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. 396/16 OF 2019

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 14th day of August, 2019

in

Commercial Case No. 10 of 2017

.....

RULING OF THE COURT

20th & 26th August, 2021

NDIKA, J.A.:

In Commercial Case No. 10 of 2017 in the High Court of Tanzania, Commercial Division at Dar es Salaam, the applicants had judgment and decree on admission entered against them on 14th August, 2019 for the sum of USD. 3,091,864.16 being the acknowledged unsettled balance of the purchase price for certain earthmoving equipment supplied and delivered by the respondent. The applicants then lodged a notice of appeal on 5th September, 2019 against the aforesaid decree and then brought this

application to stay its execution pending the hearing and determination of the intended appeal.

In support of the application, the second applicant, who is also the Managing Director of the first and third applicants, affirmed an affidavit dated 13th September, 2019 as well as a supplementary affidavit dated 25th May, 2021. Briefly, it is averred in the founding affidavit that after the applicants had lodged their notice of appeal as stated earlier, the respondent instituted proceedings in the High Court, Commercial Division vide Execution No. 10 of 2019 on 10th September, 2019 pressing for execution of the impugned decree. In the said execution proceedings, the respondent seeks the attachment of the applicants' four itemised bank accounts as well as thirty listed motor vehicles. Although the supporting affidavit does not state when exactly the applicants were served with the notice of execution or when they otherwise became aware of existence of the said execution proceedings, it is clear that this application was made on 17th September, 2019; seven days after the respondent had moved the trial court for execution.

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

In opposing the application, the respondent filed an affidavit in reply on 11th October, 2019 affirmed by its principal officer, Mr. Mohamed Shawki. The aforesaid affidavit was supplemented by an additional affidavit by the same deponent filed on 9th February, 2021. In essence, it is deposed that the intended appeal is a tactic deployed to delay the respondent from enjoying the fruits of its decree taking into account that the applicants failed to pay the purchase price since 2015 while continuing using the equipment and machines. That there was no good cause for staying the execution of the impugned decree. That the applicants are not creditworthy and that they are facing various tax cases initiated by the Tanzania Revenue Authority. And that the respondent is at a greater risk of losing its money unless the applicants are ordered to furnish security by way of a bank guarantee.

When the matter was placed before us for hearing on 20th August, 2021, Mr. Roman Masumbuko, learned counsel for the respondent, intimated that the respondent was contented with the requested order of stay being

granted as long as the applicants were made to provide a security by way of a bank guarantee for the due performance of the decree as it may ultimately be binding on them. He added that costs be made to abide the outcome of the intended appeal.

For the applicants, Mr. Frank Mwalongo, learned counsel, welcomed his learned friend's concession and indicated that the applicants were ready and willing to furnish as security 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 added, would equally secure the payment of the decretal sum. In further alternative, he urged 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 contended that while the value of the mortgaged land was settled in **Africhick Hatchers Limited** (*supra*), it is not so in the instant case. The learned counsel added, citing **Gulf Concrete and Cement Products Co. Ltd. v. D.B. Shapriya Company Limited**, Civil Application No. 96/16 of 2019 (unreported), 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 equally 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 banker's guarantee be furnished instead of an insurance performance bond or a combination of such a bond and the mortgaged equipment and machines.

In a brief rejoinder, Mr. Mwalongo maintained that an insurance performance bond will 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 affidavits, 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 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 manifest from the record before us that the matter was lodged on 17th September, 2019 well within the prescribed period of fourteen days in terms of sub-rule (4) of Rule 11 above as it was filed on the seventh day after the respondent had instituted the execution proceedings in the High

Court. There is also compliance with sub-rule (7) of Rule 11 above, the application having been 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. Although this claim was disputed by the respondent through the affidavit in reply, that was not so at the hearing. Taking into account that the decreed amount standing at USD. 3,091,864.16 is colossal and that the respondent did not come out clearly in its affidavit in reply if it has the financial wherewithal to refund the said 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 regards the requirement to furnish security in terms of sub-rule (5) (b) of Rule 11, we note the applicants' averment as per paragraph 3 of the supplementary 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

seminal decision in **Mantrac Tanzania Limited v. Raymond Costa**, Civil Application No. 11 of 2010 (unreported).

As hinted earlier, the crucial point for determination in this matter 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 case. 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 certified 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.

As hinted earlier, the applicants have undertaken, in the alternative, 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 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 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. The insurance industry in the country is soundly 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 14th August, 2019 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. 3,091,864.16, 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.

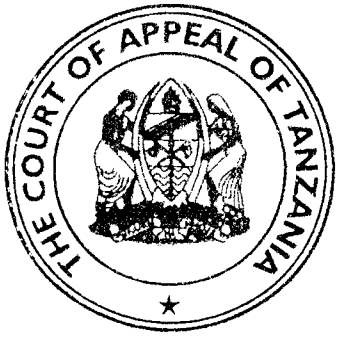
DATED at **DAR ES SALAAM** this 26th day of August, 2021.

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