

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM
(CORAM: MWAMBEGELE, J.A., MAIGE, J.A. And MDEMU, J.A.)

CIVIL APPLICATION NO. 211/16 OF 2022

MICAH ELIFURAHA MRINDOKO t/a
NEW BP KILWA ROAD SERVICE STATION APPLICANT
VERSUS

BANK OF AFRICA TANZANIA LIMITEDRESPONDENT
(Originating from the Judgment and Decree of the High Court of Tanzania
(Commercial Division at Dar es Salaam)
(Sehel, J.)

Dated the 29th Day of May, 2018

in

Commercial Case No. 75 of 2015

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RULING OF THE COURT

7th & 15th February, 2024

MAIGE, J.A.:

In Commercial Case No. 75 of 2015, the High Court of Tanzania, Commercial Division (“the Commercial Court”) pronounced an ex parte judgment against the applicant herein for payment to the respondent of Tanzania Shillings 633,642,614.87 and interests accruing therefrom at the contractual rate of 38% per annum from the date of accrual of the cause of action to the date of judgment as outstanding loan amount arising from an overdraft facility and a term loan.

Aggrieved, the applicant lodged, on 22nd day of June, 2018, a notice of appeal expressing his intention to appeal against the ex parte

judgment, the notice which was however, withdrawn on 22nd June, 2018 and marked so by the Registrar of the Court on 11th October, 2019. (See collectively annexure MLM-3 of the affidavit pleaded in paragraph 5 thereof). Subsequently, the applicant filed Misc. Commercial Application No. 18 of 2020 seeking for among others, an extension of time within which to set aside the ex parte judgment. As the affidavit speaks, the trial court as per Kisanya, J dismissed the said application for want of merit on 27th September, 2021. Unhappy with the decision, the applicant lodged, on 5th October, 2021, a notice of appeal against the refusal order as aforementioned.

Pending hearing and determination of the intended appeal, the applicant has, by a notice of motion, lodged the instant application in terms of rule 11(3), (4), (5), (6) and (7) of the Tanzania Court of Appeal Rules, 2009 (the Rules) for stay the execution of the decree in question. It is supported by the affidavit of the applicant which has been opposed by the affidavit in reply deposed on the respondent's behalf by Godwin Muganyizi, learned advocate.

At the hearing of the application, the applicant was represented by Mr. Emmanuel William Kessy, learned advocate whereas the respondent by Ms. Lige James and Mr. Denis Kahana, both learned advocates. Having noted that the intended appeal is against the refusal order while the stay

of execution is sought against the ex parte decree, we entertained doubt if the application is properly before us. We, therefore, asked the counsel to address us on this issue in the course of their submissions for and against the motion which they did. For the reasons which shall be apparent henceforward, we find it appropriate to address the legal issue first.

Submitting on the issue, Mr. Kessy was of the contention that, because the order refusing extension of time is closely related to the decree in question, the application is properly before the Court as the notice of appeal though against the order, touches the decree as well. He did not, however, cite any authority in support of such proposition. In reaction, Ms. Lige submitted that, as the notice of appeal in respect of the decree was withdrawn, the decree is, therefore, not the subject of the intended appeal. The refusal order which is the subject of the intended appeal, she submitted, cannot be the basis for the grant of stay order as the same is incapable of being executed. Reference was made to the authorities in **LRM Investment Company Limited and Five Others v. Diamond Trust Bank Tanzania Limited and Another**, Civil Application No. 418/16 of 2019 (unreported) and **Niko Insurance (Tanzania) Limited v. Gulf Bulk Petroleum**, Civil Application No. 51 of 2016, (both unreported).

We have closely followed the arguments between the counsel and we are preparing ourselves to determine who is right and who is not. Our starting point, we think, should be rule 11(3) of the Rules which provide for the power of the Court to stay execution of the decree pending appeal or intended appeal. It reads as follows:

"(3) In any civil proceedings, where a notice of appeal has been lodged in accordance with rule 83, an appeal, shall not operate as a stay of execution of a decree or order appealed from nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree or order; but the Court may, upon good cause shown, order stay of execution of such decree or order."

It is manifestly apparent from the above provisions that, the power of the Court to grant stay of execution can only be exercised where the decree or order whose execution is sought to be stayed, is not only executable but more importantly a subject of the intended appeal. There are many judicial pronouncements in support of this position. See for instance, **Keith Horan and Others v. Zameer Sherali Rashid**, Civil Application No. 230/15 of 2019 and **LRM Investment Company Limited and Others v. Diamond Trust Bank Tanzania Limited and Another** (supra). In the former case, it was observed:

" We have emboldened the text above to underline that the Court's power under Rule 11(3) is restricted to staying the execution of the decree or order appealed from. In other words, the said power can only be exercised to halt the execution of a decree or order made by the High Court which is the subject of the intended appeal to the Court pursuant to a notice of appeal already lodged. "

In the case at hand, it is clear that the subject of the intended appeal as per the notice of appeal is the order refusing to extend time to set aside the ex parte judgment. Much as it may be true that such order has relation with the decree, we cannot agree with Mr. Kessy that; mere relation between it and the decree would make the decree the subject of the intended appeal within the meaning of rule 11(3) of the Rules as judicially considered in the authority just referred. We made a similar observation in the case of **Awinia Mushi v. Tropical Pesticides Research Institute**, Civil Application No. 2 of 2006 (unreported) where, like here, the decree involved was ex parte and the intended appeal was in respect of an order refusing to set aside the ex parte judgment. In striking out the application for being incompetent, we stated:

"Since the intended appeal is not against the merits of the ex parte judgment delivered on 5.12.2005 but against the refusal delivered on 15.3.2006, in my view, it would be improper to

invoke the provisions of Rule 9(2) (2) (b) of the Court of Appeal Rules, 1979 and grant the order sought.”

In our view, therefore, since the intended appeal as per the notice of appeal is against the refusal order which by itself is incapable of being executed; and, in so far as the decree of the trial court is not the subject of the intended appeal; this Court cannot grant the stay order. As a result, the application has been misconceived and it is hereby struck out with costs.

DATED at DAR ES SALAAM this 14th day of February, 2024.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

G. J. MDEMU
JUSTICE OF APPEAL

The Ruling delivered this 15th day of February, 2024 in in the presence of Mr. Emmanuel William Kessy, learned counsel for the Applicant and Ms. Lige James and Mr. Denis Kahama, both learned counsel for the Respondent, is hereby certified as a true copy of the original.



A handwritten signature in black ink, appearing to be "A. L. Kalegeya".

A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL