal on the other hand. Fortunately, this is not a new terrain because the Court has dealt with it before. In **Africhick Hatchers Limited v. CRDB Bank PLC,** Civil Application No. 98 of 2016 (unreported), the Court dealt with that tricky seesaw by reproducing extensively the principles enunciated in the case of **Rosengrens Ltd v. Safe Deposit Centres Ltd** [1984] 3 ALL ER 198, adopting them. We shall follow suit and pick some relevant parts from **Rosengrens Ltd** (supra)**.** Part of it reads:-

> *"We are concerned with preserving the rights of both parties pending that appeal. It is not the function of the Court to disadvantage the defendant while giving no legitimate advantage to the plaintiffs... It is our duty to hold the ring even handedly without prejudicing the issue pending the appeal".*

In similar vein, in **Airtel Tanzania Limited v. Ose Power Solutions,** Civil Application No. 336/01 of 2017 (unreported) we stated:-

"While we are aware that the respondent is entitled to enjoy the fruits of its decree, the applicant has a statutory right of appeal towards which she has already commenced the process through the lodged notice of appeal which in our considered view constitutes good cause".

The case of **Enikon (T) Ltd & Another v. Abeid S. Makai & 15 Others** (supra), cited the case of **Rosengrens Ltd** (supra) and reiterates the above principles.

Back to our case, the applicant has, as admitted by Mr. Maro, complied with all the conditions but that she will suffer irreparable loss. In our considered view, the decretal amount of Tshs 908, 335, 569.00 is a colossal sum and substantial to the extent that irreparable loss may result even to a financial giant. We agree with Mr. Ngogo's distinction of the cases of **Tanzania Cotton Marketing Board** and **Aidan George Nyongo** (supra) as bearing different circumstances. Although Mr. Maro has put forward very fine arguments to which we feel indebted, we are however, inclined to hold in favour of staying the execution to avoid any possible prejudice. This prejudice factor was considered in **Africhick Hatchers Limited** (supra) citing a decision of the Kenya Court of Appeal in **Ndihiu Gitahi v. Warugongo** [1988] K.L.R 621. It reproduced a passage which we also reproduce in part:-

"The aim of the Court in this case was to make sure, in an even-handed manner, that the appeal will not be prejudiced and that the decretal sum would be available if required."

For all those reasons, we grant this application and order stay of execution of the decree of the High Court in Civil Case No. 13 of 2018, till determination of the intended appeal. This order is subject to the applicant furnishing security in a form of bank guarantee covering the decretal sum of Tshs 908, 335, 569.00 within 30 days of this order.

Costs shall be in the main cause.

DATED at **ARUSHA** this 15th day of November, 2023.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

The Ruling delivered on this 16th day of November, 2023 in the presence of Ms. Jackline Mashauri, learned counsel for the applicant and Mr. Valentine Joachim Nyalu, counsel for the respondent, is hereby certified as a true copy of the original.

A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL