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

**CIVIL APPLICATION NO. 367/17 OF 2017**

**CRDB BANK PLC .....APPLICANT**

**VERSUS**

1. **FINN W. PETERSEN**
2. **MLIMANI FARMERS LIMITED**
3. **NOOR'S FARM LIMITED**
4. **ELIZABETH KALUNGA & DEBORAH KALUNGA Legal Person Representative of the Late LEOPARD KALUNGA**

**.....RESPONDENTS**

**(Application for extension of time to file an application for stay of execution of the judgment and decree of the High Court of Tanzania Land Division) at Dar es Salaam**

**(Mgaya, J)**

**dated the 26th day of August, 2016**
**in**
**Land Case No. 255 of 2006**

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## RULING

16th July & 9th August ,2018

**LILA, J.A.:**

This is an application for extension of time within which to lodge an application for stay of execution of the judgment and decree of the High Court of Tanzania, Land Division in Land Case No. 255 of 2006 dated 26/8/2016 (Mgaya, J. as she then was). The Application is predicated under Rule 10 of the Tanzania Court of Appeal Rules, 2009 (The Rules)

and is supported by an affidavit sworn by one Wilbrod Mwakipesile, learned counsel and Legal Services Manager with the applicant.

A thorough perusal of the Notice of Motion and the averments in the affidavit, two major grounds on which the application is based clearly comes out. The first one , as reflected in paragraphs 7, 8, 9 and 10 of the affidavit is that, in view of the decision of the Court in the Civil Application No. 229/2014 **Ahmed Mbaraka v Mwananchi Engineering Co. Ltd** (Mbaraka's case), which was delivered on 10/02/2016, filing of an application for stay of execution was no longer practical and necessary as filing of the appeal proceedings including notice of appeal, writing a letter to the Registrar High Court asking for proceedings and in this case filing of the application for leave to appeal, was sufficient to stay the execution of the decree of the High Court pending the determination of the said appeal. That such legal position obtained until when a ruling in respect of the application for execution filed by the respondent was delivered by the Registrar on 10/08/2017 to the effect that application for stay of execution must always be filed and the application granted as per decision of the Court in Civil Application No. 244/2017, **Tanzania**

**Bureau of Standard v Anita Kivera Maro** (TBS case) (unreported). The second ground, as per paragraphs 3 and 4 of the affidavit, is that the High Court decision is tainted with procedural irregularities in that no evidence was adduced to prove that the compensation was paid to the applicant and that the relief granted by the High Court differed from the pleaded ones. That while the prayers in the suit were against the 4th respondent who was the 1st defendant, the High Court decision is to the effect that all the then defendants (including the applicant) are jointly and severally liable.

In compliance with Rule 106 (1) and (2) as well as Rule 106 (8) of the Rules, the parties, except the 4th respondent, filed written submissions in support of the application and a reply thereof, respectively.

At the hearing of the application, the Applicant enjoyed the legal service of Mr. Deogratias Lyimo, learned Counsel, and the Respondents had the legal services of Mr. Michael Ngalo, learned Counsel. The counsels adopted their respective affidavit and written submission and the affidavit in reply and written submission, respectively as part of their submissions and had nothing to add.

Amplifying his reasons for this application in his written submissions, Mr. Lyimo reiterated the reasons stated in the affidavit supporting the motion. He insisted that the Court's decision in **Mbaraka's** case is to the effect that execution of the decree of the High Court should not proceed where the appeal process has been initiated. That execution is stayed until the appeal proceedings are finalized. It was for that reason, Mr. Lyimo contended, the Applicant did not apply for stay of execution in time.

Mr. Lyimo, further submitted that it was until the 10th August, 2017 when he learnt through another decision of this Court in TBS case that in the absence of the grant of stay of execution order by the Court, execution must proceed in the High Court. He submitted that it was on the basis of this decision and the 1st, 2nd and 3rd Respondents' threat to execute the decree, this application was promptly filed in Court on the 17th August, 2017. It is further submitted that, at the trial, the 1st, 2nd and 3rd respondents did not lead evidence to prove that the sum of Tshs 38,000,000.00 they claimed was paid and received by the applicant as

compensation when the right of Occupancy in respect of the farm owned by the 2nd respondent was revoked by the Tanzania Government.

To Mr. Shayo, the above reasons constituted good cause for the delay in lodging an application for stay of execution under Rule 10 of the Rules and the Court's decision in Civil Application No.12 of 2002, **BENEDICT MUMMELO Vs. BANK OF TANZANIA**. He accordingly prayed the Court to grant the application with costs.

In his written submission in reply, Mr. Ngalo reiterated that it is elementary and trite law that an application for stay of execution has to be lodged within a period of sixty days from the date the notice of appeal is lodged. That to succeed in this application the Applicant has to show good cause in terms of Rule 10 of the Court of Appeal Rules, 2009. He cited Civil Application No. 6 of 2001 **Tanga Cement Company Limited v Jumanne D. Masangwa and Amos A. Mwalandwa** and Civil Application No. 49 of 2009 between **Tanzania Ports Authority v Ms. Pembe Flour Mills Ltd** to cement his arguments.

It is Mr. Ngalo's position that in **Mbaraka's** case (supra) the Court did neither expressly nor impliedly bar execution of decrees where appeal proceedings are initiated. Instead, he said, it was a warning or advise to executing courts to be careful and diligent while authorizing execution of decrees where an appeal has been preferred. That it was not a *ratio decidendi* as was held in **TBS** case (supra).

It is Mr. Ngalo's further submission that the reason given in paragraph 7 of the affidavit in support of the motion is not a good reason and that the period between 7th November, 2016 and May 2017 is not accounted for. Mr. Ngalo further submitted that the applicant ought not to have waited until August 2017 to be aware that the decision in **Mbaraka's** case was an *orbiter dictum*. He insisted that the period between May 2017 and 17th August is also not accounted for. For those reasons, he urged the Court to dismiss the application with costs.

As shown above the application is brought under Rule 10 of the Rules which vests the Court with discretion to extend time upon good cause (sufficient reason) for delay being shown by the applicant. Although the discretion is wide and unfettered it has to be exercised judicially. There

must be material on which the Court can exercise its discretion. In other words there must be acceptable reasons explaining the delay and these depend on particular circumstances of each case.

After considering the contending submissions of both sides I am confronted with only one crucial issue for determination which is whether the applicant has shown good cause for extending time to file an application for stay of execution.

In the present application the applicant alleges reliance on the decision of the Court in **Mbaraka's** case (supra) which he understood to have had barred execution ones appeal process is initiated as his first reason of delay. As he had taken some steps towards appealing by filing a notice of appeal and seeking leave to appeal, he believed that there was no need to apply for stay of execution. The respondent opposes the application on the ground that the Court's observation in **Mbaraka's** case (supra) was an *orbiter dictum*.

In order to appreciate the gist of the parties contention in respect of the Court's decision in **Mbaraka's** case (supra), I find it apposite to

quote the relevant part of the decision which is found at page 7 of that decision. It states that:-

> *"At the same time we warn the officers responsible for allowing the execution of decrees to comply with the law before authorizing execution to take place. We also recommend to the Rules Committee to harmonize article 13(6)(a) of the Constitution with Rule 11 (2)(b) of the Court of Appeal Rules".*
>
> *"The fear expressed by Mr. Kalolo is sound but can be controlled by good supervision of those entrusted with the duty of filing the documents for execution and the one signing the documents authorizing execution. The Constitution is clear that any litigant is entitled to right of appeal. The Constitution is supreme. This means that the officer signing the order authorizing the execution to be carried out must comply with the provisions of the law.* ***He/she must ensure that before signing the documents authorizing execution to be carried out, there is either no appeal pending, or none of the parties has initiated the appeal process,*** **or where the process was initiated, there is negligence by the party in making a follow up**. *We are sure if there is diligence in the whole process of applying for the documents necessary for pursuing the*

*appeal, the supply of the same to the intending appellant and careful perusal of the court record before granting an application for execution where an appeal is in the process the likelihood of dubious means in the execution of the decree will be ruled out".* (Emphasis added)

That holding was a subject of discussion in the case of **TBS** case (supra). That case was an application for stay of execution and by the time that application was lodged the applicant had already initiated the appeal process by lodging a notice of appeal and an application for leave to appeal to the Court. In the course of his submission in that case Mr. Mwitasi, learned Senior State Attorney, is recorded to have had stated that:-

*"Mr. Mwitasi also cited of this Court in the case of* ***Ahmed Mbaraka v. Mwananchi Engineering and Contracting Co. Ltd,*** *Civil Application No. 229 of 2014 (unreported), where he said that the Court interpreted the applicability and constitutionality of Rule 11(2) (b) and (c) of the Rules to mean that the executing court should not proceed with execution if there is a pending appeal on the same matter. He further submitted that, the Court went further to access the*

*constitutionality of Rule 11(2) (b) of the Rules which if it is allowed to be used as it stands, the same deprives the real meaning of the right of appeal as provide under article 13(6) of the Constitution of the united Republic of Tanzania."*

After considering the Learned Senior State Attorney's submission, the Court stated that:-

*"Looking at all the authorities relied upon by Mr, Mwitasi,* ***we have found that with the exception of the case of Ahmed Mbarak (supra) all the remaining cases were in support of the position of granting an order of stay of execution before the coming into force of the Court of Appeal Rules, 2009.*** *Whereas looking at the case of* ***Ahmed Mbarak*** *(supra), the court seems to have just recommended by stating that:-*

> ***"We also commended*** *to the Rules committee to harmonize article 13 (6) (a) of the constitution with Rule 11(2) (b) of the Court of Appeal Rules."*
> *(Emphasis added).*

> *At the time this Ruling of the Court was composed, our research found that the recommended harmonization was yet to be made.* ***After all, we have found that observation made in the case of Ahmed Mbarak (supra) cited by Mr. Mwitasi was a mere orbiter dictum."*** *(Emphasis added)*

I have deliberately taken pain to reproduce the relevant parts of the decisions under discussion not without a purpose. From the wording of the quoted parts of the two decisions, what comes out clearly from Mr. Mwitasi's submission is that it was his firm understanding that in **Mbaraka's** case the Court barred execution when the appeal process has been initiated by lodging of a notice of appeal. In my view, his view was a justified one. Even looking at the wording of the Court's decision, it is apparent that the Court indirectly agreed with him when it treated that decision (**Mbaraka's** case) as an exception. Well, it was an *orbiter dictum* but being a pronouncement of the Court, the highest Court of the land, whoever read that decision would not take it lightly. Similarly, the applicant cannot be blamed for relying on such decision and hence not applying for stay of execution within time. I, therefore find myself

constrained to agree with Mr. Shayo that, upon reading that decision (**Mbaraka's** case), the impression one gets is that where appeal process is initiated the execution proceedings should not be commenced. That decision had a binding nature until when the Court made it clear in **TBS** case (supra) that the above statement was a mere *orbiter dictum* and that the legal position remained to be that unless stay of execution is sought and granted by the Court execution at the High Court will proceed.

The record speaks it all that the decision in **TBS c**ase (supra) was pronounced on 27/5/2017 while the present application was lodged on 17/8/2017 just about two and a half months thereafter and just 7 days from the date the Registrar delivered his ruling 10/8/2017. I find the applicant to have had acted promptly in filing the present application upon knowing the legal position obtaining to the grant of applications of this nature hence complying with the legal requirement that such applications must be filed without delay. (See **Wambele Mtumwa**

**Shahame Vs. Mohamed Hamis**, Civil Application No.138 of 2016 (unreported).

In my considered view, the above reason amounts to good cause for the delay to file an application for stay of execution within time. It sufficiently disposes the application. I therefore see no reason to consider the other reason.

For the foregoing reason, the application is hereby granted. No order for costs.

**DATED** at **DAR ES SALAAM** this 3rd day of August, 2018

S. A. LILA
**JUSTICE OF APPEAL**

I certify that this is a true copy of the original


A. H. Msumi
**DEPUTY REGISTRAR**
**COURT OF APPEAL**