**IN THE COURT OF APPEAL OF TANZANIA**
**AT DAR ES SALAAM**

**(CORAM: MMILLA, J.A., MWANGESI, J.A. And MWAMBEGELE, J.A.)**

**CIVIL APPLICATION NO. 98 OF 2016**

**AFRICHICK HATCHERS LIMITED ..... APPLICANT**

**VERSUS**

**CRDB BANK PLC ..... RESPONDENT**

**(Application for stay of Execution of the Decree of the High Court of Tanzania (Commercial Division) at Dar es Salaam)**

**(Maige, J.)**

**Dated 9th day of February, 2016**
**in**
**Commercial Case No. 97 of 2014**

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## RULING OF THE COURT (MAJORITY)

## (Hon. Mwambegele, J.A. Dissenting)

25th February, & 15th March, 2019

**MMILLA, J.A.:**

In 2016, CRDB Bank Plc. (the respondent), won a suit against Africhick Hatchers Limited (the applicant), in Civil Case No. 97 of 2014 in the High Court of Tanzania (Commercial Division) at Dar es Salaam. Dissatisfied, the applicant filed in the Court a notice of intention to appeal endeavouring to challenge that decision. Meanwhile however, it instituted an application under Rules 11 (2) (b), (c) and (d) and 48 (1) and (2) of the Tanzania Court of Appeal Rules, 2009 (the Rules) seeking for orders for

stay of execution of the judgment and decree in that case pending the hearing and determination of the intended appeal. The said application is supported by an affidavit sworn by Issack Bugali Mwamasika, the Chief Executive Officer of the applicant company. The applicant is represented by Mr. Gabriel Mnyele and Mr. Mpaya Kamara, learned advocates.

On the other hand, the application is resisted by the respondent who is represented by a team of three advocates; Mr. Richard Rweyongeza, Mr. Joseph Sang'udi and Ms Jacqueline Rweyongeza, learned advocates. They filed an affidavit in reply which was sworn by Mr. Richard Rweyongeza.

At the commencement of the hearing of this application on 25.2.2019, Mr. Rweyongeza informed the Court that they were not contesting conditions (i) and (ii) instructed under sub-rule (2) (d) (i) to (iii) of Rule 11 of the Rules (now sub-rule (5) (a), (b) and (c) of that same Rule following the amendment brought about by GN. No. 362 of 22.9.2017). He stated that he and his fellow advocates for the applicant agreed to address the Court regarding the third condition on security for performance of the decree as may ultimately be binding upon the applicant. Mr. Mnyele confirmed Mr. Rweyongeza's submission, to which arrangement we had no qualms.

Both, the notice of motion and the affidavit in support of the application addressed the aspect of security for the performance of the decree as may ultimately be binding upon the application. Under paragraph (b) in the notice of motion, which is repeated word to word in paragraph 15 (b) of the affidavit in support of the application, the applicant offers the property that secured the loan to additionally cater as security for performance of the decree, though she makes an alternative offer to the first option in paragraph 17, also of the affidavit in support of the application, under which she has undertaken that should the Court find the property that secured the loan insufficient, then its directors and sister companies will be prepared to present/offer other securities as may be directed. Paragraphs 15 (b) and (17) of the affidavit in support of the application state that:-

> *"15 (b) The property on Plot No. 1027 Block G Boko Area, Kinondoni District, Dar es Salaam, CT No. 78288 measuring 7.436 hacters (sic) worth undisputed value of over Tshs. 20,000,000,000/= which is mortgage to the respondent constitutes sufficient security for due*

*performance of the decree as may ultimately be binding upon the applicant. Further the original Title Deed is in possession of the respondent.*

17. *Further to what is stated in paragraph 15 (b) hereinabove, the applicant undertakes to procure and furnish additional security from its directors and or sister companies and institutions if so ordered by the Court for due performance of the decree as may ultimately be binding upon it."*

In his oral submission, Mr. Mnyele underscored that usually, in an endeavour to comply with the requirement under Rule 11 (2) (d) (iii) of the Rules, a firm undertaking for performance of a decree as may ultimately be binding may be sufficient provided that the Court sets down the period within which to comply. He referred the Court to the cases of **Joramu Biswalo v. Hamisi Richard**, Civil Application No. 11 of 2013, CAT and **Mantrac Tanzania Limited v. Raymond Costa**, Civil Application No. 11 of 2010 (both unreported). The Court observed in **Mantrac Tanzania Limited** that:-

*"One other condition is that the applicant for a stay order must give security for the due performance of the decree against him. To meet this condition, the law does not strictly demand that the said security must be given prior to the grant of the stay order. To us, a firm undertaking by the applicant to provide security might prove sufficient to move the Court, all things being equal, to grant a stay order, provided the Court sets a reasonable time limit within which the applicant should give the same."*

In the circumstances of the present case however, relying on paragraph 15 (b) of the affidavit in support of the application, Mr. Mnyele argued that there is sufficient security in the hands of the respondent bank whose value is more than the decree itself. He said that while the decreed amount stands at Tzs. 1,785,000,000/= (notably excluding interest), the property which secured the loan, currently in the hands of the respondent, is undisputedly worth Tzs. 20,000,000,000/=. The said value of that property is supported by annexture NHL5. He added that in case the Court will find that the security which secured the loan is insufficient to stand as

such, which he said is very unlikely, then the applicant has taken a precaution and stated in paragraph 17 of the affidavit in support of the application that she is ready, able and prepared to furnish further securities from her directors and sister companies. For these reasons, Mr. Mnyele urged the Court to grant the order for stay of execution as pleaded.

On the other hand, Mr. Sang'udi marshaled the submission on behalf of his colleagues for the respondent. He was eloquent that the security covered under paragraph 15 (b) of the affidavit in support of the application is an encumbered security in so far as it secured the loan which is the subject of the intended appeal, therefore that it cannot be applied as security in the performance of the decree under discussion. He referred the Court to the cases of **Tanzania Sewing Machine Co. Ltd. v. Njake Enterprises Ltd,** Civil Application No. 238 of 2014, CAT and **CRDB Bank Ltd. v. Issack Mwamasika and Others**, Civil Application No. 103/01 of 2017, CAT (both unreported).

In elaboration, Mr. Sang'udi submitted that in the case of **Tanzania Sewing Machine** (supra), the applicant offered the house which was the subject of litigation as security for performance, but the Court declined to accept that offer on account that there ought to have been a different kind

of security. He also said that in **CRDB Bank Ltd. v. Issack Mwamasika and Others** (supra), the applicant bank offered its own bank guarantee as security for performance, but likewise the Court declined and required her to offer a bank guarantee from any other banks in the jurisdiction. Mr. Sang'udi contended that in the circumstances of the present case, the applicant's offer to use the property which secured the loan should, like in the two cases he cited, be rejected for similar reasons.

Mr. Rweyongeza chipped in to cover the other point regarding the intimation by the applicant that should the Court find that the property which secured the loan was insufficient security, her directors and sister companies were prepared to furnish additional securities as may be directed by the Court. In that regard, Mr. Rweyongeza argued that it was not a firm undertaking, especially taking into account that there is no affidavit to that effect. He insisted that more commitment was needed. He contended however, that should the Court grant the application, costs should be on the outcome of the intended appeal.

A brief rejoinder was made by Mr. Kamara. He was emphatic that the value of the property which secured the loan, which property is in the hands of the respondent bank was Tzs. 20,000,000,000/=, and that it is

over and above the decretal amount standing at Tzs. 1,785, 000,000/=. He also said that the cases of **Tanzania Sewing Machine** and **CRDB Bank Ltd. v. Issack Mwamasika and Others** (supra) were distinguishable to the facts in the present case. He said, the Court rightly declined to accept the house in **Tanzania Sewing Machine** case because it was the subject of litigation, whereas in the present case the property that secured the loan, though an encumbrance, was not the subject of litigation. He also said that in **CRDB Bank Ltd. v. Issack Mwamasika and Others,** the Court declined to accept the applicant bank's own bank guarantee as security for performance of the decree because in effect, it would remain in the applicant's possession and power, which would have ended up defeating the purpose and intention of the requirement for security. He requested the Court to grant the application, and direct the costs to be in the course.

We wish to emphasize here that under sub-rule (2) (d) (i) to (iii) of Rule 11 of the Rules, if a party is to succeed in an application for stay of execution of a decree, he/she has to satisfy all the conditions set out thereunder. That Rule provides that:-

*"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."*

We also stress that these conditions have to be complied with cumulatively – See the cases of **Joseph Antony Soares @ Goha v. Hussein Omary,** Civil Application No. 6 of 2012, **Lawrent Kavishe v. Enely Hezron,** Civil Application No.5 of 2012 (both unreported) and **Mantrac Tanzania Limited v. Raymond Costa** (supra).

As earlier on pointed out, the counsel for the parties successfully requested to address us on the question of security alone on account that the other two conditions were complied with.

We have carefully gone through the contents of the notice of motion and the affidavit in support of the application in an endeavour to satisfy ourselves whether the first two conditions were satisfied as submitted by counsel for the parties. We are persuaded that indeed, those two conditions were complied with; **firstly** because the application was made without unreasonable delay; and **secondly** that the applicant has demonstrated that she stands to suffer substantial loss if the order for stay of execution will not be granted because the respondent may end up selling the hatchery factory to her detriment.

The crucial issue demanding the Court's consideration is whether or not, from the submissions of the counsel for the parties, the question of security for performance of a decree as may ultimately be binding upon the applicant has been properly defended.

Before we may proceed to consider the submissions of counsel for the parties however, we would like to make an observation that in dealing with the question of security for performance, the Court has to balance the interests of the applicant who is seeking the order for stay and those of the respondent who is required to be paid his money in the event the decree becomes binding. Of course, most important is the fact that the respondent

should not find it difficult or impossible to realize the decree in case the intended appeal fails. This is the cornerstone of the requirement for security. In such circumstances, the Court is principally obligated to figure out whether or not any one particular mode of security vouches risks on the part of the respondent.

The position was best summarized by Parker LJ. in **Rosengrens Ltd. v. Safe Deposit Centres Ltd.** [1984] 3 ALL ER 198 at p. 200 as foliows:-

> *"The process of giving security is one, which arises constantly. So long as the opposite party can be adequately protected, it is right and proper that security should be given in a way, which is least disadvantageous to the party giving the security. It may take many forms. Bank guarantee and payment into court are but two of them . . . . So long as it is adequate, then the form of it is a matter, which is immaterial."*

In the **Rosengrens** case, Sir John Donaldson, MR added the following observation:-

*We are faced with a situation where judgment has been given. It is subject to appeal. It may be affirmed or it may be set aside. We are concerned with preserving the rights of both parties pending that appeal. It is not our function of the Court to disadvantage the defendant while giving no legitimate advantage to the plaintiffs . . . . It is our duty to hold the ring even handedly without prejudicing the issue pending the appeal. For that purpose, it matters not whether the plaintiffs are secured in one way or another. If it would be easier for the defendants or if for any reason they would prefer to provide a bank guarantee rather than cash. I can see absolutely no reason in principle why they should not do so . . ."*

Following the principle in Rosengrens in the case of **Nduhiu Gitahi v. Warugongo** [1988] K.L.R. 621, the Court appeal of Kenya added at page 623:-

> *"The aim of the Court in this case was to make sure, in an even-handed manner, that the appeal will not be prejudiced and that the decretal sum would be available if required. The respondent is not entitled, for instance, to make life difficult for the applicant, so as to tempt him into settling the appeal. Nor will either party lose if the sum is actually paid with interest at Court rates. Indeed in this case there is less need to protect the defendant because nearly half the sum will have been paid and the balance was at one state open to negotiation to reduce it."*

That principle was also followed by **Firoze Nurali Hirji (Suing through his dully authorized Attorney Sharok Kher Mohamed Ali Hirji) v. Housing Finance Company of Kenya Limited & Another** [2012] eKLR.

We hasten to point out that the above articulation is good law and we adopt it.

Back to the present case; as earlier on pointed out, the applicant in the present case has made two offers; **one** that, the Court accepts as sufficient security the property that secured the loan; and **two** that, should the Court consider the first offer to be an insufficient security, then it be pleased to allow the undertaking and indulgence of her directors and sister companies to furnish other forms of securities. We wish to consider the first option first, and that we **will turn to the second option only if** it may be found that the first one is inappropriate.

In an effort to controvert the applicant's first option to offer the property which secured the loan as security in the circumstances of this application, learned counsel Sang'udi rationalized that it is inappropriate because it is an encumbered security. As already pointed out, he relied on the cases of **Tanzania Sewing Machine** and **CRDB Bank Ltd. v. Issack Mwamasika and Others** (supra). On the other hand, counsel for the applicant maintained that the two cases relied upon were distinguishable to the circumstances of the present case, thus inapplicable. We hurry to say that we agree with the applicants' advocates on the point.

In the first place, it is true that the applicant in **Tanzania Sewing Machine** case offered the house which was the subject of litigation as

security for performance but the respondent's advocates resisted that offer. At the end of it all however, that case was not decided on the basis of the nature of the security which was offered. To the contrary, the decision in that case was pegged on the point that the applicant had not made any firm undertaking. Thus, that case is distinguishable from the present one.

Likewise, the case of **CRDB v. Issack Mwamasika & Another** is distinguishable from the present case on account that the applicant in that case offered a self-bank guarantee as security, which the Court declined to accept because it would have been in their possession and power, a fact which could have defeated the purpose and intention for the requirement for security. In other words, the applicant in that case was required to make an undertaking to ensure that the respondent would not be deprived the fruits of his litigation without justification in the event the intended appeal ended in his favour.

We are however, aware of other cases in which the applicants offered as security for performance of the decree properties which were also the subject of litigations. We have in mind the cases of **Anthony Ngoo and Another v. Kitinda Kimaro,** Civil Application No. 12 of 2012

and **Mohamed Rajuu Hassan v. Almahri Mohsen Ghalib (Administrator of the Estate of the late Salim Ally Al Saad) and 2 Others**, Civil Application No. 570 of 2017 (unreported), among others. In the case of Anthony **Ngoo and Another v. Kitinda Kimaro the** Court said that:-

> *"As for the question of furnishing security, Rule 11 (2) (d) (iii) (of the Rules) required the applicants to give security for due performance of the decree or order as may ultimately be binding upon them. . . . 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 reason. The decree forming the subject of the application says that the mining plot should be sold and proceeds be shared equally between the 1st applicant and the respondent. Under the circumstances how can it serve as*

*security for performance of the decree? This is a contradiction on the part of Mr. Sang'ka."*

We precisely agree with that stance on account that such property is not exclusively in the possession and control of the applicant, therefore unsuitable as security in such circumstances.

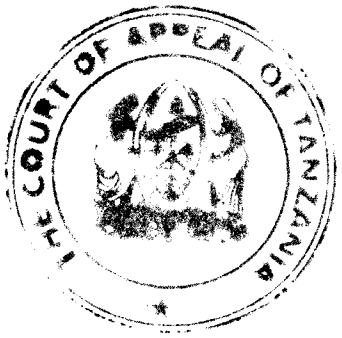
In the present case however, the property which secured the loan and currently in the hands of the respondent bank, was not the subject of litigation. It was, and still is, a collateral from which the respondent may at any requisite time recover, upon sale, his secured loan and the decreed amount. It is pertinent to point out that because the undisputed value of that property is Tzs. 20,000,000,000/=; and since the decreed amount stands at Tzs. 1,785,000,000/= (of course without interest), which means Tzs. 18,000,000,000/= is in excess; we are firm that the respondent will not be at risk. As such, justice demands that we accept that property as sufficient security, as we accordingly do, for the due performance of the decree as prayed on behalf of the applicant.

In the event, we order a stay of execution of the decree intended to be appealed against. We direct that besides securing the loan as it were,

that same property likewise operates as security of performance of that decree as may ultimately be binding upon the applicant in case her appeal fails. Costs to be in the course.

Order accordingly.

**DATED** at **DAR ES SALAAM** this 14th day of March, 2019.




B. M. MMILLA
**JUSTICE OF APPEAL**

S. S. MWANGESI
**JUSTICE OF APPEAL**

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

B.A. MPEPO
**DEPUTY REGISTRAR**
**COURT OF APPEAL**