

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

(CORAM: WAMBALI, J.A., KEREFU, J.A. And MGEYEKWA, J.A.)

CIVIL APPLICATION NO. 433/02 OF 2022

SERENGETI BREWERIES LIMITEDAPPLICANT

VERSUS

MONABAN TRADING & FARMING CO. LIMITED..... RESPONDENT

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

(Gwae, J.)

Dated the 22nd day of March, 2022

in

Civil Case No. 1 of 2020

RULING OF THE COURT

10th & 16th November, 2023

KEREFU, J.A.:

The applicant, Serengeti Breweries Limited, on 1st April, 2022 filed a notice of appeal seeking to challenge the decision of the High Court (Gwae, J.), in Civil Case No. 1 of 2020 dated 22nd March, 2022. As the intended appeal is still pending, the applicant has approached this Court by way of notice of motion made under Rules 11 (3), (4), (4A), (5), (6), and (7) of the Tanzania Court of Appeal Rules, 2009 (the Rules) for stay of execution of the decree passed in that case, pending the final

determination of the appeal. The grounds indicated in the notice of motion can conveniently be paraphrased as follows, that:

- (i) The applicant has lodged a notice of appeal in this Court against the decision of the High Court of Tanzania at Arusha, in Civil Case No. 1 of 2020 delivered on 22nd March, 2022 (Gwae, J.);*
- (ii) Substantial and irreparable loss will result to the applicant if execution is not stayed exacerbating the applicant's financial and operational difficulties;*
- (iii) The judgment and decree complained contain manifest legal and factual errors requiring determination by this Court;*
- (iv) The amount involved is colossal, being Tshs. 253,986,000.00. Allowing the execution will cause and result into significant financial and operational difficulties for the applicant;*
- (v) Execution will render the intended appeal nugatory and merely an academic endeavor;*
- (vi) The respondent's current sources of income are unknown; and*
- (vii) The applicant is able, ready and willing to issue security for the performance of the decree in the event the appeal is determined in favour of the respondent.*

The notice of motion is supported by an affidavit duly sworn by one Lucia Minde, the Head of the Legal Department of the applicant. The great part of the said affidavit narrated the historical background to the application and reiterated the above grounds stated in the notice of motion by way of emphasis including attachment of relevant documents thereto.

It is noteworthy that, the respondent, though duly served with the copy of the application, did not file an affidavit in reply to contest and/or otherwise support the application.

As indicated above, the application traces its origin from the decision of the High Court at Arusha (Gwae, J.) dated 22nd March, 2022 in Civil Case No. 1 of 2020 where the applicant sued the respondent and sought for the following reliefs; (i) a declaratory order that the respondent was handed over by the applicant a white sorghum weighing 1,383,000 Kilograms, property of the applicant; (ii) that, the respondent should be ordered to release 1,383,000 Kilograms of white sorghum to the applicant; (iii) general damages to be assessed by the court; (iv) costs of the suit; and (v) any other relief(s) as the court may deem fit to grant.

It is on record that, upon being served with the applicant's amended plaint, the respondent disputed all the applicant's claims and raised a counter claim where she prayed for the following reliefs; (i) An order for payment of TZS. 540,409,485.00 being an outstanding amount for grain management service from 7th October, 2016, 7th October, 2017, 7th October, 2018 and 7th October, 2019; (ii) costs of the suit; and (iii) any other relief(s) as the court may deem fit to grant.

Having heard the evidence from both parties, the High Court (Gwae, J.) dismissed the applicant's suit and granted the respondent's counter claim by ordering the applicant to pay her a total of TZS 253,986,000.00 and costs of the suit.

Aggrieved, the applicant lodged the notice of appeal to challenge the decision of the High Court. Meanwhile, the respondent, on 17th May, 2022 approached the High Court at Arusha vide Execution Application No. 25 of 2022 seeking execution of the impugned decree.

Subsequently, on 8th July, 2022, the applicant was served with the notice to show cause why the decree of the High Court should not be executed against her. The said notice also required the applicant to appear for hearing of the said application on 26th July, 2022. The notice

prompted the applicant to lodge the current application on 15th July, 2022.

When the application was placed before us for hearing, the applicant and the respondent were represented by Mr. Steven Axwesso and Mr. Francis Stolla, both learned counsel respectively.

In support of the application, Mr. Axwesso adopted the notice of motion as well as its accompanying affidavit. He then submitted that the applicant has fulfilled the mandatory requirements for grant of an application of this nature. To clarify, the learned counsel referred us to Rule 11(4) of the Rules and argued that the application was filed within the prescribed time as the applicant was served with the notice on 8th July, 2022 and lodged this application on 15th July, 2022. He also referred us to paragraphs 2, 6 and 8 of the applicant's affidavit in support of the application and stated that the applicant has attached all the necessary documents, such as; copies of impugned judgment and decree (annexture 'SBL-1'); a copy of the notice of appeal (annexture 'SBL-3'); and an application for execution and the notice thereof (annexture 'SBL-5') as required by Rule 11 (7) of the Rules.

He further referred us to paragraph 11 of the applicant's affidavit in support of the application and submitted that the applicant has also

complied with two conditions stipulated under Rule 11 (5) (a) and (b) of the Rules as she had indicated that the amount involved in the execution is colossal. That, if the execution is not stayed, she will suffer substantial loss as her operations will be paralyzed.

On the firm undertaking to furnish security for the due performance of the decree, Mr. Axwesso referred us to paragraph 10 of the same affidavit and submitted that the applicant has undertaken to furnish security, as will be ordered by the Court, for the due performance of the decree sought to be stayed if the appeal is unsuccessful. Finally, Mr. Axwesso submitted that, since the applicant has complied with all the conditions and had already lodged the notice of appeal, this application should be granted pending the hearing and determination of the appeal.

In his response, Mr. Stolla submitted that the respondent is not opposing the application, but only insist that the security offered should be issued in accordance with the law. That, the same should be in the form of bank guarantee and should be deposited in Court within sixty (60) days from the date of the Court's order. As such, he also prayed for the application to be granted.

In a brief rejoinder, Mr. Axwesso did not have any quarrel with the proposals made by his learned friend regarding the form of the security and the duration to deposit the same in Court.

We have examined the notice of motion, the supporting affidavit and considered the oral arguments advanced by the learned counsel for the parties. Notwithstanding the respondent's concession to the application, we are still enjoined to determine as to whether the applicant has cumulatively complied with the conditions stipulated under Rule 11 of the Rules. For the sake of clarity, Rule 11 provides that:

"11.- (1) to (3) [NA]

(4) An application for stay of execution shall be made within fourteen days of service of the notice of execution on the applicant by the executing officer or from the date he is otherwise made aware of the existence of an application for execution;

(4A) [NA];

(5) No order for stay of execution shall be made under this rule unless the Court is satisfied that-

(a) substantial loss may result to the party applying for stay of execution unless the order is made;

(b) security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him.

(6) [NA]

(7) 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;*
- (d) a notice of the intended execution."*

It is evident from the record of the application that the applicant lodged this application on 15th July, 2022 within the prescribed period of fourteen (14) days in terms of sub-rule (4) of Rule 11, as the applicant was served with the notice of execution on 8th July, 2022. It is also noticeable that sub-rule (7) of Rule 11 was fully complied with since the application is accompanied by mandatory copies of the notice of appeal, the High Court's judgment and decree appealed against and the notice of execution.

It is also evident that, to meet the requirement of sub-rule (5) (a) of Rule 11, the applicant had indicated under paragraph 11 of the affidavit in support of application that, substantial loss shall result to her if the order of stay is not granted as the applicant will be compelled to

pay TZS 253,986,000.00 which will paralyze her operations and affect her financial capacity.

As for the requirement to furnish security in terms of sub-rule (5) (b) of Rule 11, we note the applicant's undertaking, under paragraph 10 of the affidavit in support of the application, to satisfy the impugned decree if the appeal is decided in favour of the respondent. We take it as a sufficient undertaking to provide security for the due performance of the decree. See for instance our previous decisions in **Mantrac Tanzania Limited v. Raymond Costa**, Civil Application No. 11 of 2010 (unreported); **Joseph Antony Soares @ Goha v. Hussein Omary**, Civil Application No. 6 of 2012 [2013] TZCA 328: [8 May 2013: TanzLII]; **Junior Construction Company Limited & 2 Others v. Mantrac Tanzania Limited**, Civil Application No. 24/16 of 2021 [2021] TZCA 417: [26 August 2021: TanzLII] and **The Registered Trustees of the Chama cha Mapinduzi & 3 Others v. Mehboob Ibrahim Alibhai**, Civil Application No. 117/17 of 2018 [2021] TZCA 444: [26 August 2021: TanzLII].

In the final analysis, we are satisfied that the applicant has cumulatively complied with all the statutory conditions warranting the grant of the stay order as conceded by the respondent. Accordingly, we

grant the application and order stay of execution of the decree of the High Court of Tanzania at Arusha in Civil Case No. 1 of 2020 dated 22nd March, 2022 on condition that the applicant deposit in the Court, within sixty (60) days from the date of delivery of this ruling, a bank guarantee for the decreed sum of TZS 253,986,000.00. The said guarantee shall remain in force until full hearing and determination of the intended appeal. In default, the order of stay shall lapse automatically. Costs incidental to this application shall follow the event in the intended appeal.

It is so ordered.

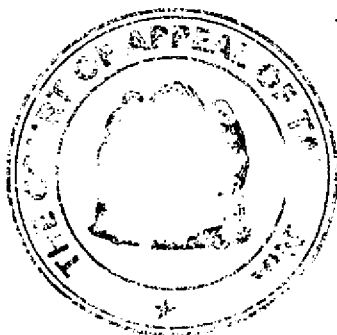
DATED at DAR ES SALAAM this 14th day of November, 2023.

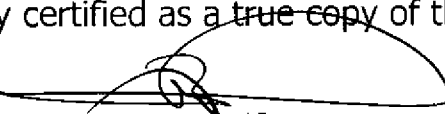
F. L. K. WAMBALI
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

A. Z. MGEYEKWA
JUSTICE OF APPEAL

The Ruling delivered this 16th day of November, 2023 in the presence of Mr. Mahmoud Mwanga, holdings brief for Mr. Steven Axwesso and Mr. Francis Stolla, learned advocates for the applicant and the respondent is hereby certified as a true copy of the original.




J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL