

TANZANIA / JUDGMENT

water aid tanzania vs clare haule

2023 tzca 17444 21 july 2023

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IN THE COURT OF APPEAL OF TANZANIA AT PAR ES SALAAM (CORAM: WAMBALI. 3.A.. KEREFU. 3.A. And MASOUD, J.A.) CIVIL APPLICATION NO. 28/18 OF 2022 WATER AID TANZANIA.....APPLICANT VERSUS CLARE HAULE.....RESPONDENT (Application for Stay of Execution of the Judgment and Decree of the High Court of Tanzania, Labour Division at Dar es Salaam) (Mwipopo, 3.) Dated the 4th Day of May, 2020 in Labour Revision No. 13 of 2019 RULING OF THE COURT 19* & 21st July, 2023 KEREFU, J.A.: The applicant, Water Aid Tanzania, on 7th May, 2020 filed a notice of appeal seeking to challenge the decision of the High Court (Mwipopo, J.), in Labour Revision No. 13 of 2019 dated 4th May, 2020. As the intended appeal is still pending, the applicant has approached this Court by way of notice of motion made under Rules 11 (3), (4), (5) (a), (b), (6), (7) (b), (c), (d) and 48 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules) for stay of execution of the decree passed in that case, pending the final determination of the appeal. The grounds indicated in the notice of motion can conveniently be paraphrased as follows, that: 1

- (i) The applicant intends to appeal against the decision of the High Court of Tanzania, Labour Division at Dar es Salaam dated 4th May, 2020 in Labour Revision No. 13 of 2019 and has filed the notice of appeal against the said decision as per annexure A2 to the affidavit in support of the application; (ii) That, there is good cause to order for stay of execution; (iii) Substantial loss may result to the applicant if the decree of the High Court of Tanzania, Labour Division at Dar es Salaam in Labour Revision No. 13 of 2019 is executed; (iv) The application for stay of execution has been made without unreasonable delay as the notice of execution was served to the applicant's advocate on 15th January, 2022 hence the application was lodged within fourteen (14) days of service of the notice; and
- (v) The applicant is willing and financially able to provide bank guarantee on the decretal amount as security for the due performance of the decree which will ultimately be binding upon the applicant. The notice of motion is supported by an affidavit duly sworn by one Reginald Bernard Shirima, the learned counsel for the applicant. The great part of the said affidavit reiterated the above grounds stated in the 2 notice of motion by way of emphasis including attachment of relevant documents thereto. It is noteworthy at this juncture that, the respondent, though duly served with the copy of the application, did not file an affidavit

in reply to contest and/or otherwise support the application. Before dealing with the application, we find it appropriate to state a brief background giving rise to the judgment and decree sought to be stayed, as obtained from the record of application. That, on 12th June, 2014, the respondent was employed by the applicant as Program Officer Urban until 31st March, 2017 when her employment was terminated based on operational requirement (retrenchment). In the course of the said employment, the respondent was promoted to various positions and, on 31st March, 2017, at the time of termination of her employment, she was holding a position of Senior Program Manager. Aggrieved by the said termination, the respondent referred the matter to the Commission for Mediation and Arbitration (CMA) vide Labour Dispute No. CMA/DSM/KIN/R.476/17 claiming that she was unfairly terminated from service as procedures for retrenchment indicated under section 38 (1) of the Employment and Labour Relations Act, [Cap.336, Act No.6 of 2004] (the ELRA) were not complied with. In defence, the applicant denied the respondent's claim, hence the suit proceeded into a full trial. Having heard the parties and considered the evidence adduced before him, the CMA arbitrator found that the respondent was fairly terminated from her employment and thus, the respondent's complaint was dismissed for lack of merit. Aggrieved by the CMA's award, the respondent moved the High Court, Labour Division vide Labour Revision No. 13 of 2019 to revise the CMA decision and she specifically prayed for payment of twenty (24) months' salary at the tune of TZS 108,965,568.00; compensation of TZS 36,312,856.00 as additional salaries for two (2) years and general damages at the tune of TZS 50,000,000.00. Upon hearing the parties, the High Court (Mwipopo, J) found that, although the respondent had valid reasons to terminate the applicant's employment, the retrenchment procedures were not complied with, thus procedurally unfair termination. On that basis, the learned High Court Judge quashed and set aside the CMA's award and ordered the applicant to pay the respondent twelve (12) months salaries as a compensation for the unfair termination. Dissatisfied, the applicant, on 7th May, 2020, lodged the notice of appeal to challenge the decision of the High Court. Meanwhile, the respondent, on 22nd October, 2021 approached the High Court, Labour Division at Dar es Salaam vide Execution Application No. 439 of 2021 seeking execution of the impugned decree. Subsequently, on 18th January, 2022, the applicant was served with the notice to show cause why the decree of the High Court should not be executed against her. The said notice also required the applicant to appear for hearing of the said application on 24th January, 2022. The notice prompted the applicant to lodge the current application on 21st January, 2021. When the application was placed before us for hearing, the applicant and the respondent were represented by Mr. Reginald Bernard Shirima and Ms. Bora Alfred Nicholaus, both learned counsel respectively. In support of the application, Mr. Shirima adopted the notice of motion as well as its accompanying affidavit. He then submitted that the applicant has fulfilled the mandatory requirements for grant of an application of this nature. To clarify, the learned counsel referred us to Rule 11(4) of the Rules and argued that the application was filed within the prescribed time as the applicant was served with the notice on 18th January, 2022 and lodged this application on 21st January, 2022 after 5 lapse of only three (3) days. He also referred us to paragraphs 2, 5 and 7 of the applicant's affidavit in support of the application

and stated that the applicant has attached all the necessary documents, such as; copies of impugned judgment and decree (annexture A1); a copy of the notice of appeal (annexture A2); and notice of execution (annexture A3) as required by Rule 11 (7) of the Rules. He further referred us to paragraph 10 (a) and (b) of the applicant's affidavit in support of the application and submitted that the applicant has also complied with two conditions stipulated under Rule 11

- (5) of the Rules as she had indicated the substantial loss which shall result into her if the order of stay is not granted. That, the applicant will be compelled to pay TZS 54,482,734.00 which will affect her activities of providing services to the community i.e health, water and sanitary. He added that, the said execution is in the form of attachment of applicant's motor vehicles, which if sold, will again, affect the applicant's services to the community. On the firm undertaking to furnish security for the due performance of the decree, Mr. Shirima referred us to paragraph 11 of the same affidavit and submitted that the applicant has undertaken to furnish bank guarantee of the decretal amount as will be ordered by the Court. That, the same will be deposited in Court within thirty (30) days 6 from the date of the Court's order. Finally, Mr. Shirima submitted that, since the applicant has complied with all the conditions and had already lodged the notice of appeal, this application should be granted pending the hearing and determination of the appeal. In response, Ms. Nicholaus submitted that the respondent is not opposing the application, but only insist that the security offered should be issued in accordance with the law. As such, she also prayed for the application to be granted. We have examined the notice of motion, the supporting affidavit and considered the oral arguments advanced by the learned counsel for the parties. Notwithstanding the respondent's concession to the application, we are still enjoined to determine as to whether the applicant has cumulatively complied with the conditions stipulated under Rule 11 of the Rules. For the sake of clarity, Rule 11 provides that: "11.- (1) to (3) [NA]
- (4) An application for stay o f execution shall be made within fourteen days o f service o f the notice o f execution on the applicant by the executing officer or from the date he is otherwise made aware o f the existence o f an application for execution; (4A) [NA]; 7
- (5) No order for stay o f execution shall be made under this rule unless the Court is satisfied that-
- (a) substantial loss may result to the party applying for stay o f execution unless the order is made;
- (b) security has been given by the applicant for the due performance o f such decree or order as may ultimately be binding upon him.
- (6) [NA]
- (7) An application for stay of execution shall be accompanied by copies o f the foilowing-

- (a) a notice of appeal;
- (b) a decree or order appealed from;
- (c) a judgment or ruling appealed from; and
- (d) a notice of the intended execution." It is evident from the record of the application that the applicant lodged this application on 21st January, 2022 well within the prescribed period of fourteen (14) days in terms of sub-rule (4) of Rule 11 above, as it was filed on the third day after being served with the notice of execution on 18th January, 2022. It is also noticeable that sub-rule (7) of Rule 11 above was fully complied with since the application is accompanied by mandatory copies of the notice of appeal, the High Court's judgment and decree appealed against and the notice of execution. 8 It is also evident that, to meet the requirement of sub-rule (5) (a) of Rule 11, the applicant had indicated under paragraph 10 (a) of the affidavit in support of application that, substantial loss shall result to the applicant if the order of stay is not granted as the applicant will be compelled to pay TZS 54,482,734.00 which will affect her capacity and activities of providing services to the community. In addition, the applicant under paragraph 10 (b) of the same affidavit, has as well deponed that, in the said execution, the respondent is seeking for orders of attachment and sale of the applicant's motor vehicles, which if sold, will again, affect the applicant's services to the community. In the circumstances, and taking into account that the respondent is not contesting this application, we are inclined to find that the applicant would be exposed to substantial loss should the impugned decree be executed. As for the requirement to furnish security in terms of sub-rule (5)
- (b) of Rule 11, we note the applicant's undertaking, under paragraph 11 of the affidavit in support of the application, to satisfy the impugned decree through bank guarantee which may ultimately be binding upon her. We take it as a sufficient undertaking to provide security for the due performance of the decree. See for instance our previous decisions in *Mantrac Tanzania Limited v. Raymond Costa*, Civil Application No. 11 of 2010 (unreported); *Joseph Antony Soares @ Goha v. Hussein Omary*, Civil Application No. 6 of 2012 [2013] TZCA 328: [8 May 2013: TANZLII]; *Junior Construction Company Limited & 2 Others v. Mantrac Tanzania Limited*, Civil Application No. 24/16 of 2021 [2021] TZCA 417: [26 August 2021: TANZLII] and *The Registered Trustees of the Chama cha Mapinduzi & 3 Others v. Mehboob Ibrahim Alibhai*, Civil Application No. 117/17 of 2018 [2021] TZCA 444: [26 August 2021: TANZLII]. In the final analysis, we are satisfied that the applicant has cumulatively complied with all the statutory conditions warranting the grant of the stay order. Accordingly, we grant the application and stay execution of the decree of the High Court of Tanzania, Labour Division at Dar es Salaam in Labour Revision No. 13 of 2019 dated 4th May, 2020 on condition that the applicant deposit in the Court, within thirty (30) days from the date of delivery of this ruling, a bank guarantee for the decreed sum of TZS 54,482,734.00. The said guarantee shall remain in force until full hearing and determination of the intended appeal. In default, the order of stay shall lapse automatically. Finally, and 10 considering the circumstances of this application, we make no order as to costs. It is so ordered. DATED at DAR ES SALAAM

this 20th day of July, 2023. F. L. K. WAMBALI JUSTICE OF APPEAL R. J. KEREFU JUSTICE OF APPEAL B. S. MASOUD JUSTICE OF APPEAL The Ruling delivered this 21th day of July, 2023 in the presence of Ms. Halima Semanda holding brief of Mr. Reginald Shirima, learned advocate for the applicant and Ms. Halima Semanda, learned counsel for the respondent is hereby certified as a true copy of the original G. H. HERBERT DEPUTY REGISTRAR COURT OF APPEAL 11

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