

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF
TANZANIA
(COMMERCIAL DIVISION)
AT DAR-ES-SALAAM**

MISC.COMMERCIAL APPLICATION NO.26 OF 2021

(Made under Commercial Application No.8 of 2021)

NADDS BUREAU DE CHANGE LIMITED.....1st APPLICANT
NELSON DANIEL SWAI.....2ND APPLICANT

VERSUS

Y2K BUREAU DE CHANGE LTDRESPONDENT

Date of Last Order: 02/ 07/2021

Date of RULING: 16/09/2021

RULING

NANGELA, J.:

This application was filed under a certificate of urgency. The Application is made under Order XXXIX Rule 5 (1), (3) and (4) of the Civil Procedure Code, [Cap.33 R.E 2019]. It was brought to the attention of this Court by way of a chamber summons supported by an affidavit of the 2nd Applicant. The prayers sought under this application are as follows:

A. Interim Ex-Parte

1. That, this Honourable Court be pleased to issue an order of stay of

execution of the Judgement and Decree of Resident Magistrate Court of Dar-es-Salaam at Kinondoni in Civil Case No.175 of 2019 as prayed by the Decree Holder (Respondent herein) in Execution Case No.6 of 2021, pending the final hearing and determination of this Application inter- partes.

B. INTER PARTES

1. That, this Honourable Court be pleased to issue an order for Stay of Execution of Decree in Civil Case No.175 of 2019 at the Resident Magistrate Court of Dar-es-Salaam at Kinondoni, contained in Execution Case No.6 of 2021, pending the final hearing and determination of Commercial Application No.8 of 2021 pending in this Court.
2. Costs of this application be granted.
3. Any other relief(s) the Honourable Court shall see fit and just to grant.

When the parties appeared before me on 17th March 2021, the learned counsel for the Respondent, one Robert Makwaiya, applied for time to file a counter affidavit. Mr James Bwana, the learned advocates for the Applicants, prayed for an interim order to maintain the

status quo, an order which this Court readily granted on the basis of the *ex-parte* prayers.

However, the Respondent's counter-affidavit having been filed, I ordered the parties to appear before me on the 1st day of June 2021. On that material date they prayed that the matter be disposed of by way of written submissions. A schedule of filing was made and the parties have complied with it. This ruling, therefore, is based on the pleadings filed in this Court and the submissions made by the parties, which I hereby proceed to analyse.

In their submissions, the Applicants, through their learned advocate, contended that, there is in this Court a Commercial Application No.8 of 2021 seeking for extension of time within which to file an appeal on the ground that the trial court lacked jurisdiction to entertain Civil Case No.175 of 2019 at the Resident Magistrate Court of Kivukoni, at Kinondoni (referred here after as the **RM's Court**).

In their submission the Applicants have disclosed, as their main ground for the application, that, the judgement for which an execution order is being sought by the Decree holder is tainted with an illegality. The illegality complained of is a want of pecuniary jurisdiction of the Court which issued the Judgement and Decree.

Referring to section 2 of the *Magistrates' Court Act, Cap.11 R.E 2002*, it was the Applicants averments that the Civil Case No.175 of 2019 at the **RM's Court** was based on a business contractual relationship between the Applicants and the Respondent, and, for that matter, it was a "**Commercial Case.**"

The Applicants' learned counsel submitted that, in terms of section 40 (3) (b) of the *Magistrates' Court Act, Cap.11 R.E 2002*, the jurisdiction of the trial court was only limited to **TZS 30,000,000/-** (thirty million shillings). Thence, the Respondent (then Plaintiff) claiming **TZS 34,350,000** as specific damages, the trial Court lacked the requisite pecuniary jurisdiction over the matter before it.

In a further submission, the Applicants have argued that, the chances of succeeding in their appeal are high owing to the alleged illegality in the Judgment and Decree of the lower court. In support of their submission, the Applicants have referred this Court to the decision of **DPP vs. Farid Hadi Ahmed and 36 Others**, Crim. Appeal No.205 of 2012, CAT, at DSM (unreported), where the Court of Appeal was of the view that:

"The purpose of an application for stay of execution is to preserve the subject matter in dispute so that the rights of

the appellant who is exercising the undoubted right of appeal, if successful, in not rendered nugatory.”

The Applicants submitted further that, the application has come without unreasonable delay and the 2nd Applicant is even ready to furnish as security for the due performance of the decree to be executed, a house located at Plot Number 69, Police Barrack Street, Keko Juu, Chang’ombe Area, Temeke District, Dar-es-Salaam Region, which same house is sought to be attached and sold by the Respondent in Execution Case No.6 of 2021.

It was on the strength of the above submission that the Applicants urged this Court to make an order staying the execution proceedings in Execution case No.6 of 2021 pending the hearing and final determination of the application for extension of time (Commercial Application No.8 of 2021) within which to file an appeal against the Judgment and Decree in the **RM’s Court**, Civil Case No. 175 of 2019.

On 14th June 2021 the learned counsel for Respondent filed a reply. He urged this Court to dismiss the application contending that there is no merit in it. He argued that, a stay of execution pending appeal is an issue governed by Order XXXIX rule 5 or 6 of the C.P.C., Cap.33 R.E 2019 and that, an application for such an

order should be made not in this Court that passed the decree and the same cannot be granted automatically. Relying on the decision of this Court in the case of **Tanzania Canon Co SA** [1997] T.L.R 63 (CA) and **E.R Mutanganywa vs Ahmed Alladn and Others** [1996] T.L.R 285 (HC), it was submitted that, no application for stay of execution pending appeal can be determined where there is no appeal filed in Court.

It was also an argument by the learned counsel for the Respondent that, the application at hand is misconceived because the Applicants have not shown any particular of the loss they are about to suffer, if a stay order is not granted. He submitted that, there is only a generalised assertion of there being a possible suffering of an irreparable loss.

Besides, the learned counsel for the Respondent contended that, the alleged illegality in the Civil Case No.175 of 2019 has no legal basis. According to the learned counsel, according to section 24 of the *Written Laws (Miscellaneous Amendments) (No.4), Act, 2019*, the Magistrates' Court Act, was amended in section 40 (3) (b) whereby the pecuniary limit of **TZS 30 million** was raised to **TZS 70 Million**.

Submitting in the alternative, the learned counsel for the Respondent argued that, should a stay order be

granted, the Applicants should furnish security as per Order XXXIX rule 6 of the C.P.C, Cap.33 R.E 2019.

In a brief rejoinder submission, the learned counsel for the Applicants submitted that, the application for stay of execution is solely based on Order XXXIX Rule 5 (1), (3) and (4) of the C.P.C, Cap.33 R.E 2019. Under those provisions, it was argued, it is clear that an appeal is not a bar to execution but it is for sufficient cause that the Court may order the stay of execution of a decree.

He contended that, there has been a demonstration of such sufficient reasons why a stay order should be granted, the main reason being the alleged illegality of the judgment and the decree to be executed. It was rejoined further that, at the time when the Civil Case No.175 of 2019 was determine by the **RM's Court**, the pecuniary jurisdiction of the Court was **TZS 30 Million** and not **TZS 70 Million** as contended by the Respondent.

The learned counsel for the Applicants rejoined that, the Civil Case No.175 of 2019 was filed at the **RM's Court** on 2nd of July 2019, the time when the *Written Laws (Miscellaneous Amendments) (No.4), Act, 2019*, was yet to be in force, as it came into force on 20th September 2019 upon being officially Gazzeted.

The Applicants rejoined further that; the grounds upon which the Court can consider when deciding whether to grant a stay order or not, are stipulated under Order XXXIX Rule 5 (3) of the Code and that, the Applicants have fulfilled those conditions. It was contended further, that, the Applicants have already taken positive steps of initiating the intended appeal before this Court by filing an application seeking for extension of time within which to lodge an appeal in this Court. As such, this Court was urged to grant the prayers sought.

I have carefully taken onboard the rival arguments by the counsels for the parties herein for my consideration. The crux of the matter is whether this application should be granted, taking into account the grounds advanced by both parties.

As correctly argued by the learned counsel for the Applicants, the main purpose of an order of stay of execution is to preserve the subject matter in dispute so that the rights of the appellant who is exercising his or her undoubted rights of appeal, if successful, are found to be intact. See: **Mantrack Tanzania Ltd vs. Junior Construction Co. Ltd and 2 Others**, Comm. Case No.10 of 2017 (unreported). See also: **DPP vs. Farid Hadi Ahmed and 36 Others** (supra).

It is also a correct assertion that, an appeal does not operate as a stay of proceedings under a decree or 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. Order XXXIX Rule 5 (1) of Civil Procedure Code, Cap.33 R.E 2019, is clear on that.

Besides, and, as correctly submitted by both parties, Order XXXIX Rule 5 (3) of the Civil Procedure Code, Cap.33 R.E 2019, is clear regarding what should be demonstrated to the Court if an order is to be granted. That particular Rule provides that:

“(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.”

In this application, it is indeed true that the Applicants have preferred this application without undue delay. As regards the requirement to demonstrate there being possible substantial loss, although such was not demonstrated, the same may be inferred from the alleged ground upon which the application is premised, i.e., the alleged illegality of the decree sought to be executed. If it was illegal as contended, if allowed to be executed that will in no doubts create a substantial loss to the Applicants.

As regards the availability of security for the due performance of such decree, the Applicants have submitted that they are willing to tender in a house, described as a house located at Plot Number 69, Police Barrack Street, Keko Juu, Chang’ombe Area, Temeke District, Dar-es-Salaam Region, which same house is sought to be attached and sold by the Respondent in Execution Case No.6 of 2021.

In view of the above, I am in agreement with the submissions of the learned counsel for the Applicants that the conditions set out in Order XXXIX Rule 5 (3) of the Civil Procedure Code, Cap.33 R.E 2019 are fully covered.

However, is that all for this matter before me? I think not. According to Order XXXIX Rule 5 (3) of the Code, an appeal does not operate as a stay of proceedings under a decree or order appealed from unless one demonstrate sufficient ground to convince the Court to grant the prayer for a stay of execution.

The Respondent has argued that, there are no sufficient reasons so far disclosed by the Applicants regarding why a stay of execution order should be granted and, further, that, even the alleged illegality by the Applicants is erroneously portrayed. The Respondent maintained that stance on the ground that, according to section 40 (3) (b) of the Magistrates' Court Act, Cap.11 R.E. 2019, as amended by section 24 of the *Written Laws (Miscellaneous Amendments) (No.4), Act, 2019*, the pecuniary jurisdiction of the lower Court is **Tanzania Shillings 70 Millions**. He argued, therefore, that, the ground that the Court had no pecuniary jurisdiction when it delivered its judgement and decree sought to be executed is misconceived and bad in law.

However, as correctly argued by the learned counsel for the Applicants, the RM's Civil Case No.175 of 2019 was filed in the **RM's Court, before the *Written Laws (Miscellaneous Amendments) (No.4), Act, 2019***,

came into force. Without further ado, the Respondent's argument will fall flat on that simple reasoning.

Besides, I have also noted that, Order XXXIX Rule 5(1) of the CPC does allow this Court, where there is sufficient cause, to make an order for the stay of execution of a decree. Looking at the reasons advanced by the Applicants here in, I am inclined to grant the prayers of the Applicants and grant the application.

I do so because, the alleged illegality of the decree amounts to a sufficient cause to put its execution on hold by an order of this Court until when the application for extension of time to lodge an appeal is heard and, if granted, the appeal itself is fully heard and determined.

In view of the above, this Court settles for the following orders:

1. That, the current application is hereby granted.
2. An order for Stay of Execution of Decree in Civil Case No.175 of 2019 at the Resident Magistrate Court of Dar-es-Salaam at Kinondoni, contained in Execution Case No.6 of 2021, pending the final hearing and determination of Commercial Application No.8 of

2021 pending in this Court, is hereby issued.

3. The Applicants are hereby ordered to furnish, in line with Rule 5(3) (c) of Order XXXIX of the Civil Procedure Code, Cap.33 R.E. 2019, security for the due performance of the decree.
4. Costs to follow the event.

It is so ordered.

DATED ON THIS 16TH SEPTEMBER 2021



A handwritten signature in blue ink, appearing to read "Nangela".

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DEO JOHN NANGELA
JUDGE