IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MKUYE, J.A., MWAMBEGELE, J.A. And KWARIKO, J.A.)

CIVIL APPLICATION NO. 18/01 OF 2020

INSURANCE GROUP OF TANZANIA LIMITED.....APPLICANT

VERSUS

JOEFF GROUP (T) LIMITED .....RESPONDENT

[Application for an order of stay of execution of the decree and order of the Resident Magistrate's Court of Dar es Salaam at Kisutu in Civil Case No. 296 of 2015 and an order of the High Court of Tanzania, at Dar es Salaam]

(Kulita, J.)

dated 28th day of November, 2019

in

Misc. Civil Application No. 497 of 2018

RULING OF THE COURT

19th February & 1st April, 2021

MKUYE, J.A.:

This is an application for stay of execution of a decree and an order of the Resident Magistrate's Court for Dar es Salaam Region at Kisutu (hereinafter to be referred as "the Kisutu Court") in Civil Case No. 296 of 2015 and an order of the High Court in Misc. Civil Application No. 497 of 2018 (Kulita, J.) dated 28th November, 2019. The application has been brought by a notice of motion taken under Rules 11 (3), (4), (5) (a) - (c), (6), (7) (b) and (c) and Rule 48 (1) of the Tanzania Court of

Appeal Rules, (the Rules). The notice of motion is supported by the affidavit sworn by Samwel Muhindi.

The brief facts leading to this application are that: The applicant was a judgment debtor in a matter that was before the Kisutu Court. Upon that decision, a garnishee order nisi attaching the applicant's bank accounts with CRDB Bank and KCB Bank was issued. Then, the applicant applied before the Kisutu Court to have the said garnishee order nisi set aside/ lifted up but was unsuccessful.

Thereafter, the applicant applied for revision of the said order at the High Court but the same was dismissed on the ground that the applicant ought to have applied for setting aside the *ex parte* order that resulted into the issuance of the garnishee order nisi by the issuing court. Still undaunted, the applicant applied to the Registrar to be supplied with the copies of proceedings, ruling and drawn order to enable him lodge an application for the revision of the order of the High Court before this Court. On 31st December, 2019 the applicant was served with a summons issued by the Kisutu Court to show cause why execution should not be carried out. This culminated in filling the application at hand.

It is also noteworthy that, this Court had, on 27th January, 2020 granted an *ex parte* order for stay of execution of the decree in the decision of the Kisutu Court pending hearing *inter partes* of this application.

On the other hand, in opposition of the application, the respondent filed an affidavit in reply deposed by Joseph Edward Missana, the Principal Officer of the Respondent Company. She also lodged a notice of preliminary objection (PO) under Rule 107 (1) of the Rules to the effect that the application for stay of execution is time barred.

At the hearing of the application, the applicant was represented by Mr. Martine Rwehumbiza, learned advocate; whereas the respondent enjoyed the services of Mr. Philemon Mutakyamirwa, also learned advocate. It is also worth noting that before the hearing commenced, it was agreed that both the PO and the merit of the application be heard and that if in the course of composing the Ruling we sustain the PO the matter would end there; and if we do not sustain it, then the Court would proceed with composing the Ruling of the application on its merit.

Submitting in support of the point of objection that the application was time barred, Mr. Mutakyamirwa contended that on 31st December,

2019 the applicant received the notice to show cause why execution should not be carried out. However, she filed this application on 20th January, 2020. He explained that in terms of Rule 11 (4) of the Rules, the applicant ought to have filed the application within 14 days of service of the notice of execution of the decree or from the date he was made aware of the existence of an application for execution. He said, by filing the application on 20th January, 2020 while he became aware since 31st December, 2019, it renders the application to be time barred and liable to be struck out. He referred us to the case of **Henry Bubinza (Administrator of the Estate of the late Mathias Njile Bubinza) v. Agricultural Inputs Trust Fund and 3 Others,** Civil Application No. 114/11 of 2019 (unreported). For this reason, he prayed that the application be struck out with costs.

In reply, Mr. Rwehumbiza submitted that the preliminary objection raised was misconceived. This is because, he contended, the notice of execution was received on 31st December, 2019 and this application was presented for filing in this Court on 14th January, 2020, well within time. He elaborated that, despite the fact that the Registrar endorsed it on 20th January, 2020 and the filing fees were paid on that date, since the

application was already in the hands of the Registrar from 14th January, 2020, then it was within time.

With regard to the merit of the application, Mr. Rwehumbiza argued that following the decision of the High Court on revision dated 29th November, 2019, the applicant lodged his intention to pursue the matter to this Court by applying for necessary documents from the High Court.

The learned counsel went on to point out that the applicant has shown that she would suffer irreparable loss as the Kisutu Court has issued a garnishee order nisi and that paragraphs 6 to 10 of the affidavit in support of the application do cover the conditions set out in sub rule 5 (a) and (b) of Rule 11 of the Rules. In relation to the issue of furnishing security for the due performance of the decree, he argued that though no undertaking to furnish security is averred in the affidavit, it is clear that the security is pegged in the garnishee order nisi. For these reasons, he argued that all the conditions were complied with and prayed for the application to be granted.

In response to the application on merit, Mr. Mutakyamirwa, in the first place prayed to adopt the affidavit in reply by the respondent. After

having done so, he forcefully argued that the applicant has failed to comply with Rule 11 (5) (a) and (b) of the Rules as in the affidavit the applicant has deposed nothing in relation to the substantial loss to be occasioned. Neither has he disclosed anything in relation to furnishing security for the due performance of the decree. To buttress his argument, he referred us to the case of **Hatibu Omari v. Belwisy Kuambaza,** Civil Application No. 35/11 of 2018 (unreported) where the application for stay of execution was dismissed for failure by the applicant to furnish security for the due performance of the decree. Ultimately, he implored us to follow suit.

That apart, Mr. Mutakyamirwa went ahead and argued that in terms of Rule 11 (7) of the Rules the application ought to be accompanied with, among others, a notice of appeal and the judgment or ruling appealed from but the applicant failed to attach them. He elaborated that the alleged letter applying for documents is not a notice of appeal. In the premises, the respondent prayed to the Court to dismiss the application with costs.

In rejoinder, Mr. Rwehumbiza stressed that they could not have attached such documents as they were not yet available at the time this application was filed and urged the Court to grant the application.

Having considered the rival submissions from either side, we think, the main issue for this Court's determination is whether this application is time barred and if the issue is found in the negative, then the next issue is whether or not the applicant has cumulatively satisfied the conditions set out in Rule 11 (3), (4), (5) (a) - (c), (6), (7) (b) and (c) of the Rules to warrant this Court to grant the application for stay of execution.

It is not disputed that an application for stay of execution is governed by Rule 11 of the Rules. Rule 11 (4) of the Rules prescribes the time within which such application is to be made, that is to say, within fourteen days of the notice of execution or from the date when the applicant is made aware of the existence of an application for execution.

In this case the record shows that the summons to show cause why execution should not issue was received by the applicant on 31st December, 2019. This is revealed in the applicant's official stamp appearing on the summons. In fact, it is not disputed that the applicant became aware of the execution process on the date indicated therein. This being the case, therefore, under the said Rule, the applicant ought to have lodged the application by 14th January, 2020.

According to the record, however, this application was endorsed by the Registrar on 20th January, 2020 and the payment of fee was effected on the same date. On the other hand, it is an open secret that the applicant presented the application for filing at the Court's registry on 14th January, 2020 and was received by Mr. Msuba L. on the same date as indicated in the rubber stamp affixed in that document.

It would appear that the documents remained in the registry until on 20th January, 2020 when the Registrar endorsed and the requisite fee paid. The contentious issue is whether the filing date should be reckoned from 14th January, 2020 when the documents were presented and received at the registry on 20th January, 2020 when the Registrar endorsed such documents and the requisite fees paid.

We are alive, as the learned counsel for the respondent rightly contended that in terms of Rule 119 of the Rules, the document is taken to have been lodged upon payment of fee. For easy reference we find it appropriate to reproduce it as under:

> *"119 (1) The fees payable on lodging any document shall be payable at the time when the document is lodged".*

Going by the provisions of the above cited Rule, we agree that the 20th January, 2020 when the Registrar endorsed the documents and the fees paid was the date when the application is taken to have been lodged.

However, in the instant matter as alluded to earlier on, the applicant's claim is that the application was lodged within time since the documents were already in the Court's hands from 14th January, 2020 when the same were received. The follow up issue is whether we should disregard this fact, moreso, in view of the overriding principle under Rule 2 and Rule 4 (2) (b) of the Rules requiring the Court to have regard to the need to achieve substantial justice and to meet the ends of justice. In our view, considering the nature and the circumstances of this matter, we are unable to do that. This is so because in this matter, as already alluded to, it is clear that the applicant presented and the registry received the documents on 14th January, 2020 through Mr. Msuba L. Unfortunately, the Registrar stayed with the documents for about 6 days until 20th January, 2020 when he endorsed them and payment of fees effected as shown in the rubber stamp affixed in the document and the copy of payment of fees receipt shown to us. In such a situation, we

have failed to figure out what the applicant could have done to ensure that the application is lodged within the prescribed time.

Given the peculiar circumstances, we think that each case has to be considered in its own merit. We are of the view that this is a situation to be looked at differently and invoke section 3A of the Appellate Jurisdiction Act [Cap 141 R.E. 2019] together with Rules 2 and 4 (2) (b) of the Rules and find that the application was lodged within time. We say so because, if we opine otherwise, it may occasion a miscarriage of justice, the more so, when taking into account that the omission was caused by the Registrar who failed to endorse the documents for about 6 days after they had been presented for filing well within time. Further, at any rate, we have not been furnished with any material to show that the respondent was prejudiced by the documents being lying at the registry from when they were presented.

Based on what we have endeavoured to explain, we find that the preliminary objection is without merit and it is hereby dismissed.

Turning now to the merit of the application, we shall begin by stating that in an application for stay of execution, the applicant is enjoined to comply with all the conditions set out under Rule 11 (4), (5) (a)-(b) and (7) (a)-(d) of the Rules. If such conditions are not

cumulatively met, the application would be rendered incompetent and the Court would not be able to grant the application for stay of execution sought [See **Gilbert Zebedayo Mrema v. Mohamed Issa Makongoro,** Civil Application No. 369/17 of 2019 (unreported)].

As regards the first condition as per rule 11 (4) of the Rules, as alluded to above, we are satisfied the applicant has complied with it as the application was presented for filing within the prescribed period of fourteen days from 31st December, 2019, the date she was served with the notice to show cause why execution should not be carried out. This application was filed on 14th January, 2020.

Sub rule 5 of Rule 11 lays down the other two requirements which must be satisfied in order for the Court to consider whether to grant the stay of execution or not. The said Rule provides as follows:

> *"11 (5) No order for 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."

In this matter, the applicant has claimed that she will suffer substantial loss as the Kisutu Court has issued a garnishee order nisi. Unfortunately, this has just been submitted from the bar as our scanning of the applicant's affidavit have shown nowhere that substantial loss may result if stay is not granted. Neither was it stated in the notice of motion. But the applicant ought to have stated such fact either in the notice of motion or affidavit by providing an explanation of the nature and extent of such substantial loss that is likely to be suffered if the stay is not granted. Hence, we find that the applicant has failed to comply with Rule 11 (5) (a) of the Rules.

As regards the issue of furnishing security, we are of the considered view that the applicant has also failed to undertake to give the security for the due performance of the decree. Of course, the learned advocate for the applicant has submitted that such undertaking is made cumulatively in paragraphs 6-10 of the affidavit which state:

"6. *That alongside with the Application for revision the Applicant filed an application No. 497 of 2018 in which the applicant prayed for stay of execution in Civil Case No. 296 of*

2015 and uplifting of the garnishee order issued on 3rd July, 2018.

7. *That on 28th November, 2019 Hon. Judge Kulita dismissed the application on a preliminary objection holding that the J/Debtor was supposed to set aside the ex parte judgment.*

8. *That on 4th December, 2019 the J/Debtor requested through the office of the Registrar to be supplied with proceedings ruling and drawn order so that the J/debtor can lodge an application for Revision in the Court of Appeal of Tanzania. That to date the Registrar has not supplied those documents on the J/Debtor.*

9. *That on 31st December, 2019 the J/Debtor was served with a summons to show cause issued by Kisutu Resident Magistrates Court of Dar es Salaam and the matter is now called for mention on 14th January, 2020.*

10. *That since the J/Debtor is still pursuing the Application for Revision to the Court of Appeal of Tanzania against orders of Kisutu and High Court of Tanzania, it is in the interest of justice that this Honourable Court be pleased to stay the garnishee order*

issued by the Kisutu Court otherwise the application for Revision in the Court of Appeal shall be of no use."

However, our understanding of these paragraphs is that they were mere narration by the applicant of the events which led to this application. In the said paragraphs there are averments relating to the filing of Application No. 497 of 2018 which was dismissed on 28th November, 2019; the applicant's request to be supplied with documents to enable filing of an application for revision in this Court; service of the summons on her to show cause issued by the Kisutu Court; and her desire to pursue an application for revision to this Court. We say, it is a mere desire or rather a wishful thinking because there is neither a pending revision nor appeal in this Court.

Besides that, there is nothing indicating the applicant's undertaking to give security for the due performance of the decree as per Rule 11 (5) (b) of the Rules. In the case of **Alex Siriamara Machare and 2 Others,** Civil Application No. 3 of 2016 (unreported), when confronted with a similar situation, while adopting with approval the case of **Farm Equipment Company Limited v. Festo Mkuta Mbuzu,** Civil Application No. 111 of 2014 (unreported), the Court declined the

applicant's undertaking of furnishing security which was stated in the written submission. In its words the Court stated as follows:

> *"... to indicate one's readiness to provide security for the due performance of a decree in the written submissions is to go against the law because written submissions consist basically of arguments.*
>
> *In the particular circumstances of the present case, however, we agree with Mr. Mpoki that since the undertaking came from the counsel's statement made from the bar, the same cannot be taken to amount to a firm undertaking binding on the applicants."*

This stance was also taken by this Court in the case of **Salim Lakhani and Two Others v. Ishfaque Shabir Yusufali (As an administrator of the Estate of the Late Shabir Yusufali),** Civil Application No 23/17 of 2019 (unreported) where it was stated as follows:

> *"Having made the above observations, we wish to endorse Mr. Lugwisa's submission that security or an undertaking to furnish security cannot be made in the course of submissions, be they oral or written. For submissions are an elaboration of the content and issues canvassed in the notice of motion and the accompanying affidavit."*

The applicant's advocate has argued that the garnishee order nisi is sufficient security. However, this came from the bar as it was neither stated in the notice of motion nor affidavit in support of the application. Based on the above cited authorities of **Alex Siriamara Machare and 2 Others** (supra) and **Salim Lakhani and Two Others** (supra) this cannot be accepted. In this regard, we are settled in our mind that the applicant has failed to comply with the other requirements.

If we may move a step further, we ask ourselves if there is anything to be stayed. We say so because under Rule 11 (7) (a), (b), (c) and (d) of the Rules the applicant was required to attach to the application the notice of appeal, judgment or ruling to be appealed against, notice of execution and proceedings. In this matter when the applicant was prompted whether those documents were attached, he said he attached the letter applying for the proceedings. He said nothing in relation to the other documents such as the notice of appeal, judgment or ruling to be appealed against and proceedings. It is obvious that the applicant did not attach such documents to the application. In our view, much as he said that he had attached the letter applying for the proceedings, under Rule 11 (7) of the Rules such letter is not among the required documents. To us, the letter applying

for documents stands as mere wishful thinking of doing something later. Be it as it may, failure to comply with the said Rule implies there is no pending matter to be stayed.

That said, it is our finding that the applicant has failed to satisfy the conditions precedent for the grant of the application for stay of execution. Hence, the same is hereby dismissed with costs.

DATED at **DAR-ES-SALAAM** this 30th day of March, 2021.

R. K. MKUYE
JUSTICE OF APPEAL

J. C M. MWAMBEGELE
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

Ruling delivered this 1st day of April, 2021 in the presence of Ms. Mashavu Katala, Company Officer for the Applicant and Mr. Philemon Mutakyamirwa, learned counsel for the Respondent, is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL