

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB- REGISTRY OF DAR ES SALAAM**

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 8 OF 2022

PRO SHARES CAPITAL LTD 1ST APPLICANT
KOTI BROTHERS COMPANY LTD 2ND APPLICANT
JONEX JOEL KINYONYI 3RD APPLICANT

VERSUS

AISRI TANZANIA LIMITED 1ST RESPONDENT
AHMEND SALUM AMOUR 2ND RESPONDENT

**(Application for stay of execution of the decree of the Resident
Magistrate's Court of Dar es Salaam at Kisutu in Civil Case No. 88 of 2020)**

RULING

27th and 28th January, 2022

KISANYA, J.:

This is an application for stay of execution lodged by the applicants, Pro Share Capital Ltd, Koti Brothers Company Ltd and Jonex Joel Kinyonyi. It has been preferred under Order XXI, Rule 27, Order XXXIX, Rule 5(1), (3) and (4) and section 95 of the Civil Procedure Code [Cap. 33, R.E. 2019] ("the CPC"). It is also supported by an affidavit deposed by their advocate one, Pendo Charles.

Pursuant to the Chamber Summons, the applicants seek an order of this Court for stay of execution of the decision of the Resident Magistrate's Court of Dar es Salaam at Kisutu in Civil Case No. 88 of 2020 pending hearing and

determination of Civil Appeal No. 381 of 2021 instituted before it. Upon being served with the application, the respondent did not file the relevant pleading to challenge it.

During the hearing of the application, the applicants were represented by Ms. Pendo Charles, learned advocate while, Mr. Abubakar Salim, learned advocate represented both respondents.

Submitting in support of the application, Ms. Pendo Charles started by praying to adopt the contents of the chamber summons and supporting affidavit to form part of her submission in chief. She went on to submit that the applicant will suffer substantial loss if the order for stay of execution is not granted. Referring the Court to paragraph 13 of the supporting affidavit, the learned advocate submitted that the applicants are ready to furnish security for the due performance of the decree subject to stay. Upon noting further that the application was not contested by the respondent, Ms Pendo prayed that the prayers sought in the chambers summons be granted.

In his reply, Mr. Salim submitted that the grounds for stay of execution are set out under Order XXXIX, Rule 5(3) of the CPC. Given the fact that the applicant undertook to furnish the security for the due performance of the decree as required by the law, the learned counsel informed the Court that the

respondents were not challenging the application. Therefore, Mr. Salim moved this Court to order the time within which the security should be furnished. He also prayed that each party be ordered to pay its own costs.

Rejoining, Ms. Charles prayed that the applicants be given sixty (60) days within which to furnish the security for the due performance of the decree. She was also of the view that each party be ordered to pay its own costs.

I have considered the submissions made by each party. Although the application is not contested by the respondent, I am inclined to consider whether it meets the legal requirements set out under Order XXXIX, Rule 5(3) of the CPC. The provision reads as follows:

"(3) 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."*

It is also settled position that the above conditions must be cumulatively complied with in order for the application for stay of execution to be granted. This implies that, the Court is enjoined to decline to grant the order for stay of execution upon being satisfied that one of the conditions has not been met. Therefore, the applicant is charged with the duty to satisfy the Court that, the application was lodged within a reasonable time; he will suffer substantial loss in the event the application is not granted; and he has furnished security for the due performance of the decree subject to the stay. This stance was well stated in the case of **Felix Emmanuel Mkongwa vs Andrew Kimwaga**, Civil Application No. 249 of 2016 (unreported) in which the Court of Appeal had this to say in respect of the provisions of rule 11(2)(d) of the Court of Appeal Rules, 2009 which are in *pari materia* with Order XXXIX Rule 3 of the CPC: -

*"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). It follows therefore that the applicant must satisfy that, the application was filed within a reasonable time; he will suffer substantial loss if the order is not granted; and he has furnished security for due performance of the decree sought to be stayed.”

Guided by the above position, this Court is called upon to consider whether the applicant has satisfied all conditions for grant of stay of execution.

Starting with the first condition, it is in evidence that the decision subject to stay was delivered on 22nd October, 2021. Aggrieved, the applicants lodged their appeal to this Court on 5th December, 2021. Thereafter, this application was filed on 7th January, 2022. In the circumstances, I am of the considered view that the application was filed within reasonable time. Thus, the applicants have satisfied the first condition for grant of stay of execution.

With regard to the second condition, the applicant deposed in paragraphs 9 and 10 of the supporting affidavit that the funds deposited in the account number sought to be attached during execution were deposited by different stake holders. It was also deposed that the application has been carried out against the 1st applicant leaving behind the 1st respondent. As indicated earlier, the above facts were not contested by the respondent. In that regard, I am

convinced that the applicants have demonstrated that they are likely to suffer substantial loss if the order for stay of execution is not granted.

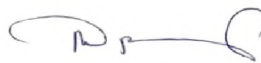
As to the third condition on furnishing security for the due performance of the decree sought to be stayed, the applicants stated on oath that they are ready and willing to furnish the disputed property and any other security. Pursuant to paragraph 5 of the supporting affidavit and the copies of the judgment and decree appended thereto, the disputed property is motor vehicle with registration No T576 DNY. Although the applicants deposed that the said motor vehicle has been modified, they did not mention or produce evidence to prove its value. In view of the judgment and decree, the price of the said motor vehicle was stated to be Tshs. 70,000,000. Given the fact that the applicants were also awarded Tshs. 50,000,000, this Court finds that the motor vehicle sought to be furnished as security cannot satisfy the decree. However, upon considering that the applicants have indicated that they are willing and ready to furnish any other security, this Court holds that they have succeeded to satisfy the third condition.

For the reasons stated above, the application is hereby granted. The stay order is conditional upon the applicants furnishing the following securities; one, the original registration card of motor vehicle with Registration No. T576 DNY

and its comprehensive insurance cover; two bank guarantee for the sum of Tshs. 50,000,000/=. It is ordered further that both securities be furnished within sixty (60) days from the date hereof. Considering that none of the parties pressed for the costs, the Court makes no order as to costs.

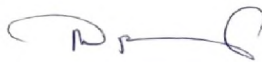
It is so ordered.

DATED at DAR ES SALAAM this 28th day of January, 2022.



E. S. Kisanya
JUDGE

Court: Ruling delivered this 28th January, 2022 in the presence of Ms. Pendo Charles, learned advocate for the applicants and Mr. Abubakar Salim, learned advocate for both respondents. B/C Salma present.



S.E. Kisanya
JUDGE
28/01/2022