

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM SUB-REGISTRY)

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 2756 OF 2024

(Originating from Civil Appeal No. 000007594 of 2024)

AGNETH CHRISTOPHER SHIRIMA Appearing as the next friend of a minor;

EILEEN FRANCIS KITAUJI..... APPLICANT

VERSUS

FRANCIS ALPHONCE KITAUJI.....1ST RESPONDENT

CRDB BANK (NECESSARY PART)2ND RESPONDENT

RULING

Date of last hearing: 19/03/2024

Date of ruling: 05/04/2024

A.A. MBAGWA, J

This is an application for a stay of execution of the judgment and decree in Civil Case No. 06 of 2022 issued by the District Court of Bagamoyo. The applicant, under certificate of urgency, has moved this Court by way of chamber summons made under the provisions of Order XXXIX Rules 5(1), (3) (a) (b), and (4) and any other enabling provisions of the Civil Procedure Code. The application is supported by an amended affidavit sworn by Agneth

Christopher Shirima filed in this court on the 19th day of February 2024. The applicant prays for the following orders;

1. That, this Honorable Court be pleased to issue a stay of execution of a decree issued on 31st day of January, 2024 in the District Court of Bagamoyo in Civil Case No. 6 of 2022 pending determination of the Civil Appeal No. 000007594 in this Honourable Court.
2. Costs of this application.
3. Any other reliefs this Court may deem fit, just or convenient to grant

When the matter was called on for the first time on the 13th day of February 2024, Batilda Mally, the learned advocate appeared on behalf of the applicant whilst the respondents were absent because they had not been served at that time. Ms. Batilda Mally prayed for *an ex parte* stay order pending hearing and determination of the application inter partes.

Considering the nature of the matter and alive to the fact that the application was brought under a certificate of urgency, this Court granted a stay order pending hearing and determination of the application inter partes. Thereafter the matter was adjourned and scheduled for hearing inter partes.

On 19/03/2024 when the matter came for an inter parte hearing, Ms. Batilda Mally, learned advocate appeared for the applicant, on the one part. On the



other part, the 1st respondent was represented by Mr. Benito Mandele, learned advocate whilst the 2nd respondent appeared through Ms. Edina Mwankenja, learned advocate.

Submitting in support of the application, Ms. Batilda Mally adopted the applicant's affidavit to form part of her submissions.

Expounding, the applicant's counsel told the Court that the applicant had filed Civil Appeal No. 7594 of 2024 which is pending in the registry of this Court. The learned counsel amplified that the nature of this application is a bit peculiar because the decree holder is the operator of the minor account as such, he does not need to file an application for execution in order to execute the decree. She strongly argued that failure to stay the execution, the respondent would continue to withdraw the money in the account and as a consequence the appeal would be rendered nugatory.

The applicant's counsel submitted that the applicant, in terms of Order XXXIX Rule 5 (3)(a)(b) and (c) of the Civil Procedure Code, needs to satisfy the Court on the following grounds in order to secure a stay order;

1. That, the applicant would suffer substantial loss if the stay order is not granted.
2. That, the applicant is ready to provide security for due performance.



Submitting further, the applicant's counsel said that the applicant is applying for stay of execution due to the following reasons; **First**, there is a pending appeal against the judgment and decree which is about to be executed as such, unless the stay order is granted, the appeal would be rendered nugatory. **Second**, if the stay order is denied, the applicant would suffer excessive hardship with the entire family. To fathom her arguments, the applicant's counsel referred this Court to the case of **Ongujo Wakibara Nyamarwa vs Beatrice Greyson Mmbaga**, Civil Application No. 200/17 of 2021, CAT at Dar es Salaam where it was held that substantial loss is one of the grounds for staying the execution.

In addition, the learned applicant's counsel had it that the applicant is ready to furnish security as averred under paragraph 11 of the applicant's affidavit. While citing the case of **Gilbert Zebadayo Mrema vs Mohamed Issa Makongoro**, Civil Application No. 369/17 of 2019 CAT at Dar es Salaam, the applicant's counsel submitted that the applicant does not necessarily need to deposit a security before granting an order for stay of execution rather a firm undertaking may prove sufficient for the Court to grant the stay.



In fine, the learned counsel concluded that the applicant has established the necessary conditions for the court to grant a stay order. She thus prayed the court to grant the orders sought under the chamber summons.

In reply, like his counterpart, Mr. Benitho Mandele, learned counsel for the 1st respondent commenced by adopting the contents of the counter affidavit together with the annexures thereto. He also remarked that the said Eileen Francis Kitauli ceased to be a minor in 2022 as per paragraph 3 of the counter affidavit and annexure CA1. Thus, a reference to her as a minor is a misconception of law, the counsel opined. He thus submitted that the bank account in dispute is no longer a minor account. The learned counsel amplified that this means the applicant herself has no interest in that account. As such, the contentions of substantial losses are out of place, the learned counsel submitted.

Mr. Mandele added while referring to paragraph 8 of the counter affidavit that the 1st respondent has shown that he is the one taking care of his family. He lamented that the applicant had abandoned the family house and taken away ten cows.

Regarding the security for due performance, Mr. Mandele submitted that they have no qualms with it if the court sets conditions for sufficient security.



Ms. Edna Mwankenja, learned counsel for the 2nd respondent did not have much to submit. Having adopted the contents of the 2nd respondent's counter affidavit, she informed the court that she was in full support of the 1st respondent's submission. She also assured the court that the 2nd respondent was ready to comply with the directives of the court.

On the security for due performance, the learned counsel left it for the Court to give the directives.

In rejoinder, the applicant's counsel conceded to the respondent's submission that Eileen, as of now, has attained the age of majority. However, she insisted that at the time of filing the suit, she was still a minor. She added that the applicant is the biological mother of Eileen as such, she has an interest in that account.

Regarding substantial losses, the applicant's counsel stressed that the applicant as a key person in the family is in charge of all activities in the family hence she is liable to suffer loss if the stay order is not granted. She also rejoined that the applicant did not get out of the family house with all properties as contended by the 1st respondent. She beseeched the Court to grant the orders sought in the chamber summons.



Having canvassed the parties' depositions and the rival arguments, the crucial issue for determination is one namely, whether the applicant has established the necessary grounds for this court to grant a stay order.

As rightly submitted by the applicant's counsel, the applicant is required, under Order XXXIX Rule 5(3) of the Civil Procedure Code to establish the following;

- (i) That substantial loss may result to the party applying for stay of execution unless the order is made;
- (ii) That the application has been made without unreasonable delay, and
- (iii) That security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him.

It is common cause that there is a pending appeal to wit, Civil Appeal No. 7594 of 2024 against the judgment and decree of the District Court of Bagamoyo in Civil Case No. 06 of 2022. It is also undeniably clear that given the nature of the dispute, the 1st respondent does not need to apply for execution to enjoy the decree.



According to the record, the judgment was delivered on 5th day of February 2024 and the present application was filed in this Court on the 13th day of February 2024. Thus there was no unreasonable delay in bringing this application.

Regarding substantial loss, in paragraph 2 of the certificate of urgency, the applicant stated as follows;

'That the conduct demonstrated by the 1st respondent herein to use the money for himself living (sic) the minor and the entire family in dilemma may in no time cause irreparable loss to the family hence rendering the pending appeal before this court nugatory'

Admittedly, the applicant's affidavit is bereft of a clear averment regarding the substantial loss that is likely to be caused. However, upon reading the amended affidavit as a whole, it is inferred that the applicant is likely to suffer substantial loss should the stay order be denied.

Further, while submitting on the security for due performance, the applicant's counsel, referred to paragraph 11 of the applicant's affidavit. She expounded that the applicant's undertaking which is provided under



paragraph 11 of the applicant's affidavit is sufficient to stand as security for due performance. The said paragraph 11 reads;

'The Applicant is ready to furnish security required by law and as may be ordered by the court for the performance of the decree'.

Mr. Benitho Mandele, learned counsel for the 1st respondent did not oppose the applicant's argument on the use of undertaking to furnish security as sufficient security for granting a stay order.

On my part, I am at one with both counsel that the firm undertaking to provide security may prove sufficient for the court to grant a stay order.

in **Mantrac Tanzania Limited v. Raymond Costa**, Civil Application No. 11 of 2010 (unreported) the Court held that:

"... To meet this condition, the law does not strictly demand that the said security must be given prior to the grant o f 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 stay order provided the Court sets a reasonable time limit within which the applicant should give the same."



In light of the authority above, it goes without saying that the undertaking provided under paragraph 11 of the amended affidavit suffices to stand as security for due performance.

All the above considered, I am satisfied that the applicant has met all the legal requirements for obtaining the stay order. Consequently, I allow the application. The execution of judgment and decree in Civil Case No. 6 of 2022 is hereby stayed pending the hearing and determination of **Civil Appeal No. 7594 of 2024** which is pending before this Court. The order is conditional upon the applicant depositing a bank guarantee of TZS. 10,000,000/= say Tanzania shillings Ten Million as security for due performance of the decree in the Court within thirty (30) days from the date of delivery of this ruling. The said guarantee shall remain in force until the hearing and determination of **Civil Appeal No. 7594 of 2024**. In the event that the applicant defaults to deposit the said sum within time, the order of stay shall lapse automatically.

Considering the marital relationship of the litigants, I make no order as to costs.

It is so ordered.



The right of appeal is explained.

DATED at DAR ES SALAAM this 5th day of April, 2024.




A.A. Mbagwa

JUDGE

05/04/2024