

TANZANIA / JUDGMENT

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THE UNITED REPUBLIC OF TANZANIA JUDICIARY IN THE HIGH COURT OF TANZANIA MBEYA
SUB - REGISTRY AT MBEYA MISC. CIVIL APPLICATION NO. 7148 OF 2024 (Arising from the
decision of the High Court of Tanzania (Hon Ngunyale, J.) issued in execution proceedings of the
Civil Case No. 13 of 2016, dated 5th June 2023) EPHRAEM CHRISTOPHER
MREMA..... APPLICANT VERSUS HOMANGE KASTORY KANZUGALA.....
1ST RESPONDENT MWANANCHI INSURANCE COMPANY LIMITED...2ND RESPONDENT

RULING

Date: 11 October 2024 & 9 January 2025 SINDA, J.: This is an application for stay of execution made under Order XXI Rule 27 and section 95 of the Civil Procedure Code, Cap 33, R.E 2019 (the CPC) in which the applicant seeks for the following orders:

1. That this Honorable Court be pleased to stay of execution order issued against the applicant in Civil Case No. 13 of 2016 by Hon D.P. Ngunyale, J on 5 June 2023 pending hearing and 1 determination of Civil Application No. 93/01 of 2024 before the Court of Appeal of Tanzania (the CAT).
2. The cost of the application be borne by the respondent.
3. Any other orders this Honorable Court deems fit and just to grant. The application was supported by an affidavit sworn by Ephraem Christopher Mrema and was strongly resisted by a counter affidavit of Homange Kastory Kunzugala. At the hearing of the application, the applicant was represented by advocate Martine Geofrey Sangira while the respondent appeared in person. The application was argued by way of written submissions. The applicant argued that he applies for a stay of execution of order(s) issued in Civil Case No. 13 of 2016 pending the determination of Civil Application No. 93/01 of 2024 as one of the remedial measures paving the way to challenge the orders of his arrest and detention as a civil prisoner. He submitted that the applicant has a reasonable fear that while an application for the extension of time to file a revision at the CAT is pending, the first respondent is likely to enforce the decree issued by this Court which is a subject of an intended revision at the CAT. 2 He stated that the first respondent applied for execution of the decree in Civil Case No. 13 of 2016 out of which the applicant seeks to challenge the orders issued thereon through Civil Application No. 93/01 of 2024 currently pending at the

CAT. He argued that if the respondent herein is allowed to proceed with execution of the orders issued in execution proceedings of Civil Case No. 13 of 2016 there is a high likelihood that the pending proceedings in Civil Application No. 93/01 of 2024 will be rendered nugatory and fruitless. Not only that, the applicant currently faces the threat of suffering irreparable loss if this Court does not grant the applied order. It is the applicant's submission that he still has remedial measures to pursue at his disposal to protect his interests, which this Court has the discretion to grant. He submitted that as pointed out under paragraphs 10.1 and 10.2 of the affidavit in support of the application, the applicant will suffer irreparable harm if the decree in Civil Case No. 13 of 2016 is not stayed, considering that the Applicant has been subjected to the burden and liability of Mwananchi Insurance Company Limited, the second respondent herein. It is a well established principle that a company is separate from its shareholders and directors. The action of the first respondent herein to 3 apply for an order of arrest and detention of the applicant as if is the sole director of the Mwananchi Insurance Company Limited to the exclusion of the other two directors makes the applicant suffer irreparably. He referred to the case of *Morgan Air and Sea Freight Logistics Kenya Limited vs. Serengeti Fresh Limited*, Misc. Civil Application 10 of 2021 [2021] TZHC Com D 3376 (26 October 2021) (TanzLII) at page 6. He submitted that the applicant here was not a party in Civil Case No. 13 of 2016 and its execution proceedings. Therefore, if the order of stay is not granted in this application, the applicant will suffer irreparable harm compared to the respondent. He submitted that the applicant is ready to furnish security in the form of a bank guarantee for the due performance of the decree, or order as may ultimately be binding on the applicant and according to the court's directives as it may deem fit and just as mandated under Order XXI Rule 27 of the CPC. He referred to the case of *Jennifer Mkapesa Chuwa Versus. Farsy Adinani Msuya*, Civil Application No. 688/01 of 2022 (TanzLII) where the Court, in approving this condition, cited its earlier decision issued in the case of *Mantrac Tanzania Limited vs. Raymond Costa*, Civil Application No. 11 of 2010 (unreported). 4 He also argued that he met the condition provided under Order XXI Rule 27 of the CPC which requires the application of this nature to be filed without undue delay. He submitted that after being aggrieved with orders issued during execution proceedings in Civil Case No. 13 of 2016, he filed in the CAT at Mbeya Civil Application No. 999/06 of 2023. Inadvertently, on 22 February 2024 the application was struck out for being incompetent as per Annexure EPH-3 to the applicant's affidavit. Subsequently, he promptly applied to the CAT for an extension of time to file a revision through Civil Application No. 93/01 of 2024 currently pending in the CAT. He submitted that, as stated in paragraph 8 of the affidavit in support of the application, the proceedings and ruling of the Court in Civil Case No. 13 of 2016 contain serious questions of law which have occasioned a miscarriage of justice against the applicant on the grounds that the Court was not properly moved by the first respondent. Hence, it was by established principles developed in execution proceedings justified to make order(s) for the arrest and civil imprisonment of the applicant who was not party to the proceedings and decree of Civil Case No. 13 of 2016, for a decree made against the second respondent, a corporation by nature and name, the High Court erroneously applied the provisions 5 of Order XXI Rule 28 of the CPC against the applicant in his personal capacity,

who was not named or decreed judgment debtor in Civil Case No. 13 of 2016. Further, he submitted that the High Court was not justified in ordering the arrest and civil imprisonment of the applicant on the liabilities of the second respondent on the grounds that the leave of the High Court was to be sought and obtained under Order XXI Rule 30 (2) of the CPC as a mandatory prerequisite condition for condemning the applicant, as director, to shoulder the decreed debt of the second respondent. In addition, the High Court did not bother to satisfy itself as to whether the judgment debtor was guilty of concealing its movable or immovable property in an attempt to defeat the execution of the decree. He added that the High Court was not moved to lift the veil of incorporation. The Court did not make a finding that there existed circumstances which warranted the piercing of the veil of incorporation. It was the applicant's submission that this Honorable Court grant an order for a stay of execution pending the determination of the intended revision so as to preserve the interests of the parties and to ensure justice for the parties. 6 In reply, the first respondent submitted that the order sought by the applicant is not maintainable in law. The decision in Civil Case No. 13 of 2016 was delivered on 5 June 2023. The applicant did not take any action upon the same, nor did he appeal while the said decision was appealable. He added that there is no appeal before the CAT. He further stated that the pending Civil Application No. 93/01 of 2024 before the CAT is not an appeal. It is an application for an extension of time to file a revision before the CAT. It is a trite law that the application for stay of execution order may be entertained where there is an appeal before the High Court, and also the appeal may be entertained where there is a notice of appeal. He referred to the cases of *E R Mutaganywa vs. Ahmed J Aladin and Others* (1996) TLR. 285 and *Christomoo Ngowi vs. William Lusito and Another* (1992) TLR. 340 to cement his argument. He argued that in order for the court to grant a stay of an execution order, there must be sufficient reasons given by the applicant, such as an injury and irreparable loss that might have to be well explained to satisfy the court, as stated in the case of *Nicholas Nere Likule vs. Independent Power (T) LTD and Another* (1997) TLR.58. 7 The respondent further argued that the applicant failed to submit evidence indicating beyond the vague and generalized assertion of substantial loss. That the loss would be irreparable, for which he was likely to suffer. See the case of *Tanzania Cotton Marketing Board vs. Cogecot Cotton Co SA* (1997) TLR 63. He submitted that the means of execution order cannot be stayed by an application stopped by an intended order from an intended revision which is not yet issued or granted because the intended application for revision has not yet been lodged or instituted or granted. He argued that the court cannot allow the application by the applicant on the expectation of the pending revision application No. 93/01 of 2024 of the CAT due to the fact that the matter the applicant pleases the court to revise is appealable. He referred the case of the cases of *SGS Société Générale de Surveillance S.A vs. Vip Engineering and Marketing ltd* (2004) TLR. 135 and *Said Himid Mwilima versus. Tabora Regional Trading Co* (1997) TLR. 156. The respondent finds that the court with jurisdiction to entertain this matter is the CAT and not this court. He referred to the case of *Simon Kabaka Daniel versus. Mwita Marwa Nyang'anyi and 11 others* 8

(1989) TLR 64. He prayed that the application by the applicant be dismissed with costs in its entirety. The applicant in rejoinder submitted that he was not a party to Civil Case No. 13 of 2016 so he cannot appeal. The only remedy is to challenge the decision by way of revision as it was decided in the case of Monica Nyamakare Jigamba vs. Mugeta Bwire Bhakome & Another, Civil Application No. 199 of 2019, [2020] TZCA 1820 (16 October 2020) (TanzLII) at page 10. He was of the view that in other circumstances, stay of execution can be granted without notice of appeal. He referred to the case of Swahiba Ibrahim Shah vs. The Registered Trustees of Masjid Quiblatain, Civil Application No. 703/01 of 2022 [2024] TZCA 693 (6 August 2024) (TanzLII), the CAT at Dar es Salaam. He submitted that based on the nature of this application, the applicant herein could not apply for a stay of execution at the CAT. Therefore, the proper court to determine an application for stay of execution is this court. He added that the decision in the case of Simon Kabaka Daniel cited by the first respondent is distinguishable from the matter at hand as in the cited case there was a pending appeal, while in the matter at hand, there is no pending appeal. Here, there is an application for 9 extension of time to file a revision at the CAT since the order sought to be challenged is not appealable. He submitted that this court is vested with the jurisdiction to entertain the matter at hand and to exercise its discretion on granting the application. I have gone through the court's records and submissions filed by the parties. The issue is whether the application at hand has merit. Order XXI Rule 27 of the CPC provides that: "Where a suit is pending in any court against the holder of a decree of such court, on the part of the person against whom the decree was passed, the court may, on such terms as to security or otherwise as it thinks fit, stay execution of the decree until the pending suit has been decided." It is also a settled position of law that to grant a stay of execution, there must be a pending appeal. If there is no appeal filed, there cannot be a basis to apply for a stay of execution. This was stated in the case of E R Mutaganywa vs. Ahmed J Aladin & Others [1995] TZHC 22 (15 November 1995) and in the case of Ujagar Singh vs. Ruanda Coffee Estates Ltd. [1966] EA 263. In this case, the applicant filed an application for a stay of execution pending the determination of Application No. 93/01 of 2024 which was an application for an extension of time to file a revision out of time. 10 Based on the above authorities, it is my opinion that for the applicant application to be considered, there was supposed to have been a pending revision. I am aware that granting an application for a stay of execution is a matter of the court's discretion, but such discretion has to be exercised judiciously. The application that is pending before the CAT is for an extension of time to file a revision and not a revision. In that regard, there is no assurance that the applicant will be granted the time to file a revision or not. Even if the applicant is granted the time to file a revision, he still can lose interest to file the revision. In that respect, I find that it would be unjust for this court to exercise discretionary power to grant this application because it can cause a miscarriage of justice to the other party. Based on the above evaluation, I dismiss the application. The right to appeal is explained. DATED at MBEYA on this 9 day of January 2025. A. A. SINDA JUDGE 11

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