(CORAM:- RAMADHANI, J.A.)

VIL APPLICATION NO. 19 OF 1993

BETWEEN

1. TRANSPORT EQUIPMENT LTD. . . . .1ST APPLICANT
2. REGINALD JOHN NOLAN. . . . . .2ND APPLICANT

AND

DEVRAM P. VALAMBHIA. . . . . RESPONDENT

(Application for Stay of the Execution of the Order of Arrest and Detention issued by the High Court of Tanzania at D'Salaam)

(Msumi, J.)

dated the 13th day of April, 1993

in

H/Court Civil Case No. 210 of 1989

R U L I N G

RAMADHANI, J.A.:

This is yet another litigation between Transport Equipmen Ltd. (T.E.L.) and Devram P. Valambhia. This time, however, the Managing Director of T.E.L., one Reginald John Nolan, is also a party.

Valambhia succeeded in securing the execution of his multi million dollar exparte award by the civil imprisonment of Nolan for six months. Nolan is now the second applicant in these proceedings and is seeking to stay the execution of the remaining part of those six months pending his appeal against that imprisonment order by MSUMI, J.

It is better, I believe, to preface this ruling with certain bits of information. At the beginning of hearing this application I told the learned advocates of both parties the circumstances which caused this application to be set down for hearing without giving the respondent a notice of hearing

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of at least two days before the date of hearing. It may well be on record that the advocates for the respondent, Mr. Maira and Mr. Marando, did not complain but used that omission to advance a preliminary objection without a notice of motion as required under Rule 100. Because of the same omission, the objection of Mr. Mbuya, the learned counsel for the applicants, against that informal preliminary objection, was overruled.

The preliminary objection of the respondent sought to strike out this application. I rejected that objection and I granted the motion by Mr. Mbuya to amend the affidavit filed in support of this application. I reserved giving my reasons for so doing. I am going to do that now.

Mr. Mbuya wrote to the Registrar of Court of Appeal (R.C.A.) seeking to amend his affidavit and enclosed a copy of a new affidavit indicating the proposed amendments. Mr. Maira's objection was that a letter could not do that and that amendment needed the leave of the Court. Mr. Maira then asked for the application to be struck out because the affidavit was so defective that there was infact no affidavit at all in support of the application and that that offended Rule 46 (1). Mr. Mbuya replied that his letter to R.C.A. was a mere notification that he was going to ask for leave to amend.

I am satisfied that the letter did not seek to amend the affidavit and that before Mr. Mbuya could ask for leave to amend he was faced with a preliminary objection. I agree with Mr. Mbuya, just as Mr. Marando did, that as he had not addressed the Court then the motion to amend had not started as was said in Osang and Another v. R. [1972] E.A. 170. However, you can only amend what is already in existence. So the question is: was there an affidavit to be amended?

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Affidavits are required to contain certain essential details such as sources of information, what information is from personal knowledge and what is obtained from other sources and there should be an affirmation clause. These were missing in the affidavit of Mr. Mbuya and he was praying to add a new paragraph eleven to introduce them.

Such omission was dealt with by the East African Court of Appeal in Assanand and Sons (Uganda) Ltd. v. E.A. Records Ltd. [1959] E.A. 360 at 364. Sir KENNETH O'CONNOR, the President, said "The affidavit of Mr. Campbell was deficient in three aspects ..." The learned President then set out two of those three aspects and concluded that "The Court should not have acted upon an affidavit so drawn". It is remarkable to note that the learned President did not say that because of the defects there was then no affidavit at all.

In Caspair Ltd. v. Harry Gandy [1962] E.A. 414 there were the same errors and Sir ALASTAIR FORBES, the Vice-President, after refering to the passage of Sir KENNETH quoted above, concluded "In my opinion the learned judge ought not to have acted on Mr. D'Silva's affidavit."

Thus both of their lordships accepted as a fact the existence of an affidavit in each case but held that their defects affected their reliability. So in the present case there was an affidavit which was patently defective and which Mr. Mbuya craved leave to amend. That was why I readily gave that leave.

After I had granted leave to amend, an adjournment was requested by the respondent for time to file a counter-affidavit.

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That was given and after two days another preliminary objection preceded the hearing of the application.

Mr. Maira sought an order to strike out the application for offending Rule 46 (3) in that the application was not accompanied by a copy of the ruling of MSUMI, J. Mr. Mbuya pointed out that Rule 46 (3) deals with applications for leave to appeal. Mr. Maira admitted that there is no specific rule on an application for a stay of execution but submitted that Rule 46 (3) should be used mutatis mutandis. In the alternative Mr. Maira submitted that Rule 3 should be invoked to meet the ends of justice.

I made no ruling on that but decided to proceed with the hearing of the substantive application and to give my ruling at this juncture.

It is glaringly obvious that Rule 46 (3) is inapplicable for this sort of application. As there is no rule relevant to a stay of execution, the Court then has to fall back on Rule 3. In my well considered opinion Rule 3 dispenses the need of applying any other rule mutatis mutandis.

Contrary to the views of Mr. Mbuya, I agree with the submission of Mr. Maira that Rule 3 is purely for meeting the ends of justice and it is not there to assist the applicant or the appellant only. Rule 3 could be used to provide a situation favourable to the respondent if that meets the ends of justice.

The question is what is the ends of justice here. Since there is no specific rule requiring annexing a copy of the ruling sought to be stayed, are the ends of justice met by

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striking out the application or by hearing it and by determining it on its merits or demerits. Without any hesitation, I am of the firm opinion that it is the latter course.

Before embarking on the substantive application, I feel I may as well dispose of another preliminary matter though it was not submitted as such, that is, a preliminary objection. Mr. Marando submitted that there is no such thing as a stay of execution of the remaining part of a term of detention in the execution of a decree. He contended that the proper course of action was for the applicant to apply for release under sections 46 and 47 of the Civil Procedure Code, 1966.

Here I will only point out that the Civil Procedure Code, 1966 does not apply to this Court. That is certain from the definition of the word "court" in section 2 of that Code which means "the High Court of the United Republic, a court of a resident magistrate or a district court presided over by a civil magistrate". The exception is as provided under section 4(2) of the Appellate Jurisdiction Act, 1979 where this Court has the same "power, authority and jurisdiction vested in the Court from which the appeal is brought". Here there is no appeal and a stay can only be granted by this Court and so the subsection is inapplicable. So this application is governed by the provisions of the Appellate Jurisdiction Act, 1979 and the Rules made thereunder. Here it is Rule 9 (2) (b).

Mr. Mbuya dwelt heavily on the chances of the success of his intended appeal. Thus in effect he argued before me the appeal against the detention of Nolan in execution of the decree in favour of Valambhia. That invited Mr. Maira and Mr. Marando to pose the counter arguments to convince me

that there was no flicker of hope of success. Needless to say, I am sure, the merits or demerits of the detention is not my baby. What concerns me is when can a court grant a stay of execution. In other words what are the grounds for ordering a stay of execution.

HAISBURY'S LAWS OF ENGLAND 4th Ed. Vol. 17 para 455 as pointed out by Mr. Marando, provides that a court will only grant a stay if there are special circumstances. Three examples of these have been enumerated: A stay will be granted, first if a refusal will render the appeal nugatory; second the poverty of the respondent; and lastly if the payment of the judgment debt will destroy the substrutum of appeal.

These examples envisage a situation where the payment of the decretal amount is to be stayed. But that is not the situation in this application. Here the applicant is in prison and he wants that to be stayed. It is a bail pending appeal if you like to put it in criminal law terminology. So the first and the third examples are relevant here.

As for the first example if a stay is refused then the appeal might be rendered nugatory not in the sense of worthless or futile or inoperative or invalid. But the appeal could be nugatory in sense of trifling that is not rendering full value. Suppose the appeal is allowed then Nolan will have lost his freedom. As for the third example, his continued incarceration affects, though might not destroy, the substrutum of appeal which is that he should not have been imprisoned at all.

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But there is another dimension to this application. A man's freedom is sacred under international human rights norms. Detention is a violation of that inherent right. Article 11 of the International Covenant of Civil and Political Rights prohibits civil imprisonment and, I may add, without derogation. Tanzania ratified and acceded to that instrument on 11th June, 1976. Admittedly, our legal position is that these instruments are not self-executing. There has to be an Act of our Parliament, to make them operative. Fortunately, Article 15 (1) of the Constitution of the United Republic of Tanzania, 1977, safe guards man's freedom. However, Article 15 (2) (a) derogates "in certain circumstances and subject to a procedure prescribed by law". Such a prescription is found in Section 44 of the Civil Procedure Code, 1966 which allows arrest and detention in execution of decree for the payment of money.

As already pointed out our Constitutional protection falls short of that which is provided by the International Covenant of Civil and Political Rights. But since we are a party to that Covenant, then it is my conviction that we have at least to interpret and apply our derogating law extremely strictly. I have already stated that whether or not the conditions enumerated in section 44 of the Civil Procedure Code for civil imprisonment have been scrupulously observed by MSUMI, J. is the subject of the intended appeal. I will never let myself be tempted into encroaching on that province. However, I am totaly convinced and verily believe that where, as in this case, there exists a venue of appeal to the highest court of the land, then the deprivation of the freedom of an

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individual in satisfaction of a civil debt, should be stayed pending the decision of that highest court. This is the very minimum we can do as a party to the instrument which prohibits civil imprisonment without derogation.

The respondent has shown his concern on securing sureties. Mr. Maira and Mr. Marando asked for the deposition of the decretal amount. That, with respect, will not then be a stay of the execution but a release because of the satisfaction of the decree. Mr. Mbuya, on the other hand, submitted that security in this case is similar to that in bail; aiming at securing the appearence of the applicant. However, as the sums involved are colossal then sureties should reflect that.

Mr. Mbuya produced for the inspection of the Court two title deeds: Title No. 31689 with L.O. No. 94334 and Title No. 38233 with L.O. No. 123149. Government valuation report of the two properties is shs. 119,486,000/=.

Mr. Maira and Mr. Marando raised certain issues. One, they said that one of the properties belongs to a limited company and so a resolution of its Board is required to pledge the property as surety. Then there was the observation that there is no evidence that the President has given his consent for the Company to own land under the Land Ordinance. However, there were no issues raised with respect to the second piece of property.

Without going into those issues, I am satisfied that there is enough security to ensure that Nolan, if released, shall not jump bail as it were. To make it double sure his passport

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should immediately be surrendered to the Senior Deputy Registrar of Court of Appeal.

For the above reasons a stay of execution is granted pending appeal against the order of imprisonment in execution of the decree. The two properties mentioned above shall form securities and it is ordered that the Senior Deputy Registrar of the Court of Appeal shall take the necessary steps without delay. As already said above, Nolan's passport, too, shall be surrendered. All these steps shall be taken before an order of release from prison is issued.

Costs to follow event.

DATED at DAR ES SALAAM this 12th day of May, 1993.

S. L. RAMADHANI
JUSTICE OF APPEAL.

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

( L. B. KALEGEYA )
SENIOR DEPUTY REGISTRAR.