

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: WAMBALI, J.A., MAIGE, J.A. And MGEYEKWA, J.A.)

CIVIL APPLICATION NO. 461/18 OF 2022

ABOOD BUS SERVICE APPLICANT

VERSUS

MASHAKA LUMATO RESPONDENT

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

(Mganga, J)

Dated the 10th May, 2022

in

Revision Application No. 332 of 2021

RULING OF THE COURT

13th & 21st November, 2023

MGEYEKWA, J.A.

The applicant seeks to move the Court to stay execution of the decree of the High Court, Labour Division (Mganga,J), pending the final determination of an appeal. The application is by notice of motion made under the provisions of rule 11 (3), (4), 4A, (5) (a) & (b), (6) & (7) (a), (b), (c) & (d) of the Court of Appeal Rules, 2009 (the Rules). The notice of motion is supported by an affidavit which was duly sworn by Robert R. Rutaihwa, the applicant's counsel on the 5th August, 2022. The application is, however,

resisted through an affidavit in reply which was sworn by Mashaka Lumato, the respondent on the 25th August, 2022. The grounds indicated in the notice of motion are as follows:

- (a) That, the decree holder (the Respondent) has filed the application for execution of the Decree of the High Court Labour Division in Labour Revision No. 332 of 2021 against the Applicant and the High Court of Tanzania, Labour Division has already issued a notice to show cause why execution should not proceed against the applicant.*
- (b) That, the intended Appeal stands good and overwhelming chances of success as enumerated in the affidavit in support hereof.*
- (c) That, if the Order of the High Court Labour Division is not stayed and the same is executed by the Respondent, the Applicant stands to suffer loss in terms of both pecuniary loss and other financial drawbacks and gain an unfair advantage over the amount to which amount he is not entitled. That the Respondent stands to suffer nothing if the order for stay is granted as prayed.*

(d) That, the Judgment debtor is a well established Transportation Company able and ready to satisfy the Decree of the court should the decree not be set aside as there will be already in court a security for the performance of a decree because the applicant is ready to give security for the performance of a decree by depositing certificate of title with the court to cover the amount sought to be recovered in execution, the subject matter of the decree of the High Court Labour Division.

(e) That, the balance of convenience and on the interest of justice the granting of stay order is appropriate than refusing the same.

The facts giving rise to the judgment and decree sought to be stayed, as obtained from the record of the application, are very brief. They go thus, the respondent was an employee of the applicant from March, 2000 until 31st July, 2020 when his employment was terminated. Aggrieved by the said termination, on 5th August, 2020 the respondent referred the matter to the Commission for Mediation and Arbitration (the CMA) vide Labour Dispute No. CMA/ DSM/UBG/ 89/2020/74 against the applicant herein. Hence the suit proceeded into a full trial. The respondent alleged constructive termination

and demanded payment of TZS. 42,267,690/= as compensation and other terminal benefits.

In defence, the applicant denied the respondent's claim on the ground that there was no employment relation between them. Having heard the parties and considered the evidence, the CMA found that the respondent was unfairly terminated from his employment and therefore issued an award dated 26th August, 2021 by which the applicant was ordered to pay the respondent TZS. 900,000.00 as his terminal benefits being sixty days' salary and one month's salary in lieu of leave.

Aggrieved by the above CMA's award, the applicant moved the High Court, Labour Division vide Labour Revision No.505 of 2019 to revise the CMA award. Upon hearing the parties, the High Court on 26th October, 2020 upheld the decision of the CMA that there was unfair termination. However, it varied the CMA's award by ordering the applicant to pay the respondent compensation of twelve (12) months' salaries at the tune of TZS. 5,000,092.31, annual leave at the tune of TZS. 300,000.00 and severance payments at the tune of TZS. 807,692.31.

Still dissatisfied, the applicant on 6th June, 2022 lodged a notice of appeal to challenge the decision of the High Court. Meanwhile, the

respondent, on 22nd July, 2022 approached the High Court seeking execution of the impugned decree. Subsequently, on 28th July, 2022, the applicant was served with the notice to show cause why the decree of the High Court should not be executed against him. The applicant was also required to appear for a hearing of the Execution Application No.300 of 2022 on 1st August, 2022. The respondent pressed for an order of attachment of two buses with registration Nos. T814 and T16 DXJ respectively. The High Court granted the order and the Court Broker was appointed to implement the order and submit the outcome on or before 29th August, 2022. The Court Broker also issued a demand notice and the warrant of attachment as well as threatened to part away with the two buses despite issuing a 14 days notice. The notice prompted the applicant to lodge the current application on 5th August, 2022 as indicated above.

When the application was placed before us for hearing, the applicant had the services of Mr. Emmanuel Kessy, learned counsel and the respondent appeared in person, unrepresented.

Submitting in support of the application, Mr. Kessy stated that the applicant had fulfilled the mandatory requirements for the grant of an application of stay of execution. He clarified that the application was lodged

within the prescribed time since the applicant was served with the notice to show cause on 28th July, 2022 and filed the instant application on 5th August, 2022.

With respect to substantial loss, Mr. Kessy referred to paragraph 12 of the affidavit and submitted that the applicant has complied with the condition stipulated under rule 11 (5) (a) of the Rules by stating that the applicant stands to suffer irreparable loss in the event the decree is executed. He clarified that the respondent has moved the High Court and it has already issued an order warranting the attachment of two buses with registration Nos. T814 and T816 DXJ respectively, which are the properties of the applicant. The learned counsel added that, if the two buses are attached and sold, great inconvenience will be caused and the respondent will not be in a position to refund the applicant.

With regard to the requirement to furnish security, Mr. Kessy referred the Court to paragraph 13 of the affidavit and averred that the applicant is ready to furnish security for the due performance of the decree. The learned counsel thus stressed that the averment of the applicant in paragraph 13 of the affidavit constitutes a firm undertaking to give security as may be ordered by the Court.

On the strength of the above submission, the learned counsel stated that the applicant has established that she deserves consideration of the Court for an order of stay of execution since she has fulfilled the requisite conditions. He thus prayed that the application be granted without costs.

Opposing the submission of the applicant's counsel, the respondent fully adopted and reiterated the averments contained in his affidavit in reply. The respondent was brief and forcefully complained that the application was time-barred and stressed that the applicant was playing delaying tactics. He prayed that the application should be dismissed.

In a brief rejoinder, Mr. Kessy reiterated his submission in chief. He also stressed that the application was lodged within time counting from the date when the respondent was served with a notice to show cause on 28th July, 2022 to 5th August, 2022 when the applicant lodged the instant application in Court.

Having heard the contending submissions of the counsel for the parties, firstly, we wish to state that it is the position of law as provided under rule 11 (3) of the Rules, that, the Court may upon good cause shown, order stay of execution of such decree and order. Indeed, consideration of

how good cause is taken to have been shown depends on the circumstances of each case.

In this regard, the issue for our determination is whether the applicant has cumulatively complied with the conditions set out under rule 11 (5) (a) and (b) of the Rules. We have thoroughly scrutinized the applicant's notice of motion, the affidavit in support of the application and the counsel's submission amid the contending submission of the respondent and the affidavit in reply.

Considering the materials in the record of the application placed before us, we have no doubt that the application was lodged within time as the applicant was served with a notice of execution on 28th July, 2022 and lodged the instant application on 5th August, 2022. Therefore, we are satisfied that, the instant application was lodged within the prescribed time in terms of rule 11 (4) of the Rules.

More so, we are satisfied that in view of the amount involved and the intended selling of two attached buses with registration Nos. T814 and T816 DXJ respectively, the applicant's properties are more worthy compared to the respondent's awarded amount to the tune of TZS. 5,727,305.08. Therefore, substantial loss may be suffered by the applicant if stay of

execution is not granted. We therefore hold that the first condition for the grant of the order for stay of execution has been met by the applicant.

On the other hand, we are satisfied that in terms of paragraph 13 of the affidavit, there is a firm undertaking by the applicant to furnish security for the due performance of the decree if the order of stay is granted. It is noteworthy that 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 of 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."

It is trite law that for the Court to grant the application for stay of execution, all two conditions stipulated under rule 11 (5) (a) and (b) of the Rules must be cumulatively fulfilled. See the case of **David Mahende v. Salum Nassor Mattar and Another**, Civil Application No. 160/01 of 2018 [2019] TZCA 71 (04 February 2019, TANZLII). In the circumstances of this

application, we hold that the applicant has met the second conditions for the Court to grant an order of stay of execution.

In the instant application, considering the affidavit in support of the application and submission by Mr. Kessy, we have no hesitation to conclude that the applicant has cumulatively fulfilled the conditions stipulated by the law to deserve the order for stay of execution. We are however alive to the argument by the applicant's counsel that, if we grant the order of stay of execution, the security for due performance should be the sum of TZS. 5,727,305.08 indicated in the application for execution of the decree.

In the upshot, we are of the view that in the circumstances of this application, the amount to be ordered as a security must be the decretal sum. In the event, we grant the application and order stay of execution of a judgment and decree of the High Court (Labour Division) in Revision Application No.332 of 2021 dated 10th May, 2022 pending the final determination of the appeal. The order is conditional upon the applicant depositing a bank guarantee of TZS. 5,727,305.08 as security for due performance of the decree in the Court within sixty (60) days from the date of delivery of this ruling. The said guarantee shall remain in force until hearing

and determination of the intended appeal. In default, the order of stay shall lapse automatically.

Nevertheless, in the circumstances of this application, we order that costs should abide the outcome of the appeal.

It is so ordered.

DATED at DAR ES SALAAM this 21st day of November, 2023.

F. L. K. WAMBALI
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

A. Z. MGEYEKWA
JUSTICE OF APPEAL

The Ruling delivered this 21st day of November, 2023 in the presence of Mr. Emmanuel William Kessy, learned counsel for the applicant and in the absence of the respondent though duly notified is hereby certified as a true copy of the original.




A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL