

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

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

CIVIL APPLICATION NO. 296/18 OF 2022

AI OUTDOOR (T) LIMITED.....APPLICANT

VERSUS

GODFREY SHUMA..... RESPONDENT

**(Application for Stay of Execution of the Judgment and Decree of the
High Court of Tanzania, Labour Division at Dar es Salaam)**

(Maghimbi, J.)

Dated the 25th day of March, 2022

in

Labour Revision No. 303 of 2021

RULING OF THE COURT

14th & 20th November, 2023

KEREFU, J.A.:

The applicant, AI Outdoor (T) Limited, on 30th March, 2022 lodged a notice of appeal seeking to challenge the decision of the High Court (Maghimbi, J.), in Labour Revision No. 303 of 2021 dated 25th March, 2021. As the intended appeal is still pending, the applicant has approached this Court by way of a notice of motion made under Rules 11 (3), (4A), (5) (a), (b), (6), (7) (a), (b), (c), (d) and 48 (1) 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 are as follows, that:

- (i) The respondent had already filed an application for execution at the High Court (Labour Division) after the pronouncement of the judgment and decree of the High Court and unless the application is granted, the execution proceedings may continue at the High Court of Tanzania (Labour Division) at Dar es Salaam;*
- (ii) Substantial loss may result to the applicant if the order for stay is not granted; and*
- (iii) The applicant has already filed notice of appeal to challenge the decision of the High Court.*

The notice of motion is supported by an affidavit duly sworn by one Enock Zadock Koola, the Executive Director of the applicant. In the said affidavit, the deponent 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.

The background facts giving rise to the judgment and decree sought to be stayed, as obtained from the record of application, are very

brief. They go thus, the respondent was an employee of the applicant at the position of a Finance Manager in respect of an employment contract envisaged to start on 10th February, 2019 to 9th February, 2022. However, the said employment contract was terminated on 31st May, 2020 on what the respondent termed as operational requirement and restructuring of the company to reduce some of the positions due to financial constraints (retrenchment).

Aggrieved by the said termination, the respondent referred the matter to the Commission for Mediation and Arbitration (the CMA) vide Labour Dispute No. CMA/DSM/ILA/518/2020/203 claiming that he was unfairly terminated from service and prayed to be paid compensation at the tune of TZS 146,369,231.00 which included leave balance, remuneration for the work done prior to the breach of employment contract and compensation for the salaries of the remaining period of the contract. In defence, the applicant denied the respondent's claims, hence the suit proceeded into a full trial.

Having heard the parties and considered the evidence adduced before it, in its award dated 25th June, 2021, the CMA partly allowed the

applicant's claims by ordering the respondent to pay him a total amount of TZS 5,669,230.08 as leave allowances and dismissed other claims.

Dissatisfied with the CMA's award, the applicant moved the High Court, Labour Division vide Labour Revision No. 303 of 2021 to revise it. Upon hearing the parties, the High Court, on 25th March, 2022, varied the CMA's award by ordering the applicant to pay the respondent a total amount of TZS. 136,319,230.77 for the remaining period of the contract.

Aggrieved, the applicant, on 30th March, 2022, lodged the notice of appeal to challenge the decision of the High Court. Meanwhile, the respondent, on 23rd May, 2022 approached the High Court, Labour Division at Dar es Salaam seeking execution of the impugned decree. Subsequently, on 24th May, 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 Execution Application No. 181 of 2022 on 2nd June, 2022. The notice prompted the applicant to lodge the current application as indicated above.

When the application was placed before us for hearing, the applicant and the respondent were represented by Mr. Gilbert Mushi and Mr. January Raphael Kambamwene, both learned counsel respectively.

In support of the application, Mr. Mushi 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 his argument, 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 24th May, 2022 and lodged this application on 6th June, 2022 after lapse of only twelve (12) days. He also referred us to paragraphs 2, 3 and 4 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 AI-1); a copy of the notice of appeal (annexture AI-2); and notice of execution (annexture AI-3) as required by Rule 11 (7) of the Rules.

He further submitted that the applicant has also complied with the 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, the respondent may not be able to refund the same and the applicant will suffer substantial loss.

On the firm undertaking to furnish security for the due performance of the decree, Mr. Mushi referred us to paragraph 6 of the affidavit and submitted that the applicant has undertaken to furnish security as may be ordered by the Court. He, however, urged us to find it appropriate to order the applicant to furnish security in the form of insurance cover. Finally, Mr. Mushi 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. Kambamwene did not oppose the application, but was only concerned with the form of security of insurance cover proposed by his learned friend. He contended that the same was only a mere counsel's statement made from the bar as it is not indicated in the affidavit in support of the application. In the alternative, Mr. Kambamwene urged us to order the applicant to furnish security in the form of bank guarantee, as he said, it may ultimately be binding upon her. The learned counsel did not press for costs as he correctly stated

that the application emanated from a labour related matter. He thus, also prayed for the application to be granted.

In a brief rejoinder, Mr. Mushi welcomed his learned friend's concession to the application. On the issue of security, although, he acknowledged that the option of issuing insurance cover as a security was not captured in the affidavit in support of the application, he insisted that, the same may be an appropriate mode of security to be issued by the respondent, as a bank guarantee may be tantamount to obtain a loan which may not be convenient to the applicant. He stated further that the said insurance cover would equally secure the payment of the decreed sum. He however, upon reflection, decided to leave the matter to the discretion of the Court. He also beseeched us to give the applicant, at least, sixty (60) days from the date of the stay order to process the said security and deposit it 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 6th June, 2022 within the prescribed period of fourteen (14) days in terms of sub-rule (4) of Rule 11, as it was filed on the twelfth (12) day after being served with the notice of execution. 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 has indicated under paragraph 5 of the affidavit in support of the application that the amount of TZS. 136,319,230.77 involved in the execution is colossal and if the execution is not stayed, the respondent may not be able to refund the same and as a result, the applicant will suffer substantial loss. In the circumstances, and taking into account that the respondent has not stated that he has the financial wherewithal to refund the said decreed sum in the event the appeal succeeds, we are inclined to find that the

applicant would be exposed to substantial loss should the impugned decree be executed.

As for the requirement to furnish security in terms of sub-rule (5) (b) of Rule 11, we note the applicant's undertaking and willingness under paragraph 6 of the affidavit to satisfy the impugned decree. We are also mindful of the fact that, in his oral submission, Mr. Mushi urged us to find it appropriate to order the applicant to furnish security in the form of insurance cover. The said option was challenged by Mr. Kambamwene who urged us to order the applicant to furnish security in the form of bank guarantee as he argued that the same is more reliable. Therefore, the crucial point for our determination at this juncture is the type of security to be furnished by the applicant for due performance of the impugned decree.

It should be observed, at the outset, that the discretion to determine the kind of security to be furnished and the duration to be given to the applicant to do so, lies with the Court and not to the parties. We find solace in our previous decision in **Mantrac Tanzania Limited v. Raymond Costa**, Civil Application No. 11 of 2010 (unreported) where we gave the following guidance:

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

In the instant application, having considered the submission made by Mr. Mushi offering insurance cover to stand as security for due performance of the decree, we are unable to agree with him on that point. As correctly argued by Mr. Kambamwene, the said form of security was only a mere statement from the bar as it is unsubstantiated in the applicant's affidavit in support of the application. As such, we agree with the argument of Mr. Kambamwene that the appropriate form of security in the circumstances of this application is the bank guarantee.

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. Accordingly, we grant the application and order

stay execution of the decree of the High Court of Tanzania, Labour Division at Dar es Salaam in Labour Revision No. 303 of 2021 dated 25th March, 2021 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. 136,319,230.77. 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. We make no order as to costs.

It is so ordered.

DATED at DAR ES SALAAM this 17th day of November, 2023.


F. L. K. WAMBALI
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

The Ruling delivered this 20th day of November, 2023 in the presence of Mr. Gilbert Mushi, learned advocate for the applicant and in the absence of the respondent is hereby certified as a true copy of the original.




J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL