

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR-ES-SALAAM**

(CORAM: MWAMBEGELE, J.A., LEVIRA, J.A., And RUMANYIKA, J.A.)

CIVIL APPLICATION NO. 182/16 OF 2021

MS. FARHIA ABDULLAH NUR APPLICANT

VERSUS

ADVATECH OFFICE SUPPLIES LIMITED1ST RESPONDENT

BOLSTO SOLUTIONS LIMITED2ND RESPONDENT

**[Application for an Order of Stay of Execution of the Decree of the High
Court of Tanzania (Commercial Division) at Dar es Salaam]**

(Songoro, J.)

dated the 28th day of May, 2015

in

Commercial Case No. 167 of 2014

RULING OF THE COURT

16th & 31st August, 2022

LEVIRA, J.A.:

The applicant has moved the Court by way of notice of motion made under Rules 11 (3), (4), (5) (a) – (c), 11 (6), (7) (b), (c), (d) and 45 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules) to order stay of execution of the decree of the High Court of Tanzania, Commercial Division at Dar es Salaam (the High Court) in Commercial Case No. 167 of 2014 dated 28th May 2015. The notice of motion is supported by the applicant’s affidavit. In addition, the applicant has lodged written

submissions in support of the application. Initially, the first respondent opposed the application through affidavit in reply which she filed on 12th March, 2021. However, at the hearing of the application, Mr. Daud Ndossi, learned counsel who appeared on her behalf vacated the initial stance and supported the application save for the request for waiver of deposit of security for the due performance of the Decree of the High Court, subject of the present application as presented under paragraph thirty (30) of the supporting affidavit. The second respondent neither filed affidavit in reply nor appeared at the hearing despite being duly served. In the circumstances, in respect of the second respondent, Mr. Deogratias Lyimo Kiritta, learned advocate who appeared for the applicant moved the Court to proceed with the hearing of the application under Rule 63 (2) of the Rules, a prayer which was not contested by Mr. Ndossi and the same was granted by the Court.

Before we embark on the determination of the application on merit, we deem it apposite to trace its background so as to bring the present application into perspective and for appreciation of the instant decision. The available record depicts that the first respondent successfully sued the second respondent before the High Court in Commercial Case No. 167

of 2014. Her victory was a result of default judgment entered on 28th July, 2015 following failure of the second respondent to file her written statement of defence pursuant to Rule 22 (1) and (2) of the High Court (Commercial Division) Procedure Rules, G.N. 250 of 2012. The second respondent was thus ordered to pay her United States Dollars One Hundred Twenty-Five Thousand (US \$ 125,000.00); Tanzania Shillings Forty-Nine Million Five Hundred Fifty Thousand (TZS. 49,550.00); Commercial Interest at the rate of 14% per annum as from 2nd August, 2013 to the date of judgment; court interest at the rate of 7% per annum from the date of judgment to the date of full and final payment; general damages and costs of the suit as prayed by the first respondent.

In order to realise the fruits of her decree in terms of default judgment, the first respondent sought and was granted leave by the High Court to execute the decree against Ms. Farhia Abdullah Nur, (the applicant herein) who happened to be the Director and Company Secretary of the judgment debtor (the second respondent). As a result, the applicant was arrested on 14th June, 2016 and detained overnight at Central Police Station, Dar es Salaam and on the following day, she was brought before the High Court to show cause why she should not be

further detained as a civil prisoner in execution of the Judgment and Decree issued against the second respondent.

Her attempt to exonerate herself from liability on account that at the time of default judgment delivery, she was neither the Managing Director nor Company Secretary of the second respondent turned futile. The High Court ordered her to pay the decretal amount or to be detained at Ukonga Prison or any other prison as a civil prisoner. The applicant agreed to pay the judgment debt by issuing a post-dated cheque for USD 160,000.00 (United States Dollars One Hundred Sixty Thousand) only as security for the satisfaction of the decree and further issued six post-dated cheques for installment payments spread over a six-month period which were received by the counsel for the first respondent. Also, the applicant signed a Deed of Compromise incorporating the terms above as condition for her release from prison. She managed to pay the first instalment and was released from police custody.

However, she failed to continue making the agreed payments. Thus, on 13th September, 2016 she was again served with the notice to appear before the High Court to show cause why she should not be committed

to prison as a civil prisoner in consequence of an Application for Execution filed by the first respondent. The applicant was aggrieved and thus unsuccessfully lodged revision application before the Court and later filed an appeal to challenge the decision of the High Court; hence, the present application.

As intimated above, the only contentious matter in this application is in respect of waiver of the requirement for the applicant to deposit the security for the due performance of the decree under consideration. Before determining whether or not we should grant the applicant's prayer to that effect which is presented in alternative after the applicant's firm undertaking to deposit the security for due performance of the decree as may be ultimately be binding upon her as may be ordered by the Court, we shall screen the whole application.

In terms of Rule 11 (4) of the Rules, an application of stay of execution is required to be filed within fourteen (14) days from the date of service of the notice of execution on the applicant or from the date she is otherwise made aware of the existence of such application. The applicant in the current application was served with a notice of execution

on 16th April, 2021 and managed to lodge the present application on 28th April, 2021 well within the prescribed time above. It is worth noting that the applicant has been able to state categorically in the notice of motion and in paragraph 28 of the supporting affidavit how she is likely to suffer substantial loss in case the application is not granted as her freedom will be curtailed. In addition, at paragraph 29 of her affidavit she has stated that she is willing to furnish security for the due performance of the decree as may ultimately be binding upon her should the Court decline her prayer for waiver of the requirement to deposit security.

Further, upon perusal of the record, we are as well satisfied that the application has met the conditions set out under Rule 11 (7) of the Rules as it contains the applicant's notice of appeal, the impugned judgment and decree and the notice of intended execution. In the circumstances, we are satisfied that the application meets all the requirements under the law, in which case we now revert to consider the sole issue raised above.

Whether we should waive the requirement for the applicant to deposit security for due performance of the decree of the High Court. Mr.

Kiritta submitted that the applicant is not a judgment debtor in Commercial Case No. 167 of 2014 as she resigned from the Directorship of the second respondent before pronouncement of the impugned judgment and decree. He went on to state that the judgment debtor who is the second respondent is available and her offices are known. Therefore, she is the one who is required to be compelled to deposit the security.

According to him, it will be unjust for the applicant to be compelled to deposit security under the circumstances of this case. Nonetheless, he pointed out that the applicant shall comply with any other condition(s) as shall be fixed by the Court.

In reply, Mr. Mushi argued that the issue as regards the applicant's status in Land Case No. 167 of 2014 had already been determined by the Court in Civil Application No. 261/16 of 2017 where the applicant was found to be a party in the proceedings in Commercial Case No. 167 of 2014. Therefore, he argued that the applicant is a proper person to satisfy the decree as decided by the High Court. Consequently, he urged us to find that the reasons for waiver to deposit security advanced by the

applicant are irrelevant and order her to deposit security for due performance of the decree as may be ultimately be binding upon the second respondent.

Mr. Kiritta reiterated his submission in chief while making a rejoinder and argued that the applicant was not a party in Land Case No. 167 of 2014 that is why, she is not a judgment debtor.

We have carefully considered the rival arguments by the counsel for the parties. It is common knowledge that security is provided so as to protect the respondent from facing difficulties or impossibility of realising the decree in case the intended appeal fails. In **Africhick Hatchers Limited v. CRDB Bank Plc**, Civil Application No. 98 of 2016 (unreported) the Court stated the importance of security in the following terms:

"Of course, most important is the fact that the respondent should not find it difficult or impossible to realize the decree in case the intended appeal fails. This is the cornerstone of the requirement for security. In such circumstances, the Court is principally obliged to figure out whether or not any one particular mode of security vouchers risks on the part of the respondent."

In the light of the stated position above, we have considered circumstances of the present application and without encroaching into the merits of the intended appeal, we find it appropriate to purchase the applicant's disposition under paragraph twenty nine (29) of the supporting affidavit as a base of our order as we decline the extended invitation in the alternative disposition under paragraph thirty (30) of the supporting affidavit. In the said paragraph, the applicant stated categorically that she is willing to deposit the security for due performance of the decree as may ultimately be binding upon her as may be ordered by the Court.

We are aware that it is now settled that a firm undertaking by the applicant to furnish security as in the case herein is sufficient. In other words, it is not a must that cash deposit is effected in every case as insisted by the counsel for the first respondent in the present application. In the same vein and for protection of respondents' rights in case the applicant's intended appeal fails and having found that the application meets all the conditions for the grant of a stay of execution order, we grant it. Consequently, we order that execution of the decree of the High Court in Land Case No. 167 of 2014 be stayed pending hearing and final determination of the intended appeal. The order is conditional upon a

deposit in Court, by the applicant, of a bank guarantee of the decretal amount within thirty (30) days from the date of delivery of this ruling. Costs should abide the result of the intended appeal.

DATED at DAR ES SALAAM this 24th day of August, 2022.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

The Ruling delivered this 31st day of August, 2022 in the presence of Mr. David Ndossi, learned counsel for the 1st Respondent also holding brief for Mr. Deogratias J. Lyimo Kiritta, learned counsel for the Applicant and in the absence of the 2nd Respondent, is hereby certified as a true copy of the original.



C. M. Magesa
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DEPUTY REGISTRAR
COURT OF APPEAL