IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: KIMARO,J.A.,MASSATI,J.A., And MMILLA,J.A.)

CIVIL APPLICATION NO. 12 OF 2012

1. ANTHONY NGOO
2. DAVIS ANTHONY NGOO } ..... APPLICANTS

VERSUS

KITINDA KIMARO.....RESPONDENT

(Application for stay of execution of the judgment of the High Court of Arusha)

(Sambo, J.)

dated 12th day of October, 2012
in
Civil Case No. 17 of 2010

.....

RULING OF THE COURT

5th & 12th December, 2013

KIMARO,J.A.:-

Before us is an application for stay of execution filed by a notice of motion under Rule 11(2) (b) of the Court of Appeal Rules, 2009. The application was filed by Messrs Imboru Law Chambers and is supported by an affidavit sworn by the applicants and that of Akonaay Sikay Muhale O'hhay –Sang'ka, learned advocate for the applicants. The grounds for filing the application are:

1. The intended appeal raises issues of both law and facts pertinent for the decision of the Court of Appeal of Tanzania, namely;

   That the judgment and hence the decree of the High Court sought to be stayed are unconscionable in that:-

   (a) The judgement and hence the decree, award unpleaded reliefs in the way of dissolution of the partnership between the parties herein and the sale of the mining plot; and

   (b) The judgment and hence the decree, award illegal interests in the way of interest of 15% p.m. on the 400,000,000/= awarded as special damages and the interest at Court rate of 12% p.a. ;and

   (c) The judgment and the hence decree award special damage or some damage to the tune of 400,000,000/= without proof ;and

   (d) The judgment and hence the decree award an unreasonable amount of general damages without any basis thereof being shown.

2. That the intended appeal has overwhelming chances of success

3. That on the balance of preponderance the applicants stand to suffer more inconvenience and hard ship than the respondent if stay of execution is refused.

The affidavit of the applicants at paragraph 6 explains why they are aggrieved by the judgment of the High Court. Paragraph 7 shows what effect the judgment of the High Court has on the suit premises (the mining plot) that it will deteriorate because of lack of constant maintenance, while paragraph 8 avers that it is the applicants who are likely to suffer more hardship than the respondent if the prayer for stay of execution is refused. As for the affidavit sworn by Mr. Sang'ka, it adds that the notice of appeal was filed in time and the appeal has overwhelming chances of success.

The respondent in his affidavit in reply, disputes what is averred in paragraphs 6 and 7 of the affidavit of the applicants. As for that of Mr. Sang'ka he disputes that the appeal has overwhelming chances of success.

Both learned advocates, (Mr. Akonaay Sikay Muhale O'hhay – Sang'ka and Mr. Mpaya Kamara) appearing for the respective parties in

this application, filed written submissions in compliance with Rule 106 of the Court of Appeal Rules, 2009 (but without specifying the specific sub - rule) to support their respective positions in the application. They also appeared for the parties when the application was called on for the hearing.

In his submission Mr. Sang'ka says that the applicants are seeking for stay of execution because they have overwhelming chances of success. He says loosing the mining plot will occasion loss to both the 1st applicant and the respondent if the order for dissolution of the partnership is executed. He said after all, that was not what the respondent asked for. What he asked for, said the learned advocate, is the right to participate in the running of the business of the mining plot, but instead of the trial court focusing on the prayers asked for, he ordered the dissolution of the partnership.

Responding to the submission made by Mr. Kamara in opposing the application, Mr. Sang'ka said that an important point raised in his submission is the question of security. In his opinion the value of mining plot which is jointly owned by the 1st applicant and the respondent is

sufficient security for the application. He prayed that the application be granted.

In his submissions the learned advocate for respondent said; firstly, it was improper for the written submissions made by the learned advocate for the applicant to be accompanied by a copy of the plaint. He cited the case of **Twico at Mbeya Cement Company Ltd V Mbeya Cement Company & Another** [2005] T.L.R.41 to support his argument. Secondly, he said the grounds for ordering dissolution of the partnership are well stated in the judgment of the High Court. The High Court took into account the worsening working relationship between the partners. The third is that the applicants have not offered security as required by Rule 11(2) (d) of the Rules. He referred the Court to the case of **Peter P.Temba t /a Mahenge Timber & Enterprises V Dar Es Salaam City Council &** Another Civil Application No.149 of 2009 (unreported). He said the requirement is mandatory and not discretionary. The fourth aspect covered by the learned advocate is the suggestion made by the learned advocate for the applicants that the parties should work together. In his considered opinion the suggestion is made in bad faith because the 1st

applicant disputes existence of a partnership between him and the respondent. He prayed that the application be dismissed with costs.

The issue before the Court is whether the applicants have satisfied all the conditions for granting them the order for stay of execution.

On our part we note that the application does not cite all the necessary provisions of Rule 11 which enable the Court to grant an order for stay of execution. The applicants cited rule 11 (2) (b) only. The Court of Appeal Rules, 2009 are clear on the provisions of Rule 11 governing the grant of an order for stay of execution. They are Rule 11 (2) (b), (c) and (d). All conditions laid down in those provisions must be satisfied before an order for stay of execution can be granted. In the case of **Joseph Antony Soares @ Goha V Hussein s/o Omary** Civil Application No. 6 of 2012 (unreported), the Court in discussing the previous conditions for granting an order for stay of execution in comparative terms with the Court of Appeal Rules, 2009 held that:

> *"In the 2009 Rules, however, the ground has shifted. The Court no longer has luxury of granting an order of stay of execution "on such terms as the*

Court may think just," but must find that the cumulative conditions enumerated in Rule 11 (2) (b) (c) and (d) exist before granting the order."

In holding so, the Court was emphasizing what the Court previously said in the cases of **Mantrac Tanzania Limited V Raymond Costa** Civil Application No.11 of 2010 (unreported) and **Lawrent Kavishe V Enely Herzon** Civil Application No. 5 of 2012 (unreported).

Rule 11(2) (b) requires the applicants to lodge the notice of appeal in accordance with Rule 83. The applicants complied with the said rule. The judgment of the High Court was delivered on 12th October, 2012. Rule 83 provides for the limitation period of thirty days for filing the notice of appeal counting from the date of the judgment. The notice of appeal was filed on 17th October, 2012 in compliance with Rule 83.

Rule 11(2) (c) requires the applicants to lodge the application for stay of execution before the expiration of the period of appeal. The application for stay of execution was filed on 10th December, 2012 within the period

required. This period for filing the application complies with Rule 90 (1) of the Court Rules which provides for a period of sixty days for institution of appeals.

Coming to Rule 11(2) (d) of the Court Rules, it provides as follows:

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

(a) 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." [Emphasis added].

The wording of sub-rule (2) (d) of Rule 11 is clear that all the conditions laid down must be complied with. The case of **Frida Kanule Mwijage V The Tanzania Building Agency** Civil Application No. 3 of 2011(unreported) is another authority of the Court reiterating the same position as was stated in the cases cited hereinbefore, that the conditions laid down in the said sub-rule must all be satisfied before the application is granted. Sub-rule (d) (ii) of rule 11(2) was complied with. The application was filed in accordance with the period provided for under Rule 11(2) (c).

However, the remaining two conditions have not been satisfied. Nowhere in the grounds for filing the notice of motion nor in the affidavits supporting the application have the applicants averred that they will suffer loss, let alone substantial loss. That is what Rule 11(2) (d) (i) requires. What the applicants averred is that they will be more inconvenienced than the respondent if the order for stay of execution is not granted. But with the new Rule 11(2) (d), that is no longer a requirement for granting stay of execution. What the applicants were required to show was the loss they

will suffer as compared to the loss that will be suffered by the respondent if the order for stay of execution is not granted. This position was discussed at length by the Court in the case of **Peter Temba t/a Mahenge Timber & Ent** (supra). The decree forming subject of the application is a money decree arising from a mining plot. The Applicants had to show the Court the kind of loss they would suffer if execution of the decree is carried out. This they have not done. They resorted to the old position which no longer applies in granting an order for stay of execution.

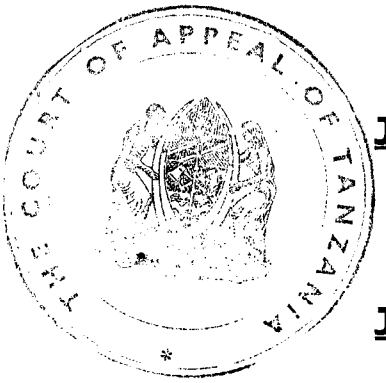
As for the question of furnishing security, Rule 11(2) (d) (iii) required the applicants to give security for due performance of the decree or order as may ultimately be binding upon them. In other words the applicants had to make an undertaking to ensure that the respondent will not be deprived fruits of his litigation without justification in the event the intended appeal ends in favour of the respondent. Mr. Sang'ka said the suit plot which forms the subject of litigation serves as sufficient security. However, he did not bother to explain how it would serve as security. With respect, we do not agree with him for one main reason. The decree forming subject of the application says that the mining plot should be sold

and the proceeds be shared equally between the 1st applicant and the respondent. Under the circumstances how can it serve as security for the performance of the decree? That is a contradiction on the part of Mr. Sang'ka.

Since the applicants have not shown that they will suffer substantial loss, and have not furnished security, nor given guarantee of security, the application for stay of execution lacks merit and is dismissed with costs.

DATED at ARUSHA this 12th day of December, 2013.

N.P. KIMARO
JUSTICE OF APPEAL



S.A. MASSATI
JUSTICE OF APPEAL

B.M. MMILLA
JUSTICE OF APPEAL

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

E.Y. Mkwizu
DEPUTY REGISTRAR
COURT OF APPEAL