IN THE COURT OF APPEAL OF TANZANIA
AT MTWARA

(CORAM: MMILLA, J.A., SEHEL, J.A., And MWANDAMBO, J.A.)

CIVIL APPLICATION NO. 603/07 OF 2018

TANZANIA PETROLEUM DEVELOPMENT CORPORATION ..... APPLICANT

VERSUS

MUSSA YUSUPH NAMWAO & 37 OTHERS.....RESPONDENTS

(Application for Stay Execution from the decision of the High Court of Tanzania at Mtwara)

(Mlacha, J.)

dated the 3rd day of August, 2019
in
Land Case No. 12 of 2015

RULING OF THE COURT

21st October, & 4th November, 2019

MMILLA, J.A.:

The applicant, Tanzania Petroleum Development Corporation (TPDC), was sued in the High Court of Tanzania at Mtwara by Mussa Yusufu Namwao and 37 others in Land Case No. 12 of 2015 for a number of reliefs. They included a declaratory order that the compensation they received regarding their respective pieces of land which were taken by the applicant was unfair and illegal, and

requested that court to compel the applicant to pay them a total of Tzs. 229,208, 727/= on top of what they were paid as a group. They likewise asked for special and general damages to the tune of Tzs. 65,000,000/= and 110,000,000/= respectively.

At the end of the trial, the High Court awarded a total of Tzs. 146,291,476/= to 24 of the 38 plaintiffs who were listed down, an amount which carried an interest at the rate of 20% per annum from 10.02.2012 to the date of the judgment of that court, and a further interest at the rate of 12% from the date of judgment till payment in full. That decision aggrieved the applicant who resolved to appeal. They filed a Notice of Appeal and applied for the necessary documents to enable them to appeal. During the pendency of their appeal however, on 3.8.2018 the respondents served them with a notice to show cause why execution could not be carried out, an aspect which triggered them to file the present application, seeking orders to stay execution of the judgment and decree of the trial High Court pending the hearing and determination of that appeal.

The present application is brought by way of Notice of Motion, and is founded under Rule 11 (3) and (6) of the Tanzania Court of Appeal Rules, 2009 as amended by Tanzania Court of Appeal (Amendments) Rules, 2017 (the Rules). It is supported by an affidavit affirmed by Abuu Mageta, the applicant's duly instructed advocate.

In opposition of the application, the respondents have filed an affidavit in reply which has been affirmed by Mussa Yusuph Namwao on behalf of the rest of them. They had similarly filed a notice of preliminary objection, but they withdrew it before the commencement of the hearing of the substantive application, thus paving way for the hearing of the application on merit.

Before us, the applicant corporation was represented by Mr. Peter Musetti, learned Senior State Attorney, who was assisted by Mr. Raymond Baravuga, the Principal Officer of the Applicant; whereas Mr. Francis Makota, learned advocate, entered appearance for all the respondents.

At the inception of hearing, Mr. Makota informed the Court that he held a discussion with the counsel representing the applicant and informed them that he was not contesting the first and second conditions expressed under Rule 11 (5) (a) and (b) of the Rules, for the reason that he was convinced those conditions have been satisfied. As such, he proposed for the contest to center on the third condition focusing on security for performance of the decree as may ultimately be binding upon the applicant. Mr. Musetti confirmed that statement. As such, we approved their suggestion.

Upon being invited to make their submission, Mr. Musetti requested to adopt their Notice of Motion, the affidavit in support of the application, and the written submissions they had filed. He mainly submitted that they made a firm undertaking in respect of the security for due performance of the decree in paragraph (a) of the Notice of Motion, and also under paragraph 6 (v) of the affidavit accompanying the application. It is stated in those paragraphs that the applicant is a reputable public corporation and is capable of satisfying the decretal sum in case their appeal may be unsuccessful, which they believed n to be a firm undertaking sufficient to convince

the Court to grant the order sought. He relied on **Mantrac Tanzania Ltd. v. Raymond Costa**, Civil Application No. 11 of 2010 (unreported), a decision which was relied upon in the latter case of **Africhick Hatchers Limited v. CRDB Bank Plc.,** Civil Application No. 98 of 2016 (unreported). He added that should the Court find that the undertaking they made is not sufficient, he was requesting it to be at liberty to impose any other conditions as it may think fit, and expressed their willingness to comply.

When his turn came, Mr. Makota prayed to adopt the affidavit in reply, and was also permitted to add one more case to his list of authorities.

Mr. Makota's submission in reply was very brief. To begin with, he refuted Mr. Musetti's assertion that a firm undertaking has been made under paragraphs (a) of the Notice of Motion and 6 (v) of the affidavit accompanying the application. To him, those paragraphs do not reflect any firm undertaking. According to Mr. Makota, a firm undertaking entails the presence of evidence that the decretal sum may readily be paid in case the appeal does not succeed, that such

evidence was lacking. He similarly said that the case of **Africhick Hatchers Limited v. CRDB Bank Plc.** (supra), is not applicable in the circumstances of the present matter because in that case the applicant was ready to give a bank guarantee or to deposit money in Court, which is not the position in the instant matter. At any rate, he went on to submit, the undertaking ought to have been made in the Notice of Motion and the accompanying affidavit and not in the written submissions as they have done. On this point, he relied on **The Attorney General Zanzibar v. Jaku Hashim Ayub & Another,** Civil Application No. 385/15 of 2018 (unreported). For those reasons, he requested the Court to dismiss the application with costs.

In a short rejoinder, Mr. Musetti repeated his request for the Court to impose any other conditions as it may think fit, and that the applicant is ready and willing to comply.

We have carefully considered the rival arguments of counsel for the parties in this regard. To start with, we need to re-emphasize that prior to the 2019 amendments to the Rules, in order for the

Court to grant an application for stay of execution, a party seeking such an order was required to comply with the demands of Rule 11 (5) (a), (b) and (c) of the Rules. As we know, there is currently a slight change since only two conditions are remaining after the 2019 amendments to the Rules, whereof clause (b) of Rule 11 (5) has been done away with. By 2018 when this application was filed, Rule 11 (5) (a), (b) and (c) of the Rules provided that:-

> *(5) No order for stay of execution shall be made under this rule unless the Court is satisfied that:-*
>
> *(a) substantial loss may result to the party applying for stay of execution unless the order is made;*
>
> *(b) the application has been made without unreasonable delay; and*
>
> *(c) security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him.*

As is the case, these conditions had to be complied with cumulatively, which necessarily meant that where one of them could have not been satisfied, the Court would decline to grant the order

sought – See the cases of **Africhick Hatchers Limited v. CRDB Bank Plc.** (supra), **Joseph Anthony Soares @ Goha v. Hussein Omary,** Civil Application No. 6 of 2012 and **Laurent Kavishe v. Enely Hezron,** Civil Application No. 5 of 2012 (all unreported).

As already pointed out, counsel for the parties have informed us that there has been an understanding that they address us on the third condition only on account of the advocate of the respondents being satisfied that the applicant has complied with the first two conditions on whether or not substantial loss may result on them if an order for stay of execution may not be granted, also that the application was filed in time.

As a matter of duty however, we went through the applicant's affidavit in support of the application, particularly paragraph 6 (ii) and (vi) thereof, as well as the written submissions they filed and satisfied ourselves that the applicant has demonstrated that she stands to suffer substantial loss if the order for stay of execution will not be granted. Likewise, we satisfied ourselves that the application was filed without undue delay. Thus, the first and second conditions have certainly been met.

The only concern therefore, is whether the third condition demanding security to be given by the applicant for the due performance of the decree as may ultimately be binding in case the appeal fails has been met.

Of course, we need to point out at this stage that in the strict sense of it, it does not necessarily mean that a party has to give such security, but that a firm undertaking may be sufficient. This is what we expressed in **Mantrac Tanzania Ltd**. (supra). It was expounded in that case 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 present case, Mr. Musetti maintained that they made a firm undertaking in paragraphs (a) of the Notice of Motion and 6 (v) of the applicant's affidavit in support of the application. We also read the applicant's written submissions and found that the aspect of security for performance of the decree has been covered under paragraph 13. It is under that very paragraph that they have at least mentioned, relying on the case of **Mantrac Tanzania Ltd** (supra), that they are making an undertaking for the demanded security for performance.

As may be recalled, Mr. Makota's position is that paragraphs (a) of the Notice of Motion and 6 (v) of the affidavit in support of the application do not at all amount to an undertaking. Apart from mentioning it in passing in their submissions, Mr. Makota asserts, the applicant has not covered this aspect in both, the Notice of Motion and the affidavit in support of the application. We sincerely agree with him.

We pose here to remark the unfortunate reality that the phrase "firm undertaking" has not been defined under the Rules or any other law. We are given to understand however, that from the way it is

being used, it implies a profound and/or solid promise by the party seeking an order for stay to fulfill the decree as and when it may ultimately become binding upon the applicant in case he/she loses the appeal.

We attempted to search from other jurisdictions worldwide to find out if we could chance to come across any such definition to enable us borrow a leaf there from. We fortunately found a Kenyan case of **Equip Agencies Limited v. Credit Bank Limited**, Civil Case No. 773 of 2003 (HC) in which an endeavour was made to define the word "undertaking". It is worthy quoting and it said:-

> *"The question for me to determine is whether there is a professional undertaking capable of being enforced against the respondent. In my understanding an undertaking is usually given to ease and smoothen the path of transactions . . .* ***It means . . . an unequivocal declaration of intention addressed to someone who reasonably places reliance on it. . . ."*** [The emphasis is ours]

A similar attempt was made by High Court in that very jurisdiction in the case of **Diamond Star General Trading LLC v.**

Ambrose D.O. Richier t/a Richier & Amollo Advocates, Misc. Civil Application No. 451 of 2015 in which that court said:-

> *"I have considered the rival written submissions, on the 1st issue relating to the letters as to whether they constitute a Professional undertaking. The Black's Law dictionary defines an undertaking as* ***"a promise, engagement, or stipulation". It states that an "undertaking" is frequently used in special sense of a promise given in the course of legal proceedings by a party or his counsel, generally as a condition to obtain some concession from the Court or opposing party.****"* [The emphasis is ours]

In that case, the court referred also to a US Legal Definitions.com where it is stated that:-

> *"Undertaking in general means, an agreement to be responsible for something. In Legal context, it typically refers to a party agreeing to surety arrangements, under which they will pay a debt or perform, a duty if the other person who is bound to pay the debt or perform the duty fails to do so."*

From the above, we gather that a firm undertaking is a promise or agreement or an unequivocal declaration or stipulation of intention addressed to someone who reasonably places reliance on it.

As earlier on pointed out, Mr. Musetti contended in this case that the applicant made the required undertaking under paragraphs (a) of the Notice of Motion and 6 (v) of the accompanying affidavit. It will serve a good purpose to reproduce them here. Paragraph (a) of the Notice of Motion has quipped that:-

> *"There are good (and) sufficient reasons for the grant of a stay on the balance of convenience as it will be difficult if not impossible for the applicant to recover the decretal sums from the respondents in the event the intended appeal succeeds while it will be easier for the respondents to recover from the applicant in the event the appeal is unsuccessful."*

On the other hand, paragraph 6 (v) of the affidavit in support of the application has stipulated that:-

> *"The applicant is a reputable public corporation which has the ability to satisfy the decretal sum in the event the application for leave to appeal*

to the Court of Appeal and or appeal is unsuccessful. . . ."

When one reads these paragraphs between the lines, it is certain that they do not constitute an undertaking in the light of what is quipped above because there is no any declaration or stipulation made. To the contrary, in these two paragraphs the applicant made expressions that they are in good financial position, which does not imply their readiness to fulfill the decree should their appeal fail. In our view, they were expected at least to indicate if they were willing and ready to provide any form of security for due performance of the decree as an assurance of their readiness to make good the debt in case their appeal may fail, which is not so.

At any rate, as we said in **The Attorney General Zanzibar v. Jaku Hashim Ayub & Another** (supra), the undertaking ought to have been made in the Notice of Motion or the affidavit in support of the application and not in the applicant's submissions as is the case here. This again, does not reflect well on them because one cannot avoid saying that there is lack of commitment.

For reasons we have assigned, because the applicant has not made any undertaking, leave alone a firm undertaking, and since the three conditions ought to be fulfilled cumulatively, the application fails and is hereby dismissed.

Order accordingly.

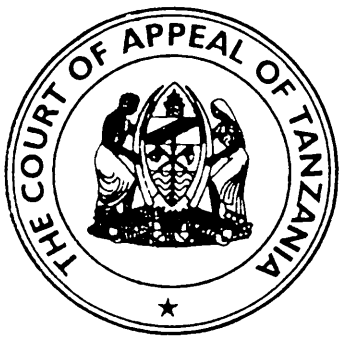
DATED at **MTWARA** this 1st day of November, 2019.

B. M. MMILLA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The Ruling delivered this 4th day of November, 2019 in the presence of Mr. Paul Kimweri Senior State Attorney for the Applicant, and the Respondents present in person, unrepresented is hereby certified as a true copy of the original.



S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL