**IN THE COURT OF APPEAL OF TANZANIA**

**AT DAR ES SALAAM**

**(CORAM: MWARIJA, J.A., NDIKA, J.A., And KWARIKO, J.A.)**

**CIVIL APPLICATION NO. 87 OF 2015**

1. **HYDROX INDUSTRIAL SERVICES LTD.**
2. **DICKSON KASHURA** .....**APPLICANTS**

**VERSUS**

1. **CRDB (1996) LTD.**
2. **ANGELO PASTORY MUTA**
3. **OLDONYO LENGAI AUCTION MART** ..... **RESPONDENTS**

**(Application for stay of execution of the judgment and decree of the High Court of Tanzania at Dar es Salaam)**

**(Muruke, J.)**

**Dated the 17th day of October, 2011**

**in**

**Civil Case No. 194 of 1999**

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**RULING OF THE COURT**

**09th November & 27th December, 2018**

**KWARIKO, J.A.:**

The applicants have filed this application for stay of execution of the decree of the High Court of Tanzania at Dar es Salaam in Civil Case No. 194 of 1999 passed by Muruke, J. The application is made by way of notice of motion in terms of Rules 4 (2) (b), 11 (2) (b) (c) (d) (i) (ii) (iii)

and (e) of the Court of Appeal Rules, 2009 (the Rules). The grounds flanking the notice of motion are as follows:-

"(1) *The judgment and Decree of the High Court of Tanzania at Dar es Salaam (Hon. Z.G. Muruke, J) dated 17th October, 2011 in Civil Case No. 194 of 1999 is problematic and if not stayed the 1st Respondent will sell the 1st Applicant's property with Certificate of Title No. 45667 causing substantial and irreparable loss to the Applicants which cannot be atoned by way of damages.*

(2) *There are good and sufficient reasons for staying execution of the aforesaid Judgment and Decree to prevent the ends of justice from being defeated especially when the High Court proceeded to uphold the Mortgage after finding that there was no Board Resolution of the 1st Applicant Company authorizing creation of the said mortgage in respect of Certificate of Title No. 45667 and where it was also clear that the mortgage deeds where in respect of*

*Certificate of Title No. 45657 and not certificate of Title No. 45667 owned by the 1st Applicant Company.*

*(3) Stay of Execution of the problematic Judgment and Decree of the High Court of Tanzania at Dar es Salaam (Hon. Z.G. Muruke, J) dated 17th October, 2011 in Civil Case No. 194 of 1999 is necessary not only on the balance of convenience but also to protect the rights and interests of the 2nd Applicant who despite being a shareholder and Director of the Company having only two members/ directors was not aware of the Mortgage transaction in favour of the 1st Respondent.*

*(4) The Judgment and Decree of the High Court of Tanzania at Dar es Salaam (Hon. Z.G. Muruke, J.) dated 17th October, 2011 in Civil Case No. 194 of 1999 which is the subject of this application is a direct result and consequence of serious irregularities in analysis of the evidence before the*

*High Court and the application of the relevant law governing administration of limited liability companies.*

(5) *That the value of property under Certificate of Title No. 45667 which belongs to the 1st Applicant is higher than the claimed sum and if this Honourable Court orders stay of execution, the 1st Respondent will not suffer any loss as the property will continue to be available as security until the appeal is heard and finally determined."*

The notice of motion is supported by the affidavit sworn by the 2nd applicant, Dickson Kashura who is also the Managing Director of the 1st applicant. The great part of the affidavit has explained chronological events regarding the case. Thus, relevant paragraphs for the purposes of this application are 3, 10, 11, 12 and 13 which can be summarized as follows:-

3. That, the trial court delivered the impugned judgment on the 17th of October, 2011 in which it held *inter alia* that, the 1st respondent is entitled to sell the mortgaged property with Certificate of Title No. 45667 to realize the outstanding debt.

10. That, upon being aggrieved by the whole of that decision, the applicants lodged a Notice of Appeal on the 27th October, 2011.

11. That, the judgment of the trial court is erroneous and that there are overwhelming chances of success in the intended appeal.

12. That, the value of the property ordered to be sold is higher than the outstanding loan amount; hence for the interest of justice the property should not be disposed of pending determination of the appeal.

13. That, on the balance of convenience, if the 1st Applicant's property comprised in Certificate of Title No. 45667 is sold the applicants will suffer substantial and irreparable loss which cannot be atoned by way of damages. Further, the property hosts a factory manufacturing chemicals of water treatment and filtration for domestic and industries, under license of HYDRO-X A/S in Denmark and employs 15 persons.

14. That, the requirement for the provision of security is not relevant in this case as the 1st Respondent is already in possession of the original Certificate of Title No. 45667 belonging to the 1st Applicant,

hence, the Applicants cannot dispose it in any way; thus, the 1st Respondent is not at any risk.

This application has been opposed by the 1st respondent through the affidavit in reply sworn by its advocate Mr. Mpale Kaba Mpoki, learned counsel. Essentially, it has been deponed that the applicants do not stand to suffer anything because they benefited from the loan which the 1st respondent advanced to them. And that security for stay of execution is required even when the original Certificate of Title is in the hands of the 1st respondent.

At the hearing of the application, the 2nd applicant appeared in person on his own behalf and on behalf of the 1st applicant as he is its Managing Director. Mr. Mpale Mpoki, appeared for the 1st respondent. The 2nd and 3rd respondents, though they could not be found for service, it transpired from the court record that they never participated in the proceedings at the trial court and the decision was made *ex parte* against them. Thus, in terms of Rule 63 (2) of the Rules, the Court proceeded with hearing of the application in their absence.

At the outset the 2nd applicant prayed for adjournment of hearing so that he could find another advocate contending that, the one who filed the

pleadings did not appear and could not trace him. Upon consideration, the Court found that, the applicants were duly served on 11/10/2018 through their advocate, Mr. Respicius Didace of Didace & Co. Advocates. Hence, if anything, the applicants had ample time to find another advocate to argue the application. The Court, as rightly urged by Mr. Mpoki declined the prayer to adjourn the hearing and ordered the 2nd applicant to proceed personally.

Arguing the application, the 2nd applicant prayed for stay of execution of the decree of the trial court. He was emphatic that, the grounds in support of the application are contained in the notice of motion and the supporting affidavit. However, he submitted that, he has not provided any security for due performance of the decree.

In opposing the application, Mr. Mpoki argued that, Rule 11 (2) (d) of the Rules obliges the applicant to fulfill three conditions mentioned therein before the order of stay of execution is given. He contended that, the applicants have not given security for due performance of the decree being one of those conditions. He therefore prayed for dismissal of the

application with costs. In his rejoinder, the 2nd applicant only insisted on his earlier prayer.

We have dispassionately considered the rival submissions by the parties. The issue that poses for decision is, whether the applicants have fulfilled the requisite conditions under the law, for the grant of stay of execution. Rule 11 (2) (b) (c) and (d) (i) – (iii) of the Rules provides thus;

> *(a) (not applicable)*
>
> *(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*
>
> *(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.*

*(d) no order for stay of execution shall be made under this rule unless the Court is satisfied:-*

*(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.*

The law says that, the applicant for an order of stay of execution must cumulatively satisfy the conditions listed above. This law has been applied by this Court in its various decisions; few of them are; **MANTRAC TANZANIA LIMITED v. RAYMOND COSTA,** Civil Application no. 11 of 2010, **JOSEPH ANTONY SOARES @ GOHA v. HUSSEIN s/o OMARY,**

Civil Application no. 6 of 2012 , **HAI DISTRICT COUNCIL & ANOTHER v. KILEMPU KINOKA LAIZER & 15 OTHERS** Civil Application No. 10/05 of 2017 **ANTONY NGOO & ANOTHER v. KITINDA KIMARO**, Civil Application No. 12 of 2012 and **MOHAMED RAJUU HASSAN v. ALMAHRI MOHSEN GHALED & 2 OTHERS,** Civil Application No. 570/17 of 2017 (all unreported).

The question arising here is whether the applicants have satisfied the conditions provided by the law. **Firstly,** the impugned judgment was given on 17/10/2011 and the notice of appeal was lodged on 27/10/2011 within thirty (30) days as required under Rule 83 of the Rules. This application was filed on 28/4/2015, after extension of time vide Civil Application No. 182 of 2012 of this Court. Therefore, the application was filed timely.

**Secondly,** the Court is satisfied that the applicants will suffer substantial loss if the execution of the decree is done. This is because they have shown that, the property adjudged to be sold hosts a chemical manufacturing factory which employs about 15 people.

**Thirdly,** the Court has considered whether the applicants have furnished security for due performance of the decree. In this respect the 1st applicant deponed in his affidavit that, provision of security is not relevant here because the original Certificate of Title No. 45667 in respect of the property ordered to be sold, which belongs to the 1st applicant, is in the custody of the 1st respondent. This Court agrees with the 1st respondent that, even if the original title deed of the said property is in its hands, the applicants ought to furnish other form of security to ensure that, the respondents would not be deprived the fruits of the decree in the event the appeal ends in disfavour of the applicants. Also, the impugned decree says that the mortgaged property with Certificate of Title No. 45667 should be sold by the 1st respondent to realize the outstanding debt. That means that, the property cannot be security for the applicants because it is the subject of the decretal order. Hence the property is no longer in the hands of the applicants, it cannot therefore, be used to furnish security for due performance of the decree- See the principle as stated by this Court for example in the cases of **REHEMA EMANUEL & ANOTHER v. ALOIS BONIFACE,** Civil Application No. 5 of 2015 and **MOHAMED SAID SEIF &**

**ANOTHER v. ABDULAZIZ HAGEB,** Civil Application No. 9 of 2016 (both unreported).

It is therefore clear that, the applicants have failed to furnish security for the due performance of the decree; they have not cumulatively satisfied the conditions for the grant of the order of stay of execution of the decree. As a result, this application is devoid of merit and it is hereby dismissed with costs.

It is so ordered.

**DATED** at **DAR ES SALAAM** this 19th day of December, 2018.

A. G. MWARIJA
**JUSTICE OF APPEAL**

G. A. M. NDIKA
**JUSTICE OF APPEAL**

M. A. KWARIKO
**JUSTICE OF APPEAL**

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

E. F. FUSSI
**DEPUTY REGISTRAR**
**COURT OF APPEAL**