

TANZANIA / JUDGMENT

CIVIL APPLICATION NO 753 06 OF 2024 IFINDU AGRIBUSINESS LIMITED VS TANZANIA COMMERCIAL BANK PLC AND 2 OTHERS

COURT
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IN THE COURT OF APPEAL OF TANZANIA AT MBEYA CIVIL APPLICATION NO. 753/06 OF 2024 IFINDU AGRIBUSINESS LIMITED.....APPLICANT VERSUS TANZANIA COMMERCIAL BANK PLC..... 1st RESPONDENT THE ATTORNEY GENERAL!..... 2nd RESPONDENT PAMOJA AUCTION MART AND COMPANY LTD..... 3rd RESPONDENT (Application for Stay of Execution of the Decree of the High Court of Tanzania, Land Division at Dares Salaam) (Sinda. J.) Dated the 2nd day of September, 2024 in Land Case No. 286S of 2024

RULING

30th September & 9th October, 2024 MAKUNGU. J.A.: The applicant, Ifindu Agribusiness Limited, is moving the Court by notice of motion for stay of execution of a decree of the High Court of Tanzania at Mbeya in Civil Case No. 2868 of 2024 dated 2nd September, 2024, pending hearing and determination of an intended appeal. The application is brought under rule 11 (3), (4), (5) (a) and (b), (6), (7) (a)

(b) (c) (d) and 48(1) of the Tanzania Court of Appeal Rules, 2009 (the Rules). The applicant and the first respondent are tangled in a dispute over the loan agreement where the first respondent loaned Tshs. 600,000,000/= to the applicant. The applicant has failed to pay the said loan and the first respondent threatened to sell the mortgaged property. As the result the applicant instituted Land Case No. 16 of 2021 where the parties consented for the loan to be due paid on December, 2023 and the Court entered judgment in consent to that effect. On 9th February, 2024 the applicant received 14 days demand notice from the 3rd respondent, who is working under the 1st respondent and requiring the applicant to pay Tshs. 1,229,820,000/= very excessive amount compared to the actual remaining amount. That, due to that notice, the applicant instituted the Civil Case No. 2868/2024 whose decision pronounced on 2nd September 2024. Following that decision of the High Court the applicant was dissatisfied and on 2nd September, 2024 he lodged a notice of appeal to this Court and applied to be supplied with the certified copies of Proceeding, Ruling and Drawn Order for appeal purposes. While waiting for such documents in order to process the appeal, on 14th

August, 2024 the applicant was served with the notice of execution. At the hearing of this application the applicant was represented by Mr. Loth Joseph Mwampagama, learned advocate whereas Mr. Joseph Tibaijuka, learned State Attorney, appeared for the respondents. The hearing was via video link from Mbeya. Submitting in support of the application, Mr. Mwampagama first adopted the affidavit deposed by the principal officer of the applicant and thereafter stated that, the application is filed within time because it was filed on 13th September, 2024 following the notice of execution served on the applicant on 2nd September, 2024. He also submitted that, copies of the notice of appeal, the judgment, decree and the notice of execution has been annexed in the supporting affidavit in compliance with legal requirement. Again, the learned advocate submitted that, the applicant has made an undertaking to furnish security by way of a bank guarantee as may be ordered by the Court. He further argued that, in the event the application is not granted, the applicant stands to suffer substantial loss. Basing on this account, Mr. Mwampagama prayed that the application be granted as prayed in the notice of motion. In resisting the granting of application for stay of execution, Mr. Tibaijuka submitted that, rule 11(7) (d) of the Rules has not been complied with because the applicant has failed to attach a notice of intended execution. He argued that all notices attached to the affidavit cannot be said to be a notice of execution as per rule 11(7) (d) of the Rules, because all notices are issued by a Court broker and not the Court. He further argued that if this application is granted the first respondent will suffer substantial loss as a bank than the applicant. He prayed the application to be dismissed with costs. In rejoinder, Mr. Mwampagama conceded that the application was filed without a notice of intended execution as required under rule 11(7)

- (d) of the Rules. However, he prayed the application to be struck out and not to be dismissed. This is what counsel of the parties submitted for and against the granting of the application for stay of execution. Having heard from the counsel, one question to resolve is whether conditions stipulated under rule 11 of the Rules has been complied with. Legally, for the Court to grant the orders sought, as highlighted above, among other requirements, the applicant needs to satisfy the following requirements, among others; One, the applicant must lodge the application within fourteen (14) days from the date that he was served with the notice of execution or from when he became aware of the execution proceedings. This is in terms of rule 11(4) of the Rules. Two, the applicant must also attach to the application the notice of the intended execution in terms of rule 11 (7) (d) of the Rules. The above two conditions and several others which are not relevant to this application, must be cumulatively met as per this Court's decisions in *Mantrac Tanzania Ltd v, Raymond Costa*, Civil Application No. 11 of 2010 and *Mohamed Masoud Abdalla and sixteen others v. Tanzania Road Haulage (1980) Limited*, Civil Application No. 58/17 of 2016 (both unreported) among others. Where the conditions are not met cumulatively, the application is incompetent and liable to fail, see *Mabruck Mengele v. Vernon David Law and Another*, Civil Application No. 87 of 2004. (unreported). In the instant application, the only controversy between the parties is in respect of the interpretation of rule 11(7) (d) regarding a notice of the intended execution. That provision makes it mandatory for the applicant of the order for

stay of execution to attach with the application a notice of execution. In this case, I thoroughly reviewed the documents in this application, but have not been able to locate such notice. I agree with Mr. Tibaijuka that the notices attached to the affidavit are not qualified to be termed as a notice of intended execution under rule 11(7)

- (d) of the Rules where the learned advocate for the applicant ultimately conceded. For the above reasons I cannot exercise my jurisdiction under rule 11 (3) of the Rules to grant the orders sought because the applicant has failed to cumulatively fulfil the conditions stated under rule 11(7) (d) of the Rules. That said, this application is incompetent before the Court and I hereby strike it out with costs. DATED at DAR ES SALAAM this 4th day of October, 2024.
0. 0. MAKUNGU JUSTICE OF APPEAL The Ruling delivered this 9th day of October, 2024 in the presence of Ms. Edina Mwamlima, learned State Attorney for the Respondents also holding brief for Mr. Loth Mwampagama, learned counsel for the Applicant is hereby certified as a true copy of the original. D. P. KINYWAFU DEPUTY REGISTRAR COURT OF APPEAL

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CASE PAGE	https://chat.esheria.ai/case-law/tanzania/ifindu-agribusiness-limited-StayofExecution-tanzlii-2024--6a3ea52d3b1caa9129826bf6

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