

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM**

MISC. CIVIL CASE NO. 8 OF 2011
(original International Chamber of Commerce
Arbitration Case No. 15947/VRO)

TANZANIA ELECTRIC SUPPLY CO. LTD. APPLICANT

Versus

DOWANS HOLDINGS SA (COSTA RICA) 1ST RESPONDENT
DOWANS TANZANIA LTD. 2ND RESPONDENT

Date of submissions: 26/06/2012

Date of Ruling: 06/09/2012

R U L I N G

F. Twaib, J:

By an Arbitral Award rendered on 15th November 2010, the International Chamber of Commerce Arbitral Tribunal ("the ICC Tribunal") ordered TANZANIA ELECTRIC SUPPLY CO. LTD. (TANESCO) ("the Applicant") to pay DOWANS HOLDINGS SA (COSTA RICA) and DOWANS TANZANIA LTD. (together "the Respondents") the sum of **US Dollars 65,812,630.03**.

Subsequently, the Applicant filed a petition in this Court, praying for an order setting aside the Award. On 28th September 2011, Mushi, J. dismissed the petition. He invoked section 17 of the **Arbitration Act** (Cap 15, R.E. 2002), and ordered that the ICC Tribunal's Final Award filed in this Court be formally registered and a decree of the Court be issued for enforcement.

TANESCO then lodged a Notice of Intention to Appeal, in terms of rule 83 of the Court of Appeal Rules, 2009. It also filed two applications: One for leave to appeal and the other for stay of execution. On 20th February 2012, I delivered a ruling on the application for leave to appeal. I ruled that there was no need, in law, for an intended Appellant from an order under section 17 of the **Arbitration Act** to obtain leave to appeal. I am now called upon to rule on the second application for stay of execution.

The chamber summons, supporting and opposing affidavits, and the rival submissions by counsels who represented the parties in this matter, have given rise to two main issues. One of them is preliminary, the other on the merits. They are:

1. Whether, in the circumstances of this case, this Court has powers to grant stay of execution pending appeal;
2. Whether the Applicant should be granted stay of execution pending appeal and if so, on what terms and conditions?

Since the second issue can only become relevant upon an affirmative answer to the first issue, I would begin with a determination of the first issue.

The issue was raised by Mr. Fungamtama, learned Counsel for the Respondents, in the course of his reply submissions. He reminded the Court that the application has been filed under rules 11 (2) and 47 of the **Tanzania Court of Appeal Rules**, 2009. He submitted that Rule 47 of the said Rules applies to applications in which the Court of Appeal as well as the High Court have concurrent jurisdiction. However, an application for stay of execution is not among them, he said. He cited *Mantrac (T) Ltd. v. Raymond Coster*, Civil Application No. 11 of 2012 (unreported) in support of this argument. It was held in that case that the Court of Appeal may grant stay of execution under rule 11

(2) (b) of the Court of Appeal Rules, 2009. Hence, according to Mr. Fungamtama, the word "Court" in rule 11 (2) (b) refers to the Court of Appeal, and not the High Court. For that reason, he opines that only the Court of Appeal can grant stay of execution under the said rule.

In response, Mr. Mwandambo for the Applicant expressed views to the contrary. He contended that the provisions of rule 11 (2) (b) of the Court of Appeal Rules, 2009 give powers to this Court as well as Tribunals from which appeals lie to the Court of Appeal to order stay of execution. He said that under the said provisions, there are only two conditions: The lodging of a Notice of Appeal, and the existence of good cause.

On Mr. Fungamtama's reliance on the case of *Mantrac Ltd. v Raymond Coster*, Mr. Mwandambo argued that the same is no authority for the proposition that this Court has no jurisdiction to grant stay. I respectfully agree. All that the Court of Appeal said in *Mantrac's case* was that it (the Court of Appeal) had jurisdiction to grant stay under the said provision. It did not expressly rule out the possibility of the High Court exercising such jurisdiction. Mr. Mwandambo further submitted, again correctly, that rule 11 (2) (d) (iii), which imposes the conditions for the grant of stay, only applies to the Court of Appeal. In other words, the conditions set out in that provision can only be imposed by the Court of Appeal and not this Court.

But the issue is, as earlier posed: Can this Court grant orders of stay of execution in the circumstances of this case? It is pertinent at this point to reproduce rule 11 (2) (b) of the Court of Appeal Rules, 2009. It states as follows:

"[I]n 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 **except so far as the High Court or tribunal may order**, 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. [emphasis mine]

The wording of above-quoted clause may at first appear ambiguous. However, it seems to me that that ambiguity can easily be explained away by reference to clause (c) of the sub-rule and relevant case law.

In *Mantrac's Case (supra)*, Rutakangwa J.A. held that most of the case law on stay of execution that interpreted rule 9 (2) of the 1979 Rules would not be relevant to the application of rule 11 (2) of the new Rules. However, I understand His Lordship to have referred to the terms on which stay of execution may be granted. Whereas in the old Rules the Court could grant stay of execution "on such terms as the Court may think just" (rule 9 (2) (b)) under the 2009 Rules it can only do so upon the Applicant fulfilling the conditions set out in rule 11 (2) (b) and (d). Hence, in that regard, the new Rules are, as His Lordship found, more restrictive. This is a clear departure from the old position.

However, does the Rule depart from the position hitherto as developed by case law? If I understood counsel Mwandambo well, simply put, his opinion is that the new law gives this Court the power to order stay of execution of its decrees even where a Notice of Appeal has already been filed.

I wish to state, with all due respect to learned counsel, that I do not think so. Though there is a statement to the effect that the Court (meaning the Court of Appeal) can, under clause (b) of the Rules, grant stay of execution upon good cause being shown, it is also clear in my mind that the enabling provision under the 2009 Rules is clause (c) of sub-rule (2) of rule 11, read together with rule 3. It grants powers to order stay of execution exclusively to the Court of Appeal and sets out in the terms on which the order may be granted. It states:

"[where] an application is made for stay of execution of an appealable decree or order before the expiration of the time allowed for appealing therefrom, the Court, may upon good cause shown, order the execution to be stayed."

Further terms and conditions for grant of stay of execution are set out in clause (d) of the same sub-rule. As Mr. Fungamtama correctly submitted, the word "Court" as used in this provision refers to the Court of Appeal that has been so defined under rule 3 of the Court of Appeal of Tanzania Rules, 2009.

The Hon. Chief Justice must have been aware of the legal position as laid down in several decisions of the Court of Appeal to the effect that once appeal proceedings in the Court of Appeal have been commenced by the filing of a Notice of Appeal, this Court ceases to have jurisdiction to entertain an application for stay of execution. Specific provisions thereon are thus made under clause (d) of rule 11 (2): See, for instance, *Aero Helicopter (T) Ltd. v F.N. Jansen* (1990) TLR 142 (Kisanga, J.A.). If His Lordship the Chief Justice wanted to change the legal position and vest in the High Court and Tribunals the power to order stay of execution, he would have done so expressly.

Mr. Mwandambo has argued that the fact that the High Court (and Tribunals) are mentioned in clause (b) means that they have such powers. It is true that they do. However, I am of the considered opinion that those powers are not granted by the said clause.

The plausible explanation for the mention made of the High Court and Tribunals in that clause is, in my respectful view, a reference to a situation where those two authorities exercise their powers under order XXXIX rule 5 (1) and (2) of the *Civil Procedure Code*, Cap 33 (R.E. 2002). That power can only be exercised *before* the filing of a Notice of Appeal. Once a Notice has been filed (as is the case herein), the High Court ceases to have jurisdiction. The position of the law with regard to the issue, therefore, has not changed.

I note that in a few cases in the Tax Revenue Appeals Tribunal, I have ruled in favour of the position taken by Mr. Mwandambo in this case: See, for instance, *Ace Distributors Ltd. v. Commissioner General, Tanzania Revenue Authority* (Tax Application No. 8 of 2012, unreported). However, in composing this ruling, I had an opportunity to take a fresh look at the legal position. The decision in *Ace Distributors Ltd.* was not rendered by the High Court, but the Tax Appeals Tribunal. It is not binding upon this Court. Further, though mindful of the principle of *stare decisis* (even if it was this Court's decision) this Court is not bound by its previous decisions. It is free to depart from them if it considers it fit to do so.

On the basis of the foregoing, I am constrained to hold, as I hereby do, that this Court has no jurisdiction to entertain the application for stay of execution filed by the Applicant. With this finding, I do not need to determine the second issue I have framed, which goes to the merits of the application.

Consequently, the application stands dismissed. There shall be no order as to costs.

Dated at Dar es Salaam this 6th day of September 2012.

F. Twaib

Judge

6th September 2012

Delivered in Court this 6th day of September 2012.

F. Twaib

Judge

6th September 2012