

**IN THE COURT OF APPEAL OF TANZANIA**

**AT DAR ES SALAAM**

**(CORAM: WAMBALI, J.A., KEREFU, J.A. And RUMANYIKA, J.A.)**

**CIVIL APPLICATION NO. 552/16 OF 2022**

**SERENGETI BREWERIES LIMITED ..... APPLICANT**

**VERSUS**

**SIKEM REAL ESTATE DEVELOPERS LIMITED ..... RESPONDENT**

**(Application for stay of execution of the Judgment and Decree of the High Court of Tanzania, Commercial Division at Dar es Salaam)**

**(Nangela, J.)**

**Dated the 11<sup>th</sup> day of July, 2022**

**in**

**Commercial Case No. 3 of 2020**

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**RULING OF THE COURT**

20<sup>th</sup> & 28<sup>th</sup> March, 2024

**WAMBALI, J.A.:**

The respondent instituted Commercial Case No. 3 of 2020 against the applicant at the High Court of Tanzania, Commercial Division (the trial court) at Dar es Salaam on the alleged breach of contractual terms agreed by the parties in June 2011. In the said suit, the respondent prayed for a declaration that the applicant had breached the contractual terms and that she is entitled to payment of general and special damages, interests and costs of the suit.

The applicant denied the allegation through the written statement of defence that she lodged in the trial court. Besides, she raised a counter

claim against the respondent in which she sought several reliefs including; a declaration that the respondent had breached general conditions of sale between the parties, payment of outstanding debt, general damages, interests and costs.

As it turned out, at the climax of the trial, on 11<sup>th</sup> July, 2022, the High Court delivered its decision in which it found in favour of the respondent, ordered the applicant to pay a total of TZS. 4,691,887,136.91 together with interests and ultimately dismissed the applicant's counter claim.

Aggrieved by the decision the High Court, the applicant lodged a notice of appeal on 21<sup>st</sup> July, 2022. It is also on the record of the application that the applicant lodged an appeal on 19<sup>th</sup> October, 2022 which was registered as Civil Appeal No. 483 of 2022.

Nonetheless, before the said appeal was lodged, the respondent on 24<sup>th</sup> August, 2022 lodged an application for execution of the impugned decree of the High Court in Commercial Case No. 3 of 2020. The applicant was however made aware of the existence of the said application for execution after its banker, CRDB Bank PLC was served with a garnishee order nisi for attachment of TZS 6,298,896,755.00.

Following the said threat and intention of the respondent to execute the decree whereby a garnishee order nisi had been issued to its banker, the applicant has approached the Court through this application seeking an order for stay of execution pending hearing and determination of the appeal. The application is premised on the following grounds:

- "(a) The Applicant has lodged a Notice of Appeal against Judgment and Decree of the High Court Commercial Division at Dar es Salaam.*
- (b) The Applicant has filed the application without delay having learnt on the 12<sup>th</sup> day of September 2022 that the Applicant's banker was served with a Garnishee Order Nisi attaching TZS. 6,298,896,755.00*
- (c) The amount that is about to be attached is colossal i.e. in excess of TZS. 6 Billion.*
- (d) The Applicant shall suffer substantial and or irreparable loss if execution is not stayed expeditiously.*
- (e) The Applicant is ready, able and willing to deposit security for the due performance of the decree in Commercial Case No. 3 of 2020 and in lieu of the garnishee order nisi."*

The application is supported by the affidavit of Lucia Minde, the Legal and Compliance Director of the applicant. Essentially, the affidavit reiterates what is stated in the reproduced grounds contained in the notice of motion. The applicant also through a counsel lodged a written submission in support of the application. It is noteworthy that during the hearing of the application, Ms. Elizabeth John Mlemeta assisted by Mr. Ally Hamza, learned advocates who appeared for the applicant adopted fully the averments and arguments contained in the affidavit and the written submissions respectively as the basis of the applicant's prayer for an order of stay of execution of the decree of the High Court. The only addition was that, if the Court finds in favour of the applicant, it should consider granting her a period of sixty (60) days within which to deposit in the Court a bank guarantee for due performance of the decree sought to be stayed.

In essence, Ms. Mlemeta urged the Court to consider the material placed before it by the applicant and grant the application as prayed in the notice of motion. She strongly contended that the applicant has met the crucial conditions stipulated by the law by showing that she will suffer substantial loss if execution of a decree will not be stayed and that she has made a firm undertaking to give security for due performance as may ultimately be binding on her.

On the other hand, though the respondent had earlier on lodged an affidavit in reply deposed by Simon Julius Gatuna, the Managing Director and the written submission opposing the application, at the hearing, Mr. Daniel Haule Ngudungi, learned advocate who appeared for the respondent retreated and expressed the respondent's intention to support the application. Notably, the only divergent submission to that of the applicant's counsel was on the period within which a bank guarantee should be deposited in the Court. To this end, though Mr. Ngudungi left the matter upon the discretion of the Court, he proposed thirty (30) days instead of sixty (60) days prayed by the applicant. Ultimately, he prayed that the application be granted as the applicant has met all the conditions stipulated by the law. He also prayed that costs be determined in the pending appeal.

It is beyond controversy that in determining an application for stay of execution, the Court is always guided by the provisions of rule 11 of the Tanzania Court of Appeal Rules, 2009 (the Rules). At this juncture, we deem it appropriate to reproduce the relevant parts of the provisions:

"11 (1) – (3) – NA

*(4) An application for stay of execution shall be made within fourteen days of service of the notice of execution on the applicant by the*

*executing officer or from the date he is otherwise made aware of the existence of an application for execution.*

*(5) No order for stay of execution shall be made under this rule unless the Court is satisfied that-*

*(a) substantial loss may result to the party applying for stay of execution unless the order is made;*

*(b) security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him.*

*(6) NA*

*(7) An application for stay of execution shall be accompanied by copies of the following-*

*(a) a notice of appeal;*

*(b) a decree or order appealed from;*

*(c) a judgment or ruling appealed from; and*

*(d) a notice of the intended execution".*

In the instant application, having carefully scrutinized the applicant's affidavit and written submission, particularly, paragraphs 2, 4, 5, 6 and 7, we are satisfied that the applicant has fully complied with the requirement stated respectively in rule 11 (4) and (7) of the Rules as the application

was lodged within 14 days and that all important documents have been attached thereto.

Moreover, gauging from the averments contained in paragraphs 9, 10, 11 and 14 of affidavit in support of the application, the applicant has undoubtedly complied with the requirement of the law prescribed under rule 11 (5) (a) and (b) of the Rules. In those paragraphs, she has clearly indicated how she will suffer substantial loss if execution of the said colossal sum, that is, TZS. 6,298,896,755.00 is not stayed and also shown her willingness and undertaken to give security for due performance of the decree as may be ordered by the Court.

Basically, from the material on the record of the application, we are satisfied that the applicant has cumulatively met the conditions stipulated under the stated rule. The compliance of the applicant regarding the issue of substantial loss is in accordance with the stance we have consistently expressed in our previous decisions in **Yara Tanzania Limited v. BD Shapriya Limited**, Civil Application No. 502/16 of 2018 and **National Housing Corporation and 2 Others v. Jing Lang Li**, Civil Application No. 192 of 2014 (both unreported). Moreover, the decisions in **Prime Catch Exports Limited and 2 Others v. Ongujo Wakibara Nyamarwa** (Civil Application No. 450/16 of 2018) [2019] TZCA 79 (28

February 2019, TANZLII) and **National Bank of Commerce Ltd v. Saoligo Holding Ltd and Magreth Joseph** (Civil Application No 137 of 2016) [2016] TZCA 860 (18 August 2016, TANZLII) are relevant with regard to the form of security and an undertaking to give it for due performance of the decree as may ultimately be binding on her.

It is therefore not surprising that, considering the nature and contents of the materials on the record in support of the application, the respondent's counsel reversed his earlier stand and readily supported the application, save for suggesting the period within which a bank guarantee should be deposited in the Court. We are however of the view that the period of sixty days proposed by the applicant is reasonable in the circumstances of this application.

In the circumstances, we grant the uncontested application. Consequently, we order stay of execution of the decree of the High Court in which a garnishee order nisi for attachment of TZS. 6,298,896,755.00 has been issued to the applicant's bank. The order is on condition that the applicant should deposit in the Court a bank guarantee of the said amount within sixty (60) days from the date of the ruling as security for due performance of the decree which may ultimately be binding upon her. The said guarantee shall remain in force until hearing and determination of



the pending appeal. More importantly, in case of default by the applicant, the order shall cease automatically.

In the end, we order that determination of the issue of costs shall depend on the outcome of the appeal.

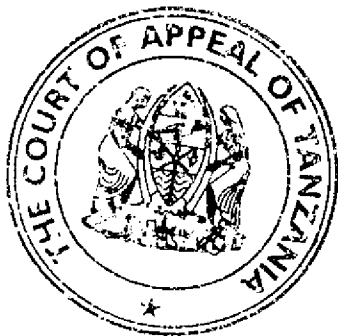
**DATED at DAR ES SALAAM this 27<sup>th</sup> day of March, 2024.**

F. L. K. WAMBALI  
**JUSTICE OF APPEAL**

R. J. KEREFU  
**JUSTICE OF APPEAL**

S. M. RUMANYIKA  
**JUSTICE OF APPEAL**

The Ruling delivered this 28<sup>th</sup> day of March, 2024 in the presence of Mr. Ally Hamza, learned counsel for the Applicant and Ms. Benadetha Fabian, learned counsel for the Respondent, is hereby certified as a true copy of the original.



  
F. A. MTARANIA  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**