

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWAMBEGELE, J.A., LEVIRA, J.A. And RUMANYIKA, J.A.)

CIVIL APPLICATION NO. 178/16 OF 2021

ECOBANK TANZANIA LIMITED..... APPLICANT

VERSUS

DOUBLE A CO. LIMITED.....1ST RESPONDENT

A. A. TRANS LIMITED2ND RESPONDENT

AKBER BASIR VERSI3RD RESPONDENT

ASGHER BASHIR VERSI4TH RESPONDENT

**(Appeal from the Ruling and Order of the High Court of Tanzania
Commercial Division at Dar es Salaam)**

(Fikirini, J.)

dated the 21st day of May, 2019

in

Commercial Reference No. 2 of 2019

.....

RULING OF THE COURT

25th August & 29th September, 2022

RUMANYIKA, J.A.:

This is an application for stay of execution of the ruling and order of the High Court of Tanzania, Commercial Division at Dar es Salaam in Commercial Reference No.2 of 2019 passed by Fikirini, J. (as she then was) on 21.05.2020. It is by way of notice of motion made under Rule 11(3), 11(4) and 11(5) (a) – (c), 11 (6), 11(7) (b), (c) and Rule 48(1) of the Tanzania Court of Appeal Rules of 2009 (the Rules). It is supported by an affidavit of Hope Liana, Principal Officer of the applicant. The application hinges on two grounds as reproduced hereunder: -

- (i) There are important legal and factual issues that need to be settled by this Honourable Court as have been raised in the affidavit in support of this application.*
- (ii) The Applicant/Appellant shall stand to suffer irreparable loss than the Respondents if this Application is not granted and shall render the intended appeal nugatory.*

Briefly, before the High Court of Tanzania Commercial Division at Dar es Salaam (Philip, J.), there was Commercial Case No. 164 of 2018 between the parties herein. However, following a defective plaint based-preliminary objection raised by the respondents, the applicant's suit was struck out on 07/03/2019.

In turn, the respondents successfully filed a bill of costs which the Taxing Master, Rumisha, Deputy Registrar, taxed at TZS. 17,744,176.115 and USD. 168,250.5236 VAT excluded. As this decision aggrieved the applicant, she preferred Commercial Reference No. 2 of 2019 which, as already said, did not succeed as Fikirini, J. upheld the decision of the Taxing Officer on 21/05/2020. Still dissatisfied, the applicant filed a notice of appeal on 04/06/2020. The respondents, decree holders set the execution process on motion vide High Court Commercial Division, Taxation Cause No. 33 of 2019 whose notice, as averred by the applicant in the supporting affidavit was served onto the applicant on 06/04/2021. It was contended that if that

decree is not stayed, the applicant stands to suffer irreparable loss much as it undertakes, as further deposed at paragraphs 11 and 10 of the affidavit to furnish security for the due performance of the decree in case the applicant's appeal will fail.

When the application came up for hearing, Ms. Inviolata Wangoma and Mr. Raphael Dismas, learned counsel appeared for the applicant and the respondent respectively.

Arguing the application, to show that the application is within time in compliance of rule 11(4) (5) of the Rules, Ms. Wangoma adopted the contents of paragraphs 9, 10 and 11 of the supporting affidavit and submitted that the applicant was served with the notice of the intended execution on 06/04/2021 and filed the present application within the prescribed fourteen days on 19/04/2021 that is thirteen days later and undertakes to furnish security for the due performance of the decree. Ms. Wangoma further submitted that her client stands to suffer irreparable loss should the intended execution not be stayed. Opposing the application Mr. Dismas adopted the contents of the joint affidavit in reply of Akber Bashir Versi and Asgher Bashir Versi and submitted that the application is incompetently before the Court as there is no copy of the decree sought to be stayed, the ruling on the bill of costs issued by the Taxing Officer on 09/08/2019 is appended. If anything, he argued, there is the Judge's drawn

order on the reference which upheld the said decree. He urged us to dismiss the application.

We have heard and considered the learned counsel's submissions for and against the application. The issue for our consideration therefore is whether the application has satisfied the conditions attached to granting of stay of execution of the decree set forth under rule 11(4) (5) and (7) of the Rules which reads thus;

"(4) An application for stay of execution shall be made within fourteen days of service of the notice of execution on the applicant by the executing officer or from the date he is otherwise made aware of the existence of an application for execution.

(4A) ... (not applicable)

(b) No order for stay of execution shall be made under this rule unless the Court is satisfied that-

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

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

(7) An application for stay of execution shall be accompanied by copies of the following-

- (a) a notice of appeal;*
- (b) a decree or order appealed from;*
- (c) a judgment or ruling appealed from; and*
- (d) a notice of the intended execution”.*

The law is settled that for the full Court to grant a stay of execution, the check list of the requisite conditions stated under rule 11(4)(5) and (7) of the Rules should be satisfied cumulatively. We held so on a number of occasions including **Mantrac Tanzania Limited v. Raymond Costa**, Civil Application No.11 of 2010, **Joseph Antony Soares @ Goha v. Hussein s/o Omary**, Civil Application No. 6 of 2012 and **Hai District Council and Another v. Kilempu Kinoka Laizer and 15 Others**, Civil Application No. 10/15 of 2017 (all unreported).

On our part, as above shown in the supporting affidavit and demonstrated, we are satisfied that the application was filed within time, the applicant, which is a financial institution firmly undertakes to give security for the due performance of the decree much as, we are satisfied to hold that indeed unless the intended execution is stayed, the applicant stands to suffer irreparable loss, namely, the multi million bank loan allegedly defaulted by the respondents.

However, considering the other pertinent issue raised by Mr. Dismass, the only question arising before us is whether the application is accompanied by a copy of a decree appealed from, in compliance with rule 11(7)(b) of the Rules.

Considering the record available and the Counsel's submissions, it is un deniable fact that the decree sought to be stayed is that one which was issued on 09/08/2019 by Rumisha, DR, the Taxing Officer and upheld wholesale by Fikirini, J. in Commercial Reference No.2 of 2019. To appreciate its gist, and for more clarity, the substantive part of the drawn order extracted on 04/06/2020 is reproduced thus;

"DRAWN ORDER

WHEREFORE, the applicant filed an application praying that: -

1. That **this Honourable Court be pleased to reverse and set aside the decision of the Taxing Master dated 9th day of August, 2019, certified on 13th August, 2019** and supplied on 20th August, 2013 in Taxation Cause No. 33 of 2019 before A. K. Rumisha, Deputy Registrar and proceed to tax the Bill of costs in accordance with the law...

THIS COURT DOTH HEREBY ORDERED THAT: The Application is dismissed with no order as to costs.
Given under my hand and seal of the Court this 21st day
of May, 2020.

P. S. Fikirini
Judge
21/5/2020

Extracted on 4/6/2020".

From the above quoted part of the drawn order, it is clear to us that the applicant's application to reverse the decree was unsuccessful. The law is now settled that this Court has powers to stay a decree or an order of any court subordinate to the High Court. See- **Salvatory Gibson v. William Laurent Malya and Another**, Civil Application No. 6/05 of 2017 (unreported) when discussing about the powers and scope of staying execution of the decree we took inspiration of the decision of the Single Justice of the Court in **Sudi Kipetio and 3 Others v. Bakari Ally Mwera**, Civil Application No. 94 of 2004 (unreported) and held as follows:

"as long as there is a notice of appeal before the Court and the order to be stayed, though given by a subordinate court, was nevertheless, given in respect of a matter subject of the pending appeal, this Court has jurisdiction to entertain an application for stay of execution" (Emphasis added).

Applying the above stance to the present case, we are aware that in exercise of her powers of reference, Fikirini, J. (as she then was) issued no original decree or order. Having heard the parties and was satisfied, she upheld the Taxing Officer's decree entirely and dismissed the application

before her. With great respect, we decline to accept the learned counsel's invitation to hold otherwise. Nor is Mr. Dismas correct to ask us to treat the decree issued by the Taxing Officer as no decree before us to stay with all intents and purpose. By holding so, we have the mandate also to hold that, if strictly our powers to stay execution were restricted to the decrees directly issued by the High Court in its first instance sitting, in total disregard of the latter's appellate, revisional, review and reference jurisdiction, the possibilities of the decree holders going out of the courts with empty decree which is a mockery of justice would not be ruled out.

The courts of law are dutifully bound to protect the rights or interest of the judgment debtors just as the rights or interest of the decree holders deserve protection with equal force and means. It is noteworthy thus, for more clarity that for the purpose of execution, a decree of the High Court includes a decree in appeal, an order or any other concise extract decision deemed or otherwise given by it. We had all this in mind also in **Salvatory Gibson** (supra) like it is the case here, when we discussed on the nature and origin of a decree the execution of which this Court may stay.

Now that for the above consideration we are settled in our minds that the copy of the said drawn order appended to this application suffices to be a decree sought to be executed as shown above, we hereby grant the

application with costs. Consequently, upon the applicant giving the security, as soon as practicable in a form of Bank Guarantee equivalent to the decretal sum, the decree of the High Court issued on 21/05/2020, and, for avoidance of doubt the order of the Taxing Officer, subject of the intended execution are hereby stayed pending determination by this Court of the intended appeal.

Order accordingly.

DATED at DAR ES SALAAM this 19th day of September 2022.

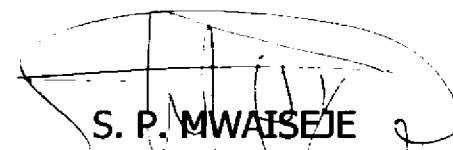
J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

The ruling delivered this 29th day of September, 2022 in the presence of Ms. Enviolata Wangoha, learned counsel for the applicant and Holding brief for Mr. Dismas Raphael, learned counsel for the respondent, is hereby certified as a true copy of the original.




S. P. MWAISEJE
DEPUTY REGISTRAR
COURT OF APPEAL