

TANZANIA / JUDGMENT

CIVIL APPLICATION NO 680 11 OF 2024 SIMON WOLFGANG NDAUKA VS IDD SEIF 5 OTHERS

COURT
TANZLIIDECIDED
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IN THE COURT OF APPEAL OF TANZANIA AT TABORA CIVIL APPLICATION NO. 680/11 OF 2024
SIMON WOLFGANG NDAUKA..... APPLICANT VERSUS IDD S E
IF1ST RESPONDENT MAIKO
LUSANGANYA.....2nd RESPONDENT JONAS
MANYANYA.....3 rd RESPONDENT HAMISI
LUMONDYA.....4TM RESPONDENT PIUS
ILINDILO..... . 5th RESPONDENT NIA
RASHID..... 6th RESPONDENT (Application for stay of
Execution of the Decision of the High Court of Tanzania, at Tabora) fKhamis. J.^ Dated the 5th
day of August, 2022 in Civil Revision No. 2 of 2021

RULING

5th & 12th September, 2024 RUMANYIKA. J.A.: All began in the District Court of Tabora at Tabora (the trial court). In its judgment in Civil Case No. 07 of 2019 dated 23rd September, 2019, the trial court found the respondents liable. It ordered them to pay the applicant TZS 76,790,000.00 being compensation for the damage caused on the respondent's land. Consequently, the respondents' herds of cattle were attached and sold in execution of the resultant decree. However, it is alleged that, the attachment involved 315 cows and 21 goats whose value exceeded the decreed sum. This prompted the applicants to complain in writing, as they had not even been served to appear in court and that the execution was improperly carried out. On those bases, the Judge - In - Charge called for the respective records with the view to satisfying himself as to their correctness, legality and propriety, hence the revision proceedings. Eventually, the decision of the trial court was quashed and its orders set aside, in terms of sections 79 (1) (c) and 95 of the Civil Procedure Code. The parties were directed, if they wished, to register the case in accordance with the law. Aggrieved, the applicant took some essential steps forwards appealing against the revision order. Besides the appeal process, the respondents initiated the execution process which has prompted the applicant to file the instant application. The application is by a notice of motion which is predicated on rules 11 (3) (4), (4A) (5) (a) - (c) and 48 (1) of the Tanzania Court of Appeal Rules,

2009 (the Rules). It is supported by an affidavit sworn by Mtaki Mugaya Kaitila Mtaki who is an advocate instructed by the applicant. The respondents did not file an affidavit in reply. At the scheduled hearing of the application on 5th September, 2024, the proceedings were conducted remotely from Tabora through Video 2 Conference. Messrs. Kaitila Mtaki and Magoti, learned counsel teamed up representing the applicant while the respondents were represented by Mr. Charles Ayo, learned counsel. Mr. Mtaki began by adopting the notice of motion and affidavit. He reiterated the contents thereof. Pursuant to the provisions of rule 11 (4) of the Rules, the learned counsel contended as follows; one, that, the applicant was served with a notice of the intended execution on 10th July, 2024 and filed the instant application within the limitation period of fourteen days on 17th July, 2024, as averred at paragraph 7; two, that, the applicant has demonstrated a substantial irreparable loss that he may suffer, in terms of rule 11 (5) (a) of the Rules, should his property listed by the respondents be attached and sold and three, that, the applicant is ready and willing to furnish security to the tune and form as the Court may direct. Besides the copies of the impugned ruling and drawn order, notice of appeal, and the notice of the intended execution appended to the application, among others. The cumulative effect of it all, Mr. Mtaki argued, warrants the grant of the application. To bolster his proposition, Mr. Mtaki cited the Court's decisions in *Ecobank Tanzania Ltd v. AA. Company Ltd & Three Others* (Civil Application No.178/16 of 2020)

[2021] TZCA 591 (29 September 2022; TanzLII) and *Serengeti Breweries Ltd. v. Ikem Real Estate Developers Ltd.* (Civil Application 3 No. 552/16 of 2022) [2024] TZCA 250 (28 March 2024; TanzLII). The appeal process apart, Mr. Mtaki asserted, the respondents are busy intending to execute the impugned decision, which is likely to preempt the pending appeal. He implored me to grant the application with costs. In reply, Mr. Ayo opposed the application since, the applicant had neither sufficiently established the alleged substantial loss nor did he state any specific security for the due performance of the drawn order. If anything, Mr. Ayo added, it ought to be not less than the decreed TZS 222,670,000.00, despite the Court's discretion. Else, he prayed for an order dismissing the application. In his rejoinder, Mr. Mtaki reiterated his earlier submission. Additionally, he urged me to discount Mr. Ayo's proposal for two reasons; one, the said TZS 222,670,000.00 was not the decreed sum since it is speculative and two, the respondents had no right to raise any factual issues at this stage, since they did not file an affidavit in reply. Having heard the contending arguments from the parties' counsel and given it due consideration, there is one main issue for my determination. This is whether the applicant has met the conditions for the grant of a stay order, cumulatively, under rule 11 (3) (4) (5) (a) - (b) and 7 (a) - (d) of the Rules. See - *Ecobank Tanzania Ltd* (supra) and *Serengeti Breweries Ltd* (supra). The court has reiterated that stance repeatedly, such as in *National Housing Corporation v. AC Gomes*

(1997) Ltd. (Civil Application 133 of 2009) [2010] TZCA 168 (19 May 2010; TanzLII). At least in the instant application the contending issue is whether the applicant has demonstrated any possible substantial loss and undertaken to furnish security. Regarding the issue of substantial loss, I am, respectfully unable to agree with Mr. Ayo on a contention that, the

applicant has failed to articulate the nature and extent of loss which he stands to suffer, should the stay order not be made, as stipulated under rule 11 (5) (a) of the Rules. For ease of reference, I find it apt to reproduce the corresponding averments under paragraph 8 of the supporting affidavit as follows: "...if there will be no for stay o f execution the respondents wili proceed to execute the order of the High Court by attaching and iater seiing the applicant's properties fisted in the respondents' application for execution and thereby occasioning an irreparable ioss to the applicant and will further pre-empt the appeal..." The excerpt above means that, unless the intended execution is stalled, the respondents' move to execute the impugned drawn order 5 would pre-empt the pending appeal, at the irreparable detriment of the applicant. I note also, that, the said averment is consonant with ground

- (a) (iii) in the respective notice of motion, with respect to the applicant's property intended to be attached and sold. From the nature of loss demonstrated, therefore, I am satisfied that, the details provided are enough and substantial for the interest of justice in the circumstances since, its giving needs no to be proved. It is obvious that, if the said property was attached and alienated and the applicant's appeal succeeds, the applicant is most likely going to suffer substantial loss, since he might not revert to his previous position or comfort. This condition thus, has been satisfied. About the requirement of security, this has been fulfilled too. For more clarity, I find it also apt to reproduce the applicant's averments at paragraph 9 of the supporting affidavit which as follows: "... the applicant is ready and prepared to furnish security for the due performance o f the order o f the High Court as may be ordered by the Court" From the extract above, therefore, with respect, Mr. Ayo's contention cannot be more incorrect that the applicant did not promise to furnish. One may wish to remember the Court's repeated stance, that, security needs not to be presented before the grant of a stay order since, a mere firm undertaking to furnish it is enough. Moreover, in *Tanzania Petroleum Development Corporation v. Mussa Yusuph Namwao & Three Others*, Civil Application No. 602 of 2007 (unreported) the Court defined the "term firm undertaking" for the grant of a stay order. That, it is a promise or an unequivocal declaration or stipulation of intention of the Judgment Debtor guaranteeing the Decree Holder enjoyment of a decree pending determination of an appeal therefrom. What counts most is the adequacy of the security to protect the Decree Holder's rights without necessarily stating the magnitude, form and type of the security since, such specification is the domain of the Court. See, for instance, our proposition in *Africhick Hatchers Ltd v. CRDB Bank PLC* (Civil Application No. 98 of 2016) [2019] TZCA 148 (15 March 2019; TanzLII). I wish to stress that, the beauty of furnishing security for the due performance of a decree needs not to be overemphasized than is necessary. It has a double impact effect such that, the right of the Judgment Debtor to exhaust the appellate hierarchy is guaranteed whereas the Decree Holder gets comfort that he will end up with a fruitful decree, however long it may take him. It follows therefore, that, the applicant herein has fulfilled the condition too. It is for those two reasons that a stay order is made for the interests of justice. The upshot of it is that, the applicant has fulfilled the conditions cumulatively showing good cause. The application

therefore, is hereby granted. It is thus ordered that, execution of the drawn order in Misc. Civil Revision No. 2 of 2021 dated 5th August, 2022 (Khamis, J.) is stayed pending the outcome of the intended appeal. However, this order is conditional upon the applicant depositing TZS 76,790,000.00 or an equivalent bank's guarantee, as security within thirty (30) days from the date hereof. Costs shall abide the outcome of the appeal. DATED at DAR ES SALAAM this 11th day of September, 2024. S. M. RUMANYIKA JUSTICE OF APPEAL The Ruling delivered this 12th day of September, 2024 in the presence of the Mr. Abraham Magoti, learned counsel for the Applicant, and Mr. Frank Kavishe, learned counsel for the Respondents, is hereby certified as a true copy of the original.

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