IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MUGASHA, J.A., NDIKA, J.A., And KWARIKO, J.A.)

CIVIL APPLICATION NO. 417/18/2018

CMA CGM TANZANIA LTD ..... APPLICANT

VERSUS

JUSTINE BARUTI ..... RESPONDENT

(Application for stay of execution of the judgement and decree of the High Court of Tanzania, Labour Division at Dar es Salaam)

(Mashaka, J.)

dated the 23rd day of May, 2018

in

Revision No. 28 of 2016

.....

RULING OF THE COURT

18th & 28th February, 2019

NDIKA, J.A.:

The applicant, Messrs. CMA CGM Tanzania Ltd., has applied by a notice of motion taken out under Rule 11 (3), (4), (5) (a) and (c), and (7) (a) – (d) of the Tanzania Court of Appeal Rules, 2009 (the Rules) as amended by the Tanzania Court of Appeal (Amendment) Rules, 2017 for a stay of execution of the judgment and decree of the High Court of Tanzania, Labour Division at Dar es Salaam dated 23rd May, 2018. The decree was issued in favour of the respondent, Justine Baruti. The application is supported by an affidavit deposed by the applicant's Claims

Manager, one Focus Issango. In resisting the applicant's pursuit, the respondent lodged his affidavit in reply.

The background facts giving rise to the judgment and decree sought to be stayed, as per the supporting affidavit and the reply thereto, are very brief. The respondent was an employee of the applicant until 8th September, 2015 when his employment was terminated. Being aggrieved by the termination, the respondent referred the matter to the Commission for Mediation and Arbitration (CMA). The CMA arbitrator, having found that the termination was unfair, issued an award dated 25th November, 2016 by which the applicant was ordered to pay the respondent compensation in the form of twelve months' salaries, severance pay, one month's salary and one year leave emolument. Dissatisfied, the applicant moved the High Court, Labour Division for revision of the award on three grounds. The court found no merit in the revision, which, it eventually dismissed on 23rd May, 2018.

In the wake of the dismissal, the applicant manifested its intention to appeal to this Court by filing in time a notice of appeal on 1st June, 2018. Meanwhile, the respondent approached the High Court, Labour Division at Tanga seeking execution of the decree by way of a garnishee order against

the applicant's bank account No. 0403925002 at Diamond Trust Bank Limited, Mosque Branch, Dar es Salaam for the sum of TZS. 216,473,161.00. Having been served with the application for execution on 6th September, 2018, the applicant lodged the present application five days later (that is, on 11th September, 2018).

At the hearing of this matter on 18th February, 2019, Mr. Mashaka Ngole, learned counsel for the respondent, raised a point *in limine* a notice of which he had filed on 1st October, 2018:

> *"That, the application for stay of execution before the Court being preferred against the decree of the High Court of Tanzania issued on 23rd May, 2018 in Revision No. 28 of 2016, then the application for stay of execution is incompetent for being preferred against unexecutable decree."*

The thrust of Mr. Ngole's argument as expounded in the written submissions that he had lodged in advance and then highlighted before us is that the impugned decree of the High Court is inexecutable because it awards no executable right to the respondent beyond the mere pronouncement that the applicant's revision was dismissed for want of merit. The only executable instrument in the matter, he added, was the

award issued by the CMA's arbitrator as it confers on the respondent a right to compensation. Citing Rule 11 (3), (4) and (7) of the Rules, as amended by the Tanzania Court of Appeal (Amendment) Rules, 2017, Counsel contended that the Court is vested with the power to stay execution of a decree or order of the High Court which is the subject of an appeal or revision to the Court only. In the premises, he submitted that the Court had no jurisdiction under Rule 11 to stay a decree or order of a court or tribunal other than that of the High Court.

Bolstering his submission on inexecutability of the decree at hand, Mr. Ngole relied on the authority of the unreported decision of the Court in **Patel Trading Co. (1961) Limited & Another v. Bakari Omary Wema t/a Sisi kwa Sisi Panel Beating Enterprises Ltd.,** Civil Application No. 19 of 2014. In that decision, the Court referred to its earlier decision in **Athanas Albert and Four Others v. Tumaini University College Iringa** [2001] TLR 63 where it held, inter alia, that:

> *"A stay of execution can properly be asked for where there is a court order granting a right to the respondent, or commanding or directing him to do something that affects the applicant."*

The Court, then, went on in **Patel Trading Co. (1961) Limited & Another** (supra) to hold that:

> *"... the decision of the High Court was not capable of being executed because it was merely a* ***dismissal order. On the basis of the dismissal order of the High Court, the parties' positions reverted to the same status quo as they were before the appeal.****"*[Emphasis added]

Concluding, Mr. Ngole urged us to find the application misconceived and proceed to strike it out with costs as we did in **Patel Trading Co. (1961) Limited & Another** (supra).

Conversely, while Dr. Wilbert Kapinga, learned counsel for the applicant, conceded to the statement of the law as argued by his learned friend on the authorities cited, he disagreed that the impugned decree was inexecutable. Referring to the copy of the impugned decree on the record, Dr. Kapinga boldly contended that the said decree explicitly indicates that the High Court went beyond merely dismissing the applicant's revision; it enjoins the applicant either to reinstate the respondent into his previous position of employment or to pay compensation in the form of salaries and other benefits in lieu of reinstatement.

Having dispassionately considered the competing learned submissions, we wish, at first, to express our agreement with the counsel's concurrence, on the authorities cited to us, that a decree is executable if it grants a right to the decree-holder as against the judgment-debtor and that a decree that purely expresses no more than an order of dismissal would be incapable of being executed. All the same, then, as the parties have crossed swords on whether or not the decree at hand is executable it behooves the Court to examine the said decree and determine its executability.

To resolve the above issue, we think it is necessary to extract from the impugned decree its operative part:

> "**DECREE**
>
> [Preambular part omitted]
>
> **AND UPON** the Judgment delivered on this 23rd day of May, 2018:
>
> **THE COURT DOTH HEREBY ORDER THAT**
>
> 1. Application for revision is dismissed for lack of merit.
> 2. The applicant has an option to reinstate the respondent under section 40 (1) (a) of the Employment and Labour Relations Act, No. 6 of 2004 or to pay compensation of 12 months' wages in addition to wages due and other benefits from the date of unfair

termination to the date of final payment under section 40 (3) of the same Act No. 6 of 2004.

IT IS SO ORDERED

Given under my hand and the seal of the Court on this 23rd day of May, 2018.

(Signed)

L.L. Mashaka

JUDGE"

We think the impugned decree, as excerpted above, speaks for itself. Apart from expressing the dismissal of the application for revision for want of merit, it explicitly commands the applicant **either** to reinstate the respondent into his position of employment **or** to pay compensation in the form of salaries and other benefits from the date of unfair termination to the date of final payment. These alternative rights to reinstatement and to compensation granted to the respondent against the applicant are, by any yardstick, executable rights. With respect, we have no difficulty in finding no merit in the respondent's point *in limine*. It stands dismissed.

The foregoing outcome leads us to the determination of the merits of the substantive application.

As indicated earlier, this application was prompted by the respondent's application for execution of the decree by way of garnishee order against the applicant's bank account for the sum of TZS.

216,473,161.00. It was duly lodged on 11th September, 2018, five days after the applicant had been served with the application for execution. The present quest is grounded upon six grounds stated in the notice of motion and elaborated in the supporting affidavit. The said grounds are, briefly, as follows: **one**, that if stay of execution is not granted, the applicant will suffer substantial loss as the decree was given in favour of the respondent who is no longer employed and has no other means of refunding the decretal sum, clearly a colossal amount of money, in case the intended appeal is decided against him. **Two**, that the High Court in the aforesaid revision upheld the decision of the CMA which entertained a dispute that was time-barred and therefore it had no jurisdiction to take cognizance of the matter. **Three**, that both decisions of the CMA and the High Court are unreasonable. **Four**, that the application for execution filed and served on the application was filed by a stranger, one Justine Steven Baruti, not the present respondent, Justine Baruti. **Five**, that the present application has been made without unreasonable delay. And **finally**, that the applicant has given security in the form of a bank performance guarantee for the due performance of the decree as may be ultimately binding upon it and that it undertakes additionally to deposit with the Court such amount as the Court may order pending final determination of the appeal.

Before us, Dr. Kapinga was very brief. He urged us to grant the application on the strength of the notice of motion, the supporting affidavit and the written submissions he had filed on behalf of the applicant. On the adversary side, Mr. Ngole was at pains to poke holes into the bank guarantee dated 10th September, 2018 given by the applicant (Annexure F1-6 to the supporting affidavit) for due performance of the decree. Apart from the fact that the said guarantee was set to expire on 9th March, 2019, Mr. Ngole was concerned that the guarantee wrongly indicates an undertaking to pay the decretal sum to the Court instead of the respondent in event that the applicant's intended appeal fails. However, on being probed by the Court on the legal sufficiency and merits of the application, Mr. Ngole conceded that the application fully complied with the cumulative conditions for the grant of stay of execution, one of which being an undertaking to furnish security for the due performance of the decree.

In a brief rejoinder, Dr. Kapinga allayed the respondent's fears, submitting that the bank guarantee given by the applicant was rightly worded that the decretal sum would be paid to the Court upon demand should the intended appeal fail. The Court will then release the money to the respondent.

Having keenly considered the learned contending arguments and taken due account of the notice of motion, the supporting affidavit as well as the reply thereto, we wish to begin our determination of the matter by expressing the obvious that execution of a decree can only be stayed if the cumulative conditions stated under Rule 11 (5) (a), (b) and (c) of the Rules, as amended, have been satisfied. These conditions are: first, that it must be demonstrated that substantial loss may result to a party applying for stay of execution unless the order is made; secondly, that the application must have been made without delay; and thirdly, that security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him.

On the basis of the notice of motion, the accompanying affidavit, the written submissions and oral arguments, it is common cause that, in the instant matter, the above conditions have been cumulatively satisfied. It is not in dispute that the applicant duly lodged a notice of appeal on 1st June, 2018 in compliance with Rule 83 (2) of the Rules, which requires such notice to be lodged within 30 days of the date of the decision sought to be appealed against. The applicant, having been served with the application for execution on 6th September, 2018, duly lodged the present application on 11th September, 2018, in compliance with Rule 11 (4) of the Rules,

prescribing a fourteen days' limitation for applying for a stay of execution following being served with an application for execution or otherwise becoming aware of such an application for execution. Furthermore, it is uncontroverted that if the intended execution is not stayed and the colossal amount of money paid by the applicant to the respondent, the latter may not have the financial wherewithal for refunding the money to the former should the appeal be decided against him. The applicant has, therefore, sufficiently demonstrated that it will suffer substantial loss if the application is not granted. As regards security, it is on the record that the applicant has not only furnished a bank guarantee for the decretal sum of TZS. 216,473,161.00 but also undertaken to deposit with the Court any such amount of money as the Court may order pending final determination of the appeal. Even though the bank guarantee given is due to expire in a bit on 9th March, 2019 obviously before the intended appeal is finalized, the applicant has satisfied the requirement under Rule 11 (5) (c) of the Rules by undertaking to furnish additional security as may be ordered by the Court – see, for instance, **Mantrac Tanzania Limited v. Raymond Costa**, Civil Application No. 11 of 2010 (unreported).

In the upshot, we are minded to grant this application, as we hereby do, with an order that the execution of the impugned decree of the High

Court be stayed pending the hearing and determination of the applicant's intended appeal in this Court. Taking into account that the bank guarantee already furnished by the applicant is due to expire before long on 9th March, 2019, we order the applicant to deposit an unconditional bank guarantee covering the whole decretal amount within thirty days reckoned from the date of the delivery of this ruling. Costs incidental to this application shall follow the event in the intended appeal.

It is so ordered.

DATED at **DAR ES SALAAM** this 25th day of February, 2019

S. E. A. MUGASHA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

I certify that this is a true copy of the original

S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL