

**IN THE HIGH COURT OF TANZANIA  
DAR ES SALAAM DISTRICT REGISTRY  
AT DAR ES SALAAM**

**MISC. CIVIL APPLICATION NO. 628 OF 2019**

*(Arising from Misc. Civil Application No. 817 of 2018 and Misc. Civil  
Application No. 344 of 2018)*

**BHAGOZAH HOLDING COMPANY LIMITED.....APPLICANT**

**VERSUS**

**DIAMONG TRUST BANK TANZANIA LTD.....RESPONDENT**

*Date of last Order:09/10/2020*

*Date of Ruling: 11/12/2020*

**R U L I N G**

**MGONYA, J.**

**BHAGOZAH HOLDING COMPANY LIMITED** filed this application for stay of execution under the provisions of **Order XXXIX Rule 5(1) and (2), section 68 (e) and section 95 of the Civil Procedure Code, Cap. 33 [R.E 2002]**. The application is sought pending hearing and determination of the application for extension of time (Misc. Application No. 622 of 2019) which is pending this court. The application is a result of execution of decree in **Civil Case No. 216 of 2012**, of this Registry; pending the hearing and determination of an application for extension of time in **Misc. Application No. 622 of 2019** which is pending this court.

Upon being served, by consent of both parties, application was heard by way of written submissions. Both counsel adhered to the schedule of filing submission hence this ruling.

Applicant's Counsel submitting for the Application stated that the reason of filing the instant application is to prevent loss which the Applicant stands to suffer on execution of Decree dated 8<sup>th</sup> November, 2018; of which the Applicant will be subjected to pay a huge sum of money arising from the Decree complained of.

Further that payment of the decretal sum which the Applicant intends to challenge will completely frustrate the Applicant's business operations and cause the Applicant's business to come to an end.

It is from the above submission that the Applicant's Counsel prayed that the instant application be granted as their application for extension of time in **Miscl. Application No. 622 of 2020** before this honourable court has not been challenged by the Respondent herein; hence the Application before the court has merits and deserves to be granted.

On the other hand, the Respondent's Counsel vehemently opposing the Application reminded the court that the instant Application has been brought under the provisions of **Order XXXIX Rule of the Civil Procedure Code, Cap. 33 [R. E. 2002]** of which had advanced three conditions for someone

applying for the application for stay of execution. He named the conditions to satisfy the court in this kind of application to be:

- 1. That substantial loss may result to the party applying for staying of execution unless the order is made;**
- 2. That the Application is made without unreasonable delay, and**
- 3. That the 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 from the above conditions that the Respondent's Counsel informed the court that the second and third conditions were not adhered to with the Applicant and that since all the conditions have to be proved, then they pray the court to dismiss the application as the same is meritless.

Having heard arguments of both sides, it is worth noting that, under the law, execution of court decrees and orders is an inherent component of the administration of Civil Justice. It is, indeed the

culmination of the entire process and cannot escape public scrutiny and comment, leave alone judicial interventions where the interests of justice so demand. Lord Denning, M.R. in ***OVERSEAS AVIATION ENGINEERING (GB) LTD [1962] 3 All E.R. 12 at page 16*** said.

***"Execution means, quite simply, the process for enforcing or giving effect to the judgment of the court and it is completed when the judgment creditor gets the money or other thing awarded to him by the judgment".***

Execution of decrees therefore is a judicial function, and ought to be carried out transparently, efficiently and judiciously. That being the case, a high degree of discipline and care is expected from all concerned court officers in carrying out this duty. Noncompliance with the mandatory legal provision relating to execution of decrees occasioning material irregularities, may lead to vitiations of the entire processes.

Referring to the present application, there exists conditions precedent necessitating application of **Order XXXIX Rule 5 of the Civil Procedure Code**. Though the Application has been brought under **Order XXXIX Rule 5 (1) and (2)**, the grant of this Application is seen under **Order XXXIX Rule 5 (3)** which indeed place some conditions in place where the need to stay execution appears. The said conditions are as well narrated by law and also as submitted in the Respondent's reply hereto. These conditions have been advanced as the Legislature has taken into board that up to the time of execution, there is in place a valid Judgement and Decree to be adhered to meet the ends of justice. However, if there is a need to stay the same, on the

balance of justice to parties in issue, then stay cannot be automatic but the same has to take into consideration the above three conditions as they appear in **Order XXXIX Rule 5 (3) of the Civil Procedure Code.**

Referring to the Application at hand, particularly to the 7<sup>th</sup> paragraph of the Applicant's Affidavit, it is the Applicant's assertion that the Application before the court is made in order to prevent loss which the Applicant stands to suffer as a result of the decree dated 8<sup>th</sup> November 2018; and thus the Applicant will be subjected to pay huge sum of money arising from the Decree complained of.

Out of the three conditions set in **Order XXXIX Rule 5 (3)**, above paragraph from the Applicant Affidavit fully **supports the first condition.** On the **second condition**, as from the record of this matter, it came to my knowledge that the Decree sought to be stayed is dated **8<sup>th</sup> November 2017** while the instant Application was filed on **22<sup>nd</sup> November 2019**. On this I have to be fair to the Applicant as it is in my knowledge that, before filing the instant Application, the Applicant had lodged the same Application only to be found omnibus and struck out. It is for this reason, I am satisfied that the Applicant in adhering the 2<sup>nd</sup> condition, he was not idle. Thus I can state that in a way he has fulfilled the second condition as he has been up front making sure that he file the Application sought.

Coming to the **third condition** that the security has to be given by the Applicant for the due performance of such Decree or Order as may ultimately be binding upon him, I have to confess that in the Applicant's entire Affidavit, I have failed to grasp anything on Applicant's security for the due performance of such Decree. As said above, these conditions were set by the Legislature to ensure that all parties to the concerned matter are protected. In the absence of this third and most crucial condition by law in the cause of this application for stay of execution, the order sought cannot be granted.

In the event therefore, **the instant Application is struck out with costs.**

It is so ordered.



  
**L. E. MGONYA**  
**JUDGE**  
**11/12/2020**

**Court:** Ruling delivered before Hon. C. M. Magesa, Deputy Registrar in chambers in the absence of both parties and Ms. Msuya RMA, this 11<sup>th</sup> day of December, 2020.



  
**L. E. MGONYA**  
**JUDGE**  
**11/12/2020**