IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MSOFFE, J.A., RUTAKANGWA, J.A., And LUANDA, J.A.)

CIVIL APPLICATION NO. 123 OF 2012

LARS ERIC HULSTROM ..... APPLICANT

VERSUS

JINGLANG LI ..... RESPONDENT

(Application for Depositing in Court cash money in lieu of a Bank guarantee from the decision of the Court of Appeal of Tanzania at Dar es Salaam)
(Msoffe, Luanda And Mjasiri, JJJ.A.)

Dated 7th day of August, 2012

In Consolidated Civil Applications Nos. 61 and 71 of 2012

RULING OF THE COURT

13 September, 2012 &
RUTAKANGWA, J.A.

Lars Eric Hulstrom (the applicant) and the National Housing Corporation (the N.H.C.), were defendants in Land Case No. 129 of 2006 (the suit) which had been instituted against them by Jinglang Li (respondent) in the High Court (Land Division) at Dar es Salaam. The suit was, on 27th April, 2012, determined in the favour of the respondent. Both defendants were dissatisfied with the judgment and decree against them. They accordingly lodged separate notices of appeal to this Court on 30th

April, 2012. Thereafter, they separately applied, under Rule 11(2) of the Tanzania Court of Appeal Rules, 2009 (the Rules), for stay of execution of the decree, pending the determination of their intended appeal to this Court. These were Civil Applications No. 61 and 71 of 2012 respectively, which were consolidated and heard together. The applicant had categorically undertaken to provide a Bank guarantee as security for the due performance of the decree.

Ruling in the consolidated applications, which were vigorously resisted by the respondent, was delivered on 7th August, 2012.

The Court unequivocally ordered:

> The execution of the High Court decree be stayed pending the determination of the first and second applicant's appeal to this Court. **The order of the Court for stay of execution is conditional upon first and second applicant each depositing a Bank's guarantee in the sum of shillings Two**

Hundred Million (200,000,000/=) within two weeks of the delivery of the Ruling.

[Emphasis is ours].

The said two weeks expired on **Tuesday 21st August, 2012.** As evidenced by this application, the applicant not only failed to deposit the ordered bank guarantee within the prescribed time, but he abysmally failed to obtain a bank guarantee at all.

Failure to comply with the sole condition upon which the stay order was predicated, forced the applicant to come up with this application. The application by notice of motion lodged on 22nd August, 2012, is premised under Rule 4(1), (2) (a) and (b) of the Rules. The applicant is moving the Court for an order:

> to be allowed to deposit in court cash money in the sum of Tshs 200,000,000/= (two hundred million only) in lieu of a bank guarantee as security for due performance of such decree as per the order of this court...

To prosecute this application before us the applicant was represented by Mr. Karoli Tarimo, learned advocate. The respondent, who strongly opposed the application, was represented by Ms. Fatma Karume, learned advocate.

From the notice of motion and its accompanying affidavit (which has three annextures) and the submissions of Mr. Tarimo, it is crystal clear that the applicant is trying to transfer the responsibility and blame for his failure to deposit the bank guarantee to "his banker", the NBC Bank Ltd (the Bank). We have deliberately expressed the words his banker in inverted commas for a reason which we shall elaborate on later.

It was Mr. Tarimo's submission before us that immediately after the Court ruling, the applicant started making *"arrangements with the banker of his company, the NBC Limited, for issuance of the Bank guarantee"*. It was his further submission that although the bank had initially agreed to grant him a bank guarantee in the sum of Tshs 200,000,000/- it reneged on its promise at the last hour, i.e. on 21st August, 2012 at 15.00 hrs. The Bank, he urged, refused to give him the sought guarantee upon giving a cash cover in the same amount because, while the requested bank

guarantee was in his personal name and/or capacity, the account used on a cash cover was in the name of a company and further that he was a foreigner. The said company, according to his affidavit in support of the notice of motion, the Bank letter (annexture LLA – 2) and the Bank's Corporate Branch A/C No. 0111030144408 (annexture LLA -1), is MALMO MONTEAGEKONSULT AB (T) (the Company) of which the applicant is the undisputed majority shareholder. For this reason, Mr. Tarimo pressed us to grant the order sought on the pain of having the decree against the applicant executed before his intended appeal is determined.

In resisting the application, Ms Karume forcefully argued that the application lacks merit as the applicant has himself to blame for failing to honour his earlier promise to the Court. Ms. Karume put it plainly that in Civil Application No. 6 of 2012 the applicant had adamantly insisted that *"he was ready to provide a bank guarantee".* His plea was accepted on 7th August, 2012. However, he waited until a week had expired before he approached the Bank to begin processing the application for a bank guarantee. It was also her strong contention that an order for stay of execution of a decree has always been an equitable remedy and not a legal right which must be pursued with great diligence and vigilance. As the

applicant failed to comply with the Court order within two weeks as ordered, the application ought to be dismissed with costs, she maintained.

In disposing of this application, we have found it convenient to begin by expressing our agreement with Ms. Karume's assertion that a stay of execution order is an equitable remedy. Nobody can claim it as a matter of right because a decree-holder has a superior right to immediate enjoyment of the fruits of the decree in his favour. That is why rule 11(2) of the Rules is couched in permissive terms, as far as the grant of a stay order is concerned. We also take it as settled law that equity only helps the vigilant, as rightly contended by Ms. Karume.

There is no dispute here that despite the respondent's stiff resistance to the applicant's application for a stay order, the Court exercised its discretion in favour of the applicant. It granted him the order sought. All the same, the stay order had a clear condition attached to it before it could become effective. The applicant had to deposit a Bank guarantee as already shown. The applicant failed totally to meet this condition precedent. As a result, the life span of the stay order expired on 21st August, 2012. That was before this application was lodged.

As if the above failure was not fatal enough, the applicant had not found it prudent and/or expedient on his part to move the Court, under Rule 10 of the Rules, to extend the time prescribed in the Court order of 7th August, 2012 "either before or after the expiration of that time" for depositing the bank guarantee. Instead he came up with this admittedly strange application on 22nd August, 2012, to vary the order. We call it strange because the said order is no longer in existence. In view of this fact, our only logical and acceptable answer, then, to the prayer of the applicant is that we cannot grant the order sought because there is no Court order before us to vary in the terms dictated. May be we would have been persuaded by the applicant's pleas, all things being equal, had we been moved before 21st August, 2012. On this ground alone we would be justified in rejecting the application. But there is another reason advanced by Ms. Karume in opposition to the application.

It is common ground that the applicant convinced the Court to grant the stay order because he had solemnly undertaken to provide a Bank guarantee. We have carefully studied the affidavit and submissions in support of the notice of motion in Civil Application No. 6 of 2012 referred

to above. We failed to glean therefrom an allusion, leave alone an assertion, to the effect that the applicant intended to seek aid from the bank account of another person, i.e the company, in his pursuit of a bank guarantee. When he attempted to do so after obtaining a stay order, the Bank flatly refused to be privy to that.

In its letter to the applicant, dated 21st August, 2012, the Bank said:

> We wish to advise that we are unable to process your request for bank guarantee from letter dated 15th August, 2012 as we would advise the guarantee to be applied from personal account of Mr. LARS ERIK HULTSROM and the Company to secure the same.
>
> Yours faithfully
>
> N.B.C. LIMITED,
>
> **Jacquiline Sindano**
> BRANCH MANAGER.

We would like to point out immediately, that this letter belies the assertions of the Applicant in paragraphs (3) and (9) of his affidavit and Mr. Tarimo's submissions before us in two respects. One, the visible

process to obtain the bank guarantee did not begin immediately after 7th August, 2012 but as late as 15th August, 2012 as correctly argued by Ms. Karume. Two, the Bank never denied the application for the sought guarantee, because the applicant was "a foreigner". So going by the affidavital evidence before us and that evidence from the applicant himself, there was a delay of (8) clear days, before he began to take credible steps to process the application of the bank guarantee and worse still not from his own personal account for that matter. We are here forced to sympathise with the applicant on his failure to appreciate the fact that obtaining a bank guarantee is a long drawn process as correctly contended by Ms. Karume, as opposed, for instance, to the process of accessing a bank for the purpose of withdrawing cash from an Automated Teller Machine (ATM). This inaction clearly vindicates Ms. Karume in her contention that lack of vigilance on the part of the applicant, should be considered against him in our determination of this application.

In trying to blame the Bank for the predicament he has found himself in, the applicant tried to impress upon us that the Bank had no justification in refusing his request as he had made it clear to it that he is a *"majority shareholder, Managing Director and the one operating the account for the*

last 20 years". That may be the case. However, it is our considered opinion that it is not within our mandate in these proceedings either to fault or to vindicate the Bank for its decision presumably based on sound commercial considerations. But, it is within our jurisdiction, we believe, to state that the applicant being the Managing Director ought to have been alive to this law of respectable antiquity. As far as the law is concerned, a company has a separate legal existence that is distinct from that of its owners, managers, operators, employees, etc. An incorporated company is a legal person with its own properties, its own rights and obligations. It is trite law that a company's money and other assets belong to the company and must be employed for the company purposes only unless its Board of Directors, by a duly passed resolution, directs or authorizes otherwise. See **SALOMON v. SALOMON & Co.** [1897] A.C. 22 H.L., among many others.

With the above facts and pertinent legal observations in mind, we have reached a conclusive finding that the applicant lacked vigilance and transparency. Had he been vigilant, diligent and ready and willing to apply for the bank guarantee from his personal account from the outset, he would not have failed to meet the condition precedent imposed by the

Court in the stay order. In our settled minds he has himself to blame. Indeed, delay defeats the equities.

In fine, we find no merit in this application. We hereby dismiss it with costs as urged by Ms. Karume.

We so order.

DATED at **DAR ES SALAAM** this 19th day of September, 2012.

JUSTICE OF APPEAL

JUSTICE OF APPEAL

JUSTICE OF APPEAL