

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

CIVIL APPLICATION NO. 118 "A" OF 2005

TANZANIA ELECTRIC SUPPLY CO. LTD. APPLICANT
VERSUS
ISRAEL KWAYU RESPONDENT

(Application for Stay of Execution from the decision
of the High Court of Tanzania – Land Division
at Dar es Salaam)

(Kileo, J.)

dated the 1st day of July, 2005
in
Land Case No. 73 of 2004

4 April & 5 May 2006

R U L I N G

NSEKELA, J.A.:

There is before me an application by way of notice of motion
seeking from the Court, *inter alia*, the following order –

"to stay execution of the decree of Land Case
No. 73 of 2004 be stayed until the appeal of
the applicant is determined by this
Honourable Court. This is on the ground that
the applicant will suffer irreparable loss if the
decree is executed and the applicant wins the
appeal."

In Land Case No. 73 of 2004, the applicant, Tanzania Electric Supply Co. Ltd., was the 1st defendant and the plaintiff was one Israel Kwayu (now respondent). The High Court (Kileo, J.) ordered the applicant to pay to the respondent the sum of Shs. 43,807,900/= as special damages and Shs. 25,000,000/= as general damages plus accrued interest. In paragraph 7 of the affidavit in support of the application, the deponent has essentially advanced three reasons for seeking a stay order. Paragraph 7 (1) of Mr. Johnson's affidavit in support reads as under –

"That the execution of the decree will seriously affect the cash flow of the respondent. This will in turn affect the delivery of the services to the respondent's customers."

The second circumstance advanced by Mr. Johnson is that the intended appeal has a high chance of success, as he put it. In his affidavit he stated that the grounds of appeal are very strong! And lastly, Mr. Johnson averred that if the decretal amount is paid in

execution of the decree, the respondent will not be able to repay the amount in the event the intended appeal is successful. The learned advocate submitted that there is no way the respondent can refund the decretal amount. On the other hand, he added, that the applicant is an established corporation and will be able to pay to the respondent the decretal sum. To bolster up his case, the learned advocate cited (CAT) Civil Application No. 106 of 2004, **Tanzania Railways Corporation v. Mrs. Augusta Upendo Rweyemamu** (unreported).

Mr. Uronu, learned advocate for the respondent, filed a counter-affidavit. Paragraph 2, is in the following terms –

“That I have carefully read the affidavit filed in support of the application. This affidavit does not contain any good ground for depriving the respondent from reaping the fruits of his judgment. In brief, this said affidavit does not disclose any substantial and/or irreparable loss to be suffered by the applicant if stay is not granted. Furthermore,

there is no material furnished to the Court to show that the appeal has a chance to succeed and/or that the respondent will be unable to compensate the applicant in the event the appeal succeeds."

By way of elaboration, Mr. Uronu submitted that the main issue was whether or not the applicant will suffer substantial and irreparable loss which cannot be compensated by payment of damages. The learned advocate submitted that the applicant has not disclosed the substantial and irreparable loss. The anchor of his submission on this point was the case of **Tanzania Cotton Marketing Board v. Cogecot Cotton Co. S.A.** (1997) TLR 63 which held, *inter alia*, that unless details and particulars of the loss are specified, there would be no basis upon which the Court could satisfy itself that such loss would be incurred.

The applicant has not in any way specified how seriously its cash flow will be affected and how delivery of services will be affected as well. No such details have been made available to the Court. In the absence of details the Court is without any basis upon

which to satisfy itself on how the applicant's cash flow will be affected and its impact on the delivery of its services.

I now come to the question as to whether or not the intended appeal has great chances of success since the grounds of appeal are very strong. In Civil Application No. 117 of 2001, **The University of Dar-es-Salaam v. Richard Kajuna Muzo** (unreported), a single Judge of this Court (Lubuwa, J.A.) made the following pertinent observations –

“On a number of occasions, this Court has held that one of the circumstances in which stay of execution is granted is a situation where on the face of the record, prima facie, the appeal stands reasonable chances of success. It is however, not in every case or situation that it is apparent on the face of the record that it can with certainty be stated that the appeal has great chances of success. Depending on the facts and circumstances, the picture crystallizes later when arguments for both parties are heard. It is however not

in every case or situation that it is apparent on the face of the record that it can with any certainty be stated that the appeal has great chances of success. It is however possible in certain situations on the face of the record to gauge the prospects of the appeal on the face of the record. For instance, where from the record it is shown that the law was wrongly used or misplaced, or that there was lack of jurisdiction it is possible to gauge the chances of success on appeal."

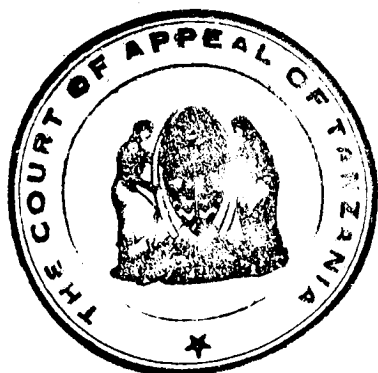
With respect, I would like to associate myself with these views. The applicant has alleged that there are very strong grounds of appeal. However, the applicant has not disclosed before the Court a draft memorandum of appeal to that effect. There is therefore no way the Court can hazard an informed opinion as to whether or not the applicant has great chances of succeeding in the intended appeal. The applicant has not therefore demonstrated that the intended appeal has **prima facie** likelihood of success.

I must confess however that I am not sufficiently assured of the respondent's ability to repay, but this should not deprive the respondent the fruits of his litigation. However the applicant is an established company in the country and will be able to satisfy whatever judgment that may be given against it if the appeal does not succeed. Therefore common sense dictates that in order to ensure that the applicant does not suffer loss should the appeal succeed, I will grant the application; and in order to assure the satisfaction of the judgment should the appeal fail, I will predicate the stay on security. I therefore allow the application and execution of the decree is stayed provided the applicant deposits in court the sum of Shs. 20,000,000/= (twenty million) only within thirty (30) days from the date hereof. Costs will be in the cause.

DATED at DAR ES SALAAM this 3rd day of May, 2006.

H.R. NSEKELA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.



(S.A.N. WAMBURA)
SENIOR DEPUTY REGISTRAR