

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CIVIL APPLICATION NO. 257/01 OF 2024

ERIC RICHARD SUMA.....1ST APPLICANT

ERIC RICHARD SUMA

(As a Personal Legal Representative of

late RICHARD SUMA, the deceased).....2ND APPLICANT

THE EXCESS CONSTRUCTIONS LIMITED.....3RD APPLICANT

VERSUS

DPI SIMBA LIMITED.....1ST RESPONDENT

MS JESCA MASSAWE T/A

J.J. AUCTION MART LIMITED.....2ND RESPONDENT

**(Application for the stay of execution of the decision of the High Court of
Tanzania, District Registry at Dar es Salaam)**

(Mruma, J.)

dated the 22nd day of August, 2022

in

Civil Case No. 178 of 2018

.....

RULING

24th June & 11th July, 2024

MURUKE, J.A.:

First respondent DPI SIMBA LIMITED, instituted a suit against the three applicants claiming against them jointly and severally for the payments of Tshs. 289,339,470.00 together with interest at the rate of 2% per month as per 31st August 2018, to the tune of Tshs. 198,168,810.00 being the outstanding debt on the goods (UPVC and HDPE pipes) supplied as per

agreement. Equally so, the first respondent also claimed further interest over the decretal sum at the bank rate of 24% from 22nd December 2016 to the date of judgement, interest at court rate of 12% from the date of judgment to the date of final payment, general damages and costs of the suit.

When the suit came for hearing before trial judge on 25th April 2022, applicants admitted the claim of principal sum of Tshs. 289,338,470.41, but disputed the interest, thus the trial court entered judgment on admission and directed counsel for the parties to address it on the issue of interest. Upon hearing parties on the issue of interest, trial court entered judgement in favor of the 1st respondent to be paid: **One**, interest of 20% per annum on the decretal sum chargeable from the date of filing the suit to the date of judgment. **Two**, interest at court rate of 7% per annum from the date of judgment to the date of full payment of the decretal sum.

The judgment by trial court on issues of interest was grounded on 22nd August 2022, in the presence of Mr. Said Nyawambura, for the 1st respondent and Mr. Flavian A. John for the applicants. To the date of this ruling only sum of Tshs.189,500,000.00 has been paid out of Tshs.289,339,470.00 amount of judgment on admission, leaving balance of Tshs.99,839,470.00

subject of executions plus interest awarded on 22nd August 2022, by trial judge.

After several efforts by the 1st respondent, being assisted by the 2nd respondent to execute the decree dated 25th April 2022 on principal sum and that of 22nd August 2022 on interest at the High Court, applicants filed present application for stay of execution on 18th April 2024. Upon being served with an application for stay of execution, first respondent apart from filling affidavit in reply, also filed notice of preliminary objection to the effect that the application for stay of execution is time barred.

On the date set for hearing of the preliminary objection, Mr. Alex Balomi and Shukran Mzikila both learned counsel, represented applicants and first respondent respectively. 2nd respondent counsel who was present on 17th May 2024, when the application was set for hearing, absented herself, thus, Court proceed with hearing of the preliminary objection raised by first respondent.

Mr. Mzikila submitted briefly on the preliminary objections that, application is time barred, in terms of rule 11(4) of the Tanzania Court of Appeal Rules 2009, that put clearly that application for stay of execution must be filed within 14 days from when the applicant served with notice of

execution or become aware of the execution proceedings. Applicants have stated at paragraph 10 and 14 of the affidavit in support of the application that they became aware of execution proceedings on 7th February 2024, on the date of proclamation of sale, it is not correct. Order for execution was issued on the 30th June 2023, there after applicants managed to file several applications one of them was objection proceedings filed by Irene Richard Suma against the applicants who were respondents in Misc. Civil application No. 548/2023, before Honorable Kakolaki, J., at the High Court. In that application Irene Richard Suma was being represented by the same counsel advocate Balomi, while the present applicants were the respondents. Obviously, the applicant had an opportunity to come to this Court to file application for stay of execution, because Irene Richard Suma application issue was on sale of property on plot no. 972, Mbezi-Kawe Kinondoni municipality title no 48967, to satisfy decree subject of stay of execution before this court today. Execution is ongoing, because same has not been withdrawn since June 2023, insisted Mr. Mzikila.

In response, Mr. Balomi submitted that objection is misconceived. First respondent has not satisfied requirements of serving the applicants. Application for execution was filed on 18th April 2023. Allegation of proof of

service at paragraph 10 of affidavit in support of the application is not contested, basing on affidavit in reply from paragraph 1-19. Applicant lodged application on 18th April 2024, same was timely lodged. Submission by 1st respondent counsel that applicant became aware since 30th June 2023 is mere words there is no proof of any documentary evidence. Affidavit being substitute to oral evidence, cannot be ignored and rely on oral submission by 1st respondent counsel. Mr. Balomi concluded that preliminary objection lacks merits.

In rejoinder Mr. Mzikila apart from adopting his submission in chief, he further submitted that, replying affidavit at paragraph 7 speaks loudly while relaying on a ruling of Hon Kakolaki, J, in which Mr. Balomi represented first applicant mother (Irene Richard Suma), while applicants together with the rest of the respondents were both respondents. On further account Mr. Mzikila insisted that paragraph 10 of applicants' affidavit has been contested by paragraph 9 of affidavit in reply. Application is out of time, that need to be dismissed upon upholding preliminary objection raised by the 1st respondent.

Having heard both parties counsel, gone through the records, issue for determination is whether applicants became aware of the execution

proceedings vide Misc. Civil Application No. 548 of 2023 of the High Court. According to the records following issues are not in dispute: **One**, existence of Misc. Civil Application No. 548 of 2023 at the High Court. **Two**, in Misc. Civil Application No. 548/2023 was on objection proceedings by Irene Richard Suma (1st applicant mother) following execution application no 25/2023 on decree of honorable Mruma, J. dated 22nd August 2022. **Three**, in that application, applicants were registered as 1st, 2nd and 4th respondents, whereas, the 1st respondent in the present application was the 3rd respondent and 2nd respondent was the 5th respondent. **Four**, in that application objection was raised that objection proceedings were filed out of time by the current first respondent then 3rd respondent, which was sustained by Honourable Kakolaki J. **Five**, the ruling dismissing Irene Richard Suma application on 10th November 2023 ,was delivered in the presence of Mr. Erick Richard Suma in person as 2nd respondent, director to 4th respondent and personal legal representative to the 1st respondent, who are all applicants in the present application.

Having outlined undisputed issues, it is worth noting that, 1st applicant Eric Richard Suma fully participated in Misc. Civil Application No. 548 of 2023

on his own and on behalf of 2nd and 3rd applicants as seen at page 5 last line to page 6 line 1-3 of the ruling by Honorable Kakolaki, J. when said:

"on his part, the 2nd respondent who also appeared as representative for the 1st and 4th representative resisted the submission by the 3^d respondent when opted to adopt and support the submission by the applicant as part of his submission".

From the above, reproduced part of the ruling, it is clear that, applicants were all along with Irene Richard Suma in prosecuting objection proceedings Misc. Civil Application No. 548 of 2023, thus aware of the execution proceedings. On further account as to the involvement of applicants in Misc. Civil Application No. 548 of 2023, Hon Kakolaki, J., at page 10 of the ruling reasoned that: The order of this Court dated 22 August, 2022 in Civil Case No. 178 of 218, subject of the pending execution proceedings in Execution No. 25 of 2023 in which this application emanates from, is pleaded and annexed as annexure 'B' to paragraph 3 of the applicant's affidavit, hence part of the pleading in which this Court is entitled to make reference to for clarity paragraph 3 of the applicant's affidavit reads:

"That, am made to understand that, there is the said pending execution proceedings fixed for necessary orders on the 21st September, 2023 before Hon. Luambano, the Registrar in this Court and is now due for execution by way of attachment and sale in order to satisfy the purported Drawn Order dated 22 day of August, 2022 by Hon. Mruma, J.

Copies of the said Drawn Order and the Application for execution are annexed hereto and collectively marked Annex 'B' to be read as forming part of my affidavit.

Again, at page 11, 1st paragraph when court answering to the issue as to when Irene Richard Suma became aware of execution proceeding, High Court Judge answered that:

"this court is satisfied and therefore arrive to the finding that, it was before 30th June 2023".

At page 13 of the ruling Honorable Kakolaki, J., he said:

"in view of the above fact this court is satisfied that, time for filing the application of this nature started to run from 30th June 2023 when the 1st application challenging the

execution order was presented for filling in court and therefore 60 days were to lapse on 29th August 2023.

Now, reckoning from 30th June 2023, when the applicant became aware of the execution order and presented the 1st application for filling which was withdrawn later on, to the date when this application was filed on 29th September 2023, it is almost 90 days passed. I therefore agree with the counsel for the 3rd respondent and uphold the 1st preliminary objection in that this application was filed outside the prescribed time limitation of 60 days as provided under item 21 of part III to the LLA".

From reproduced part of High Court ruling above, proves that applicants were aware of the proceedings of execution since 30th June 2023. It is thus surprising Eric Richard Suma, the first applicant who also represent 2nd and 3rd applicants to swear an affidavit to the effect that they became aware of the execution proceedings on 16 day of April 2024. It is a total lie while on oath. Applicants became aware of the proceedings from 30th June 2023. Thus 14 days within which to file application for stay of execution in

terms of rule 11(4) of Tanzania High Court Rules 2009, elapsed on 14th July 2023. Present application being filed on 18th April 2024, is extremely out of time. Thus, preliminary objection by the first respondent is upheld. Application is thus struck out with costs.

DATED at DAR ES SALAAM this 11th day of July, 2024.

Z. G. MURUKE
JUSTICE OF APPEAL

The Ruling delivered this 11th day of July, 2024 in the presence of the Mr. Alex Balomi, learned counsel for the applicants also holding brief for the Ms. Josephine Ndelike, learned counsel for the 2nd respondent and Mr. Shukran Mzikila, learned counsel for the 1st respondent, is hereby certified as a true copy of the original.



A. S. Chugulu
A. S. CHUGULU
DEPUTY REGISTRAR
COURT OF APPEAL