

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

MISCELLANEOUS CIVIL APPLICATION NO 26 OF 2022

(ARISING FROM CIVIL CASE NO 42 OF 2018 AND CIVIL REVISION NO 1 OF 2022)

SIMON JOHN NGALESONI.....APPLICANT

VERSUS

FATHER VELEMIR TOMIC..... RESPONDENT

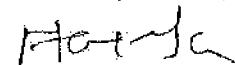
(SUING AS LEGAL REPRESENTATIVE OF THE REG. TRUSTEES OF CATHOLIC
ARCHDIOCESE OF ARUSHA)

6/6/2022 & 16/6/2022

RULING

N.R. MWASEBA, J.

This application has been brought under Order XXI Rule 24 (1) (2), Order XXXIX Rule 5 (2) (4) and Section 95 of the Civil Procedure (Cap 33 R.E 2019). The applicant herein prays that this court be pleased to grant an order for stay of execution of decree and judgment in respect of Civil Case No. 42 of 2018 pending determination of Civil Revision No 1 of 2022 which is an application for revision against ruling and orders for execution delivered by Hon Mahumbuga on the 10th December, 2021.



His application is supported by an affidavit of the applicant himself. During the hearing of the application the applicant and the respondent enjoyed the legal services of Mr Steven Mushi and Ms Lulu Monyo respectively, both learned counsels.

Submitting in support of the application, Mr Steven Mushi learned counsel after adopting the applicant's affidavit to form part of his submission he referred this court to **Order XXXIX Rule 5 (2) and (3) of CPC** which provides the conditions for granting stay of execution.

He says the first condition is that the applicant must demonstrate that he will suffer if stay order will not be granted. He avers that the applicant at paragraph 8 of his affidavit has demonstrated the loss which will be encountered to him as he will be committed as a civil prisoner and his family will suffer.

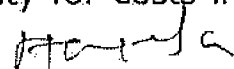
The second condition is that the applicant must be ready to undertake security for due performance of the decree should the court deem necessary. He contends that the applicant at paragraph 10 of his affidavit said he is ready to provide security as it would be imposed by this honourable court. He further said that if an order for stay of execution would not be granted then the existing revision will be rendered meaningless. He prays that the application for stay of

execution be granted and cited the case of **CRDB Bank V George Kilindu**, Civil Application No. 44 of 2004 CA sitting at Dar Es Salaam to support his stance.

His last condition is that his application has been made without undue delay. That the applicant filed his application long away when he was filing the application for revision. To support his point, he cited the case of **AG of Zanzibar V. Jaku Hashim Ayoub and Another**, Civil Application No 385/15 of 2018 C/A Zanzibar.

He winded up by submitting that the applicant has met the above conditions and so he prays that their application for stay of execution be granted.

Replying to the submission in chief, Ms Monyo Learned Counsel for the respondent did not object that the applicant has met most of the conditions for granting stay of execution save for one point that the applicant must give security for costs. She referred me to **Order XXI Rule 24 (3) of the Civil Procedure Code** that before making an order to stay an execution or to discharge the judgment debtor the court may require such security or impose such conditions upon the judgment debtor as it thinks fit. She says the applicant pleaded that he is a professional hunter and he is ready to pay security for costs if the

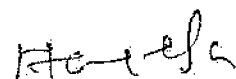


court deems fit. So, she prays that the court entail security for costs to the applicant as one of the conditions.

In his rejoinder the counsel for the applicant clarified that the law does not require that security be given prior to the grant of an order for stay of execution. He referred this court to the case of **Lomayani Langaramu V Christopher Pelo**, Civil Application No.452 /02 of 2018 CA sitting at Arusha. He avers that what is required is the applicant undertaking that he is ready to furnish security as pleaded by the applicant. He avers that the fact that the applicant is a professional hunter, be taken as a criterion for giving a security. He says since other conditions have not been objected, they pray that the application for stay of execution be granted pending determination of the main application.

After having the submissions from both sides, I wish to be guided by **Order XXXIX RULE 5 (3) of Civil Procedure Code** which depicts that no order for stay of execution shall be made under sub-rule (1) or sub-rule (2) unless the High Court or the court making it is satisfied that-

(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.

The above provision is clear that an application of stay of execution can only be granted upon compliance of the above three conditions that the applicant must show that substantial loss may result to the applicant if the application will not be granted, the application has been made without unreasonable delay and finally that the security has been given by the applicant for the due performance of the decree.

In this application it is not disputed that the applicant has fulfilled all the conditions save for the security of due performance of the decree. In this condition the counsel for the applicant referred this court to paragraph 10 of the applicant's affidavit whereby the applicant pleaded that he is ready to undertake security for the due performance of the decree against him should the court deem necessary. The counsel for the respondent referred this court to **Order XXI Rule 24 (3) of the Civil Procedure Code** and urged the court to require security for costs as one of the conditions. Thus, the only issue to be considered is

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whether a firm undertaking to furnish security for the due performance of the decree is sufficient to move the court to grant application for stay of execution.

Order XXI Rule 24 (3) of the Civil Procedure Code stipulates that:

"Before making an order to stay execution or for the restitution of property or the discharge of the judgment debtor, the court may require such security from, or impose such conditions upon, the judgment debtor as it thinks fit"

In his affidavit the applicant has made a firm undertaking to furnish security for the due performance of the decree against him as the court may deem necessary (Paragraph 10 of his affidavit).

The manner of furnishing security was well stated in the case of **Mantrac Tanzania Ltd V. Raymond Costa** Civil Application No 11 of 2010 (Unreported) where the Court of Appeal had this to say:

"That, the other condition is that the applicant for stay order must give security for due performance of the decree against him. To meet this condition, the law does not strictly demand the said security must be given prior to the grant of 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 a stay order, provided the court sets

reasonable time limit within which the applicant should give the same."

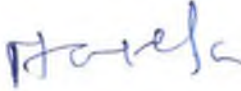
Being guided by the above provision, I am satisfied that the applicant has met all three conditions for granting the stay order including that of making a firm undertaking to furnish security which is sufficient.

In that regard, I grant the application for stay of execution of the decree and judgment in respect of Civil Case No 42 of 2018 on condition that the applicant provides security by depositing in court a sum of Tshs. 50,000,000/= or title deed of immovable property of the said amount within 30 days from the date of this ruling so as to assure the satisfaction of the judgment in case the revision fails.

It is so ordered.

DATED at ARUSHA this 16th day of June 2022.




N.R. MWASEBA

JUDGE

16.06.2022