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. 250 OF 2022

(Arising from Civil Case No. 47 of 1998.)

DAL FORWARDING (T) LIMITED ..... APPLICANT

VERSUS

SAKAS INTERNATIONAL (T) LIMITED ..... RESPONDENT

RULING

22nd September, & 25th October, 2022

ISMAIL, J.

The instant application is for stay of execution pending determination of Misc. Civil Application No. 145 of 2022. The latter is an application for extension of time with a view to re-igniting the applicant's quest for overturning the decision of the Court in Civil Case No.47 of 1998. In the said suit, the applicant emerged a loser, hence his decision to pick up pieces, after the 1st setback that saw the appeal to the Court of Appeal of Tanzania (Civil Appeal No. 136 of 2019) struck out for being preferred outside the time prescription. The decretal sum is composed of USD 370,661.71 and general damages to the tune of TZS. 20,000,000/-.

Grounds supporting the application are found in the affidavit sworn by Rosan Mbwambo, learned counsel for the applicant. Key among them is the allegation of illegalities and irregularities in the decision sought to be executed.

The application has been opposed to by the respondent. The contention, as contained in the affidavit sworn by Ms. Dora Mallaba, is that the applicant's efforts are a delaying tactic aimed at avoiding the satisfaction of the decree. The respondent singled out the applicant's undertaking that they were going to settle the matter, only to find out that the applicant had instituted an application for extension of time to file a notice of appeal. This application was subsequently neglected or abandoned.

In his submission in support of the application, Mr. Rosan Mbwambo, learned counsel for the applicant, laid an elaborate factual background of the matter and what bred the instant application. With regards to stay of execution, Mr. Mbwambo drew five issues and key considerations that he regarded as necessary in determining if stay of execution should be granted. These are:

(i) Whether the applicant will suffer substantial loss if the order is not made;

(ii) Whether the balance of convenience weighs in favour of the applicant;

(iii) Whether or not the judgment and decree intended to be appealed against is tainted with irregularities and illegalities;

(iv) That, the intended appeal stands an overwhelming chance of success; and

(v) Whether security has been given by the applicant for due performance of the decree.

With respect to the first issue, the applicant argued that grant or refusal to grant an order for extension of time is an exercise of judicial discretion, and that the Court's duty is to satisfy itself if, in case the execution proceeds, the applicant will suffer substantial and irreparable loss which cannot be atoned by way of monetary compensation. On this, Mr. Mbwambo cited the decision of the Court of Appeal of Tanzania in ***Ignazio Massina & Another v. Willow Investment & Another***, CAT-Civil Reference No. 8 of 1999 (unreported). Learned counsel contended that the respondent, a natural person, will not be able to make good the decretal sum if the execution proceeds and the applicant succeeds in the appeal process. He is a person with no known means of production or assets that the applicant can fall on and recover the decretal sum.

The applicant further contended that the properties earmarked for attachment and sale are the applicant's tools of daily operations, and that attachment will paralyze business and affect the applicant's goodwill. In the end, the financial disturbance to be caused will not be adequately compensated by way of damages. The applicant fortified her position by citing the decisions in ***Transport Equipment Ltd & Another v. Devram P. Valambhia***, CAT-Civil Application No. 19 of 1993; and ***Tanzania Saruji Company v. African Marble Company***, CAT-Civil Application No. 67 of 1997 (both unreported).

In Mr. Mbwambo's contention, the applicant is a reputable company that is established and owns vast assets capable of meeting financial obligations and settle the decretal sum in the event the intended appeal fails.

On whether the balance of convenience tilts in the applicant's favour, the applicant argued that the applicant stands to be more inconvenienced. His contention is based on the feeling that the respondent is an artificial person without any known income and assets, as opposed to the applicant, a well-established business entity with assets, movable and immovable. The applicant argued that it is unsafe to let the respondent enjoy the fruits of the decree before the appeal is conclusively determined. The applicant buttressed her contention by quoting the reasoning in ***NBC Holding***

Corporation v. Hassan Nuru Hassan, CAT-Civil Application No. 89 of 2001 (unreported), in which it was held:

> *"It is common ground that notice of appeal presupposes that the appellant is dissatisfied either with the entire judgment or part of it. In that case, I think it is only logical to wait until the unsatisfactory part of the judgment is sorted out on appeal before the decree holder enjoys the fruits of the judgment in execution."*

On the alleged irregularities and illegalities, the argument raised by the Mr. Mbwambo is that the judgment is tainted with serious irregularities that should not be left unchecked. This, he argued, justifies the need for granting stay of execution. He argued that, where the judgment and decree are problematic, a stay order should be granted. Mr. Mbwambo cited, yet again, the decision of the upper Bench in ***NBC Holding Corporation v. Hassan Nuru Hassan*** (supra), wherein it was held:

> *"it is common knowledge that in a situation such as this, where the judgment or decree is problematic and an appeal in such Judgment, Order or Decree has been preferred, the Court normally grants stay pending the determination of the appeal."*

Mr. Mbwambo urged the Court to be further inspired by an earlier decision of the superior Court in ***Ravindra R. Desai & Another v.***

Cooperative and Rural Development Bank, CAT-Civil Reference No. 2 and 3 of 1996 (unreported). In the said decision, need to stay a problematic decision pending an appeal was underscored.

On whether the intended appeal stands overwhelming chances of success, the contention by learned counsel is that this is a good ground for stay of execution. He argued that, given the irregularities, the appeal has overwhelming chances of success. Enlisting the assistance of the decisions in ***Grayson N. Machengo v. Abdulrahman Hussein***, CAT-Civil Application No. 74 of 2004 (unreported); and ***Ignazio Massina & Another v. Willow Investment & Another*** (supra), the learned advocate argued that stay of execution may be granted where, if the appeal succeeds, would render the decision sought to be executed nugatory.

Regarding the furnishing of security for due performance of the decree, the position held by the applicant is that the applicant is prepared to execute a bank guarantee in the sum to be fixed by the Court. Mr. Mbwambo cautioned, however, that security need not be deposited at the time of filing the application for stay of execution. Relying on the decision of the Court in ***Mantrack Tanzania Ltd v. Raymond Costa***, HC-Civil Application No. 11 of 2010 (unreported), Mr. Mbwambo argued that the Court may set reasonable time within which such security should be furnished. The

applicant prayed that the application be granted and that costs be in the cause.

As stated earlier on, the application has been valiantly resisted by the respondent. In the submission that supports the respondent's resistence, Ms. Dora Mallaba, learned counsel, began by dismissing what the applicant termed as irregularities and illegalities. She argued that they are not, and that the decision sought to be impugned was quite in order. She submitted that proof in support of the decree holder's case was tendered during trial, and that the decision by the Court to proceed in the absence of the applicant was due to the applicant's own negligence and lack of diligence.

Regarding the first and second issues, the contention by the respondent is that balance of convenience tilts in the respondent's favour, and that no miscarriage of justice will be occasioned if execution is left to go ahead as intended. Citing the applicant's previous moves, Ms. Mallaba argued that the applicant's latest attempt is nothing short of a delaying tactic, and that it will be illogical and injudious to accept the applicant's contentions while she is known for playing delaying tactics.

On the third issue, Ms. Mallaba argued that there was nothing irregular or illegal in the judgment sought to be executed, and that the requirements

of the law were duly conformed to, and that the respondent's case was duly proved.

With regards to the overwhelming chances of success, Ms. Mallaba's take is that this ground can only be relied upon depending on peculiar facts of each case. In this case, the learned advocate argued, the intended appeal has no overwhelming chances of success. She listed down a raft of reasons that justified her contention. The reasons point the blemishes at the applicant, making the case for a successful appeal a tall order.

While distinguishing the decision in ***NBC Holding Corporation v. Hassan Nuru Hassan*** (supra), Ms. Mallaba argued that the same would only be relied upon if the decision intended to be appealed against was problematic. This is not the case with respect to the instant matter, she contended. Learned counsel discounted the contention that the intended appeal stands overwhelming chances of success.

On the furnishing of security for the due performance of the decree, the argument by Ms. Mallaba is that, should the Court take that route, then the bank guarantee to be executed should be for the value that is not less than USD 370,661.71.

Besides rebutting the applicant's submissions, the learned advocate came up with three conditions that are considered to guide in the grant or refusal to grant an order for stay of execution. These are: likelihood of success in the pending suit; likelihood of suffering irreparable loss if the application is not granted; and balance of convenience.

On ground one, the respondent sees nothing to suggest that there is a likelihood of success, as the applicant was her own enemy, because of the negligent handling of the matter. On the irreparable loss, Ms. Mallaba argued that there was no evidence that the respondent was a person with no known property. This means that this condition was not met. She maintained that balance of convenience demands that balance of convenience militates in the respondent's favour.

She argued that conditions for grant of stay of execution, which must be cumulatively met, were not met in the instant case, contrary to the requirement of the law, as accentuated in ***Mbezi Luxury Resort Limited & 3 Others v. National Bank of Commerce Limited & Another***, HC-Misc. Land Case No. 175 of 2021 (unreported). The respondent prayed that the application be dismissed with costs.

From the parties' long drawn arguments, the singular issue to be resolved is whether the application has demonstrated grounds on which stay of execution may be granted.

The legal position with regards to stay of execution is firmly settled in our jurisdiction, and a multitude of court decisions attest to this reality. It is to the effect that the applicant of the stay order must demonstrate that the principles that govern such grant have been fully and cumulatively complied with. Both counsels are unanimous on this. While these principles were laid down and restated in numerous decisions, the decision in ***Ignazio Messina & National Shipping Agencies v. Willow Investment & Costa Shinganya*** (supra), streamlined these principles and put them in a simpler way. 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).

The stringency in the conditions for granting an order for stay of execution takes into consideration the need for the victorious party to enjoy the fruits of his success even when the losing opponent chooses to appeal against the decision. This position was underscored in ***Wilson Ndetaramo Minja v. John Godson Ngowi***, CAT-MSH Civil Application No. 2 of 2007 (unreported), in which the Court of Appeal of Tanzania held:

> *"Otherwise a party who gets from a court a decree in his favour is entitled to enjoy the fruits of his success, even if the other party wishes to challenge such success in appeal. If the decree holder is to be prevented by the court from enjoying the fruits of his success, then there must be good reasons for the court to make such unusual steps."*

With respect to irreparable loss, the applicant's duty is to give the details of the loss that he alleges will be suffered if the stay order is not granted. It would not be enough to merely restate what the provision of the Civil Procedure Code states. The specifics must show that the loss to be suffered is not only substantial but also irreparable. This imperative requirement was accentuated in ***Tanzania Cotton Marketing Board v. Gogecot Cotton Co. SA*** [1997] TLR 63, in which the Court of Appeal of Tanzania quoted, with approval, the decision in an Indian case of ***Bansidhar v. Pribhu Daya*** [1954] AIR 41, in which it was reasoned as hereunder:

> *"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 apex Court further postulated as hereunder:

> *"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 follow up question is whether the applicant has shown that loss to be suffered is irreparable. In my considered view, the applicant has demonstrated that the loss to be suffered involves her tools of business, with the potential of crippling her business if execution is done through attachment and sale thereof. Such will not be a loss which would be ordinarily incurred as a result of dispossession of the property sought to be attached. It a loss that would threaten the very existence of the applicant's business operations. This cannot be atoned by way of damages.

It is in view of the foregoing that I find some convergence with the holding of the upper Bench in ***NBC Holding Corporation v. Hassan Nuru Hassan*** (supra), and take the view that this is a fit case in respect which

the applicant should be left to challenge the unsatisfactory part of the decision.

It is my conviction that the applicant has met the threshold required for having the application granted. As I do that, I accede to the prayer by the respondent that such grant must be conditioned on furnishing of a bank guarantee in the sum constituting the decretal sum. This is consistent with the decisions in numerous cases, including the ***Geriod Francis Tairo (As administrator of the Estate of the late Francis Karuwesa Tairo) v. Jumanne S. Kitila (As administrator of the Estate of the late Fatuma Puza @ Fatuma Pyuza & Hamis Said***), CAT-Civil Application No. 254 of 2019 (unreported).

It is ordered that the said bank guarantee should be deposited into court within thirty (30) days from the date of delivery of this ruling.

Costs of the application shall be in the cause.

Order accordingly.

DATED at **DAR ES SALAAM** this 25th day of October, 2022.

M.K. ISMAIL

JUDGE

25/10/2022