

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

CORAM: MWAMBEGELE, J.A., LEVIRA, J.A., And MAIGE, J.A.)

CIVIL APPLICATION NO. 469/17 OF 2019

**THE REGISTERED TRUSTEES OF VIGNAN
EDUCATIONAL FOUNDATION**

BANGALORE, INDIA 1ST APPLICANT

INTERNATIONAL MEDICAL AND TECHNOLOGICAL

UNIVERSITY (IMTU) 2ND APPLICANT

VERSUS

**NATIONAL DEVELOPMENT
CORPORATION.....**

RESPONDENT

**(Application to vary Terms and Conditions issued by the Court in Civil
Application No. 389/17 of 2018 for Stay of Execution of the decree in
respect of the decision of the High Court of Tanzania (Land Division)
at Dar Es Salaam)**

(Mzuna, J.)

**Dated 27th day of February, 2018
in
Land Case No. 210 of 2012**

RULING OF THE COURT

14th & 30th September, 2021

MAIGE, J.A:

The first applicant is a legal entity domiciled in India and is the founder of the second applicant. The latter is a university duly existing under the laws of Tanzania. The premises unto which the second applicant is accommodated was initially owned by Saruji

Corporation which was a public corporation incorporated under the laws of Tanzania. The applicants were occupying the premises pursuant to a lease agreement subsisted between the first applicant and the said corporation. As a result of the privatization process, the corporation was divested by way of liquidation and its assets including the leased premises, vested in the respondent. In law therefore, the applicants became statutory tenants of the respondent.

The transfer of the leased premises from the said corporation to the respondent without giving the applicants, as sitting tenants, a right of first refusal, did not please the applicants. They therefore, initiated a suit against the respondent and other persons not parties to this appeal for among others, perpetual injunction to restrain the respondent from evicting them from the leased premises. The respondent raised a counter claim for rental arrears and eviction order. The suit by the applicants was dismissed. A judgment on counterclaim for payment of TZS 200,000,000/= as rental arrears as of September 2012 and TZS 40,000,000/= rental fee per month from September 2012 to the date of the judgment and subsequent thereafter was granted.

Aggrieved, the applicants lodged a notice of appeal. Pending hearing and determination of the intended appeal, the applicants filed Civil Application No. 389/17 of 2018 to have the execution of the decree stayed. On 1st October, 2019, this Court granted an order staying execution of the decree under discussion on condition that, the applicants furnish, within 30 days from the date thereof, a bank guarantee of TZS 3,000,000,000/=. For the reasons stated in the affidavit and supplementary affidavit deposed by their principal officer one Brahima Naidu Katuri, the applicants were unable to comply with the conditions. By this application therefore, the applicants have moved the Court in terms of Rule 4 (2) (a) and (b) of the Court of Appeal Rules, 2009, (the Rules), for variation of the conditions of the said stay order so that they can be allowed to deposit in Court a certificate of title No. 54082 for Plot No. 909 Block "H" Mbezi within the Dar Es Salaam City whose Market Value and Forced Sale Value are TZS 3,898,000.00 and TZS 2,924,000,000.00, respectively ("the alternative security"), together with a bank guarantee of TZS 76,000,000.00 ("the additional security"), in lieu of the Bank Guarantee of TZS 3,000,000,000/=. A photocopy of the respective

certificate of title together with a search report indicating that the **alternative security** is free from any encumbrance have been attached in the supplementary affidavit and marked as "NBK-7" and ENBK-11, respectively. The valuation report has also been attached and marked "NBK-10".

On her part, the respondent vehemently opposes the application. In the affidavit in reply deposed by her corporation secretary one Bakaru Henry, the respondent claims that, the pledged land being the property of a third party, cannot be realized in execution of a decree against the applicants in case the intended appeal fails.

At the hearing, Mr. Bernard Mbakileki, learned advocate, represented the applicants. The respondent was represented by Mr. Benson Hoseah, Mis. Jacqueline Kinyasi and Mr. George Kahenda, learned State Attorneys. The oral submission for the respondent was made by the lead counsel Mr. Benson Hoseah.

In his submissions in support of the application, Mr. Mbakileki adopted the affidavit and supplementary affidavit and informed the Court in clarification that, failure of the applicants to furnish a bank

guarantee as per the stay order resulted from the cash flow problem arising from the decision of the relevant Government authorities to bar the second applicant from admitting fresh students. He submitted further that, since the applicants have made a firm undertaking to deposit the **alternative security** together with the **additional security** whose value is above the decretal amount, it is appropriate that the application is granted. He submitted further that, although the property belongs to the first applicant's sister entity, the Registered Trustees of Vignan Education Foundation "(the Foundation)", it has been established in the affidavit that, by a Board Resolution which is attached thereto, the **Foundation** has undertaken to furnish the **alternative security**. That, he submitted, is a sufficient ground for variation of the conditions for stay of execution. Reference was made to the case of **Zahara Kitindi and Another v. Juma Swalehe & 9 Others**, Civil Application No. 142/05 of 2018 (unreported). He prayed therefore that, the application be granted.

In reaction, it was submitted for the respondent that, in deciding whether to grant or not the application, the Court should not

only consider the interest of the applicants to have the execution stayed but more importantly the right of the Respondent to enjoy the fruits of her decree. The security provided, he further submitted, should enable the respondent to enforce the decree without further difficulties should the appeal fail. He added that, because the property sought to be pledged as a security belongs to a third party, it cannot be said that, the applicants have made a firm undertaking to furnish security for due performance of the decree. He clarified that, as the owner of the **alternative security** is a separate legal entity from the first applicant and which is a stranger to the proceedings, it will be difficult for the respondent to enforce her right in the event that the appeal fails. The authority in **Zahara Kitindi case**, he submitted, is distinguishable from the current case in so far as the substituted security therein also belonged to the applicant.

The learned State Attorney did not agree with the applicants that, the Board Resolution would suffice as a firm undertaking to furnish the **alternative security**. He assigned three reasons. First, the Board Resolution was extracted on 4th August 2018 while the order sought to be varied was made on 1st October 2019. Two, there

is no evidence to establish that the said resolution was registered in the relevant authorities. Three, the resolution being of a third party, it cannot bind the applicants. All in all, the counsel urged the Court to dismiss the application with costs.

In his rejoinder submissions, Mr. Mbakileki insisted on his submissions in chief and viewed the submission for the respondent as mere speculation.

We have prudently appraised the rival submissions in line with the notice of motion, affidavit, supplementary affidavit and affidavit in reply. The main issue which we are called upon to resolve is whether the applicants have made a good case to justify variation of the condition of stay of execution from a bank guarantee to a certificate of occupancy held in the name of the **Foundation**.

It was submitted for the respondent that, because it cannot be sold in realization of a decree, a property owned by a non-party cannot be pledged as a security for due performance of the decree. For the applicants, it was submitted to the contrary.

This is not the first time we are dealing with this issue. We dealt with a similar issue in the case of **Lomayan Langaramu v.**

Christopher Pelo, Civil Application No. 452/02 of 2018 (unreported) wherein the applicant made an undertaking to pledge as a security a customary right of occupancy owned by a third party. The Court having considered the principle in the case of **Rosengrens Ltd v. Safe Deposit Centres Ltd** [1984] 3 ALL ER 198, took the view, which we fully subscribe to, that in as long as the opposite party can be adequately compensated, a security can take any form including a certificate of occupancy owned by a third party.

We do not agree with the counsel for the respondent that, the mere fact that a security is owned by a third party, renders it impossible for the secured property to be sold in realization of the decree in the event the intended appeal fails. We understand that, the decree sought to be stayed is of the High Court. Its execution is governed by the provisions of the Civil Procedure Code, Cap. 33, R.E., 2019 ("the CPC"). Under section 90 of the **CPC**, it is very clear that, a decree whose performance has been guaranteed by a third party, can be executed against him as if he was a party to the decree. It provides as follows.

"90. Where any person has become liable as surety-
(a) for the performance of any decree or any part thereof;
(b) for the restitution of any property taken in execution of a decree; or
(c) for payment of any money or for the fulfillment of any condition imposed on any person, under an order of the court in any suit or in any proceeding consequent thereon.

The decree or order may be executed against him to the extent to which he has rendered himself personally liable, in the manner herein provided for the execution of the decrees, and such person shall, for the purpose of the appeal, be deemed a party within the meaning of section 38, provided that such notices as the court in each case thinks sufficient has been given to the surety".

In view of the foregoing therefore, it is our opinion that, so long as there is a commitment by a third party to have his or her property furnished as a security for due performance of the decree, the same can be offered as a security.

Perhaps, the next question is whether the affidavit demonstrates that, the said third part has committed her property as

a security for due performance of the decree. We wish to state from the outset that, it is not the law that, at this stage, the security must be actually given. It would only suffice if the applicant or a person seeking to offer the security makes a firm understanding to that effect. Thus, in **Mantrac Tanzania Ltd v. Raymond Costa**, Civil Application No. 11 of 2010 (unreported), it was stated: -

"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, provided the court sets reasonable time limit within which the applicant should give security".

What amounts to a firm undertaking was defined in **Tanzania Petroleum Development Corporation v. Mussa Yusuph and 30 Others**, Civil Appeal No. 602/07 of 2018 (unreported) as *"a promise or an unequivocal declaration addressed to someone who reasonably places reliance on it"*.

In this case, the undertaking in the supplementary affidavit to have the certificate of occupancy pledged as a security for due

performance of the decree was not made on behalf of the **Foundation** but of the applicants. Obviously therefore, the said undertaking cannot *ipso facto* commit the property not owned by the applicants as security for due performance of the decree. Therefore, in **Paula David Kifaru vs. Karim Shahbudin Ally**, Civil Application No. 174/01 of 2017 (unreported), where the applicant undertook in his affidavit to offer as a security a property forming part of the estate of the deceased, the Court observed as follows: -

"We wish to stress that the firm undertaking must be in respect of the properties that are within the possession of the applicant, which is not the case in the instant application".

A similar position was stated in **Hadija Adamu vs. Godless Tumbo**, Civil Application No. 27 of 2015 (unreported). Thus: -

"Back to the application before us, the applicant did readily concede to the fact that, she has not committed any property as security for due performance of the decree sought to be stayed. She has indicated in her affidavit that, she is ready to commit the disputed property as security. On our part, we are in agreement with Mr. Oola that, the disputed property is not the property of the applicant and as such, it cannot be used as a commitment by the applicant as security".

Admittedly, there is no hard and fast rule as to how a person not a party to the proceedings can commit himself or herself to offer a security in due performance of a decree. In **Lomayan Langaramu v. Christopher Pelo** (*supra*), where the surety was an individual, it was held that, a factual deposition in the affidavit undertaking to offer his or her property as a security would suffice. We do not think that, the procedure would be appropriate for a corporate person as in the instant case. As we understand the law, an affidavit of one or all of the directors or board members of the respective corporate person cannot suffice to commit the corporate person. That is so because as a matter of principle, decisions affecting juristic persons are made collectively through board meetings. We think that, Mr. Mbakileki is quite right, that a Special Board Resolution duly made by the respective corporate person is sufficient to commit the same.

In this matter, the applicant has attached in the affidavit a Special Board Resolution of the **Foundation** signifying that its board of trustees had on 4th August 2018, resolved that the **alternative security** be pleaded as a security for due performance of the decree.

In her submissions through the learned State Attorney, the respondent has doubted the validity of the said Board Resolution for being made prior to the grant of the order whose condition is sought to be varied and for not being registered in the relevant authorities. Mr. Mbakileki has dismissed the complaint as mere speculation. We shall decide henceforward who is right and who is wrong.

In accordance with the affidavit and supplementary affidavit, the **Foundation** is an incorporation duly incorporated under the Trustees' Incorporation Act, Cap. 318, R.E, 2019 ("the Act"). The Special Board Resolution attached as NBK-8 as rightly submitted for the respondent, is dated 4th August 2018. In paragraph 2 of the special resolution it was resolved as follows: -

"2. That, the Trust hereby undertakes to be bound by such order or orders as may be given by the Hon. Court of Appeal of Tanzania in relation to the application for use of the Title aforesaid as Security for Stay of Execution of the Decree dated 27/02/2018 in Land Case No. 2010 of 2010."

The extract from the Board Resolution above quoted, we have no doubt, if everything remains constant, is capable of committing the **Foundation** to a liability to liquidate the decree. In our opinion

therefore, there is, for the purpose of an order for stay of execution, a firm undertaking on the part of the **Foundation** to have the **alternative security** hypothecated as a security for due performance of the decree.

While we agree with the learned State Attorney that, Board Resolutions are documents which are ordinarily required to be registered or deposited in the relevant registry establishing the incorporation, we are of the view that, whether the same was registered or not is a question of fact which can neither be established nor disestablished by mere submissions. It has to be founded on the affidavit or affidavit in reply. In the affidavit and supplementary affidavit, there is an express deposition that the resolution in question was duly and validly made. In the counter affidavit, we have observed, the validity of the resolution was not doubted howsoever. It cannot therefore be doubted by a mere legal argument.

How about registration with the registry of title? We think it cannot be made at this stage because a Board Resolution by itself is not an instrument capable of creating a lien or charge on an

immovable property. Since the law is such that a security is furnished subsequent upon the grant of the stay order, the said concern shall be taken care of in the conditions subsequent to the grant.

For the foregoing reasons therefore, we find the application with merit. The order of this Court dated 27th day of February, 2018 staying the execution of the decree of the trial Court is varied to the extent of substituting the security for due performance of the decree from a Bank Guarantee of TZS 3,000,000,000/= to a certificate of title No. 54082 for Plot No. 919 Block "H" Mbezi, Dar Es Salaam in the name of the Registered Trustees of Vignan Education Foundation plus a Bank Guarantee of TZS 76,000,000/= in the following conditions:-

- 1. Within 90 days from the date hereof, the applicants must deposit with the Registrar of the Court of Appeal the original certificate of title of **alternative security** free from any incumbrance with a deed of surety/security bond duly executed by the Board of Trustees of the Foundation and registered with the registry of titles hypothecating the **alternative security**.*
- 2. The documents referred in item 1 herein should be accompanied with a most recent search report from the registry of titles.*

3. Within the same period stated in item 1 herein, the applicants should deposit the respective Bank Guarantee.

In the upshot, the application is granted without costs in the terms and conditions as aforestated.

Ordered accordingly.

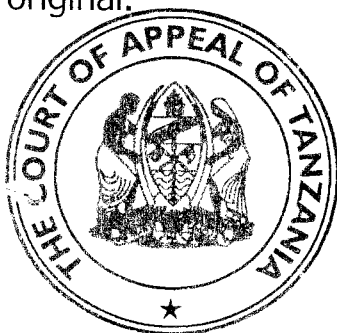
DATED at DAR ES SALAAM this 24th day of September 2021

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

The ruling delivered on 30th day of September, 2021 in presence of Mr. Bernard Mbakileki assisted by Mr. Victor Mtalula, learned counsel for the applicants and Ms. Jacqueline Kinyasi, learned State Attorney for the respondent is hereby certified as true copy of the original.




F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL