

**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. 34/18 OF 2021

CAR AND GENERAL TRADING LIMITED APPLICANT

VERSUS

TAJIRI MOHAMED RESPONDENT

**[Application for stay of execution of the decree of the High Court
of Tanzania (Labour Division) at Dar es Salaam]**

(Banzi, J.)

dated the 2nd day of October, 2020

in

Revision No. 535 of 2019

RULING OF THE COURT

18th & 31st August, 2022

MWAMBEGELE, J.A.:

In this application, Car and General Trading Ltd (the applicant) moves the Court to stay execution of a decree of the High Court in Revision No. 535 of 2019. The application has been brought by way of a Notice Motion taken under rule 11 (3), 11 (4), 11 (4A), 11 (5) (a), (b) and (c), 11 (6), 11 (7) (b), (c) and (d) and rule 48 (1) of the Tanzania Court of Appeal Rules (the Rules). It is supported by an affidavit deposed by Hamida Hamisi Mfinanga, principal

officer of the applicant and resisted by an affidavit in reply deposed by Tajiri Mohamed, the respondent.

A brief background to the present application is that the respondent was an employee of the applicant in the position of security guard from 01.11.2016 to 08.05.2018. He successfully sued the applicant for unfair termination in the Commission for Mediation and Arbitration (the CMA). The CMA ordered that the respondent be paid by the applicant Tshs. 2,880,000/= as salary arrears for eighteen months, Tshs. 442,020/= as leave pay and Tshs. 119,005/= as severance pay. Aggrieved, the applicant unsuccessfully challenged the CMA decision to the High Court as Banzi, J., in her judgment dated 02.10.2020, upheld the findings and award of the CMA.

The applicant was further aggrieved by the decision of the High Court upholding the decision of the CMA. She thus lodged a notice of appeal to this Court on 30.10.2020. In the meantime, the respondent commenced the machinery to execute the award and the applicant was summoned to appear before the High Court on 16.02.2021 to show cause why execution should applicant not take place. Upon receipt of that threat, the lodged this application on 17.02.2021.

When the application was placed before us for hearing, the applicant was advocated for by Mr. Emmanuel Kessy, learned counsel. The respondent appeared in person, unrepresented.

In his address in support of the application, Mr. Kessy reiterated what was deposed in the affidavit in support of the application. He submitted that on 06.02.2021, the respondent served the applicant a summons to show cause in Execution Application No. 497 of 2020 in the High Court of Tanzania (Labour Division) before Hon S. W. Ng'umbu, Deputy Registrar. He added that the application was slated for hearing on 16.02.2021 and that if the execution takes place, the applicant's assets that are targeted by application for execution would be sold before the applicant's appeal is heard and determined thereby occasioning substantial loss to the applicant. The learned counsel submitted further that the applicant is ready and willing to execute a Bank Guarantee for the decretal sum which will be binding on her in case the appeal fails. He insisted that the applicant has satisfied all the conditions for the grant of the order sought.

On his part, the respondent, despite filing an affidavit in reply contesting the application, did not have any qualms at the hearing if the

application would be granted provided that there was security to guarantee his fruit of litigation.

We have considered the arguments of the parties in this application. Indeed, the applicant was served with the summons to appear in Execution Application No. 497 of 2020 on 06.10.2020 and quite timely lodged this application on 17.10.2020. For the avoidance of doubt, the letter of rule 11 (4) of the Rules requires that such an application “shall be filed 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”. The applicant was made aware of the execution process upon being served with the summons to appear.

The applicant also deposed at paragraph 12 of the supporting affidavit that she will suffer substantial loss if the intended execution is carried out. That is the requirement of rule 11 (5) (a) of the Rules. The applicant is also ready to provide a Bank Guarantee as security for the due performance of the decree in case the intended appeal fails. That has been deposed at paragraph 10 of the supporting affidavit and it is the requirement of rule 11 (5) (b) of the Rules. That rule provides that no order for stay of execution

shall be made under the rule unless the Court is satisfied that security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him. In **Mantrac Tanzania Limited v. Raymond Costa**, Civil Application No. 11 of 2010 (unreported) we held that a firm undertaking is sufficient compliance with the requirement under rule 11 (2) (d) (iii); now rule 11 (5) (b) of the Rules, in the following terms:

" One other 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 stay order provided the court sets a reasonable time limit within which the applicant should give the same."

[Emphasis supplied].

We restated the above standpoint of the law in a number of our decisions including **Tsere Selly v. Serikali ya Kijiji cha Chemchem**, Civil Application No. 40 of 2014, **Asha Juma Mansoor & Nine Others v. John**

Ashery Mbogoni, Civil Application No. 122/03 of 2020 and **Nacky Esther Nyange v. Mrs. Mariam Marijani Wilmore and Another**, Civil Application No. 426/01 of 2019 (all unreported), to mention but a few. As we held in **Anord L. Matemba v. Tanzania Breweries Ltd**, Civil Application No. 95 of 2012 (unreported), security is meant to safeguard the interests of the judgment creditor in the event the judgment or decree appealed against is affirmed by the Court. We observed:

"... security as one of the conditions for the due performance of the decree should an intended appeal fail, security among other reasons is meant to safeguard the interests of the judgment creditor in the event the judgment or decree appealed against is affirmed by the appellate court. It facilitates a post-appeal execution process."

We are satisfied that, in terms of security, the applicant has made an adequate and firm undertaking of the due performance of the decree should the intended appeal fail.

We are also satisfied that the applicant has also complied with the provisions of rule 11 (7) of the Rules which require that:

"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 applicant has appended with the application all the required documents under rule 11 (7) of the Rules.

In sum we are satisfied that the applicant has cumulatively satisfied all the conditions required under the law. She has thus succeeded to move us to exercise the discretion to grant the order sought.

The above said and done, we find merit in this application and hereby grant it in terms of Rule 11 (5) (a) and (b) of the Rules. Consequently, we order that the execution of the impugned High Court decree in Revision No. 535 of 2019 be, and is hereby, stayed pending determination of the applicant's appeal in this Court. However, this order is conditional upon the applicant depositing in this Court, within thirty (30) days of the delivery of this ruling, a bank guarantee covering the entire decretal amount.

The costs of, and incidental to, this application shall abide the outcome of the appeal.

Order accordingly.

DATED at DAR ES SALAAM this 25th day of August, 2022.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

The Ruling delivered this 31st day of August, 2022 in the presence of Mr. Hamis Nkya, learned counsel holding brief for Emmanuel Kessy, learned counsel for the Applicant and Respondent present in person is hereby certified as a true copy of the original.



F. A. Mtaranja
F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL