IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF DAR ES SALAAM)

AT DAR ES SALAAM

MISC. CIVIL CAUSE NO. 316 OF 2022

(Arising from Misc. Civil Application No. 166 of 2022).

AHMED KHAMIS IDD ..... APPLICANT

VERSUS

LWILA MOHAMED SAID ..... RESPONDENT

RULING

18th August, & 14th September, 2022

ISMAIL, J.

The applicant is a judgment debtor in a couple of decrees passed against him. They are both money decrees arising from cases instituted by a few of multiple lenders from whom he borrowed significant sums of money and failed to repay. One of the lenders is the respondent, the decree holder in Civil Case No. 51 of 2020. The decretal sum involved is TZS. 80,132,000 part of which remains due and unsatisfied to-date. This necessitated the

filing of Execution No. 2 of 2022 in which an order for arrest and detention as a civil prisoner is sought.

In the pendency of the said application, the applicant has instituted Misc. Civil Application No. 166 of 2022 in which a bankruptcy order is prayed. The latter is also pending.

Sensing that the execution proceedings may culminate into an order that may pre-empty the pending bankruptcy proceedings, the applicant is, through the instant application, praying for an order of stay of execution. The application is supported by an affidavit sworn by the applicant himself, detailing grounds on which the application for stay is granted.

The application has encountered an opposition from the respondent, who has taken a swipe at the contentions raised by the applicant. The respondent has maintained that the business that is alleged to have gone under is up and running, and that his family has not fled him. Regarding the execution proceedings, the respondent's averments are that the same have been disposed of, and that the applicant was given 60 days within which to settle his indebtedness, lest he be committed to civil prison.

The application was disposed of by way of written submissions, preferred by counsel for the parties in accordance with the schedule drawn by the Court.

The applicant, who was represented by Mr. Saul Santu, learned counsel, argued that there is a pending application for bankruptcy proceedings, filed under section 11 (1) and (2) of the Bankruptcy Act, Cap. 25 R.E. 2019. Learned counsel argued that the said provision vests powers in the Court to order stay of any proceedings, to allow the bankruptcy proceedings to conclude. He also argued that Order XXI rule 27 of the Civil Procedure Code, Cap. 33 R.E. 2019 (CPC) allows stay of execution as the parties tussle over the pending suit. This stay is not without any conditions, it is predicated on meeting other conditions as may be imposed by the Court. These include those that relate security. He, however, considered such condition as an unjust condition for the applicant who is on the verge of being declared bankrupt.

He urged the Court to be persuaded to grant the application, considering that the applicant is of ill health.

In his rebuttal submission, Mr. Mosama Matinyi, learned counsel for the respondent, took an exception to the contention raised by his counterpart. Regarding the application for execution, the argument is that the said application was determined on 19th July, 2022, when the executing court granted the application and ordered that the applicant be arrested and appear in Court on 19th September, 2019. He argued that the court took the

view that no evidence had been adduced to prove that there werebankruptcy proceedings that were pending in this Court.

The respondent submitted further that a day to the date of the ruling, the applicant deposited the sum of TZS. 3,000,000/- into the respondent's account as part settlement of the decretal sum. The respondent considered such payment as the applicant's willingness to pay the decretal sum and proof that the applicant can still manage to discharge his financial obligations.

On the contention that the applicant's business operations collapsed in March, 2020, the contention by respondent's counsel is that the allegation is lacking in plausibility as no possibility would exist for the applicant to cease operations and be able to effect payments in December, 2020 and January, 2021. He argued that bankruptcy proceedings would be filed way back then and not in 2022. The respondent urged the Court to refuse to grant the application as the applicant stands to suffer less if the application is refused than the respondent will, should the application be granted.

Regarding illness, the submission by the respondent is that, in the absence of any proof that the applicant has been ailing since 2015, the allegation is lacking in truth, urging the Court to order the applicant to honour his obligations. The respondent added that the period of two years

that were set for the applicant to fully liquidate his obligation does not fall within the period of his illness. The respondent argued that, if anything, it shows that the applicant is now healthier and able to pay the decretal sum.

The respondent maintained that the reason given for staying execution of the decree is insufficient and that the documents submitted to prove illness are specifically suited to address the matter that is before the Court. He urged the Court to dismiss the application with costs.

The usual question that guides the discussion in cases like this is whether the application has what it takes to be granted.

The trite position is that stay of execution can only be granted upon demonstration, by the applicant, that his application has what it takes to meet the threshold necessary for its grant. This means, therefore, that all principles, as set out by law must be met. These principles have been underscored in many a decision, the epic of all being the Court of Appeal of Tanzania's decision in ***Ignazio Messina & National Shipping Agencies v. Willow Investment & Costa Shinganya,*** CAT-Civil Reference No. 8 of 1999 (DSM-unreported). In terms of the said principles, the applicant must be able to demonstrate the following:

(i) That refusal to do so would cause substantial irreparable loss to him which cannot be atoned by any award of damage;

(ii) That refusal to grant a stay order would, in the event the intended appeal succeeds, render that success nugatory; and

(iii) Establishment that, if, in the Court's opinion, it would be on the balance of convenience to the parties to grant such stay.

See also: ***SDV Transmi (Tanzania) Limited v. MS STE DATCO***, CAT-Civil Application No. 97 of 2004; (DSM-both unreported).

Regarding loss anticipated to be suffered, the legal position, as it currently obtains, is that it is not enough that the loss is substantial. It must be irreparable, and one that cannot be atoned by way of monetary compensation i.e. damages. Thus, in ***Tanzania Cotton Marketing Board v. Gogecot Cotton Co. SA*** [1997] TLR 63, the Court of Appeal of Tanzania made the following observation:

> *"At the outset it must be stated quite clearly that this being an application for stay of execution filed under Rule 9 (2) (b) of the Court's Rules, it is discretionary. It's grant or otherwise would depend on the individual circumstances of the case at hand. In this case, the decision turns around the issue whether the applicant would suffer not only substantial but irreparable loss which cannot be atoned by way of damages".*

Crucially, the foregoing position of the upper Bench was a leaf borrowed from the Indian case of ***Bansidhar v. Pribhu Daya*** [1954] AIR 41, wherein it was guided as follows:

> *"It is not enough merely to repeat the words of the Code and state that substantial loss will result, the kind of loss must be specified, details must be given, and the conscience of the court must be satisfied that such loss will really ensue".*

The superior Court went ahead and remarked as follows:

> *"But what seems to worry the applicant is the resulting hardship in future business dealings. Such would in my view, be the normal hazards of any judgment -debtor. This was further underscored in the case of* ***Bansidhar*** *(supra). There it was further observed:-* ***"The word "substantial" cannot mean an ordinary loss which every judgment debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the Code expressly prohibits stay of execution as an ordinary rule it is clear the words "substantial loss" must mean something in addition to and different from that". -Stay order is not normally granted unless the court is satisfied that the applicant has suffered an irreparable loss that***

cannot be atoned by way of damages." [Emphasis supplied]

The reason cited by the applicant for his quest for a stay order is the matter that is allegedly pending in this Court. In the said matter, the applicant seeks to be declared bankrupt, the ultimate aim being that he should be exonerated from fulfilling his financial obligations with his lenders and creditors, the respondent being one of them.

I have scrupulously gone through the affidavit that forms the foundation for the prayers sought. Besides the applicant's contention that there is a pending bankruptcy matter and the applicant's alleged ill health - none of which qualifies as the basis for consideration - there is nothing of substance adduced by the applicant to convey any semblance of justification. No damage has been demonstrated, substantial and irreparable, or otherwise, as the motivation for triggering the Court's discretion. It is not stated, either, that the execution will, in any way, prejudice the pending proceedings or at all. In my contention, the proceedings may still go ahead and culminate into a decision, and that the order on refusal to stay execution will not, in any way, scupper disposal of the proceedings or render the decision on bankruptcy un-implementable.

I have also considered the alleged ill health which the applicant has been carrying. My hastened position in that respect is that the same falls nowhere near good enough to constitute the reason for stay of execution. This is in view of the fact that the medical certificates and reports do not suggest that the applicant was, up until the time of instituting the application, in any illness that confined him in bed or at all. In any case, that would still not count, even if it was invoked as a ground for stay of execution.

Overall, I find and hold that the application has failed the test necessary for granting an order for stay of execution. Consequently, I dismiss it with costs.

It is so ordered.

DATED at **DAR ES SALAAM** this 14th day of September, 2022.

M.K. ISMAIL

JUDGE

14.09.2022