IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CIVIL APPLICATION NO. 578/01 OF 2024

INDUSTRIAL GASES AND CHEMICALS LIMITED ..... 1ST APPLICANT

NADAKA HOLDINGS LIMITED ..... 2ND APPLICANT

PAMBA INDUSTRIES LIMITED ..... 3RD APPLICANT

VERSUS

AZANIA BANK LIMITED ..... 1ST RESPONDENT

MAJEMBE COMPANY LIMITED..... 2ND RESPONDENT

[Application for stay of execution of a decree of the High Court of Tanzania at Mwanza]

(Dyansobera, J.)

dated the 09th day of June, 2022

in

Civil Case No. 02 of 2020

.....

RULING

12TH August, & 28th November, 2024

MASHAKA, J.A.:

The application is made under a certificate of urgency for an order to stay execution of a decree of the High Court of Tanzania in Civil Case No. 02 of 2020 dated 09th June, 2022 pending the hearing and determination of an intended appeal to this Court. It is brought by way of notice of motion preferred under rules 4 (1), (2) (b), 11 (3), (4), (5) (a), (b), (c), (6), (7) (a), (b), (c), (d) and 48 (1) of the Tanzania Court of Appeal Rules, 2009 (the

Rules) supported by the affidavit deponed by Rajesh Kapoor, the Principal Officer of the applicants. The applicants advanced three grounds that:

1. *The applicants will suffer substantial and irreparable loss that cannot be atoned through compensation unless the order for stay is made;*
2. *This application has been made timely and without delay;*
3. *On a balance of convenience, common sense and logic tilts in favour of granting the stay order.*

Further, the applicants prayed that upon granting the order to lift the public auction and sale of mortgaged landed properties by the 2nd respondent as advertised through Uhuru Newspaper dated 25/07/2024.

The respondents filed a joint affidavit in reply and the 1st respondent filed a notice of preliminary objection dated 12 August, 2024 challenging the competence of the application on two grounds that:

1. *Since there is no intended application for execution filed, and there is no notice of execution served to the applicants, the application is untenable in law for not complying with Rule 11 (4) and (7) of the Court of Appeal Rules, 2009.*
2. *The application for stay of execution is untenable in law because the decree sought to be stayed is not capable of being executed.*

At the hearing of the application inter parties by video link from Mwanza and Arusha, Mr. Leonard Slyvanus Joseph, learned advocate represented the applicants and the Principal Officer was present in person, whereas Mr. Elias Hezron, learned advocate appeared for the respondents and Mr. Victor Greyson Mshangila, Director of the 2nd respondent was also present. Both parties submitted written submissions for and against the preliminary objection.

As a matter of practice, once a notice of preliminary objection is raised it must be dealt with first before advancing to the merit of the application. I invited the parties to argued for and against the preliminary objection and to continue on arguments on the merit of the application.

Mr. Hezron wished to adopt the affidavit in reply, and written submissions to form part of his oral submissions. As a point of emphasis, Mr. Hezron amplified that rule 4 (2) (a) and (b) of the Rules gives mandate to issues orders which are to administer justice when there are no such rules and applied were there is no remedy provided by the Rules. It was his contention that the order for stay of execution is provided for under rule 11 of the Rules, and therefore rule 4 (2) (a) and (b) of the Rules is not applicable. Mr. Hezron contended that for the Court to grant stay of execution, all the requisite conditions stipulated under rule 11 (3), (4), (5)

and (7) of the Rules must be satisfied cumulatively and bolstered his position by referring the cases of **Ecobank Tanzania Limited v. Double A Ltd and Others,** (Civil Application No. 178 of 2021) [2022] TZCA (29 September, 2022 TANZLII) and **Grument Reserves Ltd v. Elias Somba Misarera** (Civil Appeal No. 111 of 2020) [2024] TZCA 307 (7 May 2024 TANZLII). He further argued that a failure to comply with any of the requisite conditions renders an application incompetent referring the case of **National Microfinance Bank v. Japhet Machumu**, (Civil Application No. 554 of 2019) [2022] TZCA 305 (25 May 2022 TANZLII). It was his submission that the application is incompetent because it is not accompanied with a copy of the notice of execution as mandatorily required under rule 11 (7) (d) of the Rules.

Regarding the second point of objection, Mr. Hezron contended that the applicants annexed a copy of notice of a public auction published in Uhuru Newspaper dated 25/07/2024 with the intent to persuade me to treat the said notice as a notice of execution, in which he maintained that it does not in any way qualify to be so. He elaborated that execution is a process of giving effect to the judgment of a court and bolstered his stance by referring the case of **East African Development Bank v. Blue Line Enterprises**, Civil Application No. 57 of 2004 (unreported). Therefore, he submitted that

the said notice annexed to this application is not a notice of execution as the respondents are not enforcing or giving effect to the judgment of the High Court. He further clarified that the respondents by the notice of public auction are exercising their right under the mortgage agreement and the Court lacks the requisite mandate to issue stay order preventing the respondent from exercising such right, bolstering his position with the case of **Catherine Honorati v. CRDB Bank Plc** (Civil Application No. 42 of 2016) [2020] TZCA 1851 (16 November 2020 TANZLII). Additionally, he submitted that the notice of public auction is not implementing any order of a court and that is the reason why no execution was preferred. He implored me to uphold the preliminary objection with costs.

In reply, Mr. Joseph wished to adopt the written submission by the applicants. He contended that this application falls under rule 4 (2) (a) and (b) of the Rules. He further argued that even if the Court finds there is non-compliance to rule 11 (4), (7) (d) of the Rules, he intimated that the respondents are in the process of selling the properties against the decision of the High Court, which is contested and there is Civil Appeal No. 279 of 2023 pending before the Court. He urged that the court can interfere and mitigate as the respondents have decided to proceed with the sale of said properties and maintained that the decree of the High Court is executable.

Referring the **Ecobank's** case, though there was a dismissal order, the uniqueness of an order to stay execution was issued by the Court to a subordinate court he argued. Nonetheless, Mr. Joseph agreed that compliance of rule 11 has to be cumulatively.

He submitted that the issue concerning the 1st respondent exercising her rights under the mortgage agreement is intended to misled the Court and she cannot be allowed to do so as it was litigated at the High Court and the applicants being dissatisfied have preferred an appeal. It was his further contention that the decision of the High Court supersedes any agreement between the applicants and the respondents. He beseeched me to overrule the preliminary objection with costs, and the application be heard on merit.

Rejoining, Mr. Herzon argued that the decree of the High Court which the applicants are praying to be stayed cannot be stayed by the Court as it referred the parties to the status before the institution of the suit. Thus, the respondents executed their rights to the mortgage and the Court cannot interfere and stay its execution.

Referring the **Ecobank's** case, the learned counsel submitted that the High Court heard an appeal from a subordinate court and the respondents had a decree from the said court which was executable. The dismissal order

to reverse the decision led the parties to the *status quo* and executable; that the dismissal of the High Court is taken together with the executable decree of the subordinate court. He elaborated further that in this application, the respondents have decided to take own action because the High Court decree did not grant any relief to any of the parties but declared that the notices of default were invalid and had no legal effect, hence returned to the status before the issuance of the notices. He reiterated their prayer.

Having considered the submissions for and against the objection, the main issue for determination is whether the application is competent for the Court to grant an order for stay of execution of the decree of the High Court.

The law is settled that for the Court to grant stay of execution, the requisite conditions stated under rule 11 (4), (5) and (7) of the Rules must be satisfied cumulatively. See, **Grument Reserves Ltd v. Elias Somba Misarera** (supra). Rule 11 of the Rules stipulates:

> *"(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 of execution of such decree or order.

(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.

(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.

(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".***

What is apparent from the bolded words in the excerpt above, is the fact that what the Court can stay from being executed, is a decree or order emanating from the High Court or tribunal, which is about to be executed while there is a pending appeal against it. In this application, the applicants are moving the Court to restrain the respondents from conducting a public auction. Since a public auction did not emanate from a court decree or order, undoubtedly, the Court lacks the requisite mandate to issue the stay order sought by the applicants. See for instance, **Catherine Honorati v. CRDB Bank Plc** (supra).

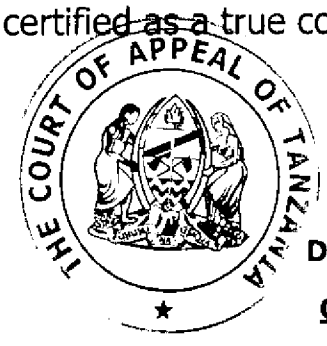
Indeed, there is non-compliance to the said rule as rightly conceded to by Mr. Joseph though he persisted for my intervention to invoke rule 4 (2) (a) and (b) of the Rules because the respondents are in the process of conducting a public auction. As rightly argued by Mr. Hezron, I find that the said rule gives mandate to the Court to issues orders which are to administer justice where there are no such rules and applied only where there is no remedy provided for by the Rules. Thus, for stay execution of a decree is provided for under rule 11 of the Rules, and therefore rule 4 (2) (a) and (b) of the Rules is not applicable.

On the basis of the above stated reasons, this first point of objection suffices to dispose of the application. In fine, I find the application is incompetent and hereby strike it out. Each party shall bear own costs.

DATED at **DAR ES SALAAM** this 20th day of November, 2024.

L. L. MASHAKA
JUSTICE OF APPEAL

The Ruling delivered this 28th day of November, 2024 in the presence of Mr. Leonard Silvanus Joseph, learned Counsel for the Applicants connected vide video conference from Mwanza, Ms. Endael Mziray, learned Counsel for the first Respondent and in the absence for second Respondent is hereby certified as a true copy of the original.



F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL