

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: LEVIRA, J.A., GALEBA, J.A. And ISMAIL, J.A.)

CIVIL APPLICATION NO. 662/16 OF 2022

SINANI BUILDING CONTRACTORS LIMITED1ST APPELLANT

MOHAMED SAID SINANI2ND APPELLANT

ASMA MOHAMED SINANI3RD APPELLANT

VERSUS

CRDB BANK PLCRESPONDENT

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

(Kisanya, J.)

dated 20th day of January, 2021

in

Commercial Case No. 114 of 2020

.....

RULING OF THE COURT

11th & 19th March, 2024

ISMAIL, J.A.:

The applicants herein featured as defendants in a matter which was instituted in the High Court (Commercial Division) and registered as Commercial Case No. 114 of 2020. The subject matter of the claim was an overdraft facility extended to the 1st applicant and secured by personal guarantees and indemnity executed by the 2nd and 3rd applicants, pursuant to which properties standing on Plot No. 102 Block 3 Factory Area, Mtwara

Township, Plot No. 165 Block "I" and Plot No. 167 Block "I", both located at Kisota Area, Temeke Municipality, were pledged as security, along with a floating debenture over the entire current and future assets of the 1st applicant. Conclusion of the proceedings saw the respondent emerge a victor. He was granted assorted reliefs that compelled the applicants to make good the outstanding loan obligations and interests that accrued thereon.

The verdict was not to the applicants' liking, hence their decision to move a ladder up, to this Court. A notice of intention to appeal was filed in the Court on 28th January, 2022. It then came to the applicants' knowledge that the properties pledged as security were to be set on sale through a public auction slated for 19th November, 2022, and that notices to that effect were in circulation through a Mwananchi Newspaper advert dated 20th October, 2022. The instant application was instituted four days after the advert.

At the hearing of the application, Mr. Roman Masumbuko, learned counsel, appeared for the applicants, whereas Ms. Linda Bosco, also learned counsel, represented the respondent. In his brief address, Mr. Masumbuko submitted that the applicants had complied with the requirements set by law. Regarding security for the due performance of the decree, the prayer by him was that, since the value of the charged security exceeds the decretal

sum, then the said security should constitute the security required for the due performance of the decree. He referred us to paragraph 6 of the supporting affidavit affirmed by Asma Mohamed Sinani, the 3rd applicant. In the alternative, the learned counsel urged us to order the applicants to issue a commitment bond or any other security as the Court may deem appropriate. On this, he referred us to our decision in **Wang Shengju & Another v. Mohamed Said Kiluwa (Suing in the name of Kiluwa Steel Group Company Ltd)**, Civil Application No. 758/16 of 2022 (unreported).

Ms. Bosco did not contest the applicants' quest for a stay order. She expressed her reservation, however, on the use of the charged property as security. She contended that there is no indication of the value of the property that her counterpart intends to rely on as security, while in the case of Mtwara property, the same was not part of the judgment or decree. She urged the Court to order that an additional security be issued, drawing a special preference to a bank guarantee which should be deposited into Court.

In rejoinder, Mr. Masumbuko implored us to hold that her counterpart, who did not file an affidavit in reply, had no material to show that the pledged security does not suffice to cover the decretal sum. He reiterated his earlier contention that the properties fetch much more than the decretal sum.

We have scrupulously glanced through the notice of motion, the affidavit in support of the motion and the parties' brief submissions. We are fully satisfied that the application has met the threshold set out in rule 11 of the Tanzania Court of Appeal Rules, 2009 (the Rules), necessary for granting stay of execution. We take into consideration, as well, the fact that the application has not been contested or opposed by the respondent. The respondent's only qualm is on the type of security to be pledged and we shall come to it in a moment. Suffices to state, at this juncture, that the application is in all fours with what we reasoned in the case of **Mantrac Tanzania Limited v. Raymond Costa**, Civil Application No. 11 of 2010 (unreported) in which we held as follows:

"... the other condition is that the applicant for stay order must give security for the due performance of the decree against him. 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 of the applicant to provide for security might prove sufficient to move the Court, all things being equal, to grant a stay order, provided the Court sets a reasonable limit within which the applicant should give the same."

We now turn our attention to the question of security to be pledged for the due performance of the decree. Mr. Masumbuko has addressed us

on this point and has urged us to follow the path taken by this Court in **Kiluwa's case** (supra) and the case of **Lesusu Lesilale Saiduraki v. Sanai Lekimboyipoi as administrator of the estate of the late Lekimboyipoi Saiduraki**, Civil Application No. 85/02 of 2021 (unreported). His contention was that, in both cases, we allowed the use of charged properties as security for the due performance of the decree. As he did that, he chose to be economical with facts on the value of the properties that are under the charge and in the hands of the respondent. This means, therefore, that, it is not clear and evident that the aggregate market value of the properties is a known affair even to the applicants themselves. This is unlike in the cases which Mr. Masumbuko urged us to follow. In **Kiluwa's case**, the shares which were pledged as security had their values ascertained and known to have met the decree sum. Further to that, the said shares were not encumbered as no charge was created thereon. In **Lesuse Saiduraki** (supra), the Court allowed execution of a bond in lieu of placement of a landed asset. These are distinct propositions to what obtains in the instant matter.

But even assuming that their values were known, which is not the case, we are constrained to hold that the properties sought to be pledged, which are no longer in the hands of the applicants are ineligible to constitute

security for the due performance of the decree. We are, in this respect, in convergence with the dissenting position held in **Africhick Hatchers Limited v. CRDB Bank PLC**, Civil Application No. 98 of 2016 (unreported). In the said case, whereas the decision of the Court (majority position) was that a charged property was eligible to serve as security for the due performance of the decree, the minority view was to the effect that:

"In an application for stay of execution, an encumbered property, irrespective of its value, cannot stand as good security for the due performance of the decree as may ultimately be binding upon the applicant in case the appeal fails. This includes a charged property which secured the loan the subject of the decretal sum. In such an application, a different security must be given to hold even for both parties ..."

Significantly, the dissenting view as expressed in quoted excerpt was extracted from the Court's previous decision in **Hydrox Industrial Services Ltd & Another v. CRDB (1996) Ltd & 2 Others**, Civil Application No. 87 of 2015 (unreported) wherein it was held:

"... 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 of 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 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 applicant, it cannot therefore, be used to furnish security for the due performance of the decree.”

We consider this to be the correct position of the law and hold the view that, being a charged property, the assets in question are encumbered and in the control of the respondent. They cannot double as security for the due performance of the decree as Mr. Masumbuko desires. The applicants should, in view thereof, provide a different form of security. In this respect, we agree with Ms. Bosco and order that the stay is conditioned on the provision, by the applicants, of a bank guarantee constituting the entirety of the decretal sum which is TZS. 283,218,845.65, and that, the same be furnished to the Court within sixty days from the date hereof. It is further ordered that, during the pendency of the impending appeal, the applicants

should not do anything that will dissipate the value of the bank guarantee issued as security. Costs to be in the cause.

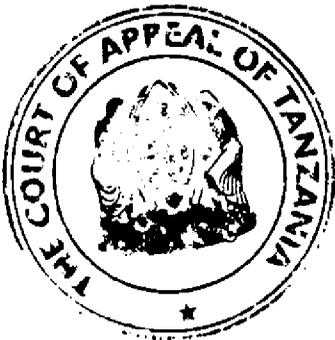
DATED at DAR ES SALAAM this 18th day of March, 2024.

M. C. LEVIRA
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

M. K. ISMAIL
JUSTICE OF APPEAL

The Ruling delivered this 19th day of March, 2024 in the presence of Mr. Fraterine Munale, learned counsel for the Applicants and Ms. Vaines Mola, learned counsel for the Respondent is hereby certified as a true copy of the original.




C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL