

**IN THE COURT OF APPEAL OF TANZANIA**

**AT MBEYA**

**(CORAM: MWAMBEGELE, J.A., KOROSSO, J.A., And RUMANYIKA, J.A.)**

**CIVIL APPLICATION NO. 649/06 OF 2021**

**MBEYA CEMENT CO. LTD ..... APPLICANT**

**VERSUS**

**SARA OLE DANIEL ..... 1<sup>ST</sup> RESPONDENT**

**JANE MICHAEL MPONZI ..... 2<sup>ND</sup> RESPONDENT**

**(Application for stay of execution of the Drawn Order of the High Court of  
Tanzania  
(Mambi, J.)**

**dated 18<sup>th</sup> day of November, 2020**

**in**

**Misc. Labour Application No. 12 of 2020**

**.....**

**RULING OF THE COURT**

23<sup>rd</sup> September, & 3<sup>rd</sup> October, 2022

**RUMANYIKA, J.A.:**

The application is for stay of the Drawn Order of the High Court emanating from the award issued by the Commission for Mediation and Arbitration for Mbeya sitting at Mbeya (the CMA) on 29/06/2018 in Labour Dispute No. CMA/MBY/34/2016. It is by way of Notice of Motion predicated under rule 11 (3), (4), (4A) (5) (a) and (b) and (7) (a) – (d) of the Tanzania Court of Appeal Rules, 2009 (the Rules). It is supported by an affidavit of

Ian Almachius, the Principal Officer of the applicant. The respondents opposed the application by filing affidavits in reply.

At the hearing of the application on 23/09/2022, Messrs Ndanu Emmanuel and Isaya Zebedayo Mwanri, learned advocates appeared for the applicant and the respondents respectively.

A brief background of the matter is that before they were retrenched and terminated by the applicant on 13/01/2020, Sara Ole Daniel and Jane Michael Mponzi, the 1<sup>st</sup> and 2<sup>nd</sup> respondents were employees of the applicant who served in the positions of Payroll Administrator and Payroll Assistant, respectively. Aggrieved by it as unfair termination, they instituted the said labour dispute in the CMA which they won. The 1<sup>st</sup> respondent got an award of TZS 86,255,536/= . Whereas, the 2<sup>nd</sup> respondent got TZS 47,591,368/= both against the applicant. This verdict aggrieved the applicant who approached the High Court by way of revision vide Revision No. 20 of 2018. That application was struck out for being time barred hence incompetent. In further pursuit of its right, the applicant attempted twice for extension of time to file revision in the High Court. Its last unsuccessful battle was declared on 18/11/2021. It was aggrieved by that decision and filed a notice of appeal. However, still in the appeal process, on 06/12/2021 the respondents served the applicant with a notice of execution set for

16/02/2022 for hearing which execution the applicant fears that if allowed and carried out, it will cause it to suffer irreparable loss, hence the present application.

At the hearing, Mr. Emmanuel adopted the contents of the affidavit and written submission in support of the application filed on 21/02/2022. To amplify the two grounds raised, as alluded to before he contended that **one;** if the impugned award is left to be executed as intended, the applicant will suffer irreparable loss and, hoping for the best the applicant's intended appeal will be rendered nugatory. To support his point, he cited to us our decisions in **Ignazio Messina and National Shipping Agencies v. Willow Investment & Costa Shinyanga**, Civil Reference No. 8 of 1999, **Transport Equipment Ltd & Reginald John Nalan v. Devram P. Valambhia**, Civil Application No. 19 of 1993, **Tanzania Saruji Company v. African Marble Company**, Civil Application No. 67 of 1997 and **NBC Holding Corporation v. Hassan Nuru Hassan**, Civil Application No. 89 of 2001 (all unreported).

**Two;** the applicant undertakes to furnish security for the due performance of the impugned award which could be in the form of a bank guarantee or any other form of security which the Court may deem just to

order much as, he added, if made, the order of stay will not prejudice the respondents.

In rebuttal, Mr. Mwanri adopted the contents of the respondents' affidavit in reply and written submission to oppose the application. He contended that the application lacked merit because in its affidavit the applicant did not state which form of security it undertakes to give. If anything, he added, those were mere words and wishes of the applicant's counsel from the bar, which are not necessary the applicant's commitment. He implored us to dismiss the application for want of merit.

Briefly rejoining, Mr. Emmanuel stressed the need for an order of stay of execution and urged us to order for any desirable form of security including a bank guarantee which is equivalent to the impugned award which the applicant was ready to furnish for the due performance of the award.

On our part, we have heard the parties' learned counsel sufficiently and paid due consideration of their affidavits and written submissions for and against the application. The central issue for our consideration is whether the applicant has fully met all the conditions necessary for warranting a stay of execution of the impugned award. On this, we are guided by the provisions of rule 11 (5) of the Rules which reads:

**"(5) 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."**

Regarding the above mandatory conditions required for giving an order to stay execution of a decree, we have a long list of authorities including our unreported decision in **Felix Emmanuel Mkongwa v. Andrew Kimwaga**, Civil Application No. 247 of 2016. We observed that:

*"... for an application for stay of execution to be granted...**The duty of the applicant to satisfy all the conditions cumulatively has been constantly reiterated by this Court in its several decisions. See for instance the cases of Joseph Anthon Spares @ Goha Hussein Omary, Civil Application No. 6 of 2012 and Laurent Kavishe v. Eneiy Hezron, Civil***

*Application No. 5 of 2012* (both unreported).  
(Emphasis Added).

Applying the rule in **Felix Emmanuel Mkongwa** (supra) and rule 11 (5) (a) of the Rules to the present case, the applicant, at paragraph 11 of its affidavit supporting the application has expressed its concerns and fears of suffering irreparable loss if the execution of the impugned award will be allowed and carried out as intended by the respondents. Surely, it has met such essential condition.

As regards the equally mandatory sub rule (5) (b) of rule 11 of the Rules, which concerns the condition number two, to give security for the due performance of the award, the applicant, in the supporting affidavit at paragraph 15 expressed its intention to do so as follows:

*"15. That Applicant is ready to furnish necessary security for the due performance of the Decree."*

Additionally, though not material to the subject matter, at paragraph 13 of the affidavit the applicant stated its more or less blanket lucrative liquidity and social status as compared to the respondents whom it thought they lacked such promising social economic profiles.

Moreover, as appearing in his written submission filed on 21/02/2022, the applicant's counsel, taking cognizance of rule 11 (5) (b) of the Rules

kept on promising to furnish security. To show that the applicant has met the requisite conditions for a stay of execution as directed by the Court in **Mantrack Tanzania v. Raymond Costa**, Civil Application No. 11 of 2020 (unreported), he further contended that the applicant was willing and ready, in favour of the respondents to execute bank guarantee which is equivalent to the said award for security. That part of the applicant's written submission is quoted thus:

*"...the applicant is prepared to execute a bank guarantee to an amount to be fixed by the Court for security...with that averment, **it is our humble submission that the Applicant has met the conditions on security for the due performance of any decree in the event the intended appeal does not succeed.**"* (Emphasis added).

Prompted by the Court, he reiterated the said firm undertaking, which remains in the record binding upon the applicant. With that fact in mind, therefore, with respect, Mr. Mwanri is not right to say that the applicant has not undertaken to give security for the due performance of the award as required by rule 11 (5) (b) of the Rules.

We wish to state that with all intents and purpose, under rule 11(5) (b) of the Rules, in ordering a stay of execution of a decree, in this case

the impugned CMA's award which is preceded by the applicant's firm undertaking to give security for the due performance, the Court's duty has double impact. **One**, it guarantees the judgment debtor a right to appeal without fear of untimely execution of the decree, and **two**, it assures the decree holder an enjoyment of the fruits of his decree in the event the applicant lost the intended appeal. That one is a practical balance of convenience between the parties, the bottom line of the present application.

Equally, in **Ignazio Messina** (supra) the Court observed on the balance of convenience between the parties as requirement for granting stay of execution in. We stated that:

*"... It is equally settled that **the court will order a stay if refused to do so would, in the event the intended appeal succeeds, render that success nugatory. Again this Court will grant a stay if, it would be on a balance of convenience to the parties to do so**".*

(Emphasis added).

The above quoted rule, as applied to the present case, we are settled in our mind that if the combination of the balance of convenience and the interest of justice, as above demonstrated bring the same equitable results so much the better. Consequently, with the above cumulative effects of the



said conditions we are inclined to grant the application and stay execution of the Drawn Order of the High Court in Misc. Application No. 12 of 2020 emanating from Labour Dispute No. CMA/MBY/34/2016 with the condition that the applicant execute a bank guarantee equivalent of TZS 86, 255,536/= and TZS 47, 591,368/= in favour of the 1<sup>st</sup> and 2<sup>nd</sup> respondents respectively within thirty days of this ruling as a security for the due performance of the impugned award pending determination of the intended appeal. We make no order as to costs because the application arises from a labour case.

Order accordingly.

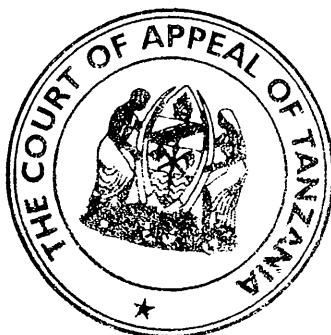
**DATED at MBEYA** this 3<sup>rd</sup> day of October, 2022.

J. C. M. MWAMBEGELE  
**JUSTICE OF APPEAL**

W. B. KOROSSO  
**JUSTICE OF APPEAL**

S. M. RUMANYIKA  
**JUSTICE OF APPEAL**

The Ruling delivered on this 3<sup>rd</sup> day of October, 2022 in the absence of the applicant and in the presence of Mr. Isaya Mwanri, learned advocate for the respondents also holding brief of Mr. Ndanu Emmanuel, learned advocate for the applicant is hereby certified as a true copy of the original.



  
R. W. CHAUNGU  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**