IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: KOROSSO, J.A., KITUSI, J.A., And KHAMIS, J.A.)

CIVIL APPLICATION NO. 300/16 OF 2022

HI BROS CANVAS AND TENTS LIMITED .....1ST APPLICANT

PARVEZ ABDULHUSEEIN HIRJI ..... 2ND APPLICANT

VERSUS

I & M BANK (T) LIMITED.....RESPONDENT

(An application for Stay of Execution of the decree of the High Court of Tanzania, (Commercial Division) at Dar es Salaam)

(Magoiga, J.)

dated the 25th day of March, 2022

in

Commercial Case No. 03 of 2018

.....

RULING OF THE COURT

6th February & 28th March, 2024

KOROSSO, J.A.:

Before the Court is an application filed by way of notice of motion under rules 4 (2) (a) and (b), 11(3), (4), (5) (a)-(c), (6), (7) (a)-(d) and 48 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules). The relief sought is for the stay of execution of the decree of the High Court (Commercial Division) in Commercial Case No. 3 of 2018 (Magoiga, J.) pending the determination of an intended appeal lodged in this Court on 13/4/2022. The notice of motion is supported by the affidavit of Parves

Abdulhuseein Hirji, the 2nd applicant and the principal officer of the 1st appellant.

Before the commencement of the hearing in earnest, Mr. Godwin Nyaisa, learned advocate for the respondent sought and was granted leave to address us on a point of objection. We also granted the prayer by Mr. Godwin Muganyizi, learned advocate, representing the applicant, that apart from submitting on the point of law, the counsel for the parties be heard on the substance of the application.

It suffices to say that, the point of objection raised by Mr. Nyaisa is that the application is incompetent for; one, for failure to be filed within the prescribed time and thus in contravention of rule 11(4) of the Tanzania Court of Appeal Rules, 2009 (the Rules). Two, failure to annex a copy of the notice of execution contrary to rule 11 (7) (a) of the Rules.

To better appreciate the application before us, we adopt the facts as expounded in the *exparte* order of the single justice of the Court dated 10/6/2022. To contextualize somewhat, briefly, the applicants were essentially clients of the respondent with two accounts, one in Tanzanian shillings and the other in US dollars. The applicants received loan facilities of different amounts and forms on different dates from the respondent as

per agreed terms between the parties. On 28/11/2016, goods worth USD 848,000.0 were ordered by the applicants from ADAM's STRUCTURES with the understanding that 10% of the value equivalent to 200,000,000/= be deposited there and the balance of 90% be paid after the 1st applicant would have manufactured and sold the goods. The respondent failed to extend the loan facility agreed upon which led to the failure of the applicant to deposit the 10% with ADAM's STRUCTURES, who then canceled the undertaking between them. The respondent allowed the operations of the 1st applicant's account. Aggrieved by the respondent's omission which led to the cancellation of the business operation discussed above, the 1st applicant instituted a suit against the respondent at the High Court of Tanzania, Dar es Salaam, Civil Case No. 144 of 2017. Equally, the respondent also instituted a case against the applicants in the High Court of Tanzania, (Commercial Division) in Commercial Case No. 3 of 2022 whose judgment, favouring the respondent, was delivered on 25/3/2022. Aggrieved, the applicants filed a notice of appeal and subsequently, the instant application.

Expounding on the point of objection raised, Mr. Nyaisa contended that the application was incompetent for failure to comply with rule 11(4) and 11 (7) of the Rules. He argued that the applicants did not file the

instant application within 14 days upon service of the notice of execution or becoming aware of the execution process as prescribed by rule 11 (4) of the Rules as there is no evidence to show compliance. He contended that the affidavit supporting the notice of motion is silent on this and thus fails to disclose the date the applicants were served with the notice of execution or became aware of it. In those circumstances, he argued that the application was premature.

Similarly, the learned counsel argued that the applicants did not attach the notice of execution of the impugned decree, a requirement under rule 11(7) (d) of the Rules. The learned counsel asserted that the contravened provisions are mandatory and have to be complied with cumulatively, failure of which, renders the application incompetent. He thus urged us to find so and strike out the application.

On his part, Mr. Muganyizi adamantly argued that the application is competent and that execution of the said decree is extracted from the impugned judgment of the High Court found on page 331 of the record of the application. He submitted that in the impugned judgment, the first order of the court states that the applicants are required to satisfy the decree within three months and the second order is to the effect that, the

respondent can immediately recover the decretal amount in the decree. According to the learned advocate, this meant the respondent was given leeway to execute the decree without going through execution proceedings or any further directions of the court. He thus implored us to find that the circumstances obtained in the impugned judgment do not invite compliance with rules 11(4) and 11(7) (d) of the Rules, since a notice of execution need not be issued. He thus prayed that the preliminary objection be overruled and the application be heard and determined on merit.

The rejoinder by the learned counsel for the respondent albeit brief, was a reiteration of his submission in chief emphasizing that even if it was assumed the 14 days started to run after the expiry of the three months directed in the impugned judgment delivered in March, 2022, the instant application was filed on 3/6/2022, before accrual of any right of the respondent. He argued further that the application was filed when no imminent danger was looming since the respondent had not initiated any process to execute the impugned decree. In addition, he contended that any recovery of the decretal amount would be by sale, as per the mortgage deed, and not through normal execution of the decree. According to him, after the lapse of three months specified in the

judgment, nothing had been initiated by the respondent to prompt the applicants to file the instant application and if it was not the case then clearly it would have been stated so in the affidavit supporting the application. He thus urged us to strike out the application, being incompetent before the Court.

As alluded to above, though parties submitted for both the point of objection and the merits of the application, as is the custom, we have to first consider and determine the point of objection and subsequently, chart out the next step. We have carefully considered the rival submissions from the learned counsel, and we commence our deliberations by going through the law applicable.

The law governing applications for stay of execution stipulates that applicants are enjoined to cumulatively meet all the conditions set out under rule 11 (4) (5) (a) -(b) and (7) (a) - (d) of the Rules, otherwise the Court may refrain to grant the same. This position has been reiterated in numerous decisions of the Court (See, **National Housing Corporation v. AC Gomes (1997) Ltd**, Civil Application No. 133 of 2009; **Joseph Soares @ Goha v. Hussein Omary**, Civil Application No. 12 of 2012; **Ahmed Abdallah v. Maulid Athuman**, Civil Application No. 16 of 2012;

and **Salvatory Gibson v. William Laurent Malya and Another**, Civil Application No. 6/05 of 2017 (all unreported)).

Addressing the point of objection, the gist of contention between the parties is whether, in the circumstances of this case, rules 11(4) and 11(7) (d) of the Rules are applicable and essential for the applicants to be granted an order for stay of execution against the impugned decree. We find it pertinent to reproduce the relevant provisions hereunder: -

> *"Rule 11(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 of from the date he is otherwise made aware of the existence of an application for execution.*
>
> *Rule 11(7)(d)- An application for stay of execution shall be accompanied by copies of the following –*
>
> *(a)* .....
> *(b)* .....
> *(c)* .....
> (d) *A notice of the intended execution."*

Indeed, sub-rule (4) of rule 11 cited above requires that such an application be filed within fourteen (14) days upon service of notice of execution on the applicant or from the date he became aware of the

existence of the application for execution. In the instant application, as alluded to by the learned counsel for the respondent, there is nowhere in the affidavit supporting the application showing the date when the applicants were served with the notice of execution. Similarly, there is no notice of execution annexed thereto. This situation impelled the learned counsel to implore us to find that the applicant failed to comply with the requisite conditions to warrant being granted stay of execution of the impugned decree.

We have gathered that the learned counsel for the applicant while conceding to the assertions by the learned counsel for the respondent that there is no averment on the date that the applicants were served with notice of execution and that a copy of the said notice was not attached in the record of the application, he urged us to find that the circumstances surrounding the present application did not provide scope for compliance with rules 11(4) and 11 (7)(d) of the Rules. His reasons were that the impugned decree had orders that initiated its execution without necessarily knocking on the doors of the court for that purpose. He thus, prayed for a finding that the point of objection lacks merit, dismiss it and the interests of justice prevail.

Indeed, the High Court ordered as follows: one, that the applicants (then the defendants) pay the respondent (then the plaintiff) a sum of Tshs. 2,590, 240,074.08, being the outstanding amount from the credit facilities plus interest and provided a grace period of three months from the date of judgment. Two, in case of default, the applicants pay, and the respondent immediately exercises her right under item (b) of the plaint. Three, the applicants are to pay interest on the outstanding amount as specified and four, interest on the decretal amount as specified.

Having perused the said High Court orders, we find nothing beyond the ordinary that prompted the applicants to file the instant application on 1/6/2022. As argued by the appellant's counsel without doubt, for the respondents to enjoy the awards accorded to them by the decree and to recover the amount, a process of execution/recovery would have to take place. If such a process had been initiated, it would have acted as a notice to the applicant of the impending process of execution/recovery of the rights in the impugned decree. Certainly, if such a process had occurred, it would have been within the applicant's right to apply for stay of the execution process, armed with all the requisite documents in compliance with the law.

In fine, we agree with the learned counsel for the respondent that the instant application is premature and essentially contravenes rules 11(4) and 11(7) (d) of the Rules. As a result, we sustain the point of objection raised and hold that the application is incompetent. The same is struck out with costs. Order Accordingly.

DATED at **DAR ES SALAAM** this 25th day of March, 2024.

W. B. KOROSSO
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

A. S. KHAMIS
JUSTICE OF APPEAL

The Ruling delivered this 28th day of March, 2024 in the presence of Mr. Evance Ignas, learned counsel holding brief for Mr. Godwin Muganyizi, learned counsel for the applicant and also for Mr. Godwin Nyaisa, learned for the respondent, is hereby certified as a true copy of the original.

R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL