IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

CIVIL APPLICATION NO. 86 OF 2004
In the Matter of an Intended Appeal

BETWEEN

TANZANIA MOTOR SERVICES LTD. ..... APPLICNT

VERSUS

TANTRACK AGENCIES LTD. ..... RESPONDENT

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

(Kimaro, J.)

dated the 17th day of February, 2004
in
H/Court Civil Appeal No. 58 of 2004

R U L I N G

KAJI, J.A.:

By a notice of motion filed pursuant to Rules 3 (2) (a) and (b), 9 (2) (b) and 45 (1) and (2) of the Court of Appeal Rules, 1979, the applicant, TANZANIA MOTOR SERICES LTD., is applying for stay of execution of the judgment passed in favour of the respondent, TANTRACK AGENCIES LTD. by the Dar-es-Salaam Regional Housing Tribunal on 26th September, 2000 and the decree issued on 30th March, 2001 pending determination of an intended appeal whose notice was filed on 1st March, 2004. When the application was called on for hearing, the respondent raised a preliminary

objection that the application has been overtaken by event because the execution has already been effected.

It was proposed by learned counsel of both parties and accepted by the Court that both the preliminary objection and the main application should be argued together. The preliminary objection was argued first. Mr. Fungamtama, learned counsel, appeared for the applicant. The respondent was advocated for by Mr. Ntonge, learned counsel. Mr. Ntonge submitted that, on 26th September, 2000 the Dar-es-Salaam Regional Housing Tribunal passed a judgment in favour of the respondent. The application for execution was lodged at Kisutu Resident Magistrates' Court as an executing court in terms of the Rent Restriction Act, 1984 and the rules made thereunder. It was filed as Miscellaneous Application No. 136 of 2001. Kisutu Resident Magistrate's Court ordered attachment and sale of the premises in dispute. On 21st August, 2002, the court issued an order for proclamation of sale of the disputed premises, and the date for sale was fixed.

But on 6th September, 2002, the applicant filed revision proceedings No. 102 of 2002 in the High Court. Following the said proceedings, an interim order for raising the attachment and sale was granted. However on 22nd June,

2004, the revision proceedings were dismissed and the interim order for raising the attachment and the intended sale were vacated. Thereafter the applicant filed this application. In the circumstances, it is the learned counsel's submission that, since attachment of the disputed premises has already been effected, and a proclamation for sale issue, there is nothing that the Court can stay. If anything, the applicant should have applied for raising the attachment and the proclamation for sale.

On his part, Mr. Fungamtama submitted that, attachment and proclamation for sale is not the end of the execution process. The Court can stay further processes of the execution. In his view, execution is completed when the judgment creditor gets the money or other thing awarded to him by the judgment.

I have carefully considered the learned counsel's submissions. I think the crucial issue in this case is to decided as to what is "execution" and when is execution deemed to be completed.

Discussing a similar issue in Civil Application No. 68 of 1999 (unreported) between **SHELL AND BP TANZANIA LTD. AND THE UNIVERSITY OF DAR-ES-SALAAM,** a single judge of this Court (the late Lugakingira, J.A.) had this

to say:

> "---- execution is the final act, that is, the satisfaction of the judgment ----------. The nature of the subject matter would dictate the mode of execution."

I wholly accept this view. Execution is the satisfaction of the judgment. On when is execution completed, Lord Denning M.R. in Re OVERSEAS AVIATION ENGINEERING (G.R) Ltd. (1963) 1 Ch. 24 at page 39 had this to say:

> "Execution ----- is completed when the judgment creditor gets the money or other thing awarded to him by the judgment."

This view was also adopted and approved by this Court in the **Shell** and **BP** case cited above.

In the instant case, execution of the judgment was not a single process. It entailed several events. All of them had to be undertaken before execution was deemed to be completed. These included the process of issuing the attachment order, the attachment of the property to be attached, proclamation for sale, sale of the attached

property, and finally payment of the sale proceeds to the decree holder.

When all these are completed, that is when execution in cases of this nature is completed. In my view, before the whole process is completed, the court can issue an order for stay of the remaining process. In the instant case, execution had reached a stage of proclamation for sale, and the date had been fixed. The Court can order the sale to be stayed if there are sufficient grounds for the same.

Mr. Ntonge has argued that the proper remedy the applicant should have applied for is for an order to raise the attachment order. I must admit that I am not aware of any specific provision in the Court of Appeal Rules, 1979 for raising an attachment order. Unfortunately even Mr. Ntonge did not cite any. It would appear even the applicant's advocate Mr. Fungamtama is in a similar predicament. However in his notice of motion he cited also the saving provisions of Rule 3 (2) (a) and (b) of the Court Rules, 1979. In my view, this is sufficient authority for "raising an attachment order" where there is no specific provision in the Court Rules, and where the ends of justice so demand. At any rate, where an attachment order is raised, the execution process is stayed. Thus, whether the attachment order is raised or execution is stayed, the end result is the same, that

is, the execution of the decree is stayed.

It is upon the above reasons that I dismiss the respondent's preliminary objection.

As far as the main application is concerned, the applicant's counsel submitted that, if execution is not stayed the applicant will suffer irreparable loss, and that common sense and balance of convenience is in favour of the applicant. In elaborating how the applicant will suffer irreparable loss if the order applied for is not granted, the learned counsel reiterated what the former Managing Director and currently caretaker of the applicant company, GIDEON KASULWA had deponed in paragraph 13 of his affidavit accompanying the notice of motion. In short, the learned counsel submitted that, if the respondent proceeds to execute the decree, the applicant will suffer not only substantial loss but an irreparable one in the sense that, in the event the applicant's intended appeal succeeds, the status quo can never be restored as the respondent (a legal person) might be wound up hurriedly, run bankrupt and/or become insolvent after the property has been sold to a third party, against whom the applicant company cannot recover its property or money. Further more, he said, the respondent company is not known to have properties or assets against which the applicant company can recover its

property or money.

On whether common sense and balance of convenience is in favour of the applicant, the learned counsel adopted paragraph 14 of Gideon Kasulwa's affidavit. In essence, the learned counsel submitted that, on the basis of common sense and balance of convenience the weight tilts in favour of the applicant in that the respondent company has no cause to fear because it is in physical possession of the property sought to be sold to satisfy the decree, and does not pay rent. In that respect, he submitted, should the applicant's appeal fail, then the steps which should have been taken now to enforce the decree, should then be taken. Secondly, the applicant is an agent of the government of the United Republic of Tanzania, and a well established institution capable of meeting the decree in the event the appeal fails.

On his part, submitting on the question of irreparable loss, the respondent's counsel reiterated what PETER JONATHAN, the Operation Manager of the respondent company, had deponed in paragraph 17 of his counter affidavit.

In short, the learned counsel submitted that the respondent company is a reputable company carrying on

business of importing motor vehicles and wildlife. In that respect, the learned counsel submitted that, it will be in a position to refund the decretal sum once the decree is reversed.

As far as common sense and balance of convenience is concerned, the learned counsel adopted paragraph 19 of the counter affidavit. In essence, the learned counsel submitted that the respondent has every reason to fear because the applicant may sell the disputed property without the respondent's knowledge as it has attempted to do so in the past.

It is now well established that the followings 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.

There are just too many authorities by this Court to that

effect. CONSOLIDATED CIVIL APPLICATIONS NOS. 19 OF 1999 AND 27 OF 1999 – **TANZANIA ELECTRIC COMPANY LTD. v. INDEPENDENT POWER TANZANIA LTD., THE PERMANENT SECRETARY MINISTRY OF ENERGY AND MINERALS AND TWO OTHERS v. INDEPENDENT POWER TANZANIA LTD.** are just some of them. In the case at hand the applicant is relying on the second and third principles, that is, whether the applicant is likely to suffer substantial and irreparable loss if the order applied for is not granted, and whether common sense and balance of convenience is in favour of the applicant. Learned counsel for both parties have ably submitted on this. I have carefully considered their submissions.

It is common ground that the property earmarked by the respondent for execution by sale is a building. The applicant's fear is that, if it is sold to a third party, and at the end of the day the applicant's appeal succeeds, the status quo can never be restored. I have carefully considered this. Indeed if the premises in dispute are sold to a third party, as the respondent intends to do, and at the end of the day the applicant's appeal succeeds, the status quo can never be restored. This, in my view, is irreparable loss. Also there is nothing indicating that if that happens the respondent will be in a position to compensate the applicant adequately. The respondent's advocate has simply submitted that the

respondent is a reputable company dealing with importation of motor vehicles and wildlife. But nothing was shown to the court how liquidity it is, and whether it owns any immovable assets in this country. The applicant's fear that in case the respondent runs bankrupt or is wound up, it may end up with nothing, cannot be taken lightly.

As far as common sense and balance of convenience is concerned, there is no dispute that the respondent is in physical possession/occupation of the suit premises. In that respect, it is my view that common sense and balance of convenience weighs heavily in favour of the applicant. Secondly, there is no dispute that the applicant is an agent of the government of the United Republic of Tanzania. In that respect, it is my view that in the event the applicant's appeal fails, the respondent will be able to execute its decree satisfactorily. The applicant's learned counsel also submitted on the principal of "prima facie likelihood of success" which was strongly challenged by the respondent's counsel. But this will properly be dealt with in the intended appeal since it appears to be among the grounds of the intended appeal.

Since the applicant has satisfied the Court that it will suffer irreparable loss if the order applied for is not granted; and since common sense and balance of convenience weighs heavily in favour of the applicant, I grant the stay

order applied for with costs under the following condition:- The applicant is not allowed to sell, alter, change, transfer, pledge, mortgage, destroy, damage or do anything bad to the disputed premises, pending hearing and determination of the intended appeal.

This condition is specifically to protect the interest of the decree holder, the respondent, in the event the applicant's appeal fails.

DATED at DAR ES SALAAM this 12th day of May, 2005.

S.N. KAJI
JUSTICE OF APPEAL

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

(S.M. RUMANYIKA)
DEPUTY REGISTRAR