

**IN THE COURT OF APPEAL OF TANZANIA  
AT ZANZIBAR**

**ZNZ CIVIL APPLICATION NO. 6 OF 2006**

**KOMBO KHAMIS HASSAN ..... APPLICANT**

**VERSUS**

**PARASKEYOPOLOUS ANGELO ..... RESPONDENT**

**(Application for Stay of Execution from the decree  
of the High Court for Zanzibar at Vuga)**

**(Mbarouk, J.)**

**dated the 8<sup>th</sup> day of June, 2006  
in  
Civil Case No. 12 of 2004**

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R U L I N G**

**1 & 6 November 2006**

**MSOFFE, J.A.:**

This is an application for a stay of execution of the decree of the High Court of Zanzibar (Mbarouk, J.) passed on 8/6/2006 in Civil Case No. 12 of 2004. The application is supported by the affidavit of Kombo Khamis Hassan, the applicant.

Briefly stated, on 24/12/1996 the parties entered into a loan agreement involving the financing and running of a bakery business known as **BOPA MODERN INDUSTRIAL BAKERY**. Clause 3.0.3 of the agreement set out the schedule of payment.

And under clause 3.0.4 thereto, it was agreed that in the event of failure to pay as scheduled the creditor (respondent herein) would have the right of taking the machines, tools and all the equipments of the business in question enough to satisfy the remaining portion of the debt not yet paid. According to the respondent, there was breach in payment hence the above mentioned suit. On the other hand, the applicant denied any breach of the agreement and in his written statement of defence he pleaded a counter claim. After hearing the parties the High Court passed the above mentioned decree. A copy of the decree is annexed to this application. In substance it was ordered in the decree as follows:-

- (a) The Defendant to hand over the bakery machineries and the bakery premises (building) to the Plaintiff immediately until such time when the outstanding Loan sum of USD 110,000 is paid in full.
- (b) The parties to forward and agree before the Registrar High Court on who Shall supervise the accounts of income and expenditure and the same be Submitted

to him on monthly basis. Failure to reach such an agreement The Registrar, High Court, to appoint any private accounts firm or qualified Accountants and the same be submitted to him on monthly basis.

- (c) After the Plaintiff has done the necessary repairs to the machineries, he shall Submit the costs of such repairs before the Court for approval.
- (d) Costs of such repairs to be deducted from the proceeds of the sale.
- (e) The counter claim is dismissed.
- (f) Costs of this suit to be borne by the Defendant.

I have carefully gone through the affidavit in support of the application and the respondent's affidavit in reply thereto. Likewise, I have listened with keen interest to the submissions made by Mr. Patel and Mr. Mnkonje, learned advocates for the applicant and the respondent, respectively. It occurs to me that the application is premised on the allegation that execution of the

decree is fraught with grave difficulties. This point is borne out by the averment under paragraph 13 of the affidavit in support of the application which reads:-

13. From the facts given above, it is my belief (a) that since the decree is fraught with grave difficulties, the executing court will fail to execute it and if it did so, then it will infringe laws relating to Labour, Immigration, L.N. 28 of 1993 if not others (b) the parties will be even at logger heads in one or the other way during implementation of the decree and (c) the issues I have enumerated in Para 12 above do need to be reconsidered by the Court of Appeal whose decision will help resolve the dispute in toto.

Para 12 of the affidavit enumerates issues which the applicant thinks are worth the consideration by this Court in the intended appeal. For purposes of this application, it will not be worthwhile to discuss the said issues here. It will suffice to say that in his submission before me Mr. Patel highlighted the envisaged grave difficulties in the event execution is allowed to take place. On the other hand, Mr. Mnkonje was of the general view that the alleged

difficulties are not necessary prerequisites for the grant of an application for a stay of execution. At best, the applicant is only harbouring fears and beliefs based on his own understanding of the facts. Execution of the decree will not lead into any difficulties. The applicant will not suffer if execution is allowed to take place. Balance of convenience tilts in favour of the respondent because he is yet to recover the decreed sum and he continues to suffer so long as the machines are not put to use, Mr. Mnkonje concluded.

Of all the principles governing a stay of execution the one which appeals to me most is balance of convenience. A balance is struck where neither party is put in jeopardy. It is on record, and undisputed for that matter, that before this application was filed the applicant filed an application in the High Court of Zanzibar seeking a stay of execution of the above decree. On 21/8/2006 the High Court dismissed the application on the ground that it was not seized with jurisdiction to deal with the application after a notice of appeal was lodged to this Court. Under paragraph 5 of the affidavit that was filed in the High Court the

applicant intimated the sort of difficulties that were bound to arise in the execution of the above decree. The respondent's response thereto is reflected under paragraph 10 (a) of the affidavit in support of **this** application. Paragraph 10 (a) reads:-

10 (a) In reply to my affidavit, the Respondent in para 8 of his counter affidavit replied

"Para 5 is denied. It is stated that the judgment had answered all issues raised by the pleadings and the evidence adduced **although there are omissions and errors in the court orders** which remedy is to make an application for correcting the same. That the licence and rent arrears will be paid as soon as the decree is properly **amended and the relevant institutions know that the failure to pay rent and renew licence was due to the court case and the orders therein.** (Emphasis supplied)

In responding to paragraph 10 (a) the respondent under paragraph 6 of his affidavit in reply merely stated that the contents of the said paragraph 10 (a) were noted, without more.

In my view, in the absence of any substantiation the respondent was actually admitting the averment made under paragraph 10 (a). In a sense he was therefore, confirming what he had averred before the High Court in the application for a stay of execution. It occurs to me therefore, that even the respondent is of the view that there are “omissions and errors” in the decree sought to be stayed. If so, in my view, prudence and common sense will demand that it will be better that an order for a stay be ordered. In my further view, it is rather unusual, and fair, to say that balance of convenience tilts in favour of both parties in the sense that unless and until the alleged “omissions and errors” are addressed in the intended appeal execution of the decree at this stage might actually cause problems and/or difficulties that are likely to affect and inconvenience the parties. In saying so, I am aware of Mr. Mnkonje’s submission that execution of the decree will not cause any difficulties to the parties. With respect, I think, Mr. Mnkonje is not being true to the respondent’s own averment above given on oath on the “omissions and errors” in the decree. I am increasingly of the view that it will not serve any useful

purpose to execute a decree which both parties perceive to contain “omissions and errors”.

For the above single reason, I grant the application. In view of the position I have taken that a stay order will be beneficial to both parties I will not make an order for costs.

DATED at DAR ES SALAAM this 6<sup>th</sup> day of November, 2006.

J.H. MSOFFE  
**JUSTICE OF APPEAL**

I certify that this is a true copy of the original.

S. M. RUMANYIKA  
**DEPUTY REGISTRAR**