IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[ARUSHA SUB-REGISTRY]

AT ARUSHA

MISCELLANEOUS CIVIL APPLICATION NO 813 OF 2024

{Originating from Civil Revision No 485 of 2024 and Application for Execution No 31 of 2023 of the RM's Court of Arusha at Arusha}

BETWEEN

MILLENIUM GENERAL SUPPLIES (T) LTD ____________________ PLAINTIFF

VERSUS

NAS TYRE SERVICES (T) LTD _________________________ 1ST RESPONDENT

SHASHI INVESTMENTS LTD _________________________ 2ND RESPONDENT

COURT BROKERS AND AUCTION MART

RULING

01/03/2024 & 19/04/2024

BADE, J.

This is a Ruling on the Application for a stay of execution which was filed under a certificate of urgency based on the fact that the execution proceedings are underway. The said Application is brought under the provision of **Order XXI Rule 26** and **27, Order XLIII Rule (2), Section 68 (e)** and **95** of the **Civil Procedure Code Cap 33 (R.E. 2022)** and any other enabling provisions of law. The parties in this matter were both represented by legal counsel with Ms. Neema Oscar learned counsel

representing the Applicant and Mr. Franklin Chonjo learned counsel representing the 1st Respondent, while the 2nd Respondent who is the Court Broker is represented by Mr. Manchale Fred Lusenga, appearing in person.

In a bid to pursue a Revision Application, on 10 January 2024 the Applicant lodged a chamber summons supported by an affidavit of Neema Oscar applying for calling for records and revising proceedings and judgment of Arusha RM's Court, Mbelwa, RM, and on 16 January 2024, also by way of a chamber summons supported by an affidavit of Neema Oscar advocate who was duly instructed by the Applicant, filed the present Application seeking to stay the execution of the said decree of the RM's Court.

The Application is opposed by the Respondents through the counter affidavit of Franklin Yuredi Chonjo, advocate, who is also duly instructed by the first respondent. The 2nd respondent while appearing in court, did not press for filing of affidavit taking no stance to oppose or support the application, which is understandable as his role is to execute the order once the court ruling is finally concluded.

The counsel had prayed and were so granted leave to argue the application by way of written submissions, and both counsel complied with the schedule of filing.

In arguing the application, the applicant adopted the chamber summons and the accompanying affidavit basically hinging on grounds that are three limbed namely: that the applicant will suffer substantial loss if a stay of execution is not granted because one, as per paragraphs 13 and 14 of the supporting affidavit, that on 29th December 2023 the 1st Respondent obtained prohibitory order and warrant of attachment enabling her to attach and sale the Applicant's properties in satisfaction of the decretal sum. And, that in consequence, on 08th January 2024, the 2nd Respondent served the Applicant with a notice of fourteen days to pay the debt or face attachment and sale of her properties.

Two, that the Applicant is willing and ready to furnish security as per paragraph 18 of the supporting affidavit, and she does undertake to furnish such security for the due performance of the decree or order as may ultimately be binding upon them. Lastly, the application has been made without unreasonable delay because the Applicant filed this application

promptly after The Resident Magistrate Court of Arusha had granted the order of execution on the 28th day of December 2023.

the case of **Airtel Tanzania Limited vs Ose Power Solutions,** Civil Application No 366/01 of 2017.

In opposition, it was submitted for the Respondents that, Respondent's counsel first and foremost, raising an objection as to the competency of the Application effecting that this court has not been properly moved since the enabling provisions of law cited by the Applicant are irrelevant, that is Order XXI Rules 26 and 27 together, as well as Order XIII Rule 2 of Civil Procedure Code Cap 33 R.E 2019); insisting that the proper enabling provisions moving this court should have been Order XXXIX Rules 5 and 2 of the Civil Procedure Code Cap 33 R.E 2019.

That aside, the counsel for the Respondent also argued that the Applicant has failed to demonstrate sufficiently that substantial loss will be suffered by the Applicant apart from merely stating that the Applicant will suffer irreparable loss damages to their business.

In addition, it was contended that, in the affidavit accompanying the Application, the Applicant has not made a firm undertaking to furnish security

for the due performance of the decree. On this, it was the respondents' argument that the applicant fell short of indicating within their affidavit that they will furnish security or the nature of security to be furnished and as such, that cannot be safely vouched to be a firm undertaking.

To back up the propositions, the respondents relied on the case of **Twaha Michael Gujwile vs Kagera Farmers Cooperative Bank,** Civil Application No. 541/04 of 2018. In this regard, it was argued that the present application for stay of execution has not complied with the prescribed cumulative conditions warranting the grant of stay and on that account, it deserves to be dismissed.

In rejoinder, Ms. Oscar reiterated her earlier submission and urged the Court to grant stay of execution of the RM's Court order, mainly retaliating on the attack that the court has not been properly moved. On this aspect, her main response is that the cited provisions are relevant since they are setting the conditions for the application for a stay of execution to be granted particularly on the requirement that there must be a pending case before the court.

In a bid that seems to have been taken in the alternative, the counsel responded that justice should not be defeated simply by the inadvertent omission to cite **Order XXXIX Rule 5 and 2** in the chamber summons. She argues that still this court has power to grant the application relying on the principle of Overriding Objective (oxygen rule) as it has been stated in several cases that wrong citation or non-citation of the provision of the law should not lead to striking out the application as long as the order sought is clearly provided by the law. She made a spirited argument the powers for the court to grant any order are inherently provided by the law and not by the chamber summons. To this end, she cited **Lwempisi General Company Limited and 3 Others vs Richard Joseph Kweyamba Rugalabamu**, Misc. Application No. 125 of 2021 High Court at Mwanza, **Alliance One Tobacco and Another vs Mwajuma Hamisi and Another**, [2020] TZHC 3663 and **Dangote Cement Limited Vs. NSK Oil and Gas Limited**, Misc. Commercial Application No. 8 of 2020.

Before I embark on determining the application on merit, let me start addressing the issue raised by the counsel for the Respondent whether this application is bad in law for wrong or non citation of the enabling law and its effect. According to Mr. Chonjo, the provisions under which

this Application was preferred does not enable this court to grant the orders sought and its effect is to strike out this application with costs.

On the other hand, Ms. Oscar had it the other way around, arguing in her rejoinder that while she is aware and has used the provisions of the law at issue to argue for the application, the Oxygen principle should be applied to serve substantive justice.

I am fully aware and have carefully gone through all the provisions cited in the chamber summons, without reciting them here, and as correctly argued by Mr. Chonjo, indeed the provisions cited in the chamber summons are not the ones envisaged for the orders sought.

I have to state at the outset that the prevailing law is **Order XXXIX Rule 5(1) (2) and 3(a-b) of the Civil Procedure Code Cap 33 (R.E 2022)** which provides not only for the conditions to be applied before an application for stay of execution is granted but also it is the provision enabling the court to make an order for stay. For ease of reference, the same provides:

> *"5 (1) An Appeal shall not operate as a stay of proceedings under a decree as order appealed from except so far as the Court may order, nor shall execution of a decree be stayed by reason only of an appeal*

having been preferred from the decree but the Court may, for sufficient cause, order the stay of execution of such decree.

(2) Where an application is made for stay of execution of an appealable decree before the expiration of time allowed for appealing therefrom, the court which passed the decree may, on sufficient cause shown, order the execution to be stayed.

(3) No order for stay of execution shall be made under sub - rule (I) 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 question I have to ask myself is whether failure to cite the relevant provisions of the law would have the effect of striking out this

application? I agree with Mr Chonjo, the learned counsel for Respondent that in the past this was fatal and incurable in all respects, even without citing any case law. However, with the introduction of overriding objective this is not the case both in civil and criminal laws as amended requiring basically courts to focus on substantive justice. See the case of **Alliance Tabacco Tanzania Limited And Another vs Mwajuma Hamisi & Another**, Misc. Civil Application No. 803 of 2018, (unreported) where his lordship Mlyambina, J. observed:

> *"....... needless the afore observation, though not disputed by the respondent, the afore wrong citation of the law cannot in anyhow affect the jurisdiction of this honourable court to grant the orders sought."*

While putting the scale of interest of justice vis a vis the striking out the Application on the predicament of wrong citation of the law, while relying on the overriding objective as cursive as guided by the amended Rule 48 of the Court of Appeal Rules 2009 thus:

> Rule 48(1) *"Provided that where an application omits to cite any specific provision of the law or cites a wrong*

provision, but the jurisdiction to grant the order exists, the irregularity or omission can be ignored and the Court may order that the correct law be inserted."

I thus respectfully refuse to be persuaded with the argument by the counsel for Respondent that the omission to cite the provisions of **Order XXXIX 5(1) (2) and 3(a-b)** renders the application before the court incompetent and be liable to striking it out. See also **Dangote Cement Limited vs Nsk Oil & Gas Limited,** Misc. Commercial Application No. 08 of 2020 [2020] TZHCComD 2052. I am also fortified to view and apply the overriding objective as provided under Section 3A of the Civil Procedure Code Cap 33 RE 2022.

Now back to the merit of the Application, It is enough to say that the provisions of **Order XXXIX 5(1) (2) and 3(a-b)** stated the prescribed conditions that had to be complied with, cumulatively, failure of which would warrant the Court to decline granting of the order for a stay of execution. The Court of Appeal made an emphasis of this position in the case of **Joseph Soares @ Goha vs Hussein Omary**; Civil Application No. 12 of 2012 [2013] TZCA 328 that:

"The Court no longer has the luxury of granting an order of stay of execution on such terms as the Court may think just; but it must find that the cumulative conditions enumerated in Rule 11 (2) (b), (c) and (d) exist before granting the order."

The Court went ahead to name these conditions as they appear in the Court of Appeal Rules which are in pari materia with the ones inserted on the Civil Procedure Code and reproduced above. See also the cases of **Mtakuja Kondo and Others vs Wendo Maliki,** Civil Application No. 74 of 201 [2013] TZCA 3543, and **Therod Fredric vs Abdusamudu Salim**, Civil Application No. 7 of 2012, (unreported) .

Amongst these conditions, furnishing security for the due performance of the decree as may ultimately be binding on the Applicant continues to be among the basic and mandatory conditions which must be fulfilled to warrant the grant of stay order. Where security is not furnished and in the absence of any such firm undertaking, settled law requires the Court not to grant stay of execution. [See **Joramu Biswalo vs Hamis Richard,** Civil Application No. 11 of 2013 and **Mantrac Tanzania Ltd vs Raymond Costa,** Civil Application No. 11 of 2010 (unreported)

I am thus guided by the stated principles to determine the issue of whether the Applicant has cumulatively complied with all the conditions to warrant the grant of the application, and conversely, whether the order should grant.

As to whether the Applicant complied with all the conditions cumulatively, it is not in dispute that the Application at hand was brought without delay having been filed on 16 January 2024, after the 1st Respondents had obtained the warrant of attachment and prohibitory orders on 29th December 2023. As expected, this caused the 2nd Respondent to serve the Applicants with a fourteen days notice to pay the decretal amount or face attachment and sale of her properties on 08th January 2024.

In respect of the compliance with the remaining conditions, it is gathered from the documents supporting this application that, among the grounds relied upon by the Applicant in her deposition in paragraph 17 of the affidavit that they will suffer substantial loss in case a stay order is not granted. To be specific, the Applicant's counsel deponed that unless this Application is granted, the Applicant will suffer irreparable loss as all her properties will be sold leading to the breakdown of her business, as well as render Civil Revision No 485 of 2024 pending before this Honourable court nugatory. In

the case of **Tanzania Cotton Marketing Board vs Cogecot Cotton Co. SA** [1997] TLR 63, it was held:

> *"It is not enough to merely 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."*

It is unfortunate that the Applicant has not divulge further in demonstrating in which way their business will be affected, other than the fact that it will all break down. A narration of the fact that the prohibitory order and warrant of attachment will cause their business to crumble can not be said to have satisfied this court in the condition as provided by the law in demonstrating a substantial loss to be suffered by the Applicant. I hold so since in my view, the Applicant ought to have gone a step ahead to articulate and demonstrate how the business will break down and cause them to suffer substantial loss. Be that as it may, I am still inclined to hold, based on the information provided in the affidavit, and taken on the balance of convenience, that the Applicant will stands to suffer irreparable loss if their business breaks down in satisfaction of the decree compared to the loss to be suffered by the Respondents if they do not get to proceed with the execution proceedings

now. Moreso, when the Application for Revision is heard and determined, the Respondents will still be able to execute the decree if they win; whilst there is an unlikely possibility for the Respondents to adequately compensate the Applicant if the outcome of the Revision will favor the Applicant. While the details of the loss to be occasioned has not been furnished to the satisfaction of the court, I am satisfied on the balance of convenience that it can be concluded that the Applicant is placed to suffer irreparable loss if their business breaks down.

Now looking at the other remaining condition, which considers if a stay could be ordered based on furnishing security, so as not to render the pending Application nugatory.

In that case, the issue for consideration is whether the Applicant has complied with the condition of undertaking to furnish security for the due performance of the decree as may ultimately be binding upon them. In paragraph 18 of the affidavit; the Applicant has deposed as follows: -

> *"That the Applicant is ready to give security for the due performance of the decree."*

In **Mantrac Tanzania Limited vs Raymond Costa,** Civil Application No. 11 of 2010 (unreported), the Court discussed the mode of giving security and stated as follows:

> *"To meet this condition the law does that strictly demand that the said security must be given prior to the grant of the 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 the stay order provided the Court sets a reasonable time limit within which the Applicant should give the same."*

According to the above-cited authority, a mere firm undertaking to furnish the security suffices. No particulars of the security are required. In my considered opinion, this necessitates the view that an undertaking given on the strength of an affidavit by the Applicant to furnish security in the manner and to the extent as the Court may determine is enough and is such a firm undertaking. It means that the Applicant is ready to comply with whatever condition as the Court may direct.

So the contention by the Respondent's counsel who argued that there is no firm undertaking by the Applicant to furnish security for the due performance

of the decree as may ultimately be binding on the Applicant is without armor. The court was confronted with an Application of a similar nature in the case of **Tanzania Petroleum Development Corporation vs Mussa Yusuph Namwao & 30 Others**, Civil Application No. 602/07 of 2018 (unreported) where the Court defined a firm undertaking as a promise or agreement or an unequivocal declaration or stipulation of intention addressed to someone who reasonably places reliance on it. This rhymes with Rule 11 (2) (d) (iii) of the Rules, whose provision is in *pari materia* to Order XXXIX Rule 5 (1), (2) and 3(c) of the Civil Procedure Code Cap 33 (R.E 2022) shouldering on the Applicant the obligation to furnish security. In this regard, the question to be addressed is whether the Applicant discharged that obligation and my answer to it is in the affirmative. See also the case of **Airtel Tanzania Limited vs Ose Power Solutions** (supra) cited by the counsel for the Applicant.

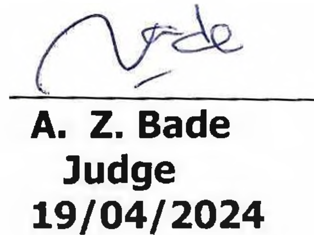
I am fortified in that account as per the authority in **Airtel Tanzania** (supra) as well as the case of **Mbeya Cement Co Ltd vs Sara Ole Daniel & Others**, Civil Application No 649/6 of 2021 supporting the position that the Applicant in the affidavit supporting the Application for Stay has made a firm undertaking to deposit security and so ordered to do so. I thus order that

the Applicant to deposit security in the form of a Bank Guarantee of the sum of the decretal amount that is sought to be stayed. The same to be deposited and filed with the Court within 30 days and before the Application is scheduled for hearing whichever is earlier.

Accordingly, the Application is allowed. Costs to follow the cause.

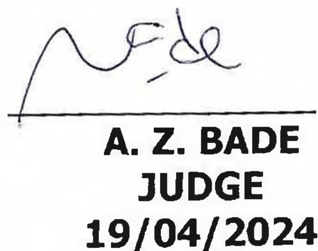
It is so ordered.

DATED at **ARUSHA** this **19th** day of **April 2024**



A. Z. Bade
Judge
19/04/2024

Ruling delivered virtually in the presence of both the Parties' representatives in chambers on the **19th** day of **April 2024.**



A. Z. BADE
JUDGE
19/04/2024