**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(IN THE DISTRICT REGISTRY OF MWANZA)**

**AT MWANZA**

**MISC. CIVIL APPLICATION NO. 113 OF 2020**

***(Arising from the Execution Case No. 14 0f 2020 and originating from the Judgment in RM Civil Case No. 26 of 2017 dated 27th September, 2018 by Hon. Sumaye, SRM in Misc. Civil Application No. 38 of 2020).***

**LETSHEGO BANK (T) LTD ..... 1ST APPLICANT**

**MASHOKA AUCTION MART (T) LTD ..... 2ND APPLICANT**

**VERSUS**

**JAMES SIMON KITAJO ..... RESPONDENT**

**RULING**

*13th March, & 10th June, 2021*

**ISMAIL, J.**

This is a ruling on an application for stay of execution of a decree passed by the Resident Magistrates' Court of Mwanza at Mwanza. The said decision was in respect of RM. Civil Case No. 26 of 2018, delivered in the respondent's favour on 27th September, 2018. The decision has aggrieved

the applicants, consequent to which they and have instituted an appeal which is pending in this Court (Civil Case No. 42 of 2020).

The application is supported by an affidavit sworn by Denis H. Dendela, a counsel duly instructed to represent the applicants. The said deposition sets out grounds on which the application is based. Of significance are paragraphs 8, 10 and 11 of the said affidavit in which the applicants aver that there is a pending appeal in this Court, and that the appeal is on an illegality, allegedly committed by the trial court. The applicants have also committed to provide security for costs if asked to do so. The respondent chose not to contest factual account averred by the applicant. This means that his contest was only confined to matters of law.

On the parties' consensual basis, hearing of the application was ordered to proceed by way of written submissions the filing of which conformed to the schedule.

Submitting in support of the application, Mr. Stephen Kaswahili, the applicants' counsel, began by describing the applicants' chances of success in the intended appeal. The basis for this contention is that the impugned decision is laden with illegalities the instances of which have been set forth. These include, entertainment of a suit whose subject matter value is not

disclosed; failure to accord the parties the right to address the court on new issues; and award of general damages without assigning any reasons.

With respect to conditions for the grant of the stay order, the counsel's argument is that all three conditions have been met. He argued that the applicants stand to suffer an irreparable loss since the respondent would not be able to refund the sum of TZS. 65,000,000/-, in case the pending appeal is concluded in the applicants' favour. This loss will not be adequately recompensed by an award of damages. On this, the learned counsel cited the case of ***Nichola Nere Lekule v. Independent Power (T) Ltd & Another*** [1997] TLR 58. With respect to filing of the instant application, the counsel argued that the same was filed without any undue delay. He argued that filing of the instant application was done immediately after they (the applicants) had been served with an application for execution. On the furnishing of security, the counsel for the applicant submitted that the applicants undertake to furnish the sum that is equivalent to the decretal sum if so ordered. The counsel exuded confidence that the 1st applicant's financial base was strong enough to meet that condition. Citing the decision in ***Geita Gold Mining Limited v. Twalib Ally***, CAT-Civil Application No. 14 of 2012 (unreported), Mr.

Kaswahili submitted that the applicant's ability to furnish security was sufficient to move the Court to grant a stay order. The applicants' counsel wrapped up his submission by arguing that the 1st applicant was a registered company with offices within Tanzania, thereby providing an assurance that it cannot evade its obligation.

Submitting in rebuttal, Mr. Julius Mushobozi, learned counsel began by attacking the competence of the application, given the fact that prior to its filing, the applicants filed Misc. Application No. 14 of 2020, praying for a stay order but the same was denied on merit. That being the case, the learned counsel submitted, the right course of action would be the institution of an appeal against the dismissal order. He held the view that the steps taken by the applicants amounted to an abuse of the court process. To buttress this contention, the learned counsel cited the case of ***Bluestar Service Station v. Jackson Musseti t/a Musseti Enterprises*** [1999] TLR 80.

In yet another onslaught, Mr. Mushobozi contended that this application has been filed belatedly, it having been filed on 31st January, 2020. He contended that this was beyond the 60-day rule set out in Item 21 of Part III of the Law of Limitation Act, Cap. 89 R.E. 2019. The

respondent's counsel contended that in this case, the instant application was filed nine months beyond the time prescription set out by law.

Mr. Mushobozi held the view that, unlike applications for which the law allows second bite, the instant application isn't in the mould of such applications. The counsel argued that the applicants ought to have resorted to applying for extension of time.

Finally on the last point, the learned counsel cited the confusion that has marred the instant application in which the 2nd applicant is joined in the application as one of the applicants while the pending appeal is against the 2nd applicant.

Submitting in rejoinder, Mr. Kaswahili refuted the contention that the application for stay was determined on merit. On the contrary, he argued, the said proceedings were terminated upon the court's direction that such proceedings would better be dealt by this Court, since the notice of appeal had been lodged in this Court. Distinguishing this case from the import of the ***Bluestar Service Station Case*** (supra), the learned counsel contended that in the latter, the matter was disposed of on merit, while in the proceedings in the lower court the merits of the application were not determined.

With respect to the time bar, the learned counsel argued that the law does not prescribe time within which an application for stay should preferred. He argued that the cardinal principle is that an application for stay should be filed before execution of the decree sought to be stayed is carried out. The counsel argued that in this case, execution of the decree is yet to be carried out, making the application perfectly timeous. He buttressed his contention by citing the Court of Appeal's decision in ***Project Manager NOREMCO v. Joseph Urio & Another***, CAT-Civil Application No. 72 of 1999 (unreported), in which it was held that stay of execution cannot be granted where execution has been carried out. Mr. Kaswahili argued, in the alternative, that the application would still be timeous if section 21 (2) of Cap. 89 was invoked and exclude time within which the applicants were pursuing the application in the lower court.

With respect to the respondent's third objection, the learned counsel's view is that there is nothing wrong with impleading the 2nd applicant, since the execution order is likely to have an impact on the said party. The counsel argued that, after all, the 2nd applicant is the agent of the 1st applicant. He urged the Court overrule the objections and grant the application.

Given the decisive importance that the objections carry, it is logical that disposal of the matter should begin with disposal of the points of objection raised by the respondent.

The respondent's counsel holds the view that the right course of action in the matter was to prefer an appeal against the lower court's refusal to grant a stay order. This is a view that is opposed by the applicants' counsel, and the reason is that this refusal did not touch on the merit of the application. As such, this was not an appealable order. I am inclined to agree with the applicants' contention. It is clear that the applicants were erroneous in their decision to apply for a stay in the court that passed the decree while time for appealing had expired and the notice of intention to appeal against the decree had been lodged. In such a case, no court worth its ilk would entertain the application and determine its merits while knowing that it is not clothed with powers to determine it. It follows that, the outcome would only be to strike out the application, leaving the applicant with a liberty to file a fresh application in a competent court, in line with Order XXXIX Rule 5 (1) of the Civil Procedure Code, Cap. 33 R.E. 2019 (CPC). Such order would not be appealable as Mr. Mushobozi suggests. I take the view that the course taken by the applicants was

plausible and unblemished, and I find no merit in the respondent's contention.

With regards to the time bar, I hasten to hold that, unlike the Court of Appeal Rules which provide for time prescription for applying for stay, the practice in this Court is that stay of execution should be applied without any indiligence, and where there is an imminent threat of execution. This means, therefore, that the sixty-day time prescription cited by the respondent's counsel does not apply in the circumstances of this case. In any case, as Mr. Kaswahili argued, action to stay execution of the decree began with Misc. Civil Application No. 38 of 2020 which was adjudged defective. This would be a fit case, were time to be a factor here, for exclusion of time under section 21 (2) of Cap. 89. In the view of the foregoing, I find the contention on dilatoriness baseless and misconceived. Misconceived, as well, is what the respondent perceives as a controversy and confusion on the inclusion of the 2nd applicant who features as the respondent in the appeal. This argument is lacking any cutting edge since the 2nd applicant, whose actions were censured by the lower court, was operating at the behest of the 1st applicant. Inevitably, it stands to suffer adversely if the decree that emanated from the actions it took is executed

against it. But even assuming that this was an error, I take the view that the same has no prejudicial effect to the respondent. In the spirit of the overriding effect, this is an error that I would be ready tolerate.

Disposal of the preliminary issues allows me to revert to the substance of the matter. At stake is whether the application for stay meets the criteria that would make it meritorious.

The established position is that an order for stay of execution is grantable upon demonstration, by the applicant, that the principles that govern such grant have been conformed to by the applicant. These principles have been restated in many a decision. They include the landmark decision in ***Ignazio Messina & National Shipping Agencies v. Willow Investment & Costa Shinganya,*** CAT-Civil Reference No. 8 of 1999 (DSM-unreported), in which the Court of Appeal of Tanzania guided as follows: -

> *"It is now settled that*
>
> *(i) The Court will grant a stay of execution if the applicant can show that refusal to do so would cause substantial irreparable loss to him*

*which cannot be atoned by any award of damage;*

*(ii)* *It is equally settled that the Court will order a stay if refusal to do so would, in the event the intended appeal succeeds, render that success nugatory*

(iii) *Again the Court will grant a stay if, in its opinion, it would be on a balance of convenience to the parties to do so."*

See also: ***Stanbic Bank Tanzania Ltd vs Woods Tanzania Ltd.*** CAT-Civil Application No. 146 of 2001; and ***SDV Transmi (Tanzania) Limited v. MS STE DATCO***, CAT-Civil Application No. 97 of 2004; (DSM-both unreported).

As stated earlier on, the basis for the applicants' prayer for a stay order is the depositions made in the applicants' supporting affidavit and the submission made by the counsel. These averments point to the irrepearable loss that is likely to be suffered if the decree is executed, and the stay is refused, and that the outcome in the intended appeal will be rendered nugatory. The applicants have also committed to furnish security

in the sum to be ordered by the Court. These contentions have not been challenged by the respondent.

It is my take, from the applicants' averments and submission, that the application is largely in conformity with the guiding principles on the stay of execution. The Court is guided by the fact that there are pending proceedings initiated by the notice of appeal. The Court is also mindful of the fact that the applicants stand to suffer more if the order for stay is not granted and the respondent is left to execute the decree.

Consequently, the application for stay of execution is granted. Such grant is conditional upon the applicant depositing, into the Court, the sum constituting the decretal sum as a security for the performance of the decree. The sum should be deposited within seven (7) days from the date of this ruling. Costs to be in the cause.

It is so ordered.

DATED at **MWANZA** this 10th day of June, 2021.


**M.K. ISMAIL**

**JUDGE**