

**IN THE HIGH COURT OF TANZANIA
COMMERCIAL DIVISION
AT DAR ES SALAAM**

MISC.COMMERCIAL APPLICATION NO.14 OF 2009

KINONDONI MUNICIPAL COUNCIL...APPLICANT/JUDGMENTDEBTOR

VERSUS

N.W.BUILDERS CO.LIMITED.....RESPONDENT/DECREE HOLDER

Date of last Order: 23/03/2012

Date of last Submissions: 10/04/2012

Date of ruling: 11/05/2012

RULING

MAKARAMBA, J.:

This is a ruling on the application for stay of execution the Applicant filed in this Court on the 22nd day of November 2011, following the decree of this Court dated 10th June, 2011. The application has been preferred under Order XXI Rule 24 and section 95 of the Civil Procedure Code [Cap.33 R.E 2002]. The application is supported by the affidavit of **BURTON Y. MAHENGE**, the Legal Officer of the Applicant/Judgment Debtor. In the application the Applicant is seeking for the following orders;

- (i) *That this honourable court be pleased to stay the execution of the decree granted by this honourable Court pending the determination of the Appeal to the Court of Appeal.*
- (ii) *Costs to be on the course*

(iii) Any other relief/order this court deems fit to grant.

The Respondent has raised a preliminary objection on a point of law that, much as the Applicant had filed a Notice of Appeal, this Court is not seized with jurisdiction to entertain the application for execution.

The application and the preliminary objection by consensus of the learned Counsel for both parties were disposed of by way of written submission, by Mr. Mahenge, learned Counsel for the Applicant/Judgment Debtor and Mr. Mnyele, learned Counsel for the Respondent/Decree Holder.

The application is supported by the affidavit of one **BURTON Y. MAHENGE**, the Legal Officer of the Applicant/Judgment Debtor. In his affidavit at paragraph 5, Mr. Mahenge states that since the basis of the Applicant's appeal lies on the decretal sum, application for stay of the execution of the decree becomes unavoidable. Mr. Mahenge states further at paragraph 6 of his affidavit that the decree holder has raised an amount which the Applicant/Judgment debtor finds unrealistic, and is based on wrong computation formula. Paying the same will make the Applicant/Judgment Debtor to suffer irreparably. At paragraph 7 of the affidavit, the Applicant states that if execution of the decree is not stayed, the whole appeal will be rendered a nugatory.

In his submissions I support of the application Mr. Mahenge avers that an appeal or intention to appeal by itself cannot be a bar for execution of the decree. The essence of the Applicant/Judgment Debtor's dissatisfaction with the ruling is for the improper analysis of the party's entitlement and the order of this Court not specifically stating the decretal sum. That has resulted into

the Respondent/Decree Holder to claim the amount which pleases him irrespective of what ought to be paid, Mr. Mahenge further submits. Since the core problem lies on what is to be paid, the question of ascertaining the liabilities of the parties is of paramount importance and need to be decided by the appellate court, therefore a stay of execution of the decree is unavoidable, Mr. Mahenge added. Since the decree is not stayed nothing can prevent the Respondent/Decree Holder from executing it, and thus rendering the intended appeal of no value, and the right of appeal to be curtailed. If the appeal becomes successful, the Applicant/Judgment Debtor's decree will be made toothless and of no value, Mr. Mahenge surmised.

In his response Mr. Mnyele submits that it is settled law that upon filing notice of appeal in the Court of Appeal, the High Court cannot continue to deal with the case to which appeal is intended. Mr. Mnyele adds that the application for stay of execution was filed in this Court on the 22nd day of November, 2011, and the notice of appeal was lodged on the 24th day of October, 2011. This means that by the time an application for stay of execution was filed in this Court the matter was already before the Court of Appeal, Mr. Mnyele points out and refers this Court to the case of **NATIONAL INSURANCE CORPORATION V. KWEYAMBAH QUAKER [1999] TLR 150**, which held inter alia that:

- i.*
- ii. Once a Notice of Appeal has been lodged, any dealing with or in connection to it can only be transacted in the Court of Appeal; as the*

intimation to withdraw the Notice of Appeal in this case was directed to the High Court, it was ineffectual and the Notice subsisted,

iii. A notice of Appeal removes a case from the High Court to the Court of Appeal and rule 76(4) of the Court of Appeal Rules 1979 under which the High Court exercises jurisdiction to grant leave to appeal even after a Notice of Appeal has been lodged does not serve to bring back to the High Court a matter already before the Court of Appeal.

Mr. Mnyele has further refers this Court to the case of **M/S LAW ASSOCIATES, ADVOCATES V. M/S INDEPENDENT POWER (T) LTD [2004] TLR 276**, where it was held that:

"Once there is a Notice of Appeal the proceedings cease to be before the High Court and the Civil Procedure Code ceases to apply to the proceedings."

Mr. Mnyele also cites the case of **SIMON KABAKA DANIEL V. MWITA MARWA NYANG'ANYI & 11 OTHERS [1989] TLR 64** where it was held that:

- i. High Court has no jurisdiction to entertain application for stay of execution pending determination of an appeal to the Court of Appeal since that jurisdiction is vested in the Court of Appeal.....,*
- ii.*

Mr Mneyel submits further that it was also stated in the case of **WILLIAM MUGURUSI V. STELLA CHAMBA [2004] TLR 406** that:

i. Once proceedings of appeal to the court of appeal have been commenced, the High Court cannot properly apply the Civil Procedure Code and so the whole Civil Procedure Code is disapplied.

Mr. Mnyele submits further that an appeal proceeding to the Court of Appeal is commenced by the filling of a notice of appeal. That, upon such filling of a notice of appeal the High Court has no jurisdiction to stay the execution of the decree Mr. Mnyele adds and submits further that, it is trite law that for an Applicant to be granted an order for stay of execution pending appeal, he has to satisfy the Court on the following grounds namely:

- 1. That there is arguable case that evidences chances of success in the appeal,*
- 2. That the applicant will suffer irreparable loss, and*
- 3. A balance of inconvenience that tilts in the favour of the applicant, that is, as to prove that he will suffer more if a decree executed, than how the respondent will suffer if the decree is stayed.*
- 4. The judgment that is to be appealed is problematic.*

Mr. Mnyele refers this Court to the case of **NATIONAL INSURANCE CORPORATION & PARASTATAL SECTOR REFORM COMMISSION V. MECCO UNISYS LIMITED, Civil Application No.102 of 2004**

(Unreported) where Hon. Msoffe, J.A had this to say at page 3 of the typed ruling:

"Over the years this Court has developed or adopted principles to guide it when dealing with an application of this nature. For example, stay will be granted if an applicant can show to him/her which cannot be atoned by an award of damages; or if refusal to do so would in the event the appeal succeeds render that success nugatory; or if in its opinion it will be necessary to do so based on a balance of convenience to the parties. And more recently, this Court has held that stay would be granted if the intended appeal has prima facie chances of success if it appears on the face of it that the court giving the decision the subject of appeal lacked jurisdiction to order the award it did."

Mr. Mnyeale submits further that, it is the duty of the Applicant to have given detailed particulars of success of intended appeal, irreparable loss he will suffer and that of a balance of inconvenience that tilts in his favour. Mr. Mnyeale submits further that, the Applicant in paragraph 5 of the affidavit, is of general assertion that stay of execution is unavoidable, but there is no particulars as to why it is unavoidable. Mr. Mnyeale refers this court to the case of **NATIONAL INSURANCE CORPORATION & PARASTATAL SECTOR REFORM COMMISSION V. MECCO UNISYS LIMITED**, Civil Application **No.102 of 2004 (Unreported)** (supra) where Hon. Msoffe, J.A had this to say at page 4 of the typed ruling:

*"As for particulars of irreparable loss likely to be suffered by the applicants if a stay is not granted, let me say that it is always expected that such particulars will be given. The point was underscored by this Court in **Tanzania Sewing Machine Co. Ltd v. CRDB (1996) & Another-Civil Application No.9/99 (unreported)** thus the court has on a number of occasions held the view that it is not sufficient to assert in general terms that the Applicant will suffer irreparable loss, particulars have to be shown of the irreparable loss to be incurred."*

Mr. Mnyele also supports his argument by citing the decision in **NICHOLAS NERE LEKULE V. INDEPENDENT POWER (T) LTD & THE ATTORNEY GENERAL, Civil Application No. 70 of 1996 (unreported)**, where Hon. Lubuva, J.A had this to say at page 5 of the typed ruling:

"On the question whether or not to grant a stay, it is common ground that one of the essential conditions for granting a stay of execution pending the determination of an intended appeal is the loss or injury that an applicant is subjected. It should not be any ordinary loss; it must be an irreparable loss which cannot adequately be compensated by way of damages."

Mr. Mnyele concludes that the Applicant has failed to give sufficient and detailed particulars of the grounds for stay of execution.

In his rejoinder Mr. Mahenge submits that, the Respondent/Decree Holder did not cite any provision of the law which the Applicant has offended, nor did the Applicant state which provisions of the law under/in the Court of

Appeal Rules that provides for the application for stay of execution to be made to the Court of Appeal. The existing Court of Appeal Rules do not have any provision for stay of execution, and for that matter the rules have a gap in it, Mr. Mehenge points out. Mr. Mahenge submits further that the cases of **NATIONAL INSURANCE CORPORATION V. KWEYAMBALI DUAKER [1999] TLR 150; M/S LAW ASSOCIATES, ADVOCATES V. M/S IPTL (T) LTD [2004] TLR 276;** and that of **SIMON KABAKA DANIEL V. MWITA MARWA NYANGLANYI & 11 OTHER [1989] TLR 64** were all decided prior to the Court of Appeal Rules, which came into force in 2009.

Mr. Mahenge submits further that, there is an error either on the Applicant's side, or on the Court of Appeal Rules, that the matter has been left for this Court to decide and alongside that, if there appears any fault on the part of the Applicant, and in the alternative and without prejudice the Applicant prays that the application be struck out instead of being dismissed.

Mr. Mahenge submits further that, the dissatisfaction of the Applicant is on the uncertainty of what the parties are entitled. The Respondent had filed a decree whose computation is vague. It even offends the award by the Arbitrator. Finally, Mr. Mahenge summarizes the grounds for stay of execution as follows:

- (i) *That if the position is not ascertained by the appellate court the applicant will suffer irreparably for, she will be compelled to pay the money which the Respondent is not entitled.*

- (ii) *If the stay is not granted even if the applicant succeeds on her appeal the victory will be honorary/ceremonial rather than being executive.*

Such as summarised above are the submissions by Counsel for the parties. I gather therefrom that a decree is open to execution unless and until an interested party has applied for, and obtained order for its stay. This has been restated by the Court of Appeal of Tanzania in the case of **EMANUEL MBEIYANI V. KATIBU KIKUNDI NKOANEKOLI**, Civil Application No. 21 of 1996 Court of Appeal of Tanzania at Dar es salaam (Unreported). The Court may therefore order stay of execution before all the processes of execution have been completed. Thus, the mere filing of a notice of intention to appeal is not a bar to execution of a decree. An Appellant/Judgment Debtor may file an application for stay of execution in the trial court even after lodging a notice of appeal. Order XXI Rule 27 of the Civil Procedure Code provides that:

*"Where a suit is pending **in any court** against the holder of a decree of such court, on the part of the person against whom the decree was passed **the court may, on such terms as to security or otherwise as it thinks fit, stay execution of the decree until the pending suit has been decided.**" (the emphasis is of this Court).*

I am alive to the decision of my learned brother judge, Hon. Mruma, J. in the case of **KIWENGWA STRAND HOTEL LIMITED V. ROYAL**

INSURANCE (T) LIMITED, Commercial Case No. 68 of 2003, wherein a notice of appeal was lodged followed by application for stay of execution and this Court granted the order for stay of execution. I wish also to draw inspiration from the spirit of the Rules of the Court of Appeal which allows a party to lodge application for stay of execution, but only before expiration of the time allowed for appealing therefrom. This is envisaged under Rule 11 (1) & (2) (b) and (c) of the Court of Appeal Rules, 2009 as follows:-

"11.-(1) No sentence of death or corporal punishment shall be carried out until the time for giving notice of appeal has expired or, where notice of appeal has been given, until the appeal has been determined.

(2) Subject to the provisions of sub-rule (1), the institution of an appeal, shall not operate to suspend any sentence or to stay execution, but the Court may-

(a)Not relevant

*(b) in any civil proceedings, where a notice of appeal has been lodged in accordance with Rule 83, **an appeal, shall not operate as a stay of execution of the decree** or order appealed from except so far as the High court or tribunal may order, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree or order; **but the Court, may upon good cause shown, order stay of execution of such decree or order.***

*(c) **where an application is made for stay of execution of an appealable decree or order before the expiration of the***

***time allowed for appealing therefrom**, the Court, may upon good cause shown, order the execution to be stayed.”
(the emphasis is of this Court)*

The general principle an applicant must establish in order to convince the court to exercise its discretion to grant stay of execution has been well expounded in law and in a number of case authorities. I pick a leaf from the provisions of section 24 of the Civil Procedure Code [Cap.33 R.E 2002] which provides as follows:

*“The court to which a decree has been sent for execution shall, **upon sufficient cause being shown, stay the execution of such decree for a reasonable time**, to enable the judgment debtor to apply to the court by which the decree was passed or to any court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay execution or for any other order relating to the decree or execution which might have been made by such court of first instance or appellate court if execution had been issued thereby, or if application for execution had been made thereto.” (the emphasis is of this Court).*

In the case of **NICHOLAS NERE LEKULE VS INDEPENDENT POWER (T) LTD & ANOTHER, [1997] T.L.R 58** it was held that:

“One of the essential conditions for granting a stay of execution pending the determination of an intended appeal was the loss or injury that an

applicant would be subjected to. The loss had to be of an irreparable nature which could not be adequately compensated by way of damages."

Furthermore, His Lordship Lubuva, J.A, as he then was, in the case of **TRANSPORT EQUIPMENT LTD V. JOHN NOLAN**, Civil Application No. 19 of 1993 Court of Appeal of Tanzania, at Dar es salaam (Unreported) had this to say:

"The application of any principles of stay in a particular case is governed by the desire to "ensure that the ends of justice in each case are attained. In order for this to be achieved each case must be taken on its merits and circumstances."

The same legal position was also later stated by Lubuva, J.A, as he then was, in the case of **TANZANIA POSTS & TELECOMMUNICATIONS CORPORATION V. M/S B.S. HENRITA SUPPLIES**, Civil Application No. 14 of 1997 Court of Appeal of Tanzania at Dar es salaam (Unreported) thus:

"In exercising the Court's discretion such discretion should at all times be exercised judicially. This is in order to ensure that the ends of justice in each case are attained. In order for this to be achieved, each case must be taken on its merits and circumstances. In the light of this

general principle, I will next examine the relevant factors for the granting or otherwise of the stay order in the instant case.”

Mr. Mnyele, argues that the Applicant has to satisfy the Court that there is an arguable case which evinces chances of success in the appeal. With due respect to Mr. Mnyele, such ground has been criticized by some Judges including Mroso, J.A, as he then was, in the case of **RICHARD ZUBERI T/A ZUBERI & SONS AND SWEDISH MOTOR CORPORATION V. STANDARD CHARTERED BANK (T) AND 2 OTHERS**, Civil Application No. 86 of 2003 Court of Appeal of Tanzania at Dar es salaam (**Unreported**) where his Lordship acknowledged that:

“There may be in the observations of members of the public their Lordships in the Court hold divergent views on whether prospects of an appeal succeeding can be a relevant factor in the exercise of the court’s discretion to order stay of execution. An application of the principles of stay or a combination of any, depends on the circumstances of each case and the interests of justice. No two cases will be exactly alike. The duty of the court is to balance the competing interests of the parties and decide on balance to stands to suffer from granting or withholding a stay order.”

The pertinent issue in the present matter is whether there are special circumstances upon which this Court could exercise its discretion to grant stay of execution. The Court could only order execution to be stayed if there are

sufficient grounds for the same. In the present application, the Judgment Debtor is intending to appeal on the amount which is subject of execution by this Court. I wish to point out here that it has clearly been stated by this Court in **Commercial Case No.27 of 2002 between Tanzania Investment Bank and M/S Ilabila Industries & Others** that:

"Much as the law envisages concurrency of jurisdiction of both this Court and the Court of Appeal in dealing with application for stay of execution in a suit where Notice of Appeal to appeal to the Court of Appeal or cross-appeal has been lodged, it was not the intention of Parliament to vests a court of inferior jurisdiction over a matter legally before a superior court, much to the legal tuft which would possibly arise as a result of fighting over jurisdiction which might lead to conflicting decisions in the same subject matter. Not only law but also common sense dictates that the Court of Appeal should be left to finish its business first over the matter before this Court can exercise its jurisdiction over the subject matter."

I am also inspired by words of Munuo, JA, in the case of **LUCAS ELIAS BUKOMBE V. AUREA EDWARD, Civil Application No.178 of 2007** thus:

"As the applicant has a right of appeal against the decision of the High Court, on the balance of convenience, there is cause to stay execution pending the determination of the intended appeal."

I take it that on a balance of convenience and common sense, and in order to avoid conflicting decisions on the same subject for which both this Court and the Court of Appeal have jurisdiction, granting an order of stay of execution would be in the interest of justice. The balance of convenience tilts more in favour of granting than refusing stay of execution.

In the whole and for the foregoing reasons, the application for stay of execution succeeds. It is hereby ordered that the execution of the decree of this Court dated 10th June, 2011 be stayed pending the determination of the intended appeal. It is accordingly ordered.



R.V. MAKARAMBA
JUDGE
11/05/2012

Ruling delivered this 11th day of May, 2012 in the presence of Mr. Ndalawa, learned Counsel for the Applicant/Judgment Debtor and Mr. Mnyele, learned Counsel for the Respondent/Decree Holder.

A handwritten signature in black ink, appearing to read 'R.V. Makaramba', written over a horizontal dotted line.

R.V. MAKARAMBA
JUDGE
11/05/2012