IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CONSOLIDATED CIVIL APPLICATIONS NOS. 19 OF 1999 AND 27 OF 1999

BETWEEN

TANZANIA ELECTRIC SUPPLY COMPANY LTD. ...... APPLICANT

AND

INDEPENDENT POWER TANZANIA LTD. .... RESPONDENT

1. THE PERMANENT SECRETARY MINISTRY OF ENERGY AND MINERALS
2. THE PERMANENT SECRETARY MINISTRY OF FINANCE
3. THE HON. ATTORNEY GENERAL

.... APPLICANTS

AND

INDEPENDENT POWER TANZANIA LTD. .... RESPONDENT

(Application for Stay of Execution from the Ruling and Order of the High Court of Tanzania at Dar es Salaam)

(Msumi, J.K.)

dated the 5th day of March 1999

in

Misc. Civil Application No. 61 of 1999

R U L I N G

SAMATTA, J.A.:

I have before me two applications, which have been consolidated, brought under Rule 9 (2)(b) of the Tanzania Court of Appeal Rules, 1979 (hereinafter referred to as "the Rules"), for stay of the enforcement of the order made by the High Court (Msumi, J.K.) in Misc. Civil Application No. 61 of 1998, pending the determination of appeals from the said order the applicants intend to lodge before this Court, notices (under Rule 76 (1) of the Rules) of which have already been lodged. Counsel for all the parties have made their submissions in writing.

The salient facts which constitute the background to the applications can, I think, be stated as shortly as is consistent

with intelligibility. The respondent company, Independent Power Tanzania Ltd., a limited liability company registered under the Companies Ordinance, is a joint venture company between Mechmar Corporation Bhd. of Malaysia (MECHMAR) and VIP Engineering and Marketing Limited (VIPEM) established for the purpose of building, owning and operating a 100 MW Power Plant at Tegeta in Dar-es-Salaam. On May 26, 1995, the company entered into a Power Purchase Agreement (the PPA) with one of the applicants, Tanzania Electric Supply Company, hereinafter referred to by its acronym, TANESCO, whereby the former agreed to sell and make available to the latter company, which agreed to purchase from and after the commercial operation date, electric power generated at the Tegeta plant. Initially, it was agreed between the parties that the monthly reference tariff of purchase price would be USD 4.2 million. On June 8, 1995, the parties signed an Implementation Agreement (the IA) wherein the Government of Tanzania guaranteed, inter alia performance of the payments obligations of TANESCO to the respondent company. A day later, the parties signed Addendum No. 1 of the PPA in which they agreed that before the commencement of operations at the plant the Reference Tariff would be adjusted upwards or downwards depending on the effect of changes that will have taken place any or all of the underlying assumptions stated in the /PPA/. Utilising the loans amounting to USD 105 million secured from two Malaysian banks and USD 45.0 million provided by MECHMAR and VIPEM, the respondent company caused the design and construction of the power plant at Tegeta. Following that step, it submitted to TANESCO documents which, it asserted, demonstrated that the total capital cost of the Project without Gas Conversion Equipment amounted to USD 150.0 million. The company informed TANESCO that, on the basis of that capital cost, the monthly capacity payments would

be USD 3,623 million. TANESCO was not prepared to accept that figure. On or about April 9, 1998, it issued a Notice of Default under the PPA alleging that the respondent company had defaulted on its obligations to supply and instal slow speed diesel generating sets. The respondent company rejected the Notice. Discussions between the parties could not resolve the dispute. The applicants refused to honour the suggested Initial Operation Date (IOD) of August 31, 1998. On November 25 TANESCO filed a request for arbitration against the respondent company before the International Centre for the Settlement of Investment Disputes (the ICSID) under the relevant provisions of the PPA. Faced with threats from its lenders and creditors to hold it in default, five days later the respondent company filed before the High Court Misc. Civil Application No. 61 of 1998 in which it sought the following reliefs:

(1) a declaration and order that the Initial Operations Date for the Tegeta power plant be deemed to have occurred on August 31, 1998, and 15th September, 1998, respectively;

(2) an order requiring TANESCO to pay in accordance with the provisions of the Power Purchase Agreement interim monthly capacity payments of USD 3.623 million to the Applicants with effect from 15th September, 1998, until when the tariff dispute between the Applicant and the Respondents shall be finally and conclusively resolved;

(3) an order directing TANESCO to pay Energy Charges based on the provisions of the PPA;

(4) an order directing TANESCO, the Permanent Secretary of the Ministry of Energy and Minerals, and the Permanent Secretary of the Ministry of Finance discharge their respective obligations stipulated in the PPA and the IA in consequences of the orders granted under paragraphs 1, 2 and 3 of the Chamber Summons;

(5) a "Declaratory Order" issued against TANESCO and the Permanent Secretary of the Ministry of Energy and Minerals "restraining them from employing delaying tactics through frivolous and unequitable interpretations of the terms of the Power Purchase Agreement, the Implementation Agreement And the Generation Licence";

(6) an order that "the Interim Mandatory Orders shall subsist until when the tariff dispute is resolved and that upon resolution of the dispute recalculations shall be made from 15th September, 1998, till the date when the dispute is resolved using the awarded tariff rates and in case the result will be that the Applicants were overpaid during the interim period such over payments shall be recovered from future monthly capacity payments due to the Applicants and vice versa";

(7) the cost of the application be borne by the respondents; and

(8) any other additional interim reliefs that the Court may deem just and equitable to grant.

This application was brought under Order XLII, r.2 and sections 68 (e) and 95 of the Civil Procedure Code (hereinafter referred to as "the Code") and s. 2 (2) of the Judicature and Application of Laws Ordinance (the Ordinance). Following a short ruling on an application for adjournment, which was dismissed, the applicants (the then respondents) filed petitions praying for stay of the proceedings under s. 6 of the a Arbitration Ordinance, Cap. 15. That section reads:

> . Where any party to submission to which this Part applies, or any person claiming under him, commences any legal proceedings against any other party to the submission or of any person claiming under him, in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time after appearance, and before filing a written statement, or taking any other step in the proceedings, apply to the court to stay the proceedings; and the court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings.'

The respondent company opposed the petitions, arguing that they were bad in law because the applicants could not have the court's powers under the provisions of s. 6 of the Arbitration Ordinance exercised in their favour when, by applying for adjournment so that they could file applications for stay of execution, they had taken steps in the proceedings. The learned Jaji Kiongozi found this argument valid in law. On March 3, 1999, after the parties' counsel had filed their written submissions, he gave his ruling on the merits of the application. He granted all reliefs sought except the fifth relief, to wit, an order restraining TANESCO and the Permanent Secretary of the Ministry of Energy and Minerals from "employing tactics through frivolous and unequitable interpretations of the terms of the Power Purchase Agreement, the Implementation Agreement and the Generation Licence". It is this decision which the applicants intend to appeal against before this Court. It is common ground that the respondent company filed no suit in the High Court in respect of the dispute between it and the applicants.

On behalf of TANESCO, Mr. Mkono, learned advocate, who has been assisted by Dr. Kapinga and Dr. Mwaikusa, has submitted, among other things, the following: first, neither under Order XXXVII, r.1 (b) of the Code, which permits a party to a suit to seek from the court conservatory measures, nor under any provision of other laws is a litigant before a court in this country entitled in law to be granted a "final judgment" before the dispute before the court is determined. According to the learned advocate, the proceedings instituted before the High Court in this case were not preservatory proceedings. By instituting those proceedings the respondent company purported to avoid instituting substantive proceedings. Secondly, having consented to the arbitration before the ICSID, the respondent company, in terms of Article 26 of the Convention establishing the Centre, forfeited its right to seek a relief or reliefs in another forum. Thirdly, relying on Linotype - Hell Ltd. v. Baker [1993] 1 W.L.R. 321, Winchester Cigarette Machinery Ltd. v Payne (No.2), The Times, December 15, 1993, Camdex v Bank of Zambia [1997] I All E.R. 728 and Tanzania Cotton Marketing Board v Coget Cotton Company S.A., Civil Application No. 52 of 1996 (C.A.) (unreported), the balance of convenience in this case swings in TANESCO's favour because, as asserted in the supporting affidavit of Mr. John Killar Madaha, the Deputy Managing Director (Corporate Sercices) of TANESCO, if the order made by the learned Jaji Kiongozi is enforced, as prayed, by the end of May TANESCO will be running a deficit of T.Shs. 6.09 billion, with the result that an extraordinary econimic harm would befall upon the country because the power company would be rendered financially incapable of generating electricity and therefore of buying electricity even that produced by the respondent company. Granting a stay of execution in Lino -type Hell Ltd's case supra, Staughton, L.J., said, inter alia:

> "It seems to me that if a defendant can say that without a stay of execution he will be ruined and that he has an appeal which has some prospect of success, that is a legitimate ground for granting a stay of execution."

Mr. Mkono has strenuously urged me to hold that the balance of advantage lies in "not visiting upon the population of Tanzania grave and severe hardship which would inevitably follow if the order of Msumi, J.K. is now enforced."

Mr. Mwidunda, counsel for the applicants in Civil Application No. 27 of 1999, has essentially made submissions similar to those made by Mr. Mkono. Submitting on the kind of harm that would allegedly be inflicted on the country if the applications for stay of execution are not granted, the learned State Attorney drew my attention to what Mr. Madaha deposes in his affidavit on the point, and then said: "If the payment of the amounts by TANESCO to the respondent as ordered by the High Court Order is not stayed, the effects on TANESCO and as well as the overall electricity industry in Tanzania will be irreparably disastrous. All the industrial and economic sectors production will stop and public and social services including hospitals will be paralysed ... The exact magnitude of loss to be suffered is incalculable as it will affect each and every person in Tanzania including the Respondent as there will be no production and transmission of electricity." The learned State Attorney has drawn my attention to the following passage in Ralph Gibson, L.J.'s judgment in Winchester Cigarette Machinery's case supra:

> "In recent cases it has been said that the practice of the Court has moved on from the principle that the only ground for a stay was the reasonable probability that damages and costs would not be repaid if the appeal

> succeeded. Those cases held that the approach of the Court now was a matter of common sense and balance of advantage."

Dr. Tenga, learned advocate, who has been assisted by Miss Hawa Bayona, has, on behalf of the respondent company, strenuously opposed the applications, which he has described as "a mere device to abuse the due process of the law." Relying on the judgment of Kaji, J., in Nicholas Mere Lekule v (1) Independent Power (T) Ltd. (2) The Attorney General, Misc. Civil Cause No. 117 of 1996 (unreported) and the decision of this Court (Lubuva, J.A.) in Civil Application No. 70 of 1996 between the same parties (unreported), the learned advocate has contended that in this country a court can, without a pending suit, entertain an application for a mandatory injunction or a similar relief. According to the learned advocate, the order which the learned Jaji Kiongozi made in the respondent's favour is an interim or conservatory relief and not, as has been described by the applicants' counsel, a final interlocutory judgment. Dr. Tenga also submitted, on this aspect of the case, that the common law confers on a court of law jurisdiction to grant an interim mandatory injunction. The learned advocate cited Copee Lavalin S ANV v Ken Ren Chemicals and Fertilizers Ltd. (in liq.) [1994] 2 All E.R. 449 in support of that submission. According to Dr. Tenga, the intended appeals have no prospects of success.

On the issue of balance of convenience, Dr. Tenga has submitted that it is impossible to reconcile the assertion that if the learned Jaji Kiongozi's order is not stayed, TANESCO would suffer irreparable loss which cannot be atoned by way of monetary compensation, with the fact that the PPA and the IA between the parties are valid and binding upon them. The learned advocate has further submitted that

the continual wasting of the available electricity of the respondent company when, it is in any case bound to be paid for whether or not it is used, either by way of an enhanced monthly capacity tariff or higher total capacity payments, is what could lead to irreparable loss. According to the learned advocate, if no interim monthly capacity payments are made, the respondent company will fail to meet its bank interest and debt repayments, which may cause the lenders taking over the power plant at Tegeta, a step which will render arbitration nugatory. Concluding his submission on this point, Dr. Tenga drew my attention to the following observation in the judgment of Buckley, J., in Charrington v Simons & Co. Ltd. [1970] I W.L.R. 725, at p. 730:

> "A plaintiff should not, of course, be deprived of relief to which he is justly entitled merely because it will be disadvantageous to the defendant."

Dr. Tenga has urged me to hold that common sense calls for the dismissal of the applications now before me because, as he put it, the learned Jaji Kiongozi merely ordered the parties to perform according to the agreements they had entered into until the final arbitration award. Drawing my attention to the "fact" that the capital costs have arisen from USD 150.0 million to USD 171.0 million as at June 30, 1999, and they will continue to build up until adequate interim capacity payments are made, the learned advocate urged me to find that "it will actually be saving the Applicants and indeed the whole country from further unnecessary costs by refusing to grant the Stay of Execution than by granting it because if there is delay in starting to make the interim payments there will be an inevitable increase in the Tariff, the increase that will mean paying for power that was not used."

Submitting specifically on the application of the two Permanent Secretaries and the Attorney General, Dr. Tenga has contended that that application should be summarily dismissed because, as he has put it, having indicated to the High Court that they did not object to guaranteeing the interim payments that are due to the respondent from TANESCO, those applicants have no cause for appeal.

Before I proceed to deal with the merits or otherwise of the rival arguments I have summarised above, I wish to make two observations. First, there were other arguments addressed to me in the two applications, but, for reasons which, I hope, will be apparent in this ruling, I do not find it necessary to deal with them. Secondly, no less than 50 authorities have been cited in argument in the applications. Although I have examined all of them, in this ruling I will make specific reference to only some of them. With those two observations made, I proceed now to consider the merits or otherwise of the applications.

It cannot be doubted that the power to order a stay of execution which is conferred upon this Court by Rule 9 (2)(b) of the Rules is a discretionary power. A discretion must be exercised according to common sense and according to justice. As was observed over two hundred years ago by Lord Mansfield in Rex v Wilkes (1770) 4 Burr. 2257 (cited by Sir Jocelyn, P., in Povey v Povey [1971] 2 W.L.R. 381 at p. 387):

> "discretion, when applied to a court of justice means sound discretion guided by law. It must be governed by rule, not by humour: it must not be arbitrary and fanciful; but legal and regular."

In this country, it is now well established, I think, that the following are the principal factors a court should consider whether or not to grant a stay of execution:

(1) Whether the appeal has, prima facie, a likelihood of success.

(2) Whether its refusal is likely to cause substantial and irreparable injury to the applicant.

(3) Balance of convenience.

The first question I ask myself and which I shall endeavour to answer is whether the provisions of law upon which the respondent company purported to base its application before the High Court, read together or individually, prima facie conferred jurisdiction in the court to entertain that application. As will be recalled, those provisions were Order XLII, r.2 and section 68 (e) and 95 of the Code, and s. 2 (2) of the Ordinance. I will start with Order XLII, r.2.

Order XLII, r.2

This rule must be read together with rule 1 of the same Order. The two rules read as follows:

"1. - (1) Any person considering himself aggrieved -

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred;

(b) by a decree or order from which no appeal is allowed,

and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient

reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the court which passed the decree or made the order.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when being respondent he can present to the appellate court the case on which he applies for the review.

2. An application for review of a decree or order of a court, other than the discovery of such new and important matter or evidence as is referred in rule 1 or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree, shall be made only to the magistrate who passed the decree or made the order sought to be reviewed; but any such application may, if the magistrate who passed the decree or made the order has ordered notice to issue under rule 4, sub-rule (2), proviso (a), be disposed of by his successor."

Plainly, these two rules were utterly irrelevant to the application. Relating to applications for review of judgments, as they do, those rules have nothing to do with applications for "interim reliefs." Having said that, I turn now to a consideration of the next provision - section 68 (e).

Section 68 (c)

For reasons which should be clear shortly, I propose to quote not only the whole of that section, but also the section immediately following it, namely, section 69. Those sections read:

> "68. In order to prevent the ends of justice from being defeated the court may, subject to any rules in that behalf -
>
> (a) issue a warrant to arrest the defendant and bring him before the court to show cause why he should not give security for his appearance, and if he fails to comply with any order for security commit him as a civil prisoner;
>
> (b) direct the defendant to furnish security to produce any property belonging to him and to place the same at the disposal of the court or order the attachment of any property;
>
> (c) grant a temporary injunction and in case of disobedience commit the person guilty thereof as a civil prisoner and order that his property be attached and sold;
>
> (d) appoint a receiver of any property and enforce the performance of his duties by attaching and selling his property;
>
> (e) make such other interlocutory orders as may appear to the court to be just and convenient.
>
> 69.-(1) Where in any suit in which an arrest or attachment has been effected or a temporary injunction granted under the last proceeding section -
>
> (a) it appears to the court that such arrest, attachment or injunction

was applied for on insufficient grounds, or

(b) the suit of the plaintiff fails and it appears to the court that there was no reasonable or probable ground for instituting the same,

the defendant may apply to the court, and the court may, upon such application, award against the plaintiff by its order such amount, not exceeding two thousand shillings, as it deems a reasonable compensation to the defendant for the expense of injury caused to him.

(2) An order determining any such application shall bar any suit for compensation in respect of such arrest, attachment or injunction." (The emphasis is supplied).

These two sections fall under PART VI of the Code, which is headed SUPPLEMENTAL PROCEEDINGS. The word "supplemental" is defined in Black's Law Dictionary, abridged 6th ed., at p. 1003, as "that which is added to a thing or act to complete it." In my opinion, the heading suggests that the powers conferred upon the court by the two sections can be invoked only where there is a suit before it. Section 68 does no more than summarise the general powers of courts in regard to interlocutory proceedings, the details of which are set out in the First Schedule to the Code. I am unable to read anything in that section as conferring upon the court the power to enter a monetary judgment in favour of an applicant. Applications made under the section are intended to assist the applicant in the prosecution of his case, whether before or after final judgment, or to enable the court to protect the subject-matter of the primary proceeding before the rights of the parties are finally determined. It should be distinctly understood that the right conferred by

section 69 upon a person who has not instituted a suit to apply for what in effect is a monetary judgment is an exception to the general rule that a claim for monetary judgment must be made by way of a suit. I have sufficiently demonstrated, I hope, that prima facie the respondent company's application in the HHgh Court could not in law be made under s.68 (e) of the Code. I proceed, therefore, to a consideration of the application of section 95.

Section 95

The section provides:

> "95. Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."

As I understand it, this section does not confer any jurisdiction on the High Court or courts subordinate thereto. What it was intended to do, and does, is to save inherent powers of those courts. The section is undoubtedly a very useful provision, but it is not a panacea for all ills in the administration of justice in civil cases. Commenting on section 151 of the Indian Code of Civil Procedure, which is in pari materia with that section, the learned authors of The Law of Civil Procedure, 6th ed., observe, at p.324, as follows:

> "The power is intended to supplement the other provisions of the Code and not to evade or ignore them or to invent a new procedure according to individual sentiment."

Prima facie, section 95 constituted no authority for the High Court to entertain the respondent company's application. That opinion brings me face to face with the question whether, prima facie,

s.2 (2) of the Ordinance confers jurisdiction on courts to entertain the kind of application which the respondent company filed before the High Court.

Section 2 (2) of the Ordinance

The sub-section reads as follows:

> "(2) Subject to the provisions of this Ordinance, the jurisdiction of the High Court shall be exercised in conformity with the written laws which are in force in Tanganyika on the date on which this Ordinance comes into operation (including laws applied by this Ordinance) or which may hereafter be applied or enacted, and, subject thereto and so far as the same shall not extend or apply, shall be exercised in conformity with the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the twenty-second day of July, 1920, and with the powers vested in and, according to the procedure and practice observed by and before Courts of Justice and Justices of the Peace in England according to their respective jurisdictions and authorities at that date, save in so far as the said common law, doctrines of equity and statutes of general application and the said powers, procedure and practice may, at any time before the date on which this Ordinance comes into operation, have been modified, amended or replaced by other provision in lieu thereof by or under the authority of any Order of Her Majesty in Council, or by any Proclamation issued, or any Ordinance or Ordinances passed in and for Tanganyika, or may hereafter be modified, amended or replaced by other provision any such Ordinance or Ordinances or any Act or Acts of the Parliament of Tanganyika.

> Provided always that the said common law, doctrines of equity and statutes of general application shall be in force in Tanganyika only so far as the circumstances of Tanganyika and its inhabitants permit, and subject to such qualifications as local circumstances may render necessary."

The Code (the Civil Procedure Code) cannot be said to be exhaustive. It would be unrealistic to expect the legislature to contemplate all possible circumstances which may arise in litigation. It is legitimate, therefore, to apply, under the above quoted sub-section of the Ordinance, relevant rules of common law and general statutes of application in force in England on the twenty-second of July, 1920, where the Code is silent. Applying that power, in Nicholas Mere Lekule's case supra, Kaji, J., held that the High Court has jurisdiction in a proper case to grant an "interim injunction order" pending institution of a suit. About two years later, in Tanganyika Game Fishing and Photographic Ltd. v (1) The Director of Wildlife (2) The Attorney General (3) Muanauta and Company (T) Ltd., Misc. Civil Cause No. 42 of 1998 (unreported), Katiti, J., invoked the power under the sub-section and held that the court has the inherent power to grant a temporary injunction order in circumstances not covered by Order XXXVII of the Code. The provisions of that Order confer jurisdiction on the court before which a suit has been instituted to grant a temporary injunction, to order interim sale and to make an order for the detention, preservation or inspection of any property which is the subject-matter of the suit, or as to which any question may arise therein. I have no doubt that both cases were rightly decided, but I do not think that those decisions are helpful to the respondent company in the present proceedings. I hold that view because neither Kaji, J., nor Katiti, J., held that a relief in the form of monetary judgment can be granted where there is no suit or before a suit is determined.

As will be recalled, on the issue of jurisdiction Dr. Tenga also relied on Cope-Lavalin's case supra. With respect, I am unable to see how that case supports the proposition that in England a court can enter what in effect is a monetary judgment where there is no suit before the court. In that case the House of Lords held that a court has jurisdiction to grant an interim relief in form of security for costs to a party to an international arbitration. According to their Lordships, that jurisdiction is inherent or created by s.12 (6) of the Arbitration Act, 1950, as amended, which reads:

> "The High Court shall have, for the purpose of and in relation to a reference, the same power of making orders in respect of - (a) security for costs ... (c) the giving of evidence by affidavit (d) examination on oath of any witness before an officer of the High Court or any other person, and the issue of a commission or request for the examination of a witness out of the jurisdiction; (e) the preservation, interim custody or sale of any goods which are the subject matter of the reference; (f) securing the amount in dispute in the reference; (g) the detention, preservation or inspection of any property or thing which is the subject of the reference or as to which any question may arise therein, and authorising for any of the purposes aforesaid any persons to enter upon or into and land or building in the possession of any party to the reference or authorising any samples to be taken or any observation to be made or experiment to be tried which may be necessary or expedient for the purpose of obtaining full information or evidence; and (h) interim injunctions or the appointment of a receiver, as it has for the purpose of and in relation to an action or matter in the High Court; Provided that nothing in this subsection shall be taken to prejudice any power which may be

> versed in an arbitrator or umpire of making orders with respect to any of the matters aforesaid.'

In this country, there is no statutory provision which is similar to this provision which cannot be applied here (in Tanganyika) as it was enacted after July 22, 1920, assuming that it is a statute of general application. Be that as it may, the jurisdiction referred to in Coppe-Lavalin's case supra is not that of granting interim reliefs in the form of monetary judgments. Similarly, I can find nothing in the decisions or observations made in Metropolitan Tunnel and Public Works Limited v London Electric Railway Company (1926) Ch. 371; Resort Condominiums International Inc. v Bolwell and Another 118 ALR 655; and Tanganyika Game Fishing's case supra which can be said to support Dr. Tenga's submission. The last case, as will be recalled, dealt with the issue, among others, whether a temporary injunction can be granted in circumstances not governed by Order XXXVII of the Code. There was no issue in the case whether a monetary judgment can be entered in favour of a party who has not filed a suit. In a useful passage, if I may so describe it, the learned authors of Halsbury's Laws of England, 3rd ed., Vol. 22, para 1613, at p. 752 list situations in which the English law authorises the giving of judgments and making of orders. The passage reads:

> "Apart from orders determining questions as to procedure, a judgment or order may be given or made at the trial or hearing of an action, or on the hearing of an appeal or, in the case of actions commenced by writ, as a result of (1) the consent of the parties, or (2) admissions by either party, or (3) default of appearance by a defendant, or (4) default of delivery of a defence, or (5) certain procedural defaults, or (6) in certain cases, an application by the plaintiff for summary judgment when he can

> satisfy the court that he is clearly entitled to the relief claimed, or (7) acceptance of a payment into court, or (8) after trial of an issue." (the emphasis is supplied)

It leaps to the eye that under the common law a court has no power to give a judgment in favour of an applicant who has not instituted a suit. I agree with Mr. Mkono that prima facie the reliefs which the High Court purported to grant the respondent company were not "preservatory measures" as the Court's order required TANESCO to make payments to the respondent company. A decision of a court of law cannot be a preservatory order by merely tying that label to it.

Before I part with the issue of jurisdiction, I must deal, as briefly as possible, with Dr. Tenga's last two arguments on the matter. The first of those arguments was that, the parties having agreed before the learned Jaji Kiongozi that preliminary points which were capable of disposing of the whole of the respondent company's application be considered first, the jurisdiction of the court to entertain the application became, as a result, a non-issue. In his response to this argument Mr. Mkono disputed the existence of that agreement. I am prepared to assume that the parties did reach that agreement. Having made that assumption, I must say at once that the agreement is, prima facie, incapable of advancing the respondent company's case. It is a trite principle of law that parties cannot by agreement or otherwise confer jurisdiction upon a court: see Farquharson v. Morgan [1894] 1Q.B.552; Essex County Council v Essex Incorporated Congregational Church Union [1963] 2 W.L.R. 802 at p. 820; Allarakha v Agakhan [1969] E.A. 613 at p. 617 and Royal Bank of Scotland Ltd. v Citrusdal Investments Ltd. [1971] 1 W.L.R. 1469 at p. 1472. The parties' agreement in the case

now before me could not, therefore, create new jurisdiction in the High Court. The second argument was that the applicatón of the Permanent Secretaries and the Attorney General should be summarily dismissed because, as Dr. Tenga put it, having indicated that they did not object to guaranteeing the monthly interim payments that are due to the respondent company from TANESCO, those applicants have no cause for appeal. There is, I think, a simple answer to this contention. By making that statement the three applicants were not admitting that the amounts of payments demanded by the respondent company were the amounts TANESCO owed. The quanta of those payments were very much in dispute between the parties. This was evident in the spirited opposition those applicats, like TANESCO, attempted to put up against the respondent company's claims. I fear I cannot put any weight on Dr. Tenga's argument.

In spite of the wealth of ingenuity spent by Dr. Tenga on the issue of jurisdiction, it is my settled opinion that, prima facie, the High Court had no jurisdiction to entertain the respondent company's application for a relief in the form of monetary judgment.

I shall now deal, very briefly, with the remaining two factors I am required to consider in the two applications. There can be no doubt, upon the evidence laid before me, that whichever side loses in the applications now before me the opposite side is likely to sustain a substantial and irreparable loss. It is conceivable that lesser payments may not have on TANESCO the devasting effect described by Mr. Madaha in his affidavit. Any substantial adjustments made in that company's favour after arbitration would surely not prevent that damage. With regard to the question of balance of convenience, I wish to observe that the scales of justice appear to me to be slightly tilted in the applicants' favour, bearing in mind what is deposed in the opposing affidavits.

Before I part with these applications, I desire to express my indebtedness to counsel for all the parties for their lucid and interesting arguments.

For the reasons I have given, I am satisfied that, as ably contended by Mr. Mkono and Mr. Mwidunda, the applicants' intended appeals have prospects of success and that both justice and common sense call for the granting of the two applications for stay of execution. I grant those applications as prayed with costs.

DATED at DAR ES SALAAM this 8th day of July, 1999.

B. A. SAMATTA
JUSTICE OF APPEAL

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

(A.G. MWARIJA)
DEPUTY REGISTRAR