

IN THE HIGH COURT OF TANZANIA

MWANZA DISTRICT REGISTRY

AT MWANZA

MISC. CIVIL APPLICATION No. 110/2020

(Arising from Civil Application No. 97/2020, Originating from Civil Case No. 96/2020 of Resident Magistrate Court of Mwanza)

SAYONA DRINKS LIMITED..... APPLICANT

VERSUS

ELIAWONI ELINAMU MACHANGE

(Holder of Power of Attorney of Ana John Ngowi)RESPONDENT

RULING

26th November, & 19th February, 2021

TIGANGA, J

This Ruling is in respect of the application for stay of execution of the decision of the resident Magistrates Court of Mwanza, hereinafter referred to as the trial Court, in Civil Case No. 96/2019, pending hearing and determination of the Civil Appeal No. 38/2020 filed with this court. The applicant also asked for any other order(s) as the court may deem fit and just to grant. The application was filed under section 68 (e), section 95 of Civil Procedure Code, [Cap 33 R.E 2019] and any other enabling provisions of the law.



It was supported by the Affidavit sworn by Mussa Rashid, a Principal Legal Officer of the applicant, in which he deposed that, the applicant was a defendant in Civil Case No. 96/2019 which was determined exparte by the trial court on 27/03/2020. The decision of the trial court was followed by the application for execution through Misc. Civil Application No. 57/2020 before that court.

The applicant after being notified of the decision, he filed an application to set aside the exparte judgment in Misc. Civil Application No. 61/2020, which was dismissed on 19/06/2020. Following the dismissal they filed Civil Appeal No. 38/2020 before this court which was assigned before Hon. Manyanda, J, of this court.

It is deposed in the affidavit that, together with this civil case, there is also criminal proceedings with reference No. MW/IR/2153/2019 which is connected with the motor vehicle Mitsubishi Fuso number T.431 ALY whose seizure was subject of civil case No. 96/2019.

He deposed that if the application will not be stayed the cases in court will be rendered nugatory, and the appeal before Hon. Manyanda, J has overwhelming chances of success. That, the applicant stands to suffer

irreparable loss if the application is not granted and that on the balance of convenience, it is better if this application is granted than denied. Further to that, he said that the application has been made without unreasonable delay.

The application was countered by a counter affidavit of Eliawoni Elinamu Machange, the holder of the Power of Attorney of Anna John Ngowi, the respondent. He submitted that an application at hand is nothing but an abuse of court process, and that if this application is granted, the respondent will suffer.

Hearing of the application was done orally, the applicant was represented by Mr. Msalaba, learned Advocate, who while submitting in support of the application adopted the affidavit of Mussa Rashidi and in his submission almost reiterated the court of the content of the affidavit filed in support of the application. For the purpose of brevity I will not reiterate his submission.

The respondent was represented by Mr. Mainde, learned counsel who besides adopting the whole counter affidavit, his submission reiterated the content of the counter affidavit and he said that the applicant has not

proved the ingredient of Order XXXIX Rules 5 of the Civil Procedure Code [Cap 33 R.E 2019] which requires that the applicant must show that, i) substantive loss may result, ii) that the application has been made without unreasonable delay, and, iii) security has been given by the applicant for the due performance of such a decree or order as may ultimately be binding upon him. He submitted further that, the applicant has not proved the substantial loss, if that is so then the order staying execution is useless.

In the rejoinder, Mr. Msalaba for the applicant submitted that, it has been proved that there is an appeal before this court which has overwhelming chances of successful. He asked the application to be allowed with costs.

In this case, there is no dispute that there is an appeal before this court, Hon. Manyanda, J, that appeal is challenging the decree which its execution is sought to be stayed in this application.

In law, the criteria for stay of execution are listed under Order XXXIX Rule 5 of the Civil Procedure Code [Cap 33 R.E 2019], since the prayers sought are pending the hearing and determination of an appeal, and the applicant has proved in his affidavit and submission that a substantial loss


will result if an order staying execution will not be issued. It has also been proved that the application was made without unreasonable delay.

That although no security has been given, then given the nature of the case and the fact that the appeal is about to be heard, then the application for stay of execution is hereby granted pending determination of the Appeal No. 38/2020 before Manyanda, J. No order as to costs is made.

It is so ordered.

DATED at MWANZA this 19th February, 2021




J. C. Tiganga
Judge
19/02/2021