

**IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA**

(CORAM: MBAROUK, J.A., MASSATI, J.A. And ORIYO, J.A.)

MZA CIVIL APPLICATION NO. 12 OF 2014

TANZANIA BREWERIES LIMITED.....APPLICANT

VERSUS

ANTHONY NYINGI.....RESPONDENT

(Appeal against the Decision of the High Court of Tanzania, at Mwanza)

(Sumari, J.)

Dated the 16th day of May, 2014

in

Civil Case No. 3 of 2009

RULING OF THE COURT

12th & 18th March, 2015

ORIYO, J. A.:

Before the Court, is an application for Stay of Execution lodged through a notice of motion under Rule 11(2) (b), (c),(d) of the Court of Appeal Rules, 2009, (the Rules).

The genesis of the application is Civil Case No 3 of 2009 in which the applicant was successfully sued in negligence by the respondent in the High Court. At the end of the trial, the respondent was awarded shs. 50,000,000/= being general damages together with interest and costs of the suit.

Aggrieved by the decision of the High Court delivered on 16th day of May, 2014, the applicant duly lodged a notice of appeal to this Court on 27th day of May, 2014; hence the application for stay of execution pending appeal.

In its notice of motion, the applicant listed a number of grounds upon which the application is predicated as follows:-

- (i) The appeal stands a good overwhelming opportunity of success.
- (ii) The applicant will suffer irreparable loss if an order of stay is not granted whereas the respondent stands not to suffer if stay order is granted.
- (iii) That the balance and advantage lies to granting stay order than refusing it.
- (iv) That, unless a stay order is issued the respondent will cause an execution of the decree of the High Court which will render the pending appeal nugatory.

The notice of motion is supported by an affidavit of Karoli Valerian Tarimo, learned advocate for the applicant. While the affidavit reiterates the grounds stated in the notice of motion by way of emphasis, we have

taken note that there are additional grounds stated in paragraphs 6 and 7 thereof. The relevant paragraphs in the counsel's affidavit are to the following effect. **One**, that the application has been made without delay. **Two**, the applicant which is a reputable, well established breweries company in the country, is adequately insured against all risks, including the respondent's claim, will suffer irreparably in the event the execution of the decree takes place because the physical address of the respondent is not known.

Even of greater significance to us in the affidavit, is that the applicant has undertaken to give security in the form of a bank guarantee to satisfy the decree, in the event the pending appeal does not succeed.

On his part, the respondent lodged an affidavit in reply. Essentially, the respondent disputes the averments in Mr Tarimo's affidavit and calls for the strictest proof of each averment.

When the application was called on for hearing, Mr. Karoli Tarimo's learned counsel, appeared for the applicant, while the respondent was represented by Mr. James Njwela, learned advocate.

Pressing for the grant of a stay order, Mr.Tarimo submitted that the applicant had filed a notice of appeal without delay, had shown good cause and the applicant was ready to furnish the security within 21 days from the date of the ruling. He urged the Court to exercise its discretionary powers to grant the application for the reasons advanced in the notice of motion, his affidavit and the written submissions.

Responding to the applicant's submissions, the counsel for the respondent conceded that a stay order be granted. However, he prayed that the applicant be ordered to furnish security within **seven days** from the date of the ruling, as opposed to the **twenty one days** period sought by the applicant.

Perhaps we should begin with the Court's cherished principle that a decree holder, as is the respondent in this case, is not to be blocked from enjoying the fruits of his litigation unless there are compelling grounds for ordering otherwise; see Court's decisions in **National Housing Corporation versus A.C Gomes (1997) Ltd, Civil Application No 133 of 2009; Mantrac Tanzania Ltd versus Raymond Costa, Civil Application No 11 of 2010;** (both unreported).

The issue now is whether the applicant has complied with the conditions set out in Rule 11(2)(b), (c) and (d) (i), (ii) and (iii), of the rules. In terms of Rule 11(2) (b), the Court may in its absolute discretion order a stay of execution of a decree or order appealed from upon the applicant fulfilling the following conditions:-

1. after lodging a notice of appeal under Rule 83,
2. showing good cause,
and
3. complying with the provisions of sub rule 2, item (d) (i), (ii) and (iii), cumulatively.

See Court's decisions in **Mantrac Tanzania Ltd versus Raymond Costa** (*supra*) and **Awiniel Mtui and three others versus Stanley Ephata Kimambo, Civil Application No 7 of 2013** (both unreported).

Next for our consideration is whether the applicant has complied with the statutory conditions set out above. There is evidence on record that the judgment of the High Court was delivered on 16th day of May, 2014 and the Notice of Appeal was instituted on 27th day of May, 2014, which was hardly a week later and it was in strict compliance with Rule

83 of the Rules. This application for a stay order was instituted on 15th day of July, 2014, which was within the limitation period of sixty days. Therefore, the application was timely instituted in Court.

Has the applicant shown **good cause** to justify the grant of an order of a **stay of execution**?

In answer, we resort to the contents of paragraph 7 (a), (b) and (c) of the affidavit of Mr. Tarimo in support of the notice of motion, it is stated:-

"7 (a) That the applicant will suffer substantial loss if an order of stay is not made because the respondent's physical address is unknown therefore refund of the decretal sum in the event the same is executed will be impossible and therefore on a balance of convenience it is proper that the execution of the decree be stayed.

(b) That the respondent will suffer nothing in the event the appeal will not succeed because in any case there will always be possibilities to recover the fruits of his decree from the applicant considering that the applicant is a reputable and well established breweries company in Tanzania which is well insured against all risks including the respondent's claims.

(c) That in the event the intended appeal succeeds while the judgment has been executed, the loss/damage which will be occasioned to the applicant cannot be atoned in monetary terms."

In our view, these reasons constitute **good cause** because in the event a stay is denied and the respondent causes execution to be carried out it will be difficult for the appellant to recover the colossal sum of shs. 50,000,000/= general damages together with interest thereon and the costs of the suit, if the appeal is demined in its favour.

Another condition that the applicant has undertaken to satisfy is to provide security for the due performance of the decree in terms of rule 11 (2) (d) (iii) of the Rules. Paragraph 6 of the affidavit supporting the notice of motion states:-

"6. That, this application has been done without delay and the applicant is ready to give security for the performance of a decree by executing a bank guarantee."

In view of what we have endeavoured to discuss, we are settled in our minds that the application has merit and the applicant has satisfied all the conditions to warrant the Court to exercise its discretion in its favour. We therefore order the execution of the impugned decree of the

High Court be stayed pending the determination of the appeal in this Court. This order is conditional upon the applicant depositing a bank's guarantee of a sum equal to what amounts to the decretal sum within twenty one days of the delivery of the ruling.

Costs to be in the cause.

DATED at **MWANZA** this 17th day of March, 2015.

M. S. MBAROUK
JUSTICE OF APPEAL

S. A. MASSATI
JUSTICE OF APPEAL

K. K. ORIYO
JUSTICE OF APPEAL

I certify that this is a true copy of the original.


P. W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL