

IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: JUMA, C.J., MWAMPASHI, J.A. And MLACHA, J.A.)

CIVIL APPLICATION NO. 359/08 OF 2023

BAHATI MOSHI MASABILE

T/A NDOÑO FILLING STATION..... APPLICANT

VERSUS

HAMIS MAGANGA KILONGOZI.....RESPONDENT

**(Application for Stay of Execution of the Summary Judgment and Decree
of the High Court of Tanzania at Mwanza)**

(Kahyoza, J.)

dated the 31st day of October, 2022

in

Civil Case No. 26 of 2021

RULING OF THE COURT

20th & 22nd February, 2024

MWAMPASHI, J.A.:

The High Court of Tanzania sitting at Mwanza in Civil Case No. 26 of 2021, allowed the respondent's suit filed by way of summary procedure against the applicant. By the decree dated 31.10.2020, the applicant was, among other things, condemned to pay the respondent Tshs. 388,428,931/= being the debt balance the applicant owed to the respondent. Aggrieved, the applicant duly lodged a notice of appeal to this Court on 11.11.2020. Subsequently, an appeal, which is still pending before the Court, was filed by him.

While the applicant's appeal is still pending for determination, on 30.01.2023, the respondent filed Execution Cause No. 01 of 2023 for the execution of the decree. Upon being served with the notice of the intended execution on 10.02.2023, the applicant duly filed the instant application on 17.02.2023 seeking an order for stay of execution of the relevant High Court decree pending determination of his appeal. The application which is by notice of motion is brought under rule 11 (3), (4), (4A) (5), (6), (7)(a)(b) and (d) as well as rule 48 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules) and it is supported by an affidavit sworn by the applicant, Bahati Moshi Kilongozi. In addition, the applicant has lodged written submissions in terms of rule 106 (1) of the Rules. The application is resisted by the respondent through an affidavit of Mr. Willbard R. Kilenzi, learned advocate for the respondent.

According to the notice of motion, the application is premised on the following grounds:

- 1. The applicant has been issued with a notice of execution on 10th February, 2023 and at any time the execution will be carried out unless the order to stay the same is issued.*
- 2. The applicant will suffer substantial loss as he has been served with notice of execution despite the fact that there has never been proof of the figure under execution and the applicant has*

lodged an appeal to challenge the same in this Honourable Court which is pending for determination.

- 3. The applicant is ready and willing to furnish security for due performance of the decree as may ultimately be binding upon him.*
- 4. The pending appeal to challenge the summary decree issued against the appellant will be rendered nugatory unless an order for stay is issued and the appeal has a great chance of success.*

At the hearing of the application, Messrs. Egbert Colonel Mujungu and Willbard Kilenzi, both learned advocates, appeared and represented the applicant and the respondent, respectively.

In arguing the application, Mr. Mujungu began by adopting the supporting affidavit and his written submissions. He then submitted that the application is properly brought before the Court in accordance with rule 11 (4) and (7) as well as rule 48 of the Rules. Mr. Mujungu further argued that the prerequisites conditions as required under rule 11 (5) of the Rules have been complied with. On the requirement regarding substantial loss under rule 11 (5) (a) of the Rules, Mr. Mujungu referred us to paragraphs 6, 7, 8, 9 and 10 of the supporting affidavit and argued that if the execution of the decree is not stayed, the applicant will suffer substantial loss because the decretal amount is colossal and the respondent would not be in a position to reimburse it in case the intended

appeal succeeds. To cement this point, Mr. Mujungu relied on the decision of the Court in **Mohamed Enterprises (T) LTD v. Mussa Shaban Chekechea**, Civil Application No. 394/11 of 2018. He also contended that, the applicant was not accorded the right to be heard in the summary proceedings and that should the execution proceed the applicant's pending appeal will be rendered nugatory.

As regards security for the due performance of the decree as may ultimately be binding upon the applicant, it was submitted by Mr. Mujungu that as deposed under paragraph 8 of the supporting affidavit, the applicant is ready and willing to provide as security his two plots located at Uyovu and Igulwa Ushirombo Urban Area, in Bukombe Geita.

On the other hand, Mr. Kilenzi, having adopted the affidavit in reply, submitted that the application should be dismissed because the applicant has totally failed to cumulatively meet the conditions under rule 11 (5) (a) and (b) of the Rules. He argued that, if the application is refused no substantial loss is likely to ensure. He pointed out that paragraphs 6, 9 and 10 of the supporting affidavit contain vague and generalised assertions. Mr. Kilenzi further contended that the applicant has not specified or particularized the kind or nature of the loss likely to be suffered by him. Placing reliance on the decision of the Court in **Tanzania Cotton Marketing Board v. Cogecot Cotton Co. S.A** [1997] T.L.R.

63, he argued that there must be good reasons for blocking the decree holder from enjoying the fruits of his decree. He also argued that, the applicant has neither in the supporting affidavit nor in his submissions, stated if the alleged loss cannot be atoned by an award of damages. Citing the decision of the Court in **Nicholas Nere Lekule v. Independent Power (T) LTD and Another** [1997] T.L.R. 58, he maintained that the loss the applicant is likely to suffer if his application is dismissed is not substantial and it is reparable.

Responding on the issue of security, Mr. Kilenzi submitted that no firm commitment to furnish security has been made by the applicant. He contended that a claim under paragraph 8 of the supporting affidavit that there are two plots for that purpose lacks proof firstly, that the said two plots exist and that they belong to the applicant because no relevant Certificate of Title has been attached to the supporting affidavit and secondly that it is not known if the plots are free from any incumbrances and further that even the value of the said two plots of land is also not certainly known.

Mr. Kilenzi did also urge the Court to disregard the applicant's argument that he was not afforded the right to be heard in the summary proceedings. He pointed out that, the applicant was heard in his application for leave to appear and defend which was however dismissed.

He also argued that the argument that the intended appeal has more chances of success is pre-mature and immaterial at this stage.

Finally, Mr. Kilenzi argued that should the Court find the application grantable, the applicant be ordered to deposit to the Court bank account the decretal amount as security and not provide his two plots as security as prayed by him.

In his brief rejoinder, Mr. Mujungu submitted that since an affidavit is a substitute to evidence the averment in the supporting affidavit suffices to substantiate that the applicant will suffer substantial loss if the application is refused. He also contended that in the basis of the decision of the Court in **Geita Gold Mining Limited v. Twalib Ally**, Civil Application No. 14 of 2012 (unreported), the applicant's firm undertaking to furnish security under paragraph 8 of the supporting affidavit, suffices. He thus, reiterated his prayer for the application to be granted.

Having examined the notice of motion and the affidavit filed in support and against the application and also after considering the submissions made by both sides, the only issue for our determination is whether the application has fulfilled the prerequisite conditions warranting the grant of stay of execution of the decree.

Before we begin to tackle the above posed issue, let us first restate that, it is rule 11 (3) of the Rules, that vests the Court with the jurisdiction to order stay of execution of a decree upon good cause being shown. It is stated under that provision that:

"11(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 the 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".

The prerequisites conditions that need to be fulfilled to warrant grant of stay of execution of the decree are provided under rule 11 (5)(a) and (b) of the Rules, that:

"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.

The law is also settled that the conditions laid down under rule 11 (5)(a) and (b) of the Rules, must be satisfied cumulatively. See **Mohamed Masoud Abdalla and 16 Others v. Tanzania Road Haulage (1980) Limited**, Civil Application No. 58/17 of 2016 and **Salvatory Gibson v. William Laurent Malya and Another**, Civil Application No. 06/05 of 2017 (both unreported). In the former decision the Court observed that:

"For an application for stay of execution of a decree to succeed, the applicant must comply with conditions listed under the law, cumulatively".

Guided by the above restated position of the law, we are of a settled mind that when the averment under paragraphs 9 and 10 of the supporting affidavit, are considered, it cannot be said that the applicant has failed to demonstrate that substantial loss may result to him if stay of execution is not ordered. There is no gainsaying that the decretal amount, that is, Tshs. 388,428,931/= is not a small amount but colossal. We also find, as also argued by Mr. Mujungu, that the capability of the respondent to reimburse the amount in case the execution of the decree is not stayed and if at end of the day, the applicant's pending appeal succeeds, is not

certainly known. In cases where the decretal amount is regarded colossal, the Court in the case of **National Bank of Commerce Limited v. Alfred Mwita**, Civil Application No. 172 of 2015 (unreported) observed that:

"We are satisfied that, the decretal sum of more than Tshs. 50,000,000/= is a colossal sum and if it falls in default as a result of the execution before the appeal is determined, the loss is irremediable. As such, the applicant has on the balance of probabilities satisfied this Court this requisite condition".

See also- **Junior Construction Company Limited & 2 Others v. Mantrac Tanzania Limited**, Civil Application No. 396/16 of 2019 (unreported).

Regarding the condition of furnishing security as required under rule 11 (5) (b) of the Rules, we find that by stating, under paragraph 8 of the supporting affidavit, that he is ready and willing to provide his two plots of land as security for due performance of the decree as may ultimately be binding upon him, the applicant has, in terms of our decision in **Mantrac Tanzania Ltd v. Raymond Cost**, Civil Application No. 11 of 2010 (unreported), sufficiently made a firm commitment to furnish security. With due respect to Mr. Kilenzi, we are not in agreement with him that the applicant was required to produce Certificates of Title or

valuation reports in respect of the two offered plots of land at this stage. At this juncture we should also reiterate what we stated in our decision in **Mantrac Tanzania Ltd** (supra) that:

*"One other condition is that the applicant for a stay order must give security for the due performance of the decree against him. **To meet this condition, the law does not strictly demand that the said security must be given prior to the grant of the stay order. To us, a firm undertaking by the applicant to provide security might prove sufficient to move the Court, all things being equal, to grant stay order provided the Court sets a reasonable time limit within which the applicant should give the same**".*

[Emphasis supplied]

In view of what we have discussed above, we are satisfied that the applicant has managed to accumulatively meet all the statutory required conditions for an order of stay of execution to be made. The applicant has shown good cause as required by rule 11 (3) of the Rules and for that case we grant the application.

However, notwithstanding our finding that in offering the two plots to be given as security, the applicant has sufficiently undertaken to provide security, we are of the considered view that, under the circumstances of this case, the security to be given should not be the said

two plots of land as offered by the applicant. Instead, we order that the execution of the decree dated 31.10.2022 in High Court Civil Case No. 26 of 2021, be stayed pending the determination of the applicant's appeal on condition that the applicant deposits to the Court a bank guarantee in tune of the decretal amount, that is, Tshs. 388,428,931/=. The bank guarantee should be deposited within sixty (60) days of the delivery of this Ruling. Costs in the cause.

DATED at **MWANZA** this 22nd day of February, 2024.

I. H. JUMA
CHIEF JUSTICE

A. M. MWAMPASHI
JUSTICE OF APPEAL

L. M. MLACHA
JUSTICE OF APPEAL

The Ruling delivered this 22nd day of February, 2024 in the presence of Mr. Motete Kihiri holding brief for Mr. Egbert Mujungu, learned counsel for the applicant and Mr. Erick Tumaini Korogo holding brief for Mr. Willbard Kilenzi, learned counsel for the respondent, is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL