IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MKUYE, J.A., MWAMPASHI, J.A. And MDEMU, J.A.)

CIVIL APPLICATION NO. 315/12 OF 2022

CRDB BANK TANZANIA LIMITED..... APPLICANT

VERSUS

TUNU AHMED LASHIKU..... RESPONDENT

(An application for stay of execution of the Order dated 31st May, 2022 in Civil Application No.24 of 2021 and Order dated 20th November, 2021 in Execution Application No.12 of 2019 arising from the Judgment and Decree of the High Court of Tanzania, at Tanga)
(Rugazia, J.)

dated the 7th day of May, 2015

in

Civil Case No. 25 of 2002

.....

RULING OF THE COURT

15th & 23rd November, 2023

MDEMU, J.A.:

This application, which is by way of notice of motion and supported by the affidavit of Mr. Pascal Mihayo, the Head of Legal Services of the applicant, intends to stay execution of the order dated 31st May, 2022 in Civil Application No. 24 of 2021 and the order dated 20th November, 2020 in Execution Application No. 12 of 2019 arising from the judgment and decree of the High Court of Tanzania at Tanga, in Civil Case No. 25 of 2002. It came for hearing on 15th November, 2023 in which, Mr. Francis Mgare,

learned Advocate who represented the respondent, rose and objected the hearing of the application on account that, it was filed out of time contrary to the requirement of rule 11 (4) of the Tanzania Court of Appeal Rules, 2009 (the Rules). Given the nature of the preliminary objection and the circumstances surrounding the entire application, we decided, and made our order to hear both the raised preliminary objection and the application. This ruling of the Court therefore determines both the preliminary objection and the reliefs sought for in the notice of motion.

Before we embark on the exercise of determining the objection and the entire application, we find it relevant to state briefly facts giving rise to the instant application. In Civil Case No. 25 of 2002, the respondent herein filed a suit in the High Court of Tanzania at Tanga against the applicant, jointly with Shukuru Banzi and Mnkondo Auction Mart, not party to this application, for special and general damages. Prior, the applicant advertised to auction some of its vehicles. The respondent bided and became a successful bidder in that auction, thus purchased a motor vehicle with registration number TZH 7149, make land rover discovery. The said motor vehicle was not handed over to the respondent as agreed. As said, the respondent filed a suit claiming TZS. 10,335, 000.00 as principal direct costs

of a tied-up investment; TZS. 16, 680, 000.00 for loss of use of the purchased motor vehicle from August, 1999 to May, 2000; TZS. 8,000,000.00 for pain and suffering and TZS. 10,000,000.00 for loss of esteem and embarrassment and interest at commercial bank rate to the date of judgment and also at court rate to the date of payment. At the conclusion of trial, the High Court (Rugazia J.) on 7th May, 2015 decreed as follows:

> *The plaintiff is entitled to the general damages assessed at Tshs.5 million, interest thereof at the prevailing commercial bank rate from August, 1999 up to the date of judgment and at court rate, from date of judgment to date of full payment. Costs are also awarded.*

With this decree, neither the applicant nor the respondent appealed from. On 27th February, 2019 the applicant applied for execution of the said decree which, based on his calculations, had accrued to TZS. 399,384,506.78 to be realized by attachment and ultimately the sale of motor vehicles of the applicant. The Deputy Registrar allowed the application for execution by observing that:

> *On my part, I have considered rival submission and I agree with the learned counsel for the applicant that there is no good cause shown to halt this execution. If at*

all the respondent wanted the court to stay execution, then a proper application to that effect should have been filed.

Given that order of the Deputy Registrar, a fourteen (14) days' notice was served to the applicant to settle the decretal sum, else eleven (11) motor vehicles of the applicant would be the subject of attachment and thereafter be auctioned in realization of the said decree. Following that notice, the applicant moved the High Court of Tanga at Tanga (Agatho J.) in Miscellaneous Civil Application No.24 of 2021 for lifting the warrant of attachment. The main concern of the applicant was on the value of the motor vehicles subject of attachment which were estimated to value TZS. 2 billion being greater compared to the decreed value. The application was dismissed with costs for want of substance. In the course, the High Court reactivated execution proceedings No. 12 of 2019 and Civil Case No. 25 of 2002. Being dissatisfied with this decision, the applicant lodged a notice of appeal and also filed this application for stay of execution of a decree on the grounds stated in the notice of motion.

As alluded to, Mr. Mgare, for the respondent, rose and with leave of the Court, raised orally a preliminary objection to the effect that, the application for stay of execution is time barred. The basis of Mr. Mgare's

objection in his submission was that, as the applicant was served with the notice of execution on 7th March, 2019, application for stay of execution filed on 10th June, 2022 was well beyond the fourteen (14) days prescribed under rule 11 (4) of the Rules. In his argument, the applicant was to file the said application latest by 21st March, 2019.

In the second limb, Mr. Mgare submitted that, even when time is computed from the date the applicant was served with the fourteen (14) days' notice of warrant of attachment, yet the application was time barred because the said notice (annex CRDB-4) was served to the applicant on 2nd August, 2021. That is, the application for stay of execution ought to have been filed by 16th August, 2021 but, it was not until 10th June, 2022. As the application contravened rule 11 (4) of the Rules, Mr. Mgare urged us to dismiss the application relying on the principles stated in **Stanbic Bank Tanzania Ltd v. Solomon Sioi**, Civil Application No.521/18 of 2017 (unreported).

In reply, Mr. Rwazo resisted the preliminary objection by submitting that, the application for stay of execution was filed within time because the decision of the High Court which reactivated the application for execution was delivered on 31st of May, 2022 while this application was filed on 10th

June, 2022, thus was within fourteen (14) days. He added further that, the applicant did not contest the decree but the manner it was to be executed. In his argument, this was the reason for not applying for stay of execution immediately upon being served with the notice of execution. What the applicant did under the circumstances was to draw the attention of the Deputy Registrar and later moved the High Court to lift the warrant of attachment, all being steps to ensure the execution is within the value of the decree and not as was in this case where what was to be attached was far beyond the value of the decree to be executed. He thus distinguished the case of **Stanbic Bank Tanzania Ltd** (supra) because, unlike in that case, the instant application was made after the High Court refused to lift the warrant of attachment, and instead, reactivated the execution processes. He, thus, urged us to find the preliminary objection unmeritorious.

In rejoinder, Mr. Mgare stated that, it was wrong on the side of the applicant to compute time basing on the ruling of the High Court which refused to lift the warrant of attachment as the said order is not executable hence, incapable of being stayed. The learned counsel also faulted the applicant to cite rule 4 (a) of the Rules as one of the enabling provisions on

account that, the rule is only invoked in circumstances where there are no provisions guiding the matter in question.

Submitting in the main application for stay of execution, Mr. Rwazo first prayed to amend his notice of motion by citing rule 4 (2) (a) and (b) instead of rule 4 (a) appearing thereto. Leave, having been granted as prayed for, the learned counsel commenced his submission by adopting the affidavit of one Pascal Mihayo to form part of his submission. He thereafter cited to us the case of **Ecobank Tanzania Limited v. Double A Co. Ltd & Others**, Civil Application No.178 of 2021 (unreported) elaborating that, this Court may stay any order which an appeal may lie from. In this therefore, his argument was that, as the learned judge failed to indicate the amount to be executed and that, the interest deployed was not prescribed by the court, the applicant has thus challenged that decision by lodging the notice of appeal. Therefore, as deposed under paragraphs 9, 10 and 11 of the affidavit, the application was filed within time as per the requirement of rule 11 (4) of the Rules.

Regarding substantial loss to be suffered in case execution is allowed to proceed, the learned counsel submitted that under paragraphs 13 and 14 of the supporting affidavit, the applicant deposed that, what is to be

executed is over and above the value of the decree and therefore, the possibility of recovery is not certain given the unknown financial position of the respondent. He added in this that, the motor vehicles to be attached are in normal daily operations which, if attached, provision of service by the applicant will be jeopardized. He also submitted that, the applicant, as deposed in paragraphs 14 and 15 of the supporting affidavit, made an undertaking to furnish security. In these two stated conditions, Mr. Rwazo's argument was that, rule 11 (5) of the Rules has been complied with.

As to meeting the requirement of rule 11 (7) of the Rules, Mr. Rwazo submitted to have attached, in the application; the notice of appeal, the drawn order, ruling, the application for lifting the warrant of attachment and the ruling of the Deputy Registrar. He thereafter cited the following cases to bolster his argument: **East Africa Development Bank v. Double A Co. Ltd & A.T.H. Mwakyusa,** [2005] TLR 203; **Selcom Gaming Ltd v. Gaming Management (T) Ltd & Gamming Board of Tanzania,** [2006] TLR 200; **The Attorney General v. the Board of Trustees of Cashew Nut Industry Development Trust Fund & Another**, Civil Application No. 72 of 2015; **Mantrac Tanzania Ltd v. Raymond Costa,** Civil Application No.11 of 2010; **National Bank of**

Commerce Ltd v. Alfred Mwita, Civil Application No.172 of 2015; **National Housing Corporation v. Deepan Premji Durasa & Others**, Civil Application No. 258/18 of 2019; **Mohamed Enterprises (T) Ltd v. Mussa Shaban Chekechea**, Civil Application No.394/11 of 2018 and **Asha Juma & 9 Others v. John Asheri Mbogoni**, Civil Application No.122/3 of 2020 (all unreported).

Mr. Rwazo submitted in the alternative that, in the interest of justice, and in event conditions under rule 11 of the Rules have not been exhaustively complied, then rule 4 (2) (a) and (b) of the Rules cited in the notice of motion be deployed by this Court to stay execution of the decree.

Mr. Mgare, in reply, began by adopting an affidavit in reply sworn by one Jimmy Mrosso, advocate for the respondent. He thereafter explained to us that, as the application intends to stay execution of the ruling and drawn order of the High Court dated 31st May, 2022 which refused to lift the warrant of attachment, then the application is incompetent because the said ruling and drawn order are not executable and incapable of being stayed.

Submitting on compliance of conditions stipulated under rule 11 of the Rules, Mr. Mgare cited the case of **Ecobank Tanzania Limited** (supra) arguing that, such conditions have to be met cumulatively. He thereafter

argued that, rule 11 (4) of the Rules on time limitation has not been complied because, one, the notice of execution was served on 7th March, 2019. Two, the fourteen (14) days' notice of warrant of attachment was served on 2nd August, 2021. On that stance, the application for stay of execution filed on 10th June, 2022 was obviously out of time.

Regarding irreparable loss to be suffered and the requirement to furnish security provided for under rule 11 (5) of the Rules, Mr. Mgare submitted that, the applicant has failed to explain how attachment of the motor vehicles will affect its business operations. Equally, the applicant simply undertook to furnish security contrary to the requirement of the rules to furnish security. Replying to paragraph 10 of the supporting affidavit, the learned counsel submitted that, there is no notice of execution attached thus, rule 11 (7) (d) of the Rules has been violated.

Mr. Mgare also commented on the import of rule 4 (2) (a) and (b) of the Rules cited by the applicant in the notice of motion. In his argument, citing the said rule without stating the order to be stayed, if any, may not be of any help to the applicant. The least he argued was that, the applicant cited irrelevant provision to that effect. He submitted further that, much as in **East Africa Development Bank** (supra) each case has to be decided

on its own merits; this may not extend to this application for stay of execution. Having noted so, he distinguished the following cases as the circumstances herein do not permit their application: **Mantrac Tanzania Limited** (supra); **Selcom Gaming Limited** (supra); **National Housing Corporation** (supra); **Asha Juma & 9 Others** (supra) and **Hatibu Omary v. Belwisy Kuambaza,** Civil Application No.35/17 of 2018 (unreported).

Mr. Rwazo briefly rejoined that, the order dated 31st May, 2022 is capable of being stayed because the learned Judge reactivated execution proceedings and therefore the application was filed intime. He concluded his rejoinder by faulting the respondent's counsel regarding his interpretation of rule 11 (5) of the Rules that security has to be furnished prior for the Court to grant an order for stay of execution. In his argument, that is a wrong interpretation. To him, a firm undertaking by the applicant to furnish security suffices because, in the end, the Court is the one seized with the discretion to determine the amount and nature of security to be furnished.

We have heard the submissions of the learned counsel for and against the application. We have also considered the notice of motion and

depositions in the affidavits. In the preliminary objection raised by Mr. Mgare that the application for stay of execution is time barred, in our view, parties are not into consensus as to which decision the intended appeal lies whose decree is the subject of stay. Mr. Mgare's basis of objection, as said was that, as the applicant was served with the notice of execution on 7th March, 2019, an application for stay of execution ought to be filed latest by 21st March, 2019. Or, when taking from when the applicant was served with the fourteen (14) days' notice of warrant of attachment, that is on 2nd August, 2021, the application for stay of execution ought to have been filed by 16th August, 2021. In both argument, Mr. Mgare appears to deal directly with the judgment and the decree dated 7th May, 2015 in Civil Case No. 25 of 2002. Yes, this is the decree to be executed. However, the applicant did not appeal against that judgment and decree. The notice of appeal filed by the applicant on 1st June, 2022 and which was served to the respondent through Jimmy Mrosso, learned Advocate, is in respect of the decision of the High Court of Tanzania, at Tanga (Agatho J.) dated 31st May, 2022 in Miscellaneous Application No.24 of 2021.

This being the case, as argued by Mr. Rwazo, the application was filed within fourteen (14) days because the decision of the High Court which

reactivated the application for execution was delivered on 31st May, 2022 while this application was filed on 10th June, 2022, thus was within fourteen (14) days. We are of that view because the applicant became aware of execution soon after the High Court reactivated execution processes. In other words, reactivation of the Application for Execution No. 12 of 2019 made by the High Court, have the meaning of allowing the decree holder to continue with execution processes of the decree in Civil Case No. 25 of 2002. It has to be again borne in mind that, the application before the High Court was for lifting the warrant of attachment. The High Court refused. For all intent and purposes, refusing to lift the warrant of attachment and reactivating execution processes, it entails that the respondent herein should proceed to attach the properties of the applicant named in the warrant of attachment. That being the case, we find the objection by Mr. Mgare to lack merits and we accordingly overrule it.

Now to the main application for stay of execution. The contentious issue which we have to resolve is whether the application is in compliance with rule 11 of the Rules. This being an application for stay of execution, we have first to examine if the application was filed within fourteen days as per the dictates of rule 11 (4) of the Rules. See **National Housing**

Corporation (supra). We ruled out in the course of determining the preliminary objection that, the applicant came to be aware of the execution proceedings on 31st May, 2022 when the High Court reactivated execution proceedings. This application for stay of execution was filed on 10th June, 2022, thus it was filed within fourteen (14) days. We are unable therefore to take sides with Mr. Mgare that the said order is incapable of being stayed. As we alluded to when resolving the contentious preliminary objection, the High Court refused to lift the warrant of attachment. From that end, it is obvious that the respondent herein was allowed to proceed with execution by attaching motor vehicles of the applicant. This is clearer particularly in the following words of the High Court in the so-called reactivating execution proceedings:

> *In lieu of the foregoing, the present application is without merits. And since this ruling marks the end of the interim order given by this court on 05/08/2021, and having held the application lacks substance and merits, the warrant of attachment and orders issued with respect to execution application No.12 of 2019 and Civil Case No.25 of 2002 is re-activated.*

We have taken note of the concern of Mr. Mgare that, immediately upon the filing of execution application No.12 of 2019, the applicant was to

file application for stay of execution. However, in our considered view, that would have been possible had the applicant commenced appeal processes through lodgment of the notice of appeal. As this was not done, the applicant therefore rightly objected unsuccessfully before the Deputy Registrar regarding the manner the execution was to proceed. Dissatisfied with that decision, the applicant approached the High Court to lift the warrant of attachment. As said, the High Court refused and, in the course, reactivated the application for execution. Under the circumstances, unlike what Mr. Mgare observed, we find that the applicant would not have applied for stay of execution as observed by the Deputy Registrar at that time in circumstances where there was no notice of appeal preferred to challenge that judgment and decree.

Regarding the condition relating to furnishing security, the applicant deposed in paragraph 15 of the supporting affidavit on a firm undertaking to furnish security in the form of a bank guarantee. The respondent's counsel faulted that undertaking on the ground that, what is envisioned under rule 11 (5) (b) of the Rules is to provide or furnish prior security and not a mere undertaking. With respect to Mr. Mgare, that is a narrow approach of interpretation of the rule. As stated in **Mantrac Tanzania**

Limited (supra), the law does not strictly require the said security to be given prior to the grant of an order for stay of execution. A firm undertaking, as argued by Mr. Rwazo, is sufficient to move the Court. Of essence also in the case of **Mantrac Tanzania Limited** (supra) is that, the Court is the one mandated to determine the amount and nature of security to be furnished within a certain period. We find substance in this ground.

As to substantial loss, Mr. Mgare again resisted. His concern was that the applicant's supporting affidavit is devoid of facts as to how attachment of the applicant's motor vehicles will result into suffering of substantial loss or even affecting business operations of the applicant. Mr. Rwazo had a different view. His argument was in twofold; one, in paragraphs 13 and 14 of the supporting affidavit, there are depositions such that as motor vehicles to be attached are rendering services, the attachment will affect business operations of the applicant. Two, recovery of the amount awarded to the respondent should the appeal succeed, is unlikely because the financial status of the respondent and the assets he owns are not disclosed. On our part, we are satisfied that, the applicant has proved to suffer substantial loss on the balance of probabilities hence has met the condition

as required in the Rules (see **National Bank of Commerce Limited** (supra).

Last is in respect of the requirement of rule 11 (7) of the Rules. The rule requires the application for stay of execution to be accompanied by the notice of appeal, a decree or order appealed from, a judgement or ruling appealed from and the notice of execution. In the instant application, the applicant attached the notice of appeal, the ruling and drawn order. What is missing here is the notice of execution. Mr. Mgare, as said, contested in twofold. First, that the ruling or order of the High Court is incapable of being stayed as there is no decree to execute. Two, there is no notice of execution and that the applicant may not rely on the reactivated execution proceedings made by the High Court.

In resolving this contentious matter, we treated with specialty the circumstances surrounding the whole matter. We have taken this route guided by the provisions of rule 4 (2) (a) and (b) of the Rules relied on by the applicant in the alternative. The rule is also cited in the notice of motion being among the enabling provisions.

Now to the peculiarity of the circumstances. **One**, the applicant is not contesting the judgment and the decree. He is not however happy with the

manner the decree is to be executed especially on the value, which, to him, is more than what was decreed. **Two**, the applicant contested to the Deputy Registrar regarding miscalculation of the interests both at commercial bank rate and the court rate at the hearing of the application for execution. The applicant also contested on the value of 11 vehicles to be attached in realization of a miscalculated value of the decree. In his view, the value appears to be higher as compared to the value of the decree. In the course, the Deputy Registrar dismissed those concern for want of a valuation report and that, the applicant was to contest by way of an application for stay of execution.

Three, the applicant moved the High Court to lift the warrant of attachment on the same grounds advanced at the hearing of an application for execution. Again, the High Court dismissed his claims and went further to reactivate execution proceedings. **Four**, the applicant filed the notice of appeal so that in the intended appeal, this Court should intervene and pronounce itself regarding what transpired in this matter. **Five**, the applicant moved this Court to stay execution of the decree pending determination of the intended appeal on the grounds stated in the notice of motion.

Given the foregoing circumstances, and as we observed above, the move of the High Court to reactivate execution proceedings, in our view, has only one connotation, that is, the respondent has been given a green light to attach the 11 vehicles of the applicant which he contested and in fact, through the notice of appeal so lodged, invited this Court to make the matter right.

As it is, the manner of what is to be executed is contested. The value of what is to be attached appears to be far beyond the decretal sum. Both commercial bank rate and court rate are contested. Equally, the respondent has, in that calculation, included also the bill of costs. This is unusual. Under the circumstances we are mindful and bound to protect rights of both the judgment debtor and judgment creditor. This is what justice require us to do. In **Ecobank Tanzania Limited** (supra), at page 8, this Court held that:

> *The courts of law are dutifully bound to protect the rights or interests of the judgment debtors just as the rights and interest of the decree holders deserve protection with equal force and means.*

Thus, in meeting the ends of justice and guided by the foregoing principles in **Ecobank Tanzania Limited** (supra), we are compelled to

stay execution of the order of the High Court of Tanzania dated 31st May, 2022 which reactivated execution proceedings and in consequence thereof, the decree in Civil Case No.25 of 2002 is thus stayed pending the determination of the intended appeal against Civil Application No. 24 of 2021. The execution is stayed on condition that, the applicant herein should deposit in Court a bank guarantee worth TZS. 200,000,000.00 within thirty (30) days from the date of this ruling. Costs to follow in the cause. It is so ordered.

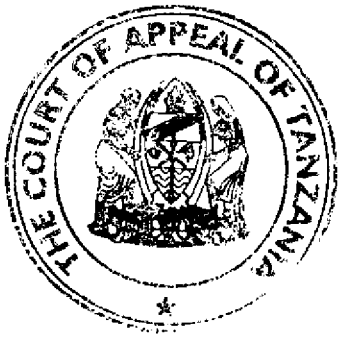
DATED at **DAR ES SALAAM** this 22nd day of November, 2023.

R. K. MKUYE
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

G. J. MDEMU
JUSTICE OF APPEAL

The Ruling delivered this 23rd day of November, 2023 in the presence of Mr. Gaspar Nyika, learned counsel for the Applicant while the Respondent appear in person is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL