IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: NDIKA, J.A., GALEBA, J.A., And MWAMPASHI, J.A.)

CIVIL APPLICATION NO. 24/16 OF 2021

1. **JUNIOR CONSTRUCTION COMPANY LIMITED**
2. **SULEIMAN MASOUD SULEIMAN** .... **APPLICANTS**
3. **NCHAMBI'S TRANSPORTERS LIMITED**

VERSUS

MANTRAC TANZANIA LIMITED .... **RESPONDENT**

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

(Fikirini, J.)

dated the 30th day of October, 2020

in

Commercial Case No. 10 of 2017

....

RULING OF THE COURT

20th & 26th August, 2021

NDIKA, J.A.:

The applicants were the losing party in Commercial Case No. 10 of 2017 in the High Court of Tanzania, Commercial Division at Dar es Salaam, where judgment and decree were entered against them on 30th October, 2020 for the sum of USD. 1,519,762.84 being the outstanding balance of the purchase price for certain earthmoving equipment supplied and delivered by the respondent. In an earlier decision of that court dated 14th August, 2019, judgment and decree were entered against the applicants for the unsettled sum of USD. 3,091,864.16 that had been admitted by the applicants. So far

as it is relevant to this matter, the applicants, being dissatisfied with the said judgment and decree of 30th October, 2020, lodged a notice of appeal on 3rd November, 2020 against the aforesaid decree and then brought this application to stay its execution pending the hearing and determination of the intended appeal.

The second applicant, who is also the Managing Director of the first and third applicants, affirmed an affidavit dated 4th February, 2021 in support of the application. Briefly, the deponent averred that after the applicants had lodged their notice of appeal as stated earlier, the respondent instituted proceedings in the High Court, Commercial Division on 29th January, 2021 to execute the impugned decree. In the said proceedings, the respondent seeks the attachment of the applicants' properties including specified bank accounts as well as a series of listed motor vehicles, equipment and machines. He averred further that the applicants were served with the notice of execution on 29th January, 2021, the same day the matter was instituted. Eleven days later, that is, on 9th February, 2021, the applicants lodged the instant matter.

In justifying the application, it is stated that the application was made without undue delay; that substantial and irreparable loss will result if the decree is executed, thereby rendering the intended appeal nugatory; that

the impugned judgment is fraught with irregularities and illegalities; and that the applicants have undertaken to satisfy the decree as it may ultimately be binding upon them.

The respondent did not file any affidavit in reply. It means, therefore, that the depositions made on behalf of the applicants remained uncontroverted.

When the matter was placed before us for hearing on 20th August, 2021, Mr. Roman Masumbuko, learned counsel for the respondent, conceded to the application but urged that the applicants be ordered to provide security by way of a bank guarantee for the due performance of the decree as it may ultimately be binding on them. As regards costs, he urged that they be made to abide the outcome of the intended appeal.

Mr. Frank Mwalongo, learned counsel for the applicants, welcomed his learned friend's concession and indicated that the applicants were ready and willing to furnish as security the equipment and machines which the applicants had charged to the respondent to secure the payment of the purchase price. In support thereof, he cited **Africhick Hatchers Limited v. CRDB Bank PLC**, Civil Application No. 98 of 2016 (unreported) where, by the majority decision, the Court accepted mortgaged land securing the same credit facility to stand as security for the due performance of the

decree should the appeal fail. In the alternative, he submitted that instead of being ordered to furnish a bank guarantee, which he said would be tantamount to taking a loan, the applicants be ordered to provide an insurance performance bond. Such bond, he stated further, would equally secure the payment of the decreed sum. In further alternative, he advocated that the applicants be ordered to furnish an insurance performance bond combined with the aforesaid equipment and machines. On being probed by the Court, Mr. Mwalongo acknowledged that apart from the said equipment and machines being the subject matter of the present litigation, there was no valuation report attached to the supporting affidavit indicating their current value.

In reply, Mr. Masumbuko strongly opposed all the options offered by his learned friend. He submitted that the equipment and machines being the charged property to secure the payment of the purchase price could not serve as security. Distinguishing the instant case from **Africhick Hatchers Limited** (*supra*), he argued that while the value of the mortgaged land was settled in **Africhick Hatchers Limited** (*supra*), it is not so in the instant case. Citing **Gulf Concrete and Cement Products Co. Ltd. v. D.B. Shapriya Company Limited**, Civil Application No. 96/16 of 2019 (unreported), the learned counsel argued that even if the market value of

the said property had been certain and indicated, it is the forced sale value of the said property that should be considered. For the price that will be fetched when the property is sold in a public auction will be no more than forced sale value.

Mr. Masumbuko was also concerned with the proposed undertaking by the applicants to furnish an insurance performance bond. We understood his main concern being that such a bond was an inferior security as he contended that the insurance industry was not sufficiently regulated in the country. He thus urged that a bank guarantee be furnished instead of an insurance performance bond or a combination of such a bond and the mortgaged equipment and machines.

Rejoining, Mr. Mwalongo maintained that an insurance performance bond would be a valuable and efficacious security. He allayed his learned friend's fears on the state of the insurance business in the country, contending that the insurance industry is properly and effectively regulated by the Tanzania Insurance Regulatory Authority (TIRA) within a robust statutory framework.

We have examined the notice of motion, the supporting affidavit, written submissions for and against the application and the lists of authorities filed by the parties in the light of the oral arguments of the learned counsel.

Notwithstanding the respondent's concession to the application, in order to do justice to the matter we are enjoined to determine whether the application has met the requirements of Rule 11 of the Tanzania Court of Appeal Rules, 2009 ("the Rules") for granting stay of execution:

> *"**11**.-(1) to (3) [Omitted]*
>
> *(4) An application for stay of execution shall be made within fourteen days of service of the notice of execution on the applicant by the executing officer or from the date he is otherwise made aware of the existence of an application for execution.*
>
> *(4A) [Omitted]*
>
> *(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) security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him.*
>
> *(6) [Omitted]*
>
> *(7) An application for stay of execution shall be accompanied by copies of the following-*
>
> *(a) a notice of appeal;*
>
> *(b) a decree or order appealed from;*
>
> *(c) a judgment or ruling appealed from; and*
>
> *(d) a notice of the intended execution."*

It is evident from the record before us that the matter was lodged on 9th February, 2021 well within the prescribed period of fourteen days in terms of sub-rule (4) of Rule 11 above as it was filed on the eleventh day after the respondent had instituted the execution proceedings in the High Court. It is also noticeable that sub-rule (7) of Rule 11 above was fully complied with since the application is attached with the mandatory copies of the notice of appeal, the decree appealed from, the judgment appealed from and the notice of execution.

To meet the requirement of sub-rule (5) (a) of Rule 11, the applicants claimed that substantial and irreparable loss will result if the decree is executed. This claim is unchallenged as the respondent did not lodge any affidavit in reply. Taking into account that the decreed outstanding amount of USD. 1,519,762.84 is enormous and that the respondent did not prove by an affidavit in reply if it has the financial wherewithal to refund the aforesaid sum in the event the appeal succeeds, we are inclined to find that the applicants would be exposed to substantial and irreparable loss should the impugned decree be executed.

As for the requirement to furnish security in terms of sub-rule (5) (b) of Rule 11, we note the applicants' undertaking as per paragraph 11 of the founding affidavit undertaking to satisfy the impugned decree as may

ultimately be binding upon them. We take it as a sufficient undertaking to provide security for the due performance of the decree in terms of our ground-breaking decision in **Mantrac Tanzania Limited v. Raymond Costa**, Civil Application No. 11 of 2010 (unreported).

The crucial point for determination in this matter, as hinted earlier, is what type of security should be ordered to be furnished.

It should be observed, at the outset, that the discretion to determine the kind of security to be furnished lies with the Court, not the parties. It would certainly be disrespectful and arrogant for a party to arrogate to himself such power and purport to determine what security to be given as a condition for granting an order of stay of execution.

As the first option, the applicants have suggested that the equipment and machines, the subject matter of the present litigation, be used as security on the authority of the majority decision in **Africhick Hatchers Limited** (*supra*). We have read the said decision. It is clearly distinguishable from the present situation. To be sure, in that case the Court allowed mortgaged landed property in the hands of the respondent bank to be used as security by the applicant on the ground that its undisputed value of TZS. 20,000,000,000.00 dwarfed the decretal sum that stood at TZS. 1,785,000,000.00, implying that there was a value of around TZS.

18,215,000,000.00 in excess of the decretal sum and that the respondent was, by any yardstick, not at risk. Conversely, in the instant case the value of the equipment and machines, as conceded by Mr. Mwalongo, is unascertained. Mr. Masumbuko could as well be right that the value of the said equipment and machines might have plummeted to as little as 10% of their original value as they had been in continuous use for six years since 2015. Thus, accepting such property as security will certainly put the respondent at risk.

In the alternative, the applicants have undertaken to furnish an insurance performance bond. That undertaking was to the chagrin of the respondent's counsel who insisted on provision of a bank guarantee on the reason that an insurance performance bond is inferior because of his fears that the insurance industry was not sufficiently regulated in the country. He urged that a bank guarantee be furnished instead of an insurance performance bond or a combination of such a bond and the mortgaged equipment and machines.

Admittedly, by the practice the Court invariably demands provision of bank guarantees as security for due performance of decrees. But, we have no doubt that, all things being equal, an insurance performance bond from a reputable insurance company would equally be acceptable security. For a

performance bond is, in essence, an instrument *"giving security for the carrying out a contract"* – see Oxford Dictionary of Law, 5th Edition, Oxford University Press, Oxford, 2002. Learned authors Geraldine Andrews and Richard Millet in **The Law of Guarantees**, 6th Edition, Sweet & Maxwell, London, 2011, at page 271, succinctly summarize the obligation of a surety or guarantor thus:

> *"A contract of guarantee is an accessory contract, by which the surety undertakes to ensure that the principal performs the principal obligation.* ***It has been described as a contract to indemnify the creditor upon the happening of a contingency, namely the default of the principal to perform the principal obligation.*** *The surety is therefore under a secondary obligation which is dependent upon the default of the principal and which does not arise until that point."* [Emphasis added]

Mr. Masumbuko's submission that an insurance performance bond would not be sufficient is plainly unsubstantiated and, therefore, carries no weight of persuasion in our mind. The insurance industry in the country is regulated under the framework of the Insurance Act, No. 10 of 2009 ("the Act"). Within that statutory framework, the business of suretyship, that is, effecting and carrying out performance bonds or similar contracts of

guarantee, is listed as a category of regulated "general business" of insurance as Item 15 of Part B of the Second Schedule to the Act made under section 51 (1) (b) of the Act. There may have been no or little use of such bonds as security for due performance of court decrees as bank guarantees have appeared to be one of the most preferable forms of security in the country, but we note that such bonds are one of the options in use in the neighbouring Kenya – see, for example, the following cases where such a bond was considered or accepted: **James G.K. Njoroge t/a Baraka Tools & Hardware v. APA Insurance Company Limited & 3 Others** [2018] eKLR; **James G.K. Njoroge t/a Baraka Tools & Hardware (a firm) v. Kenya Marketing Co. Ltd. & 2 Others** [2019] eKLR; **Real Insurance Co. Ltd. v. Titus Itumo Ndambuki** [2019] eKLR; and **Papius Kirogothi Muhindi & Another v. Equity Bank Limited & 4 Others** [2021] eKLR.

In the final analysis, we find merit in the application, which we hereby grant. Accordingly, we stay execution of the decree of the High Court of Tanzania, Commercial Division at Dar es Salaam in Commercial Case No. 10 of 2017 dated on 30th October, 2020 on condition that the applicants deposit in the Court within thirty days from the delivery of this ruling a bank guarantee or an insurance performance bond for the decreed sum of USD. 1,519,762.84, the said guarantee or bond remaining in force until full hearing

and determination of the intended appeal by this Court. In default, the order of stay shall lapse automatically. Costs of the application shall abide the outcome of the intended appeal.

It is so ordered.

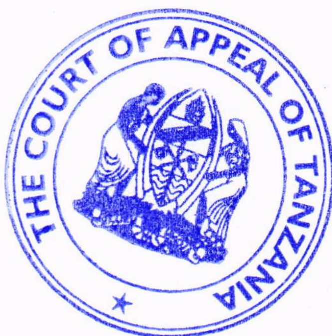
DATED at **DAR ES SALAAM** this 26th day of August, 2021.

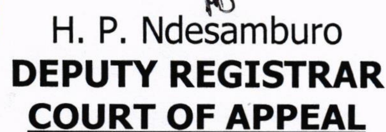
G. A. M. NDIKA
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Ruling delivered this 26th day of August, 2021 in the Presence of the Mr. Frank Mwalongo, learned counsel appeared for the applicants and Mr. Roman Masumbuko, learned counsel appeared for the respondent is hereby certified as a true copy of the original.





H. P. Ndesamburo
DEPUTY REGISTRAR
COURT OF APPEAL