

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM
(CORAM: MMILLA, J.A., LILA, J.A. And NDIKA, J.A.)

CIVIL APPLICATION NO. 276/18 OF 2016

AL HILAL CERAMICS & HARD WARE LIMITED..... APPLICANT

VERSUS

1. NASSOR RASHID NASSOR 2. SALEHE BACHO 3. HEMED ISSA 4. GEREMIA SOSTHENES NTEMI 5. MOHAMED ALLY MOHAMED	} RESPONDENTS
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(Application for stay of execution from the decision of the High Court of Tanzania at Dar es Salaam)

(Nyerere, J.)

dated the 5th day of August, 2016

in

Labour Revision No. 331 of 2015

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RULING OF THE COURT

MMILLA, J.A.:

In this application, Al Hilal Ceramics & Hardware Ltd. (the applicant), is requesting the Court to grant orders for stay of execution in respect of the judgment and decree of the High Court of Tanzania (Labour Division), at Dar es Salaam dated 5.8.2016 in Revision No. 331 of 2015. It is anchored under Rule 11 (2) (b), (c), (d) and 49 (1) of the Tanzania Court

of Appeal Rules, 2009 (the Rules), and is supported by an affidavit affirmed by Juma Nassoro, the applicant's duly authorized advocate.

According to the Notice of Motion and the accompanying affidavit, the applicant was aggrieved by the decision of the High Court allegedly because it was made basing on a point on which the parties were not heard, therefore it suffers from illegality. That sparked the filing of a notice of intention to appeal. To evade the impending threat of execution, the applicant instituted as well the present application in which she is inviting the Court to stay execution of the decree because if it may not be stayed, she is likely to suffer substantial loss.

On the other hand, the respondents have employed the services of S. A. F. & Co. Advocates to oppose the application. They have filed an affidavit in reply in which they are principally refuting the applicant's assertions.

The brief background facts of this matter are that, way back in 2004, the respondents were on diverse dates employed by the applicant as store keepers. Eight years later however that is on 30.8.2013, their employments were unilaterally terminated. That aggrieved the respondents who held the

view that the applicant had no cause to terminate them from employment. They successfully contested their employer's decision in the Commission for Mediation and Arbitration (the CMA). In turn, the CMA's decision aggrieved the applicant who unsuccessfully challenged it by way of a revision in the High Court, hence the intended appeal to the Court.

On the date of hearing of this application on 16.9.2019, Ms Safia Mbunda, learned advocate, appeared for and represented the respondents; whereas Mr. Hafidhi Salum, the Operation Manager of the applicant company, appeared for the applicant. He informed the Court that their advocate did not appear, but he was prepared to fill the gap and elected for the hearing of the application to proceed as was scheduled. We warmly accepted his proposal.

It is unfortunate that both parties did not file written submissions; however, we invited them to submit orally.

In his brief submission, the applicant prayed to rely on the grounds he raised in the Notice of Motion as elaborated in the accompanying affidavit. He added that they have stated therein that the application was filed without unreasonable delay; also how substantial loss is likely to occur

in case the Court does not grant the order sought. Further, they have made a firm undertaking for security of performance as and when the decree may become binding on them. He urged us to grant the application.

On her part, though she had initially challenged in her affidavit in reply that the applicant did not establish that she stands to suffer substantial loss if the Court does not grant the order stay of execution of the said decree, Ms Mbunda changed her stand/base line during her oral submission that she no longer doubted that fact. She nevertheless, urged the Court to grant the order sought subject to a firm undertaking to deposit a bank guarantee which will take into account the total amount manifested in the decree subject of the application for stay.

This application was filed before the 2017 and 2019 amendments to the 2009 Court of Appeal Rules, and was based on the provisions of Rule 11 (2) (b), (c), and (d) (i), (ii) and (iii) of the Rules. Under that provision, an applicant was required to file the application without unreasonable delay, also to satisfy the Court that he/she stands to suffer substantial loss if the order sought is not granted. It further required the applicant to make

a firm undertaking for security of performance of such a decree or order, should it ultimately become binding upon him/her.

We have carefully gone through the pleadings in this matter, including perusal of the Notice of Motion and the accompanying affidavit. We have likewise astutely considered the oral submissions of the parties in this regard. We are satisfied that the applicant has established that she stands to suffer substantial loss in case the order for stay of execution is not granted, also that she filed the application without unreasonable delay. Reference is to paragraphs 3 and 4 of the Notice of Motion. We have further satisfied ourselves that she has made a firm undertaking for security of performance of such a decree, should it ultimately become binding upon her.

As already pointed out, the condition on security of performance of such a decree is what desperately concerns Ms Mbunda. She has requested the Court to grant the order sought subject to a firm undertaking to deposit a bank guarantee which will take into account the total amount decreed in the decree subject of the application for stay. We do not

hesitate to acknowledge that Ms Mbunda's concern is justified, and we have the duty to alleviate her worries.

As we had the occasion to emphasize in a number of cases, **Mantrac Tanzania Ltd v. Raymond Costa**, Civil Application No 11 of 2010, CAT (unreported) being one of them, to meet the condition for security for performance, the law does not strictly demand that the said security must be given prior to the grant of the stay order. What is essential is a firm undertaking by the applicant to provide security 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.

In the present matter, the applicant has expressly stated under paragraph 8 of the affidavit in support of the application that she is willing and financially able to provide a bank guarantee or any other form of security for the due performance of the decree if it may ultimately be binding upon her. In our strong view, such a declaration sufficiently caters for that purpose. What we need to do is to give instructions which may vouch the reservations expressed by Ms Mbunda.

In view of the above, we hereby grant the prayer for stay of execution, conditional upon the applicant depositing the Bank's Guarantee covering a total sum of Tzs. Sixteen million two hundred thousand seven hundred (16,200,700/=) within a period of 45 days from the date of delivery of this ruling.

DATED at **DAR ES SALAAM** this day of September, 2019.

B. M. MMILLA
JUSTICE OF APPEAL

S. A. LILA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL