

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: LILA, J.A., LEVIRA, J.A., And MASHAKA, J.A.)

CIVIL APPLICATION NO. 597/18 OF 2021

CAPITAL DRILLING (T) LIMITED APPLICANT

VERSUS

ABDULLHAB SEIF KAMANAE & 118 OTHERS RESPONDENTS

**[Application for stay of execution arising from the Ruling and Order of the
High Court of Tanzania Mwanza District Registry at Mwanza]**

(Rumanyika, J.)

dated the 28th day of April, 2021

in

Labour Revision No. 95 of 2020

RULING OF THE COURT

13th June, 2023 & 1st March, 2024

MASHAKA, J.A.:

By way of a notice of motion preferred under rule 11(3), (4), (5)(a), (b) and 11 (7)(a), (b), (c) and (d) of the Tanzania Court of Appeal Rules, 2009 (the Rules), the applicant represented by Messrs. Alex Gaithan Mgongolwa and Francis Kamuzora, learned advocates, is seeking for the order of the Court to stay execution of the decree of the High Court of Tanzania at Mwanza (Rumanyika, J as he then was) in Labour Revision No. 95 of 2020 dated 28/04/2021. The notice of motion is supported by an affidavit deposed by Mugisha Lwekoramu, Principal Officer of the

applicant and resisted by the affidavit in reply deposed by Alhaji Abubakar Majogoro, learned counsel for the respondent.

The substance of this application can be traced from the decision of the High Court (Labour Division) which set aside the award of the Commission for Mediation and Arbitration (the CMA) at Geita and held that, the respondents were entitled to overtime pay of TZS. 1,404,606,159.00. The High Court ordered the CMA to compute the overtime payment. The CMA computed the amount in the absence of the applicant and awarded the respondents TZS. 5,006,948,761.80. Dissatisfied, the applicant lodged a notice of appeal on 11/05/2021.

On 17/11/2021 the applicant was served with the notice of hearing of Labour Execution No. 46 of 2021 thus culminating to lodging of this application on 23/11/2021. It is worth to note that on 23/02/2022, in terms of rule 11(6) of the Rules, an *ex parte* stay order was granted by a single Justice of the Court (Kwariko, J.A). Before us, is the application for determination to stay the order of the High Court (Labour Division) *inter partes*.

During hearing of the application before us, in support, Mr. Alex Gaithan Mgongolwa adopted the notice of motion, supporting affidavit and the written submissions. Mr. Mgongolwa highlighted that the

applicant has met all the conditions required for grant of a stay order as stipulated under rule 11(5) (a) and (b) of the Rules.

Expanding on that, Mr. Mgongolwa argued that, if the decree of the High Court (Labour Division) is not stayed, the applicant is likely to suffer substantial loss as the amount which the respondents seek to recover from the applicant is colossal and 119 respondents are not businessman as admitted at paragraph 10 of the affidavit in reply. He fortified his position with the case of **Tanzania Harbours Authority v. Mathew Mtalakule and 8 Others**, Civil Application No. 59 of 1999 (unreported).

Regarding the second precondition which requires to furnish security for the due performance of such decree to be binding on the applicant, Mr. Mgongolwa submitted that paragraph 13 of the supporting affidavit is self-explanatory that the applicant is ready to furnish the security for the due performance of the decree in a form of a bank guarantee or any other form to be determined by the Court. Bolstering his argument that in the case of **Mekefason Mandali and 8 Others v. Registered Trustees of the Archdiocese of Dar es Salaam**, Civil Application No. 491/17 of 2019 (unreported), it is sufficient for the judgment debtor to make a firm undertaking to provide security, the nature of which and the time limit within the same is to be furnished is

for the Court to determine. He further maintained that, the applicant is ready to furnish any form of security as determined by the Court as she has registered property, machines with original certificate of ownership free from encumbrances with a deed of surety for security bond duly executed by the board of directors. To fortify his assertion Mr. Mgongolwa referred the cases of **The Registered Trustees of Vignan Educational Foundation Bangalore, India and Another v. National Development Corporation**, Civil Application No. 467/17 of 2019 and **Africhick Hatchers Limited v. CRDB Bank Pic**, Civil Application No. 98 of 2016 (both unreported). Mr. Mgongolwa implored the Court to exercise its discretionary powers and grant the stay order.

In reply, Mr. Majogoro, learned counsel for the respondents adopted the contents of the affidavit in reply and confronted the grant of the application founded on two issues; the substantial loss and security. It was his contention that the respondents were still employees of the applicant and a few had left the employment. Therefore, the applicant has the means to recover the amount from the salaries hence there is no likelihood of the applicant to suffer substantial loss in case the decree is executed.

Regarding the issue of security for the due performance of the decree in case the appeal will not succeed, Mr. Majogoro strongly opposed the applicant's intent to put machines as security which depreciate in value. He proposed that the applicant ought to furnish security in a form of bank guarantee equal to the decretal sum and be given time to satisfy and deposit. Otherwise, he prayed the application for stay be dismissed with no order as to costs because it originates from a labour dispute.

A brief rejoinder was made by Mr. Mgongolwa that most of the respondents are no longer employees of the applicant as averred at paragraph 7 of the affidavit in reply. In respect of the security, he reiterated his position stated at paragraph 13 of the supporting affidavit.

In our determination of the application for stay of execution, we are obliged to examine its cumulative compliance to rule 11 (4) (5) and (7) of the Rules. The application ought to be filed within fourteen days of service of notice of execution or from the date the applicant was made aware of such existence. The notice of execution requiring the applicant to enter appearance and show cause why execution should not proceed was served to the applicant on 17/11/2021. The present application was

lodged on 23.11.2021, hence within time. We find the applicant duly complied.

Also, the applicant has to demonstrate that she stands to suffer substantial loss if this application is declined and make a firm undertaking to furnish security for the due performance of the decree which will ultimately be binding upon her. This is in accordance to rule 11 (5) (a) and (b) of the Rules which reads:

(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."

We have gone through the record, and without hesitation find that the applicant has fulfilled the statutory conditions. We disagree with the proposition made by Mr. Majogoro that the applicant has means to recover the decretal amount as the respondents are still her employees. Looking at the decretal sum, it is colossal and cannot be atoned easily in

case the appeal succeeds. In the circumstance, Mr. Mgongolwa has established that the applicant is likely to suffer substantial loss.

On the issue of security for the due performance of the decree in the event the intended appeal fails, as correctly submitted by Mr. Mgongolwa, the applicant has made a firm undertaking to furnish security for the due performance of the decree gleaned at paragraph vi of the applicant's notice of motion and paragraph 13 of her supporting affidavit, thus suffices as observed in **Mekefason Mandali and 8 others v. Registered Trustees of the Archdiocese of Dar es Salaam** (*supra*). What is contentious is the kind of security which could be furnished. While Mr. Mgongolwa proposed for the machines and bond from directors, Mr. Majogoro resisted that for the reason that the machines do depreciate in value and recommended that if the application is granted, then the security has to be a bank guarantee based on the decretal sum. In our considered view, we agree with the observation that the bank guarantee on the decretal sum will meet the ends of justice.

Given that all the conditions warranting the grant of stay of execution order stated under rule 11 (7) of the Rules have been complied with cumulatively, we thus find merit on the application and grant it. Consequently, we order stay of execution of the decree in Labour

Revision No. 95 of 2020. This order is conditioned upon the applicant depositing in the Court a bank guarantee at the tune of TZS. 5,006,948,761.80 within sixty (60) days of the pronouncement of this ruling.

We make no order as to costs as this application originates from a labour dispute.

DATED at DAR ES SALAAM this 29th day of February, 2024.

S. A. LILA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Ruling delivered on this 1st day of March, 2024 in the presence of Mr. Kalagne Rashid, learned counsel for the Applicant who also took brief for Mr. Alhaji Abubakar Majogoro, learned counsel for the Respondents, is hereby certified as a true copy of the original.




A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL