

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA SUB - REGISTRY

MISC. CIVIL APPLICATION NO. 6 OF 2023

(Originating from Civil Appeal No. 39 of 2022 of the High Court of Tanzania at Mbeya)

LETSHEGO BANK LTDAPPLICANT

VERSUS

DICKSON NGONYANIRESPONDENT

RULING

Date of last order 13/3/2024

Date of ruling 4/4/2024

NONGWA, J.

By a chamber summons filed under order XXI Rule 27, XXXIX Rule 5(1) and sections 68(e) and 95 of the Civil Procedure Code [Cap 33 R: E 2019] "the CPC" the applicant above named has sought to move this court to order a stay of execution pending hearing and determination of Civil Appeal No. 39 of 2022 between the parties herein. The application is supported by an affidavit sworn by John Mtefu the principal officer of the applicant and resisted by the respondent who filed a counter affidavit.

Before dealing with the merit or demerit of the application, I find it appropriate to state a brief background giving rise to the judgment and decree sought to be stayed, as obtained from the record of application.

That the respondent filed Civil Case No. 14 of 2019 in the resident magistrate court of Mbeya at Mbeya against the applicant, the judgment was delivered on 10th May 2022 in favour of the respondent with an order that the applicant pay the respondent general damage at the tune of Tsh. 20,000,000/=. Being ggrieved the applicant has filed Civil Appeal No. 39 of 2022 which is still pending in this court. Meanwhile, the applicant on 14th December 2022 was served with summons to appear before the resident magistrate court of Mbeya in an application for execution. It is averred that should execution proceed the applicant will suffer irreparable loss by virtue of being banking institution and that the applicant is ready to provide undertaking in form of bank guarantee as security for performance of the decree.

When the application was ripe for hearing, the applicant and respondent were represented by Mr. Isaya Mwanri and Ms. Martha Walema, both learned advocates respectively. Hearing proceeded through written submission.

In the submission, Mr. Mwanri adopted the affidavit of John Mtefu and proceeded to submit that for stay to be granted condition under Order XXXIX rule 5(3) of the CPC has to be met, that is to say the applicant must satisfy **one**, that substantial loss may result; **two** the application is made without unreasonable delay and **three** security has been given for due

performance of the decree. Counsel cited the high court decision in which the above three condition was expounded.

It was submitted that the applicant being a financial institution transacts in money intrusted to her by public, should execution be carried on, it will paralyse the business and the public be affected. Further that as there is Civil Appeal No. 39 of 2022 challenging the decree sought to be executed, if stay is not ordered the appeal will be rendered nugatory. He cited the case of **Mekefason Mandali & Others vs Registered Trustees of Archdiocese of Dar es Salaam**, Civil Application No. 491 of 2019 [2021] TZCA 4 (Unreported) in which the court discussed input of order XXXIX rule 5 of the CPC as striking balance of interest of the decree holder and that of the judgment debtor.

Mr. Mwanri further, stated that notice to show cause in execution was issued on 13th December 2022, the appeal lodged on 20th December 2022 after obtaining necessary documents and the present application filed on 23rd February 2023, thus there is no unreasonable delay. Furthermore, that the applicant is ready to give security in form of bank guarantee and on this the court was referred to the decision of this court in **Simon John Ngalesoni vs Father Velemir Tomic (Suing as Legal Representative of the Reg. Trustees of Catholic Archdiocese of Arusha)**, Misc. Civil Application 26 of 2022) [2022] TZHC 10090 (Unreported). He added that the respondent will not be prejudiced and

the applicant was willing to pay in case appeal fails. Mr. Mwanri rested his submission with a prayer that the application be granted with costs.

In opposition, Ms. Walema adopted the counter affidavit of the respondent filed earlier on and submitted that the fact that the applicant is the banking institution should not be used as a shield for the respondent not to enjoy fruits of the decree. Counsel insisted that the applicant should deposit security as assurance for him to get his rights.

Ms. Walema admitted that there was pending appeal between them but was adamant that it was not an impediment to proceeding with execution. From this submission prayed the application to be dismissed with cost unless there was deposit of security for performance of a decree.

In rejoinder the counsel reiterated the earlier submission.

I have examined the chamber summons, the supporting affidavit and considered the written arguments advanced by the learned counsels for the parties. From the counter affidavit and argument advanced the only issue for my determination is whether the application has merit or otherwise.

Before I get there, in application of this nature power to grant or refuse stay of execution is discretionary and the court has duty to balance interests of both the judgment debtors as well as decree holders. In **Ecobank Tanzania Limited v. Double A Co. Limited**

and 3 Others, Civil Application No. 178/16 of 2021 [2022] TZCA 591 (29th September 2022, TANZLII) the Court echoed that duty in the following words;

'The courts of law are dutifully bound to protect the rights or interest of the judgment debtors just as the rights and interest of the decree holders deserve protection with equal force and means.'

In the case of **Mekefason Mandali & Others vs Registered Trustees of Archdiocese of Dar es Salaam**, Civil Application 491 of 2019 [2021] TZCA 4 (5 February 2021; TANZLII) the court of appeal cited with approval a passage of Justice C. K. Thakker (Takwani) in his book, Civil Procedure, 6th Ed., 2011 Reprint, Eastern Book Company, Lucknow, India, which comment on rule 5 of 0.41 of the Indian Code of Civil Procedure, 1908 which empowers an appellate court to stay execution of a decree. The author states as follow;

'The object underlying Rule 5 is to safeguard the interests of both, the judgment - holder and the judgment - debtor. It is the right o f decree - holder to reap the fruits of his decree. Similarly, it is the right of the judgment - debtor not merely to get barren success in case his appeal is allowed by the appellate court. This rule thus strikes a just and reasonable balance between these apposing rights.'

In making sure that justice is done to both parties, the law has put in place conditions which have to be fulfilled by the applicant before granting order for stay of execution. Relevant to our case is order XXXIX rule 5(3) of the CPC which put three conditions to be satisfied. It provides;

'No order for stay of execution shall be made under sub-rule (1) or sub-rule (2) unless the High Court or the court making it is satisfied that-

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

(b) that the application has been made without unreasonable delay; and

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

To be noted is that the above conditions have to be cumulatively met by the applicant. In **Ongujo Wakibara Nyamarwa vs Beatrice Greyson Mmbaga**, Civil Application No. 200 of 2021 [2022] TZCA 732 (21 November 2022; TANZLII) the court stated;

'It is trite law that, in order for the Court to grant the application for stay of execution all the three conditions must be cumulatively fulfilled.'

Now testing the first condition of substantial loss, Mr. Mwanri did not expound much on what the law meant by requiring substantial or irreparable loss to be established though reference was made to paragraph 8 of the affidavit which reads;

8. That if the execution of the judgement and decree of the resident magistrate court proceeds the applicant will suffer substantial loss in terms of money as the applicant is the financial institution carry on business of transact money with money hence the capital will be outside the cycle of the applicant business.

Amplifying this paragraph in his submission Mr. Mwanri stated that the applicant being financial institution her business depends on availability of money and without it the whole business will paralyse. He added that the respondent will not be prejudiced as money will be there for him. Adversely it was stated that that should not be used to as shield against court orders.

In my view this narration and argument advanced by Mr. Mwanri fell short of the substantial loss envisaged by the law likely to be suffered by the applicant. The applicant, rather surprising, and for an obscure cause did not state in details the particulars of substantial loss other than making mere assertion which is not enough. The Court has on numerous occasions, been reluctant to issue an order for stay where the applicant

does not sufficiently demonstrate in the affidavit in support of the notice of motion that they stand to suffer substantial loss if stay order is not granted. See also the case of **Uthmaan Madati (Administrator of the Estate of the Late JUMA POSANYI MADATI vs Hambasia N'kella Maeda**, Civil Application 529 of 2016 [2022] TZCA 219 (25 April 2022; TANZLII)

In the case of **Tanzania Cotton Marketing Board vs Cogecot Cotton Co. SA** [1997] TLR 63 the court stated that:

'That the applicant had not gone beyond mere assertion that it would suffer great loss and that its business would be brought to a standstill. Unless details and particulars of the loss were specified there was no basis upon which the Court could satisfy itself that such loss would be incurred.'

Therefore, it is not enough to merely recite the words of the Code and state that substantial loss will result without clearly stating specifically the kind of loss that will result, details must be given, so that the conscience of the court is satisfied that such loss will really result.

Applying the above principle to the case, from para 8 of the affidavit reproduced earlier above, it is noticeable that the applicant did not give the details of the substantial loss to be suffered. Under this condition it was expected from the applicant to indicate if the amount is huge and in case payment is made and the applicant succeeds on appeal, the

respondent could not refund the same. Financial inability of the respondent to refund the paid money was supposed to be disclosed in the affidavit and not only to assert that the respondent will not be prejudiced and that the applicant is ready to pay if the appeal fails.

Being financial institution is not exception to execution of lawful decree and order of the court. Fear of loss of business on part of the applicant have never been a reason for a court of justice to grant stay of execution. In view of the above the applicant has failed to establish substantial loss to be suffered and therefore the first condition is not met.

The above could be enough not to inquire into remaining conditions, however there is variance of argument as to when security be given. The applicant under 9 of the founding affidavit has stated that is ready to deposit bank guarantee, the same was echoed in the submission of Mr. Mwanri, and not opposed by the respondent, though it would seem she wanted deposit before granting the order. In **Mantrac Tanzania Ltd v. Raymond Costa**, Civil Application No. 11 of 2010 the Court stated:

'One of the condition is that the applicant for a 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 by the applicant to provide security might prove sufficient to move the Court, all things being equal,

to grant a stay order, provided the Court sets a reasonable time limit within which the applicant should give the same.'

There being no context that the applicant is ready to give bank guarantee as security for due performance of a decree and that determining form of security and the time to be given is in the discretion of the court, bank guarantee equal to the decreed amount has been accepted as sufficient security. See **Capital Drilling T. Limited vs Abdullhab Seif Kamanae & Others**, Civil Application No. 597/18 of 2021 [2024] TZCA 153 (1 March 2024; TANZLII). The second condition is met by the applicant.

The last condition is whether the application was filed without unreasonable delay, in the submission Mr. Mwanri elucidated that the summons of execution was served to her on 14th December 2022 and the present application filed on 23rd February 2023. The respondent did not make any reply. I have perused the law particularly Order XXI rule 24(1), 27 and order XXXIX rule 5(1) both of the CPC, there is no time limit under the CPC within which application for stay of execution to be made to the court. Therefore, the law is open to wide interpretation based on circumstances of each case. I have noted that the application was filed after the lapse of thirty-nine (39) days from when the applicant was served with summons of execution. As stated earlier this condition was not contested by the respondent. Taking into account that the law is

silence on time limit within which application for stay of execution should be filed, I take thirty-nine days taken to file the present application not inordinate and it was therefore the application was filed without unreasonable delay.

In the end, I find that the applicant has failed to demonstrate that she stands to suffer substantial loss, thus to meet cumulatively all conditions for stay of execution. Consequently, the application is dismissed with costs.



A handwritten signature in blue ink, appearing to read "V.M. Nongwa".

V.M. NONGWA

JUDGE

4/4/2024

DATED and DELIVERED at MBEYA this 4th Day of April 2024 in presence of Mr. Seifu Wembe Advocate for the Applicant.



A handwritten signature in blue ink, appearing to read "V.M. Nongwa".

V.M. NONGWA

JUDGE