

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

(CORAM: SEHEL, J.A., FIKIRINI, J.A., And KHAMIS, J.A.)

CIVIL APPLICATION NO. 262/16 OF 2023

THE ARAB CONTRACTORS (OSMAN

AHMED OSMAN & CO. LIMITED)1ST APPLICANT

EL-SEWEDY ELECTRIC COMPANY.....2ND APPLICANT

VERSUS

ACCLAIM CONSTRUCTIONS

SUPPLIES LTD.....RESPONDENT

**(Application for Stay of Execution of the Judgment and Decree of the High
Court of Tanzania, Commercial Division, at Dar es Salaam)**

(Mbagwa, J.)

dated the 24th day of February, 2023

in

Commercial Case No. 1 of 2022

RULING OF THE COURT

4th October & 1st November, 2023

KHAMIS, J.A.:

The present respondent, Acclaim Construction Supplies Limited, hereinafter to be referred to as the respondent or Acclaim Construction, filed a suit, Commercial Case No. 01 of 2022 in the High Court, Commercial Division, for judgment and decree against two foreign companies operating as a joint venture and engaged in the construction of Julius Nyerere Hydropower Project (Stieglers Gorge), namely, the Arab

Contractors (Osman Ahmed Osman & Co.) Limited and El- Sewedy Electric Company AC-EE Joint Venture, hereinafter to be referred to as the applicants or the joint venture.

The respondent's claim in the suit was founded on the alleged breach of contract entered between the parties in the year 2019. Under the said arrangement, Acclaim Construction undertook to supply to the joint venture, concrete superplasticizer (PCA -1-TZ9) SBT Co. (the admixture prepared on a special formula) for construction works at the Julius Nyerere Hydropower Project. The supply was to be done upon issuance of the purchase orders by the joint venture.

Initially, the parties' contract was smoothly implemented with both sides striving to make it operational. However, the dispute arose when the joint venture's procurement manager cancelled three purchase orders which cancellation was viewed by Acclaim Construction as a breach of contract, hence the filing of a suit. In defence, the joint venture admitted cancellation of the purchase orders and justified its decision on the ground that, contrary to the terms of the contract, Acclaim Construction supplied the admixture that was unsuitable for use in the project.

Upon trial, the High Court entered judgment and decree in favour of Acclaim Construction, thereby ordering the joint venture to immediately

return and or make payment of 140 intermediate bulk containers valued at USD \$ 12,174, pay general damages to the tune of United States Dollars Five Million (USD \$ 5,000,000) and interest on the general damages at the rate of 7% from the date of judgment to the date of full and final payment.

Aggrieved, the joint venture issued a notice of appeal intending to challenge the High Court judgment in this Court. A letter was also written to the Deputy Registrar of the High Court applying for certified copies of the judgment, decree and proceedings. Upon being served with a *garnishee order nisi*, the joint venture filed the present application for stay of execution of the High Court judgment and decree pending determination of the intended appeal.

The application was filed by notice of motion brought under rules 11 and 48 of the Tanzania Court of Appeal Rules, 2009 (the Rules). The notice of motion was supported by the affidavit of one Walid Wahbi, the principal officer of the joint venture company, who deposed that despite commencement of the appeal process, Acclaim Construction proceeded to secure a *garnishee order nisi* against the joint venture's bank account used for daily operations of the hydropower project without serving the applicants with copy of the application for execution.

It was also deposed that, the applicants were not aware of the execution proceedings until the 6th day of April, 2023 when their banker disclosed that they could not perform any transaction following a *garnishee order nisi* which attached their account. Further, it was deposed that in the event execution is allowed to proceed, the joint venture's good will and reliability will be highly damaged and the loss cannot be compensated by monetary terms as the hydropower project will lag behind due to delays in paying the subcontractors and employees.

The deponent also averred that, if execution proceeds unchecked, the pending appeal will be rendered nugatory and of no effect. He added that, the application for stay of execution was made without undue delay and well within 14 days from the time that the applicants became aware of the execution proceedings.

On the security for due performance of the decree, he deposed that being a reputable entity well established in Tanzania and currently executing the national strategic project, the Mwalimu Julius Nyerere Hydro Power Project (the Stiegiers Gorge), the respondent could smoothly execute the decree without any inconvenience. It was also deposed that the applicants are ready and willing to furnish corporate guarantee as

security for due performance of the decree and subject to the order of the Court.

Upon being served with the application, the respondent elected not to file an affidavit in reply. On the date of hearing, Messrs. Geoffrey Paul Geay and Frank Kifunda, learned advocates, appeared for the applicants. The respondent was represented by Messrs. Juma Nassoro and Abubakar Salim, learned advocates.

At the outset, Mr. Nassoro disclosed that the respondent did not intend to contest the application but sought leave of the Court to submit on the security for due performance of the decree. He contended that, rather than a corporate guarantee proposed by the applicants, a bank guarantee would be suitable in the circumstances. Expounding, the learned counsel asserted that, the applicants are two separate companies operating as a joint venture entity for the purpose of the Julius Nyerere Hydropower Project, which creates uncertainty on who is to provide a corporate guarantee.

Responding, Mr. Geay adumbrated the notice of motion, the supporting affidavit and written submissions earlier on filed by the applicants in line with rule 106 (1) of the Rules. He contended that, a corporate guarantee which was proposed by the applicants, much as it

was not commonly used, is an acceptable way of furnishing security in court proceedings.

The learned counsel expounded that, a corporate guarantee as a contract between a corporate entity and a debtor for the performance of a certain obligation or debt, was sufficient to cover the decree, allegedly because the applicants were entrusted by the Government to carry out a strategic project of national magnitude which is highly valuable and thus, are financially stable to fulfil the decree if a need to pay arises.

To buttress the point, Mr. Geay cited **Tanganyika Wattle Company Limited v. Dolphin Bay Chemicals (PTY)**, Civil Application No. 521 of 2020 [2022] TZCA 511 [18th August, 2022: TANZLii] and; **Geriod Francis Tairo v. Jumanne S. Kitila & Another**, Civil Application No. 254 of 2019 [2020] TZCA 1843 [11th November, 2020: TANZLii]. In the latter case, the Court discussed the manner of giving security for due performance of the decree and observed that, the law does not strictly demand security to be given prior to the grant of the order for stay of execution. Further, the Court alluded that a firm undertaking by the applicant to provide security is sufficient to move the Court for the order sought.

Since there was no rejoinder by the respondent's counsel, the overriding issue for determination is whether the applicants have met the

prerequisite for grant of an order for stay of execution pending appeal. The principles upon which the Court may stay the execution of the judgment and decree appealed from are well settled. Rule 11 (3), (4), (5) and (7) of the Rules which are relevant in the circumstances of this matter, provide that:

"11 (3) In any civil proceedings, where a notice of appeal has been lodged in accordance with rule 83, an appeal, shall not operate as a stay of execution of the decree or order appealed from nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree or order; but the Court, may upon good cause shown, order stay of execution of such decree or order.

(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.

(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.

(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."*

In order to succeed in an application for stay of execution, the applicant is duty bound to comply with all the requirements of the law as listed above. This legal stance was established by this Court in **Mtakuja Kondo & Others v. Wendo Maliki**, [2013] T.L.R 383 and several other cases, thus:

"...the conditions which applicants have to satisfy so as to be granted the order for stay of the execution are laid out in rule 11(2)(4545b)(c) and (d). All conditions must be satisfied. The applicant must show the following: a notice of appeal was given; they have sufficient cause of praying for the order for stay; the application was filed within time; they will suffer substantial loss if the order is not granted; and they have furnished security."

In **Arusha Hardware Traders Limited & Two Others v. M/S Exim Bank Tanzania Limited** [2016] T.L.R 96, and; **Airtel Tanzania Limited v. Ose Power Solutions** [2017] T.L.R 20, we emphasized that, the above stated conditions for the grant of an order of security for the

due performance of the decree must be satisfied conjunctively and not disjunctively. That means, the conditions are linked to each other and cannot stand independently.

On the security for due performance of the decree, this Court has pronounced itself in a plethora of authorities that the law does not strictly demand such security to be given prior to the grant of the order for stay. Instead, it is sufficient for the applicant to undertake to provide security subject to the directions of the Court on relevant issues such as the type of security and time within which the applicant should give the same [See: **Mantrac Tanzania Ltd v. Raymond Costa**, Civil Application No. 11 of 2010; and; **Joramu Biswalo v. Hamis Richard**, Civil Application No. 11 of 2013] [both unreported].

In the instant application, the applicants contended that, as the main contractors in the Julius Nyerere Hydroelectric Project, a strategic national project, they are bound to pay employees and subcontractors through the bank account that was attached in execution of the decree. The applicants further contended that, if the attachment continues, employees and subcontractors will not be able to effectively perform their duties and therefore, the strategic national project is likely to lag behind and cause irreparable damage to the applicants' reputation.

The applicants' counsel asserted that, a bank guarantee was not an ideal manner of security as it required actual deposit of the decretal sum to the bank that would in turn, offer the guarantee required. He explained that, if such happens, the applicants' operations will be paralysed as the amount involved is colossal and mainly, on the general damages. He submitted that, the balance of convenience, common sense and logic tilts in favour of granting the order sought as the respondent has not demonstrated that it will be able to compensate for the loss if the appeal succeeds.

On the other side, the respondent's counsel delved into the type of security to be provided by the applicants and registered no objection for the order sought. In the circumstances, we are inclined to determine whether the applicants should be ordered to furnish either a bank or corporate guarantee.

There is no doubt that the Court is vested with discretionary powers to either grant or refuse an application for stay of execution. However, in so doing, we must consider the purpose of an order for stay of execution pending appeal which is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the doubtless right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. It

is equally important to consider the successful litigant who should not be deprived of the fruits of litigation. The Court, is therefore placed in a duty to ensure that no party suffers prejudice that cannot be compensated in monetary form.

In this case, the application was filed timely without delay, the notice of appeal made under rule 83(1) of the Rules and lodged in the High Court on 1st day of March, 2023 was attached to the application. The letter written by KKB Attorneys for and on behalf of the applicants on 1st day of March, 2023 and addressed to the Deputy Registrar of the High Court applying for certified copies of the proceedings, judgment and decree for the appeal purpose was appended to the application together with its reminder dated 5th April, 2023. We have also inspected the record and satisfied that, a *garnishee order nisi* addressed to the branch manager, CRDB Bank, Azikiwe Branch, dated 5th day of April, 2023 was attached as annexure to the affidavit in support of the notice of motion.

On the aspect of security, the applicants have undertaken to furnish a corporate guarantee, meaning that, they are able and willing to comply with that condition as security for the due performance of the impugned decree. That notwithstanding, this Court is not bound by the type of security offered by an applicant. It can make appropriate orders which

serve the interests of justice taking into account the circumstances obtained which vary from case to case.

In resolving the issue before us, it is unavoidable to make, albeit in brief, an overview on the subject of corporate guarantee. A corporate guarantee is a contract between a corporate entity or individual and a debtor wherein the guarantor agrees to take responsibility for the debtor's obligations, such as repaying a debt or fulfilling terms of the decree of the court, as it is the case in this application. Corporate guarantees are critical in business operations, especially in the case of receiving or creating credit. Most guarantees are granted to banks, other lenders and to some extent, courts of law.

From the time immemorial, courts of law have maintained that when a guarantor takes responsibility for the liability of someone else, that agreement becomes a legal, distinct, and enforceable contract between the creditor and the guarantor. The law remains clear and focused that so long as the guarantee agreement clearly and unequivocally defines the rights and obligations of the guarantor, principal debtor and beneficiary, it remains valid and enforceable at law.

In the case at hand, it was not disputed that the applicants are main contractors engaged in the construction of the Julius Nyerere (Stieglers

Gorge) Hydropower Project. They have a registered office and bank accounts that are operational in Tanzania. It was undeniable that, they own and operate top quality heavy-duty equipment used in construction. Machines such as excavators, backhoe, dragline excavator, bulldozers, graders, wheel tractor scraper, trenchers, loaders, tower cranes and compactors are very expensive and where necessary, can offset the decretal sum.

Taking all the above factors into consideration and in order not to render the intended appeal nugatory, we find and hold that, the applicants have fulfilled the requirements for grant of an order for stay of execution of the judgment and decree of the High Court pending appeal as stipulated under rule 11 of the Rules.

Accordingly, we hereby allow the application and grant an order for stay of execution of the judgment and decree of the High Court, Commercial Division, in Commercial Case No. 1 of 2022 dated the 24th day of February, 2023 pending final determination of the intended appeal, on the condition that:

- i) Each of the applicants shall separately execute and present to the Court a corporate guarantee aggregating the decretal sum in accordance to the percentage of each applicant in the joint

venture agreement, in favour of the respondent for the due performance of the decree, within 30 days of the date of delivery of this ruling.

ii) The costs shall be in the course.

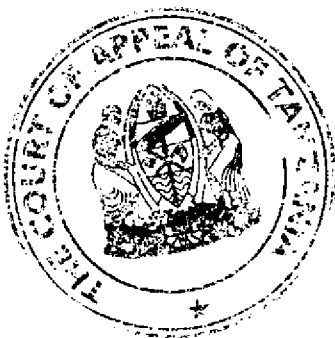
DATED at DAR ES SALAAM this 27th day of October, 2023.

B. M. A. SEHEL
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

A. S. KHAMIS
JUSTICE OF APPEAL

The Judgment delivered this 1st day of November, 2023 in the presence of Mr. Benedict Magoto Mayani, learned advocate for the applicant and in the absence of the Respondent is hereby certified as a true copy of the original.



S. J. Kainda
S. J. KAINDA
REGISTRAR
COURT OF APPEAL