IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CIVIL APPLICATION NO. 133 OF 2009

BETWEEN

NATIONAL HOUSING CORPORATION ..... APPLICANT

AND

AC GOMES (1997) LTD ..... RESPONDENT

(Application for Stay of Execution of the Judgement and Decree of the High Court of Tanzania at Dar es salaam)

(Mihayo, J.)

Dated the 23rdth day of September, 2009
In
Civil Case No. 248 of 2000

RULING

4 &19 May, 2010

KALEGEYA, J.A.:

This application was filed under the revoked Rules [The Court of Appeal Rules, 1979]- rule 9 (2) (b), the equivalent of Rule 11 of the current Rules [The Court of Appeal Rules, 2009, hereinafter to be referred to as "the Rules"]. The Notice of Motion is supported by an affidavit of one Ms Victoria Mandari, the Applicant's Corporation Secretary. The application is

resisted with the support of a counter-affidavit of one Gulam Ismail, the Respondent's Managing Director. Mr. Matunda, Advocate, assisted by Ms Mandari represented the Applicant while Mr. Nyika, Advocate, represented the Respondent.

A background to the controversy as can be discerned from the documentation on record and the counsel's submissions is as follows.

The Applicant and Respondent were a Landlord and Tenant respectively. They fell apart after the former had issued to the latter, a notice of termination of tenancy for redevelopment of the leased premises. A settlement order was reached after the Respondent had taken the matter to court. Details thereof are not necessary but among others, the Respondent was promised new tenancy in new premises. New premises were subsequently earmarked and a new tenancy Agreement entered into. The Respondent paid a sum of shs 11,608,460/= as transfer fee and key deposit. However, for two years, until the expiry of the lease agreement, the premises were not occupied. This notwithstanding, the parties executed yet another lease agreement, for different premises. As was the case with the former premises, these also were not occupied by Respondent. Reasons

for non occupation of the two premises were contested before the High Court but for purposes of this application, analysis thereof is not necessary. Subsequently, the Applicant offered to refund the money paid attracting a gallant refusal by the Respondent. The latter proceeded further and successfully filed a suit before the High Court for breach of contract; refund of the sum paid (shs 11,608,460/=) plus both special and general damages.

The High Court (Mihayo, J) entered judgement in favour of the Respondent (Plaintiff in that cause) in the sum of shs 11,608,460/= plus interest at the rate of 22% p.a; shs 28,324,642/= as special damages and shs 800,000,000/= as general damages.

Dissatisfied, the Applicant filed a Notice of Appeal to this Court and the current application for stay of execution.

The Applicant, vide the Notice of Motion, impressed that the grounds upon which the application is pegged are as follows:

> *"(a) That the intended appeal has prima-facie, great chance of success.*

(b) The Judgment of the High Court is problematic and should be sorted out through the intended appeal before execution is carried out.

(c) The Respondent has closed down its business and it is no longer a going concern

(d) The amount involved in the decree is very colossal.

(e) If the decree is executed before the intended appeal is determined it is likely to cause substantial and irreparable injury to the applicant.

(f) The balance of convenience, commonsense and hardship weighs in favour of the applicant.

(g) That the interests of justice in the circumstances of this case necessitate to await the result of the appeal when execution can take place in an atmosphere of certainty."

Before proceeding, let me point out what the current position is regarding granting or otherwise of an order for stay of execution. The approach that ruled under the revoked Rules is no longer controlling.

While Rule 9(2) under the revoked Rules simply and briefly provided:

*"Subject to the provision of sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the court may_*

(a) ..... (not relevant)

(b) In any civil proceedings, where a notice of appeal has been lodged in accordance with Rule 76, order a stay of execution, on such terms as the Court may think just",

the new Rules have provided detailed and specific guidance thus:-

"11 (1) ....(not relevant)

(2) Subject to the provision of sub-rule (1), the institution of an appeal, shall not operate to suspend any sentence or stay execution, but the court may-

(a) ..... (not relevant as it relates to criminal matters)

(b) in any civil proceedings, where a notice of appeal has been lodged in accordance with Rule 83, an appeal, shall not operate as a stay of execution of the decree or order appealed from except so far as the High Court or tribunal may order, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree or order; but the Court, may upon good cause shown, order stay of execution of such decree or order.

(c) where an application is made for stay of execution of an appealable decree or order before the expiration of the time allowed for appealing thereform, the Court, may upon good cause shown, order the execution to be stayed

(d) No order for stay of execution shall be made under this rule unless the Court is satisfied-

(i) That substantial loss may result to the party applying for stay of execution unless the order is made;

(ii) That the application has been made without unreasonable delay; and

(iii) That security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him.

(e) Notwithstanding anything contained in sub-rule (d), the Court may make any ex parte order for stay of execution pending hearing of the appeal or application". [Emphasis mine]

Under the revoked Rules, with the limited guidance, the Court had generally set different and varying factors whose existence it considered necessary before issuance of an order for stay of execution in civil matters. Numerous decisions of this Court spanning over a long period of time, some of which were substantively referred to by both counsel, reflect those factors to have included: whether the intended appeal has prima facie, a likehood of success (which element is very tricky and not easily definable as the actual picture of success or otherwise can only be comprehended after hearing of the particular appeal or revision for that matter); whether

the execution would destroy the substratum of the appeal; whether the outcome of the intended appeal would be rendered nugatory in the event the appeal succeeds; whether the judgment which is intended to be appealed is problematic; whether refusal to stay execution would cause substantial and irreparable injury to the applicant; balance of convenience, common sense and justice. The enlisted grounds in the Notice of Motion as quoted therefore were perfect and in line, treading along the then accepted Court's guidance. The Court did not end there as it categorically stated that the list of such factors or circumstances was not closed (See, Civil Application No. 125 of 2002 Between **Tanzania Telecommunications Company Ltd versus Mic Tanzania Limited**; Civil Applications No. 104 of 2005, **In the Matter of an Intended Appeal, Ramadhani Badi Ramadhani versus Patrick M. Chacha**; Consolidated Civil Application No. 19 and 27 of 1999, **Tanzania Electric Supply Co. Ltd versus Independent Power Tanzania Ltd;** Civil Application No. 146 of 2001, **Stanbic Bank Ltd versus Woods Tanzania Ltd;** Civil Application No. 39 of 1995, **Joseph K. Mlay versus Ahmed Mohamed; Tanzania Posts and Telecommunications Corporation versus M/S B.S. Henrita Supplies** (1997) TLR 141; Civil

Reference No. 26 of 2006, **Farida Mbarak and Farid Ahmed Mbarak versus Domina Kagaruki; Tanzania Cotton Marketing Board versus Cogeat S.A** (1997) 63, to mention just a few.

With the current Rule 11 of *"the Rules"*, as quoted however, the ambit of factors to be considered has very much been limited and defined. It is on this latter scenario that facts of the present application have to be subjected.

As already pointed out, the Applicant's Counsel premised his application on the old stand. In his keen submissions, he detailedly went through the grounds as enlisted in the Notice of Motion and with reference to the judgment and the trial Court's record, seeking support from the Court's decisions as already enumerated. That approach however was substantially unnecessary. What he should have zeroed to was to establish that the Applicant would suffer "substantial loss" if an order for stay of execution is not granted. The only question to consider therefore is whether he discharged that burden and in doing that I will only consider part of both counsel's submissions related thereto.

The Applicant's counsel submitted, seeking support from paragraph 14(c) – (h) of Ms Victoria's affidavit which in part runs as follows:-

> *"(c) The Respondent has closed down its business and it is no longer a going concern.*
>
> *(d) The amount involved in the decree is very colossal.*
>
> *(e) If the decree is executed before the intended appeal is determined it is likely to cause substantial and irreparable injury to the Applicant because even if it succeeds in the intended appeal it can not recover the monies that will have been already paid to the Respondent because the latter has already closed down its operations and is not a going concern.*
>
> *(f) The balance of convenience, commonsense and hardship weighs in favour of the Applicant because whereas the Respondent has already closed down its operations and is not a going concern there will not be any new hardship placed upon it if the execution of decree is stayed pending determination of the intended appeal, on the other hand the Applicant is a public body which is still a going concern with immovable properties located countrywide. Furthermore the Applicant is charged with statutory obligations to construct residential and commercial houses as well as maintaining its stock. If the decree, which involves a very colossal sum of money, is*

executed before the rights of the parties have been finally decreed by this court the Applicant shall be impaired in exercising its statutory mandate, let alone the fact that it will not recover the monies since the Respondent does not have any place of business or any other business as a going concern. As a result public interest shall be prejudiced."

He also made reference to (CAT) Civil Reference No. 16 of 2004, ***National Insurance Corporation Ltd vs Meeco Unisys Ltd*** and (CAT) Civil Application No. 117 of 2001, In the Matter of an Intended Appeal BETWEEN ***The University of Dar es Saiaam AND Richard Kajuna Muzo***

Expounding further on the question of the Respondent not being any longer in business he referred to a copy of a 2002 Annual Return attached to the counter-affidavit branding it as being the last, in line with the time of demise of Respondent's business.

The Respondent's counsel challenged the opposite submissions by insisting that the return of 2002 is irrelevant as they are still in Hotel and Tourism business having closed down only Garment's business; that the

amount involved is not colossal adding that even if it was, it would not stop the decree-holder from enjoying the fruits of the decree apart from the fact that the sum involved would not affect the Applicant's operations which has revenue collections from properties scattered country-wide. In the alternative, Mr. Nyika submitted that if the application is granted the Applicant should be ordered to deposit the decretal sum with the Court as this will compel them to take the necessary steps in time, making reference to (CAT) Civil Application No. 73 of 2002 between ***Tanzania Revenue Authority and Tanzania Breweries Ltd*** and (CAT) Civil Application No. 8 of 2001 between ***The Director, Tilapia Hotel and Ashura Abdulkadri.***

Not subdued, the Applicant's counsel rejoined insisting that the Respondent is no longer in business and that this fact was conceded by its Managing Director as referred to on page 4 of the High Court judgment where he is recorded to have testified that the Applicant's action led to the **"death of Gomes"** (Respondent) and that the same is still conceded in paragraph 17 of the counter-affidavit wherein it is stated that the alleged Hotel and Tourism business is being run by a different company, Wellworth

Hotel Ltd; that even the copy of the Annual Report of 2002 relied upon is not signed; that if money is given to Respondent, in the event of the appeal succeeding, it may not be recovered regard being had to its current status; that in any case, if stay is ordered it would not alter the Respondent's current status, making reference to ***TRA v Breweries Ltd*** (supra) and concluded that if security is ordered it should not be physical cash but in a form of Insurance Bond, immovable property or Bank guarantee.

I should start by restating the principle that a decree-holder as is the Respondent should not be blocked from enjoying the fruits of its litigation unless there are compelling grounds for ordering otherwise. There are numerous decisions of this Court on this but it suffices to mention just two – [CAT] Civil Application No. 176 of 2003, ***Mrs. Wajibu Magungu & Others vs NBC and [CAT]*** Civil Application No. 176 of 2006, ***Abdul Hamid Mohamed Kassam & Abdullatif I. Murudeker vs Aman Mohamed & 2 others.*** The question is whether the Applicant has tilted the scale positively, that is, in its favour.

The nucleus of the Applicant's submission is that the amount involved being colossal, if paid its statutory operations will be affected and that in any case it may not be refunded in the event the appeal succeeds because the Respondent is no longer in business.

In my considered view, no doubt, by all standards controlling in this country, a sum of over one billion shillings (for, that is what the decretal sum, inclusive of interest, would total up to) is colossal. This per se however is not enough to support the application for stay of execution. There should be other factors conjunctive thereto. I should hurriedly observe however that the question of alleged effect on perfecting Applicant's statutory obligations if such colossal sum is paid out is irrelevant because statutory obligations go together with responsibilities and if legally a liability is incurred it has to be discharged under any circumstances. That apart, I am not convinced that Applicant's obligations would come to a standstill if such sum is paid out otherwise it would not deserve the name and the status it wields.

That said however, I am convinced that other factors existing tilt the balance.

The fact that the decree-holder who is clamouring to effect execution of decree is in no position to refund the to-be-paid decretal-sum in the event of the appeal succeeding, is a relevant factor when considering stay of execution (***Muzo case,*** supra). Common sense let alone justice dictate that courts should not be instruments of unjustified enrichment to some parties and impoverishment to others by engaging in hurried and unguided executions. A party should get what it legally and finally deserves.

On the facts before us, I am satisfied that notwithstanding the opposing claim by Mr. Nyika, the Respondent is no longer in business. I have so concluded because of the following.

Firstly, as rightly pointed out by the Applicant's counsel, the Respondent's Managing Director, one Gulam Ismail, who testified as Pw1 before the High Court, was indeed explicit by stating that failure to get premises resulted in ***"the death of A-C Gomes".*** This was pointed out by the High Court at page 4 of its judgment. Secondly, that ***"death***

status" is unreservedly exposed further by the very evidence produced by the Respondent in a form of a copy of an Annual Return attached to the counter – affidavit and marked ***"Exhibit AC1".*** Indeed, this is shown to be a 2002 Return. It does not require deep thinking to appreciate that if business is still being carried on by the Respondent as claimed, the latest Return would not date as far back as 2002 unless an explanation of the disparity is given and which lacks here. That apart, even that copy [Exhibit AC1) has very doubtful trappings. When I brought this element to the counsel's attention both conceded its wanting nature. The so called Annual Return is not dated nor signed let alone lacking certification, it being a copy. For all it reflects, it cannot be said to be a copy of an official communication filed by a company with the Registrar. And, thirdly, although the Respondent claims to have dropped the Garments' business while retaining Hotel and Tourism business, its very evidence expounded in the counter – affidavit negates the same. That alleged business is in another company's name and no attempt has been made to establish any connectivity between the two. Paragraph 17 of the counter-affidavit which leaves no spec of doubt thereof speaks for itself thus:-

> *"...The Respondent is still a going concern engaged in hotel business and tourist industry through* ***Wellworth Hotels***

Limited. *The only business which was closed is the garments business of which the court has ruled that the Applicant was the cause. They are now produced and shown to me copies of Annual Returns of AC Gomes and are attached herewith Marked Exhibit AC 1"* [Emphasis mine]

And, it should be noted that Pw1 (the Respondent's Managing Director) who declared ***"A.C. Gomes's death"*** in the High Court is the same person who deponed the counter – affidavit in support of the Notice of Motion in this Court. The Respondent's financial status has not been proved to be shaky, unsound or related but equally, there is no spec of proof establishing, let alone suggesting, the opposite. What has been established is that it is no longer in business in its litigation name and it has not been suggested that it has changed its name or that it is trading under some other assumed and legally recognized title.

On the facts as exposed, I am satisfied that on the status reflected, it would be risking its refund in the event the appeal succeeds, if over one billion shillings is allowed to be put into the Respondent's hands. If the same is not refunded, the Applicant would indeed suffer a substantial loss, of a magnitude envisaged by Rule 11(d) (i) of ***"the Rules".***

The other requirement under Rule 11 (d) (ii) was obviously also met – the application was filed without any unreasonable delay. The High Court delivered its judgment on 23 September, 2009 and the Notice of Motion was filed on 23rd November, 2009, exactly within a two months' period, which by all standards cannot be said to be unreasonable.

What about the third requirement, that is, security to guarantee payment of the decretal sum?

As already explained, Rule 11 of ***"the Rules"*** changed the position regarding issuance of an order for stay of execution. All the three conditions: substantial loss; filing without delay and provision of security for due performance of the decree if it comes to that [Rule 11(i), (ii) and (iii)] have to be fulfilled before such order is granted. As we have seen, the Applicant has so far succeeded on grounds (i) and (ii). The contending submissions aside, provision of security on the Applicant's side is not optional. The only question is what form should it take.

The Respondent's counsel insisted on hard cash, as in his opinion, this will make Applicant act in time and promptly. I take this to mean instituting the appeal because otherwise the process of fixing when the appeal should be heard is not in its domain but the Courts' for it is the latter that cause lists matters before itself. On the other hand, the Applicant proposes an Insurance bond, immovable property or bank guarantee. Regard being had to the nature of the controversy and the colossal amount involved and which would obviously be idle if the Respondent's plea is acceded, I am satisfied that depositing of hard cash with the Court is not the best option nor in the interest of justice. The apprehended fear of delay or failure by Applicant to take necessary steps to expedite the disposal of the appeal i.e failure to institute the appeal, is fully taken care of by the Court **"Rules"**.

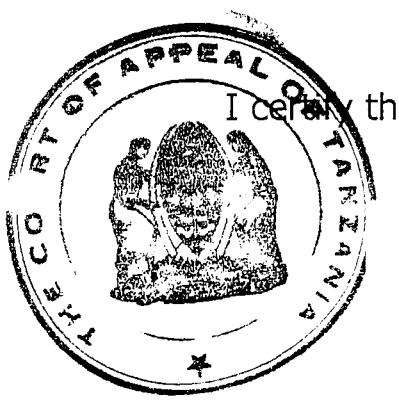
As conceded by the Respondent's Counsel, by it very nature of operation, the Applicant has properties scattered all over the country. Thus, it cannot fail to meet the decretal obligation if it loses the appeal. In fact, if it was not for the mandatory requirement of Rule 11 (d) (iii) of ***"the Rules"***, that factor alone would make provision for security unnecessary.

That said however, the rule has to be complied with. The Applicant to provide security in a form of a bank guarantee in a sum equal to what would be a decretal sum inclusive of interest as of the date when this ruling is delivered. The said Bank guarantee to be provided within seven days of the delivery of the ruling.

For reasons discussed, the application for stay of execution stands allowed in terms as detailed above with costs.

DATED at DAR ES SALAAM this 19th day of May, 2010

L.B. KALEGEYA
JUSTICE OF APPEAL



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

J.S. MGETTA
DEPUTY REGISTRAR
COURT OF APPEAL