

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MWARIJA, J.A., KENTE, J.A. And MURUKE, J.A.)

CIVIL APPLICATION NO. 60/16 OF 2022

PRESTINE PROPERTIES LIMITED APPLICANT

VERSUS

SEYANI BROTHERS & CO. LIMITED RESPONDENT

(Application for stay of execution of the Order of the High Court,

Commercial Division at Dar es Salaam

(Nangela, J.)

dated the 16th November, 2021

in

Miscellaneous Commercial Cause No. 54 of 2020

RULING OF THE COURT

29th August, & 28th November, 2023

KENTE, J.A.:

The applicant in this case, Prestine Properties Limited is a judgment debtor in respect of Miscellaneous Commercial Cause No. 54 of 2020 before the Commercial Division of the High Court. The respondent, Seyani Brothers and Company Limited is the decree – holder.

According to the prohibitory order on the applicant’s property issued by the Deputy Registrar of the High Court, as at 8th February 2022, the decretal sum and therefore the applicant’s liability to the respondent, stood at TZS 3,284,105,498.60. The abovementioned sum of money is a

result of an arbitral award which was forwarded to the Commercial Division of the High Court for purpose of registration in terms of section 12 (2) of the Arbitration Act (Cap 15 R.E. 2002).

Notably, on 11th January, 2021, the applicant had lodged a petition in the same court (Miscellaneous Commercial Cause No. 2 of 2021) with a view to challenging the intended registration of the arbitral award but, on 15th November, 2021 the High Court (Nangela, J) delivered its ruling dismissing the petition preferred by the applicant for lack of merit. The decision of the High Court, riled up the applicant as to spur it on 19th November 2021 to lodge in the Registry of this Court a notice of appeal to challenge the said decision.

Meanwhile, as the applicant was still waiting to be issued with the documents necessary for appeal purposes, the respondent went ahead and applied for execution of the High Court decree resulting into the issuance of the earlier mentioned prohibitory order on the applicant's property on Plot No. 2406/5 (Title No. 189045/74 Sea View Area, Ilala Municipality, Dar es Salaam).

To avert the danger of the intended appeal being rendered nugatory, and still desirous on escalating her grievance further, the applicant has preferred the present application in terms of Rule 11 (3),

(4), (5), (6) and (7) of the Court of Appeal Rules, 2009 (hereinafter the Rule) seeking an order for stay of execution of the High Court decree awaiting hearing and determination of the intended appeal.

The affidavit in support of the application was affirmed by one Gulam Punjani, a Managing Director of the applicant company. In that affidavit, having reproduced the above-stated factual background to this application, the deponent goes on to state in relation to the averments supporting the application thus:

- 8. That, if this notice is left to be carried out, It will cause irreparable loss to the Applicant as it will take up all the resources and cash flow needed to keep the applicant afloat pending the determination of the Appeal.*
- 9. That, further if the public auction is allowed and the suit premises is sold, it will take a toll on the real estate business and good will of the Applicant, he will lose trust, finance and business of his clients and other financial institutions who he has accumulated through the years, even if the court determines the suit in our favor such good will can never be atoned for.*
- 10. That, if the execution is left to take place to its finality and the intended appeal succeeds, it will render the whole appeal nugatory and the*

reputation of the Applicant in the hospitality industry and public at large will further be permanently and irreparably damaged.

Whereas Mr. Adnani Chitale, learned counsel who appeared to represent the applicant submitted that, the applicant had amply demonstrated in paragraphs 8, 9 and 10 of its affidavit that it stands to suffer an irreparable loss if an order for stay is not granted, Mr. Joseph Nuwamanya, learned counsel who appeared for the respondent was diametrically opposed to him. However, Mr. Nuwamanya was mindful that, like in any application of the present nature, the applicant was required in terms of Rule 11 (5) (a) of the Rules to show that unless the application is granted and an order for stay of execution is subsequently made, it would suffer an irreparable loss and in the second place that, in terms of Rule 11 (5) (b) of the same Rules, the applicant has undertaken to furnish security for the due performance of the decree as may be ultimately binding on her.

Even though, the learned counsel argued that, in the instant case, the applicant had failed to meet the legal threshold to warrant the grant of an order for stay of execution of the impugned decree. Elaborating, Mr. Muwamanya contended in the first place that, the applicant had failed to substantiate the claim that, if we will rigidly decline to grant the

application, the intended execution will cause irreparable loss to her and, in the second place, that the applicant's undertaking to furnish security was not firm as the applicant had not sufficiently explained under which circumstances and how the intended security will be furnished.

The learned counsel relied on our earlier decision in the case of **DRTC Trading Company Ltd v. Malimi Lubatula Ng'holo and Another**, Civil Application No. 89/1 of 2020 to underscore the position that, in an application for stay, the applicant is saddled with a duty to cumulatively meet the conditions requisite for grant of the application and not to give general averments whose details are scanty as the applicant allegedly did. The learned counsel also contended, but without substantiation that, the property which the applicant intends to furnish as security was subject to some other mortgages. In these circumstances, we were urged by Mr. Nuwamanya to dismiss the application on the grounds that it had no merit.

In a brief rejoinder, Mr. Chitale, by and large, rehashed his earlier arguments in support of the application. He insisted that the applicant had sufficiently demonstrated that it stood to suffer an irreparable loss in the event of the application not being granted. He asserted that, the applicant had clearly undertaken to submit to the Court a certificate of title in respect of the property sought to be furnished as security. Regarding the

contention by Mr. Nuwamanya that the said property was a subject of some other mortgages, Mr. Chitale was very brief. In the assessment of the learned counsel, that contention was a mere statement from the Bar which did not feature anywhere in the respondent's affidavit in reply.

We have anxiously gone through the parties pleadings and the arguments by the two learned counsel expounding on them. As it will be noted at once, the question for our determination has received almost exhaustive treatment by this Court as attested to by various case law authorities. For instance in the case of **DRTC Trading Company Ltd (supra)**, we made it clear that:

"... the mandate of this Court to grant a stay of execution of the decree like the applicant has sought this Court to do is founded under Rule 11 (3) of the Rules, and the Court in exercising its discretion, under Rule 11 (5) (a) and (b), must satisfy itself that:

- (a) Substantial loss may result to the party applying for stay unless the order is made, and, that;*
- (b) The applicant has given security for the performance of the decree or order as may ultimately be binding upon him"*

We also insisted, and all authorities on the point agree that, the conditions listed above, have to be met cumulatively by the party seeking to move the Court to issue an order for stay of execution of a decree. It follows therefore that in the instant case, the applicant has to satisfy cumulatively the above listed conditions so as to justify the grant of an order for stay., That is the only way for the applicant in any case of the present nature to pass the qualifying test for grant of an order staying execution of a decree which is being challenged on appeal.

Upon the above exposition of the law, we are, we are of the unwavering view that the applicant's case appears to be much more convincing than that of the respondent. Going by Mr. Nuwamanya's arguments, it is not obvious to us as to what aspects of the applicant's averments in paragraphs 8, 9 and 10 of the affidavit in which the applicant contends that it stands to suffer an irreparable loss if an order for stay is not made, have been left out.

Taken in the round, we do not think that there was anything material which Mr. Gulam Punjani passed over in his elaborate affidavit. The arguments by Mr. Nuwamanya should have specifically and precisely identified what is really missing in the applicant's supporting affidavit in as far as the averments that the applicant will suffer an irreparable loss if stay is not ordered is concerned. However, as the matters stand, Mr.

Nuwamanya's unsubstantiated arguments have not been of any help to us.

Likewise, is the contention by the learned counsel for the respondent that the property sought to be furnished by the applicant as security, is a subject of some other mortgages, a contention which is not borne out from the respondent's affidavit in reply. The position consistently taken by the appellate courts both in Tanzania and other common law jurisdictions is that, in a system of adversarial litigation, evidence upon any factual matter must be given on oath and therefore, the practice of counsel giving evidence from the Bar is to be deprecated. See **Farid Mbarak And Another v. Domina Kagaruki And Four others**, Civil Reference No. 14 of 2019 (unreported).

In the light of the foregoing position of the law to which our jurisdiction is non-exempt, we have no hesitation in rejecting Mr. Nuwamanya's unproven claims. We find in the ultimate event that, the applicant company has managed to prove on a balance of probabilities that, it is likely to suffer a substantial and irreparable loss if the order for stay of execution of the impugned decree is not made. We also find that indeed the applicant has undertaken and is ready and willing to furnish security in the form of an immovable property in the event of the pending appeal being determined in its disfavour.

We thus grant the application and order the applicant, within 30 days of delivery of this ruling, to submit to the Registrar its certificate of title No. 186045/74 LO No. 28502 Plot No. 2406/5 in respect of its property located at Sea View Ilala, Dar es Salaam. The costs of this application shall abide the outcome of the intended appeal.

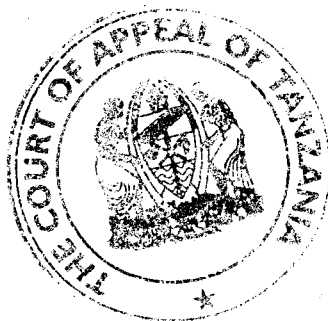
DATED at DAR ES SALAAM this 27th day of November, 2023.


A. G. MWARIJA
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

Z. G. MURUKE
JUSTICE OF APPEAL

The Ruling delivered this 28th day of November, 2023 in the presence Ms. Diana Salewi, Human Resource officer of the applicant, and Mr. Humphrey Kiwelu, Legal officer from Mawala Advocates for the Respondents is hereby certified as a true copy of the original.




J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL