

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: NDIKA, J.A., FIKIRINI, J.A., And ISSA, J.A.)

CIVIL APPLICATION NO. 611/18 OF 2022

UAP INSURANCE (T) LIMITEDAPPLICANT

VERSUS

YUDA THOMAS SHAYO & 5 OTHERS 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 11th day of February, 2022

in

Revision Application No. 16 of 2021

RULING OF THE COURT

20th & 25th March 2024

ISSA, J.A.:

By a Notice of Motion filed under rule 4(2)(a) and (b), 11(3), 11(4), 11(4A), 11(5)(a),(b), 11(6), 11(7) (a),(b),(c),(d) and 48(1) of the Tanzania Court of Appeal Rules, 2009 (the Rules) the applicant had sought to move this Court to order a stay of execution pending hearing and determination of Civil Appeal No. 355 of 2022. The application is supported by an affidavit sworn by Venance Minja, the legal counsel and company secretary of the applicant company.

The application is resisted by the respondent not only by way of an affidavit in reply, but also by a notice of preliminary objections of which was filed under rule 107(1) and (3) of the Rules, and served on the applicant. So when the application came up for hearing, we had to start with the preliminary objections.

Mr. Benedict Bahati Bagiliye, learned counsel, who advocated for the respondent, had initially raised four points of objection. During the hearing, he abandoned three of them and argued only the first preliminary objection, which goes thus:

*"The Court has no jurisdiction to grant the orders of stay as the application for execution filed by the applicant is an application pending nothing and an abuse of court process for the decree sought to be executed in the High Court is not the decree subject for appeal in Civil Appeal No. 355 of 2022 pending in the Court of Appeal and thus contrary to settled principle of the law that **a party cannot apply for stay of execution of a decree which he is not intending to appeal against laid down by this Court in AWINIA MUSHI v. TROPICAL PESTICIDES RESEARCH INSTITUTE, CIVIL APPLICATION NO. 2 of 2006**".*

In order to appreciate the essence of the present application, it is opportune to narrate a brief background facts on the dispute between the parties. The respondents were employed by the applicant company and their employment ended on 24th May, 2018 when they were retrenched. Aggrieved by retrenchment, the respondents filed Labour Dispute No. CMA/DSM/ILA/R.685/538 at the Commission for Mediation and Arbitration (the CMA) which delivered the award on 5th August, 2019 in favour of the respondents. It ordered reinstatement of the respondents without loss of remuneration and it also awarded general damages to each of the respondents to the tune of TZS 50 million.

Aggrieved, the applicant lodged Revision Application No. 16 of 2021 at the High Court Labour Division. Although the applicant was aggrieved, but as she had no intention of reinstating the respondents, she attempted to satisfy the award. She sought to pay the respondents accrued salaries together with twelve months salaries in lieu of reinstatement totaling TZS 153,873,932.00. The respondents allegedly refused to give their bank details, hence, the applicant deposited the money into the Labour Court's account on 6th December, 2019 and notified the Labour Court as well as the respondents' counsel.

In spite of those events, the respondents initiated execution proceedings in terms of Labour Execution No. 437 of 2021. In response,

the applicant filed an affidavit to show cause in which it informed the Registrar that, it has satisfied the award in terms of the order for reinstatement. The Registrar found the application for execution without merit and struck it out on 20th September 2021 without recognising the partial fulfillment of the award.

Aggrieved with non-recognition of the partial fulfillment of the award the applicant lodged Labour Revision No. 433 of 2021 at the High Court to challenge the order striking out execution application. While Labour Revision No. 433 was pending, the High Court delivered its judgment on Labour Revision No. 16 of 2021 on 11th February, 2022. The court set aside the payment of general damages and upheld the order of reinstatement. The applicant had no qualms about this order especially since she had already deposited the amount in Labour Court to pay the respondents.

The decision in Labour Revision No. 433 of 2021 was delivered on 20th May, 2022 which struck out the application for revision. Undaunted, the applicant filed in Court Civil Appeal No. 355 of 2022 to challenge the High Court decision in Labour Revision No. 433 of 2021. The applicant has also filed this application to stay the execution of the decree in Labour Revision No. 16 of 2021.

Returning to the preliminary objection raised, Mr. Bagiliye pointed out that in Civil Appeal No. 355 of 2022 which is pending in Court the appellant has appealed against the Revision Application No. 433 of 2021 and not Revision Application No. 16 of 2021 which the respondents are executing. Therefore, the application is not maintainable in view of the decision in **Awinia Mushi v. Tropical Pesticides Research Institute**, Civil Application No. 2 of 2006 (unreported) that, a party cannot apply for stay of execution of a decree which he is not intending to appeal against. He prayed for this application to be struck out with costs.

In response, Ms. Miriam Bachuba, learned advocate for applicant submitted that the Court has jurisdiction to grant the stay of execution even though the order the applicant is seeking to stay is not the order she is appealing against. She bolstered her arguments by our decisions in **Attorney General v. The Board of Trustees of the Cashewnut Industry Development Trust Fund and Another**, Civil Application No. 72 of 2015 [2015] TZCA 581 (13th May 2015, TANZLII) and **CRDB Bank Tanzania Limited v. Tunu Ahmed Lashiku**, Civil Application No. 315/12 of 2022 [2023] TZCA 17879 (23rd November 2023, TANZLII).

Ms. Bachuba added that she has no qualms about the orders in Labour Revision No. 16 of 2021 and that is why the applicant did not appeal and even before the decision was delivered the applicant had

deposited the money to satisfy the issue of retrenchment. The problem was that the executing court had not recognised the deposit made. Hence, if the execution of the decree in Revision Application No. 16 of 2021 is not stayed the applicant will be forced to pay for the second time. Lastly, she concluded that the **Awiniya Mushi** (supra) is distinguishable from the present case. She prayed for the dismissal of the preliminary objection.

In rejoinder, Mr. Bagiliye was very brief. He submitted that the order in Revision Application No. 433 of 2021 which is subject of appeal to this Court is both non-appealable and non-executable. Hence, it should not be the basis for this application.

We shall now proceed to determine the preliminary objection whether the Court has jurisdiction to entertain the application for stay of execution when the decree sought to be stayed is not the decree which is appealed against. In this application the applicant cited rule 4(2) (a) and (b) and rule 11 of the Rules. Rule 4 and rule 11 are very different in their substance and implication. Starting with rule 4 it provides:

"4.(1) The practice and procedure of the Court in connection with appeals, intended appeals and revisions from the High Court, and the practice and procedure of the Court in relation to review and reference; and the practice and procedure of the High Court and tribunals in connection with appeals

*to the Court shall be as prescribed in these Rules or any other written law, **but the Court may at any time, direct a departure from these Rules in any case in which this is required in the interests of justice.***

(2) Where it is necessary to make an order for the purposes of-

(a) dealing with any matter for which no provision is made by these Rules or any other written law;

(b) better meeting the ends of justice; or

(c) preventing an abuse of the process of the Court, the Court may, on application or on its own motion, give directions as to the procedure to be adopted or make any other order which it considers necessary."

(Emphasis provided).

This special rule was put in place by the drafters to cover those situations where the rules are silent or where in the interest of justice a need arose where the Court has to depart from the Rules in addressing the matter before it. The Court in **Attorney General v. The Board of Trustees of the Cashewnut Industry Development Trust Fund and Another** (supra) stated:

"We think that, the wording of Rule 4 (1) and (2) (a) and (b) of the Rules, is wide enough to give discretion to this Court to go into any matter or

give any order, if it is of the opinion that it is required in the interest of justice.”

On the other hand, rule 11 is a provision which is particularly dealing with stay of execution. Starting with rule 11(3) it provides:

(3) 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 nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree or order; but the Court may upon good cause shown, order stay execution of such decree or order”

In numerous decisions of the Court it has been held that, for the Court to exercise its powers under rule 11 (3) there must be a valid notice of appeal which clothes the Court with jurisdiction to entertain the application. For a notice of appeal to be valid it must be issued in compliance with Rule 83(6) and Form D in the First Schedule to the Rules. Form D categorically requires the notice to identify the matter sought to be appealed against. Rule 11(7) also provides that in the application for stay the application must be accompanied by a notice of appeal, a decree or order appealed from, a judgment or ruling appealed from, and a notice of the intended execution. In the absence of a valid notice of appeal and the

decree or order sought to be appealed against, the application becomes incompetent and liable to be struck out. (See - **Awinia Mushi v. Tropical Pesticides Research Institute** (supra), and **National Housing Corporation v. Ettienes Hotel**, Civil Application No. 175 of 2004 (unreported)).

The application before us, no doubt, does not fall under rule 11(3). The applicant is asking the Court to stay the decree which she is not appealing against. The applicant is not aggrieved by the decree, but she is aggrieved with the manner the execution court refused to recognise the payment deposited earlier in Labour Court account for partial satisfaction of the court award. Therefore, there is an injustice as the money deposited in 2019 has not been recognised to date. To make the matter even worse there is no particular rule in place to address such an injustice.

Rule 4(2)(a) and (b) of the Rules, therefore, comes readily handy to address the injustice. The Court has already invoked this rule in similar circumstances. **In Selcom Gaming Limited v. Gaming Management (T) Ltd and Gaming Board of Tanzania** [2006] T.L.R. 200, the Court stated that where there was no provision governing and application for stay of execution pending an application for revision, the Court could invoke rule 4 (2)(a) and (b) of the Rules to entertain such an application.

Similarly, in **Attorney General v. The Board of Trustees of the Cashewnut Industry Development Trust Fund and Another** (supra).

The Attorney General (the AG) was not a party to the case before the High Court where the Government money was attached in favour of 2nd respondent (Hammers Incorporation Co. Ltd). The AG filed an application for extension of time and an application for revision. It later lodged an application for stay of execution under rule 4(2)(b) and (c) of the Rules. Preliminary objections were raised by the 2nd respondent to the affect that the application for stay was incompetent as there was neither a notice of appeal lodged nor an appeal which has been filed. The Court firmly stated that it has the power to entertain the application under rule 4(2)(b) and (c) of the Rules in the interests of justice. The interests of justice entail 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."

Turning to the preliminary objection under consideration, we are of the firm view that the Court has jurisdiction under rule 4(2) (a) and (b) to entertain the instant application in the interest of justice. Therefore, we find the preliminary objection raised has no merit and we hereby dismiss it. Costs shall abide the outcome of the application. The application for stay of execution is scheduled for hearing on the date to be fixed by the Registrar.

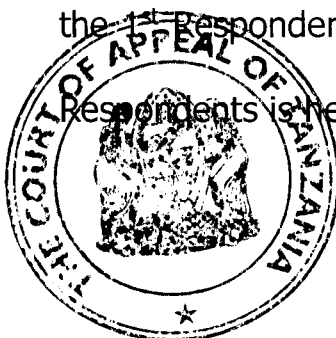
DATED at DAR ES SALAAM this 22nd day of March, 2024.

G. A. M. NDIKA
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

A. A. ISSA
JUSTICE OF APPEAL

The Ruling delivered this 25th day of March, 2024 in the presence of Ms. Miriam Bachuba, learned counsel for the Applicant, in the presence of the 1st Respondent in person and in the absent of the 2nd, 3rd, 4th and 5th Respondents is hereby certified as a true copy of the original.




D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL