

IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

CIVIL APPLICATION NO. 1079 OF 2024

MASHAPALE AFRICAN GOLD CO. LTD..... APPLICANT

VERSUS

FREDRICK KITALY.....1st RESPONDENT

ADON ADOLF.....2nd RESPONDENT

**(Application for Stay of Execution of the Decree/Order/Award of the
Commission for Mediation and Arbitration at Geita,
CMA/GTA/GTA/04/2023)**

(Chuma, J.)

dated the 30th day of July, 2024

in

Labour Revision No. 38 of 2023

.....

RULING

14th November, 2024 & 17th January, 2025

FIKIRINI, J.A.:

The applicant allegedly employed the respondents, the assertion partly controverted. Throughout the case, the applicant denied having employed the 1st respondent while admitting that of the 2nd respondent. Despite the situation, both respondents claimed they were unlawfully terminated. Upset, they referred their matter to the Commission for Mediation and Arbitration (the CMA). In its Award dated 15th September 2023, the CMA decided in favour of the respondents, awarding payment

of TZS. 4,600,000.00. Discontent, the applicant appealed to the High Court in Labour Revision No. 38 of 2023. He lost the appeal.

The applicant preferred an appeal to this Court, thus lodged a notice of appeal on 14th August, 2024 and duly served the respondents on 22nd August, 2024. On the other end, the respondents on 28th August, 2024 filed an application for execution registered as Application for Execution No. 21399 of 2024. The applicant was served on 11th September, 2024.

Unimpressed with the respondents' move, the applicant by way of notice of motion preferred under rules 11 (3), (4), (4A), (5) (a) & (b), (6), (7) (a) – (d) and 48 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules) applied for a stay of execution. The application was registered as Civil Application No. 1079 of 2024. Supporting the application was an affidavit from Mr. Vianey Gasper Mbuya, learned advocate, who was duly instructed to depone the same. He also appeared on behalf of the applicant at the hearing. The respondents filed a joint affidavit in reply and later written submissions contesting the grant of the application. Both parties appeared and were heard via video link from Geita court, where it was agreed that the application be argued by filing written submissions.

Mr. Mbuya and the respondents filed their submissions in compliance with rules 106 (1) and (7) of the Rules. In the submissions, the applicant contended that there are issues deserving the attention of this Court. Hence, a notice of appeal lodged on 22nd August 2024. Additionally, the applicant implored that hardship and substantial loss would be suffered if this application for a stay of execution is not granted since the property is the sole source of income for himself and his family, plus other basic human needs.

He further stated that if the outcome of the intended appeal favours the applicant, it would be nugatory. It would also be difficult to recover the applicant's property, including the Mashapela African Gold plant, located at Mpomvu Street in Geita Town Council, Geita Region.

Showing willingness and commitment to furnishing security for the due performance, the applicant readily pledged his landed property on Plot No. 86 Block "E", Mpomvu Area, in Geita. Content that all the requirements stipulated under rules 11(4), (4A), (5) (a) and (b) of the Rules have been fulfilled the applicant urged the Court to grant the application and stay the execution of the award in CMA No. CMA/GTA/GTA/04/2023, which was upheld by the High Court in Labour Revision No. 38 of 2023.

The respondents were brief in their submissions, mainly focusing on two points: *one*, that the notice of appeal lodged was not served on the 1st respondent, contravening rule 84 of the Rules. *Two*, they challenged the applicant's assertion that he will suffer hardship and substantial loss since his landed property, subject to attachment, is his only source of income. The respondents contended that the applicant would not suffer any loss, considering he has multiple sources of income, including lodges and minerals' broker office, to name a few. Therefore, weighing the two, the respondents were to suffer more since their employment contracts were ruthlessly breached, and since then, they have not secured other jobs. In addition, they complained that they had wasted most of their time pursuing their rights in following up the case they initiated before the CMA and later appeal preferred by the applicant before the High Court.

The respondents further submitted that the applicant's intended appeal is barren of fruit; at most, he wants to delay the respondents' getting their rights. According to them, the applicant has not shown a justifiable reason warranting the grant of the application. They thus urged the Court to decline to grant the application. If the Court deems it appropriate to grant the application, it should be with an order that the applicant furnishes security for the due performance.

One issue needs to be resolved before proceeding with the determination of this application. In their submission, the respondents raised the issue of contravention of rule 84 of the Rules since the first respondent was not duly served with a copy of a notice of appeal as required. The point might have bearing, but it cannot be addressed at this juncture. The opportunity to do so is when the appeal comes for hearing. At that point, the respondents could raise that as a preliminary point in terms of rule 107 (1) of the Rules. This issue will thus not be considered.

Coming to the application itself, it is well settled that the decree holder, as are the respondents, should not be denied the right to enjoy the fruits of the decision in their favour unless there are compelling reasons for doing so. See: **Mrs. Wajibu Magungu & Others v. National Bank of Commerce**, Civil Application No. 176 of 2003 and **Abdul Hamid Mohamed Kassam & Abdullatif I. Murudeker v. Aman Mohamed & 2 Others, Civil Application No. 176 of 2006** (both unreported).

In the application of this nature, the law requires that all the requirements be satisfied cumulatively. Those are the requirements under rules 11 (3), (4), (5) (a) and (b) and (7) (a), (b), (c) and (d) of

the Rules. This has been our stance in several of our previous decisions, such as **Joseph Soares @ Goha v. Hussein Omary**, (Civil Application No. 12 of 2012) [2013] TZCA 328 (8th May, 2013; TANZLII), **Gilbert Zebedayo Mrema v. Mohamed Issa Makongoro**, (Civil Application No. 369/17 of 2019) [2020] TZCA 48 (16th March, 2020; TANZLII), **Lawrence Kavishe v. Enely Hezron**, Civil Application No. 5 of 2012 and **Mantrac Tanzania Limited v. Raymond Costa**, Civil Application No. 11 of 2010 (both unreported) to list a few.

Before the Court, what is for determination is whether the applicant has fulfilled all the requirements and whether the application is worthwhile.

What prompted the present application was the lodgment of the Application for Execution No. 21399 of 2024 dated 28th August, 2024, which was served upon the applicant on 11th September, 2024. This application was lodged on 24th September, 2024, within the requisite period prescribed by rule 11 (3) and (4) of the Rules. The application is accompanied by all the necessary documents, which are requirements under rules 11 (7) (a), (b), (c) and (d) of the rules. A copy of the notice of appeal attached marked as RACA-3, copies of the drawn order and impugned ruling marked RACA-2, and a copy of the execution notice

marked RACA-4 and RACA-1, a copy of the Award dated 15th September, 2023, though not a requirement. This condition has been met.

The second condition is stipulated under rule 11 (5) (a) of the Rules, that the applicant demonstrate substantial loss to be suffered if the application is refused. The applicant's concerns and reasons are that he would suffer hardship and substantial loss since the respondents intend his landed property on Plot No. 86 Block "E" located in the Mpomvu area, Geita Town, to be attached and sold. The applicant contends that the said property catered for him and his family. The contention was refuted by the respondents, who stated that the applicant had several other sources of income. The applicant is also apprehensive about whether he will be able to recover his landed property once sold in the execution of the decree if he wins the appeal. He also argued that the respondents would not be prejudiced if this application is granted.

From the affidavits deposed by parties, neither the applicant nor the respondents have elaborately supported and accounted for the positions taken. For example, in the written submissions, the applicant expounded on the hardship and substantial loss that could be occasioned if the application grant is declined. This is because it will

affect the applicant's livelihood and his family. The respondents, likewise, have hinted that the applicant has other sources of income but without any proof or further and better particulars of the averment. The Court has always emphasised that submissions are not evidence, as is the case with the contents of the affidavits. Therefore, any fact claimed must be proved. In the instant application, whether the applicant has other sources of income, as alleged by the respondents or that was the applicant's only source of income, came about in the written submissions. Written submissions are for further explanation of what has been averred in the affidavit or evidence led in court or to elaborate more on the legal position. All in all, weighing the two rival assertions, I find that the applicant has been able to show that hardship and substantial loss could be suffered if the grant of the application is declined. In my view, the second requirement in terms of rule 11 (5) (a) of the Rules is merited.

Having concluded that the first and second conditions have been met, I now turn to the third. On the third condition, the main focus is on furnishing security for the due performance. In doing that, the Court should be cautious not to be an instrument of unjustified enrichment to some parties and impoverishment to others by engaging in unguided executions. See: **The University of Dar es Salaam v. Richard**

Kajuna Muzo, Civil Application No. 117 of 2001. The courts had the duty to protect both the decree holder and the judgment debtor so long there is a proper procedure to be followed.

Under rule 11 (5) (b) of the Rules, the applicant is required to furnish security for the due performance. The applicant has indicated willingness to provide security, which may ultimately be binding upon it under paragraph 10 of the affidavit supporting the application. The respondents are essentially not contesting the idea as they have proposed in paragraph 10 of their affidavit in reply. The willingness and commitment exhibited are sufficient assurance. See: **Mantrac Tanzania Limited** (supra).

In showing his willingness, the applicant preferred that the landed property on Plot No. 86 Block "E" at Mpomvu be considered a security for the due performance. Although the security pledged is suitable and would suffice, I find it would pose difficulty to the respondents when the intended appeal fails, and they have to execute the decree in their favour. From the Application for Execution, the landed property intended to be attached reads as Mashapale African Gold Plant. Even though the value of the landed property on Plot No. 86 Block "E" Mpomvu has not been established, it must be worth more than the award to be executed.

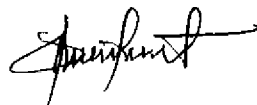
Selling a plant, which the Court believes is worth more, could be illogical to execute a decree valued at TZS. 4, 600,000.00.

In that regard, while I allow the application as merited, I, however, order a stay of execution of the decree intended to be appealed against and direct the applicant to deposit cash TZS. 4,600,000/= with interest as security for the due performance of the decree, instead of the landed property on Plot No. 86 Block "E" at Mpomvu. The TZS. 4, 600,000.00 should be deposited with the Court within thirty (30) days from the date of delivering of this ruling. It is so ordered.

DATED at **DAR ES SALAAM** this 15th day of January, 2025.

P. S. FIKIRINI
JUSTICE OF APPEAL

The Ruling delivered this 17th day of January, 2025 in the presence of Mr. Vianey Mbuya, learned counsel for the applicant and in the absence for the respondents, is hereby certified as a true copy of the original.



D. P. KINYWAFU
DEPUTY REGISTRAR
COURT OF APPEAL

