

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF MUSOMA**

AT MUSOMA

MISC. CIVIL APPLICATION NO. 52 OF 2020

*(Arising from the Judgment and Decree of the District Court of
Musoma at Musoma in Civil Case No. 3 of 2012)*

FINCA TANZANIA..... APPLICANT

VERSUS

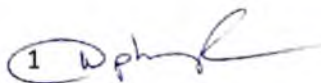
LEONARD ANDREW KOROGO..... RESPONDENT

RULING

20th and 27th November, 2020

KISANYA, J.:

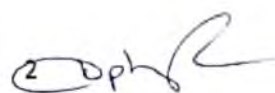
Finca Tanzania unsuccessful¹ appealed against the decision the District Court of Musoma at Musoma in Misc. Civil Application No. 30 of 2015 in which her application to set aside the *ex-parte* judgment and decree in Civil Case No. 3 of 2012 was dismissed for want of merit. The said appeal (Civil Appeal No. 16 of 2020) was dismissed by this Court on 28th August, 2020. Intending to appeal against the said decision, **Finca Tanzania** lodged an application (Misc. Civil Application No. 47 of 2020) for extension of time within which to file notice of appeal to the Court of Appeal. The said application was filed in this Court on 26th October, 2020. By that time, the respondent, **Leonard Andrew Korogo** had already lodged before the District Court of Musoma at Musoma, an application for execution of judgment and decree in relation to Civil Case No. 3 of 2012.

① 

From the foregoing, **Finca Tanzania** has by way of Chamber Summons made under O. XXI, R. 27, Order XXXIX, Rule 5(1), and (2) and (3) (a) (b) and (4), Order XLIII, R. 2 and section 95 of the Civil Procedure Code [Cap. 33, R.E. 2019] (the CPC) moved the Court to order for stay of execution of the decree of the District Court in Civil Case No. 3 of 2012 pending hearing and determination of the application for extension of time to lodge notice of appeal. This application is supported by an affidavit of Ms. Tupage Anna Mwambosya, learned advocate for the applicant.

In her application which was filed under certificate of urgency, the applicant sought for an *ex-parte* order pending hearing of the application inter-parties. However, this Court ordered both to appear for hearing on 20th November, 2020. And when the matter came up for hearing on 20th November, 2020, Ms. Tupage Anna Mwambosya, learned advocate appeared for the applicant. The respondent failed to appear. Therefore the hearing proceeded in his absence upon noting that he was duly served.

Submitting in support of the application, Ms. Mwambosya started by adopting the affidavit as part of her submission. She went on to submit that, there is a good cause for extension of time in respect of the application pending in the Court. Ms. Mwambosya submitted further that, in the event this application is not granted the pending application will be nugatory and hence, causing inconvenience to the applicant if the Court finds merit in the pending application. The learned counsel contended that, the applicant is a financial institution and hence, in a good position of paying the decree sum in case the pending suit (application) is not granted. She also asked the Court to depart from the requirement of furnishing security for the performance of such decree on the reason that, the applicant is a financial institution capable to



satisfy the decree sum. That said, Ms. Mwambosya urged the Court to grant the application.

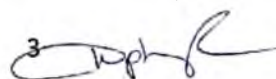
Before I embark on the determination of the merit of this application, I find it pertinent to reproduce the condition for grant of stay of execution as provided for under O. XXI, R. 27 of the CPC which reads:-

Where a suit is pending in any court against the holder of a decree of such court, on the part of the person against whom the decree was passed the court may, on such terms as to security or otherwise as it thinks fit, stay execution of the decree until the pending suit has been decided.

In the instant matter, the application for stay of execution of the District Court's decree has been filed in this Court where the suit arising from appeal against the judgment and decree sought to be executed is pending. Likewise, in terms of O. XXXIX, R. 1 of the CPC, this Court has power to stay execution of the decree appealed against if there is a sufficient cause. Such power can be exercised whether or not the application for execution has been filed. However, in order for this Court to exercise its power, it must be satisfied that the following conditions for stay of execution specified by O. XXXIX, R. 5 (3) of the CPC have been met by the applicant:-

- (a) That substantial loss may result to the party applying for stay of execution unless the order is made;*
- (b) That the application has been made without unreasonable delay; and*
- (c) That security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him.*

It is settled law that all conditions must be cumulatively complied with by the applicant for the Court to grant the order for stay of execution. Complying with one or two conditions will not salvage the applicant. See **Felix Emmanuel**

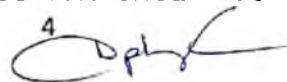


Mkongwa Vs Andrew Kimwaga, Civil Application No. 249 of 2016, CAT at Dar es Salaam (unreported). In that case, the Court of Appeal cited rule 11 (2) of the Court of Appeal which is *in pari materia* with O. XXXIX, R.5 (3) of the CPC and went on to hold as follows:-

*"The above provisions, we think, are self-explanatory and need no further expounding. Suffice only to state that, for an application for stay of execution to be granted under the Rules, the above conditions had to be cumulatively complied with, meaning that where one of them could have not been satisfied, the Court would decline to grant the order for stay of execution. The duty of the applicant to satisfy all the conditions cumulatively has been constantly reiterated by this Court in its several decisions. See for instance the cases of **Joseph Anthony Spares @ Goha v. Hussein Omary**, Civil Application No. 6 of 2012 and **Laurent Kavishe v. Enely Hezron**, Civil Application No. 5 of 2012 (both unreported)."*

In view of the above, the issue is whether the applicant has complied with the conditions set out under Order XXXIX, R. 5(3) of the CPC. It is not disputed that the respondent has applied for execution of decree and there is a suit pending before the Court against the same decree. The applicant has deposed in paragraph 9 of the affidavit how she will suffer if the application for execution is granted. Also, in terms of the affidavit which was not challenged by the respondent, this application was filed without delay from the moment it came to the knowledge of the applicant that her appeal against the judgment and decree subject to execution had been dismissed. Thus, it is my considered view that, the applicant complied with the first and second condition for execution.

The third condition requires the applicant to give security for the due performance of such decree as may be binding upon her. Guidance on how the said security is required to be furnished was well stated in **Mantrac**



Tanzania Ltd v. Raymond Costa, Civil Application No. 11 of 2010 (unreported) where the Court of Appeal held 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."* [Emphasize supplied].

It is also settled that the phrase "firm undertaking" means a promise or agreement or an unequivocal declaration or stipulation of intention addressed to someone who reasonably places reliance on it. See the case of **Tanzania Petroleum Development Corporation vs Mussa Yusuf Namwao and 30 Others**, Civil Application No. 602/07 of 2018 (unreported). In event the security for the performance of the decree is furnished, the Court is not required to grant the application for stay of execution. This position was stated in **Aidan George Nyongo Vs Magese Machenja and 3 Others**, Civil Application No. 237/17 OF 2016 (unreported). The Court of Appeal held:

"Moreover, furnishing security for the due performance of the decree as may ultimately be binding on the applicant continues to be among the basic and mandatory conditions which must be fulfilled to warrant the grant of stay order. Where security is not furnished and in the absence of any such firm undertaking, settled law requires the Court not to grant stay of execution."

In the instant application, there is no firm undertaking whatsoever by **Finca Tanzania** to furnish security for the due performance of the decree as may ultimately be binding on her. Such undertaking was not given or stated in the affidavit in support of application. Further, no agreement or unequivocal



declaration of intention to furnish security for the performance of decree was not given and appended to the application or shown during the hearing. Furthermore, when asked by the Court to address on this issue, Ms. Mwambosya asked the Court to depart from that requirement on the account that, the applicant is a financial institution which is capable of paying the decree sum. In the light of the above cited authorities, the Court has no mandate to exempt the applicant from complying with any of the conditions for the grant of stay of execution. This is so even if the applicant has financial capacity of paying the decree sum.

In the upshot, I find this application not meritorious for the reason that, the applicant has failed to furnish security for the due performance of the decree as may ultimately be binding on her as required under O. XXXIX, R. 5 (3) (a) of the CPC. Consequently, the application is dismissed. I make no order as to costs because the respondent did enter appearance.

Dated 27th day of November, 2020.



E. S. Kisanya

JUDGE

Court: Ruling delivered this 27th day of November, 2020 in the absence of the parties with leave of the Court. B/C Mariam- RMA present.

Court: Parties be notified to collect original copy of ruling. At the same time, copy of ruling be sent to the parties through email address appearing in the pleadings.

E. S. Kisanya

JUDGE

28/8/2020

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF MUSOMA**

AT MUSOMA

MISC. CIVIL APPLICATION NO. 52 OF 2020

*(Arising from the Judgment and Decree of the District Court of
Musoma at Musoma in Civil Case No. 3 of 2012)*

FINCA TANZANIA APPLICANT
VERSUS
LEONARD ANDREW KOROGO RESPONDENT

DRAWN ORDER

WHEREAS the applicant filed an application under certificate of urgency praying for the following orders:

EX-PARTE

- 1. This Honourable court be pleased to issue an ex-party (sic) order for stay of execution of decree in DC Civil Case No. 03 of 2012 pending hearing and determination of this Application interparty.*

INTEPARTIES

- 2. This Honourable court be pleased to issue an interparty order for stay of execution of decree in DC Civil Case No. 03 of 2012 pending hearing and determination of Miscellaneous Application No. 47 for extension of time at the High Court of Tanzania at Musoma District Registry and pending the intended appeal to the Court of Appeal.*
- 3. Hearing of this application be expedited.*
- 4. Costs be in the course*

5. Any other order (s) as the honourable court may deem fit to issue under the circumstances:

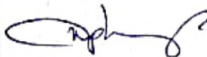
AND WHEREAS, the application is coming for ruling on 27th November, 2020 before **Hon. E.S. Kisanya, Judge**, in the absence of the parties with leave of the Court.

THIS COURT DOTH HEREBY ORDER THAT:

1. The application is dismissed for want of merit.
2. No order as to costs because the respondent did enter appearance.

GIVEN under my Hand and Seal of the Court this 27th day of November, 2020.




E. S. Kisanya
JUDGE
27/11/2020