

AT SUMBAWANGA

ORIGINAL JURISDICTION

**MISCELLANEOUS CIVIL APPLICATION NO. 6 OF 2013
(Application for stay of execution of the decree of the
Sumbawanga Resident Magistrates' Court and maintenance of the
status quo in Civil Case No. 11 of 2011)**

FABEC INVESTMENT COMPANY LIMITED APPLICANT

Versus

JIANGX – GEO ENGINEERING GROUP) RESPONDENT

16th September, 2014 & 17th February, 2015

RULING

MWAMBEGELE, J.:

The applicant FABEC Investment Company Limited; a legal person, through the services of a firm of advocates named Brass Attorney, is applying for an order of stay of execution and maintenance of *status quo* of the decree of the Resident Magistrates' Court of Sumbawanga at Sumbawanga in Civil case No. 16 of 2011 dated on 17.06.2013. The application has been taken under the provisions of Order XXXIX, Rule 5 (1), Sections 68 (e) and 95 of

application seeks the following reliefs:

- a) That this Honourable court be pleased to grant the order for stay of execution and maintenance of the *status quo*;
- b) Costs of this application be provided; and
- c) Any other relief this Honourable court may deem fit and just to grant.

The application is supported by an affidavit of Mr. Brayson Shayo, learned counsel for the applicant sworn on 02.09.2013. On the other hand, the respondent, Jiangx - Geo Engineering (Group) Corporation; also a legal person, through the services of Mr. Mathias Budodi, learned counsel from a firm of advocates going by the name S. Mawalla Law Consultants & Attorneys, swore and filed a counter affidavit on 11.10.2014 opposing the application.

When the matter came for mention on 12.08.2014, Mr. Chambi, advocate, holding briefs of both counsel, prayed to this court that the matter be disposed of by way of written submissions. The court granted the prayer and scheduled the submissions dates and the parties have submitted their written submissions as ordered by the court.

Mr. Budodi, learned counsel for the respondent had raised a preliminary objection on the application by filing a notice thereof on 11.10.2013 but on 23.06.2014, for undisclosed reasons, he sought to withdraw the same so

The background to the application may briefly be stated as follows; on 27.07.2010 the applicant entered into a contract of construction of ceiling board, door frames, and door shutters for the respondent's staff houses in Sumbawanga Municipal along Sumbawanga – Mpanda road where the applicant was the contractor and the respondent was the employer of the aforesaid assignment. According to the executed contract, it was agreed that the applicant will carry out the work in accordance with the contract bill which was attached in the contract and the applicant was required to adhere to the conditions stipulated in the contract bill. Upon completion of the assignment under the supervision of the respondent, on 01.02.2011, the applicant wrote a letter to the respondent for handing over the project to the respondent in the presence of her consultant but during the handover inspection the consultant came up with other different specifications as to opposed the agreed conditions, and as stipulated in the contract. However, on 18.02.2011, the respondent wrote a letter to the applicant requiring her to rectify minor defect. Following that letter the applicant rectified the defects as proposed by the respondent. And later, the applicant wrote a letter for handling the assignment but the respondent did not reply, but the respondent, without being handed over, and without paying the applicant, decided to take occupation of the premises and wrote another letter informing the applicant that the work done was of poor quality and the consultant had held payment and further enhanced liquidated damage from 0.1% to 1% of contractual sum per day

One Hundred Twelve Million Six Hundred Eighty Two Thousand Nine Hundred Twenty Five) for hiring Hotel for their staff from 01.02.2011 to 11.06.2011. Hence the applicant was praying for judgment and decree against the respondent for specific damages at the tune of Tshs. 100,000,000/= (say, Tanzania shilling One Hundred Million) for breach of contract made by the respondent.

On the other hand the respondent disputed the whole claim. But further she had a counter claim of Tshs. 100, 000,000/= against the applicant being the total specific damages for breach of contract which was executed on 27.02.2010. After a full trial, the Resident Magistrates' Court dismissed the suit and ordered the applicant to pay the respondent the sum of Tshs. 45,000,000/= (say, Tanzania shillings forty five million), the amount includes the entire respondent's prayers in the counterclaim save for costs of the suit.

After the trial court delivered its judgment on 17.06.2013 the applicant lodged her appeal on 22.08.2013. While the said appeal which was registered as DC Civil Appeal No. 2 of 2013 is pending, the applicant is moving this court for an order that the execution of the judgment and decree of the trial court be stayed pending the determination of the appeal on the following grounds as sieved from the affidavit supporting the application:

1. That execution of a decree will adversely affect the applicant since its cash flow and business activities will be impaired by withdrawing the whole amount abruptly in its accounts before its rights are heard and determined by this honourable Court.
2. That the lower court passed a decree and granted prayers which were not proved. As such, if the respondent is left to proceed with the execution of the decree, he will benefit from nullity.
3. That it is a matter of justice and common sense and equity that when there are proceedings in court, which in this case is the pending appeal in which the respondent is a party, then it is just and reasonable that the recovery of anything under the proceedings should be stayed in order to await the outcome of the proceedings in court.
4. That it is in the interest of justice that the order for stay of execution be granted pending the hearing and determination which is still pending in Honourable Court.
5. That the applicant makes this application believing the same to be the right forum to protect their interests pending the hearing of the Appeal which is still pending in this Honourable Court.

6. That the applicant stands to suffer irreparable loss if stay is not granted as the respondent is set to execute the decree of the court and realize the sum claimed which sum is unjustifiably high.

Submitting in support of the application, the applicant's counsel in his written submission reiterated has been stated in the affidavit. He clarifies that that, the decree which is sought to be stayed, the Decretal sum of Tshs. 45,000,000/= was awarded as punitive damages and without proof and the court is requested to consider this fact by staying the execution so that the court may have time to consider the legality in the pending Civil Appeal No 2 of 2013 which is awaiting this Court's determination. The applicant's counsel submits further that if the stay is not granted pending determination of Civil Appeal No. 2 of 2013, the appeal may be rendered nugatory as the otherwise illegal and or irregular order will be executed. It is his view that there are overwhelming chances of success of Civil Appeal No. 2 of 2013 in favour of the applicant. On this aspect he referred this court to the case of ***Richard Zuberi t/a Zuberi & Another Vs Standard Chartered Bank (T) Ltd & Others***, Civil Application No. 86 of 2003 (unreported) where the Court of Appeal stated at pp 8 – 9 that:

"If, prima facie, and without the need for a detailed consideration of the evidence or the law the intended appeal will probably succeed. It will be proper to grant stay of execution. I have in mind a situation for example where there is no serious dispute that the High court had no

jurisdiction or the rule audi alteram partem was obviously breached, or the decision of the High Court is plainly unsupportable. But where the evidence and the law need careful detailed consideration before the Court can form the opinion that the pending appeal stands chances of success, the Court should not grant stay of execution."

To cement his argument on this aspect counsel for applicant also directed the mind of this court to the case of ***Tanzania Posts & Telecommunications Corporation Vs M/S B S Henrita Supplies*** [1997] TLR 141 wherein the Court stated at page 144 that:

"It is however relevant at this juncture, to reflect that this Court has on numerous occasions taken the views that the chances of success of an intended though a relevant factor in certain situations, it can only meaningfully be assessed later on appeal after hearing arguments from both sides. This, it is a common knowledge is but a general principle which exception. There are situations in which as a matter of exception to the rule and depending on the circumstances of the case, the chances of success can be gauged right way."

On this regard he had the view that the decretal sum of Tshs. 45,000,000/= was awarded as punitive damages without proof. The same was not based on evidence.

He added that, the claims of the parties were over the breach of the contract and each party gave evidence in support of her case. And the Resident Magistrate was supposed to analyze evidence and specifically pointed out that the decretal sum of Tshs. 45,000,000 was to remedy particular/specific loss suffered by the respondent and not to punish the plaintiff so that he can teach the entire industry of Contractors a lesson.

With that view the applicant's counsel submitted that on the circumstances of this case the chance of success can be gauged right away by this Court as the punitive damages does not apply to the breach of the contract, as in the breach of the contract the court upon being satisfied by the evidence is only duty bound to put the party claiming for breach to nearly to the position she would have be if the contract was not breached and not otherwise.

Learned counsel insisted that, the decretal sum of Tshs. 45,000,000/= was awarded as punitive damages and without proof is also one of the ground of Civil Appeal No. 2 of 2013 which is still pending in this Court for determination. He relied on and supplied the case of ***BP (Tanzania) Ltd Vs Sanyou Service Station Ltd***, Civil Application No. 138 of 2005 (unreported) where the Court of Appeal stated at page 6 – 7 that:

"Indeed, there is sufficient ground for staying execution because the awarded general damages is a triable issue in the intended appeal. On the balance of convenience and common sense it is justifiable to stay execution pending determination of the intended appeal because the respondent would amicably enjoy the fruits of the decree plus interest without the inconvenience of refunding the decretal amount if the appeal succeeds."

The learned counsel for the applicant also the case of ***Murray and Roberts Contractors (T) Ltd. Vs Jennifer Paul***, Civil Application No. 25 of 2003 (unreported) where the High court awarded Tshs. 30 million as a general damages for the alleged breached contract of employment. The Court when granting the application stated at page 5 that:

"To pre-empt rendering the appeal mightily it is pertinent that to order stay of execution to enable the Court of Appeal to determine whether the award of Tshs. 30 million general damages was manifestly excessive or adequate."

While insisting that the application be granted, the applicant's counsel submitted that the respondent will still have the right to execute the decree with increased interest if the Civil Appeal No. 2 of 2013 which is still pending in this court for determination will not succeed. But the execution of the said sum will entail wiping away most of the applicant's property and working capital thereby causing substantial and irreparable loss to the applicant. In sum, the applicant's counsel is of the view that the balance of convenience and common sense tilt in favour of the granting the stay of order. He thus prayed that the application be granted pending the hearing and determination of Civil Appeal No. 2 of 2013 which is in this Court for determination.

On the other hand, Mr. Budodi, learned counsel for respondent submitted that the cardinal principle of law in granting the application for stay of execution are that the court must be satisfied that the applicant shall suffer irreparable (substantial) loss if the application is not granted, the appeal will be rendered nugatory if the stay is not withheld, the intended appeal has overwhelming chances of success and the last depend on the gauge of balance of inconveniences. He submitted that throughout the submission of the applicant, the learned counsel has confined himself on a single factor that the purported appeal has overwhelming chances of success. The gist of the applicant's argument is that the awarded of 45,000,000/= out of 100,000,000/= the decretal sum which was claimed by the respondent as a consequence of breach of contract was punitive. He added that, from the outset of it that is the matter of evidence and determination of the same is to put the court in a temptation to determine the merits of

appeal, to him an act which implies procedural evil for want of prudence. But for avoidance of that detrimental, learned counsel stated that the court has been entertaining the factor of overwhelming chances of success strictly and limited only on obvious circumstances and so to speak on legal questions such as where there is a question of jurisdiction or the issues of time barred. On this he referred the decision of the Court of Appeal of Tanzania in **Reginald John Nolan Vs Stanbic Bank Tanzania Limited**, DSM, Civil Application No. 36 of 2003 (unreported), when referring to its earlier decision in the case of **Tanzania Electrical Supply Company Ltd and 2 Others Vs Independent Power Tanzania Ltd**, Consolidated Civil Application Nos. 19 and 27 of 1999, (unreported), where the Court held that:

“...where it is demonstrated that an intended appeal has prima facie likelihood of success stay of execution will be granted. But the likelihood of success must be obvious, like where the court clearly lacked jurisdiction or that the suit was undoubtedly time barred.

He submitted further that, in absence of any obvious or clear circumstances showing the alleged likelihood of success, the element of overwhelming chances of success is disqualified to stand as a ground for stay of execution as it was stated in **Reginald John Nolan** (supra) quoting with approval its previous decision in **Linus Furaha Shao Vs NBC**, Civil Application No. 9 of 1999 (unreported) in which it was stated:

"....this court has said in many occasions that the allegation that the intended appeal has overwhelming chances of success is no ground for stay because, among other things, there is often no material on which the Court can at this stage ascertain that the allegation. I cannot justify my decision whether to accept the allegation or not"

Therefore, he had the view that the applicant has not substantiated the obviousness of the likelihood of success in the intended appeal and therefore stay of execution shall only facilitate denying respondent's right to benefit the fruits of the judgment. The learned counsel also submitted that in both the affidavit and the submission, it is not suggested that the respondent is not in a position to refund the applicant, but for him since the decretal amount of 45,000,000/= he same does not amount to irreparable loss as it can be quantified and well atoned by damages in case the appeal succeeds as the respondent is capable of refunding the same.

Finally the learned counsel for the respondent submitted that, stay of execution shall attract the interest accrual of the decretal sum (at court's rate) on the part of the applicant for indefinite period of pending determination of appeal an act which implies irreparable loss. And therefore the right gauge on the balance of inconvenience in the circumstances is that stay shall cause more trouble than if the application

Massawe t/a Sombetini and Tabata Matumbi Petrol Station vs. Engen Petrol Station (T) Ltd, Civil Application No. 170 of 2004, the decision of the Court of Appeal at Dar salaam (unreported), where the court stated:

“That apart, in this application, the applicant did not substantiate how, or what irreparable loss he would suffer if execution proceeds. If stay is granted, and the intended appeal fails, the already large debt would be heavier because interest would accrue thereon, over and above interest that has already accrued on the said debt. On the balance of convenience, therefore, common sense would dictate that the execution should not be stayed.”

Regarding the cases cited to this court by the applicant’s counsel, Mr. Budodi had the view that the same are distinguishable from the present case; in **Murray’s case** the trial court awarded Tshs. 30,000,000/= to the respondent who was a terminated employee who worked for seven months only under probation before termination, hence according to him the intended appeal had overwhelming chances of success, in that case the respondent was an individual hence attract some unnecessary inconvenience. The same is different with this case as that both parties are registered companies. And the respondent was able to hire the applicant in

hence application, such does not suggest that the respondent shall not be able to refund the applicant in case the appeal succeeds. And he had also that the case of **BP (Tanzania) Ltd** is distinguished too as the subject matter of execution in that case was half a billion while in this case it is only Tshs. 45,000,000/=. He thus called upon this Court to dismiss the application for stay of execution with costs.

I have carefully considered the affidavit and counter as well as the rival submissions of the learned counsel of both parties. I have also carefully considered the overall circumstances surrounding the application. It is common knowledge that the Court has power to grant or to refuse a stay order under Order XXXIX, rule 5 of the Civil Procedure Code. These powers are unfettered and discretionary which, however, must be exercised with a judicial mind guided by the established principles and common sense. I start with the bottom line that a successful party is entitled to enjoy the fruits of the judgment and decree in its favour. It is only when the applicant has established to the satisfaction of the court that the conditions for granting a stay order do in fact exist, that a decree-holder may be deprived of the enjoyment of the decree pending the determination of the intended appeal – see **S.A. Said & Company Limited Vs CXA Exports Limited** Civil Application No. 72 of 2004 (unreported). In that case, the Court of Appeal relied on its earlier decisions of **Tanzania Electric Supply Company Limited Vs Independent Power Tanzania Limited & 2 Others** [2000] TLR 324, **Stanbic Bank Tanzania Limited Vs Woods Tanzania Limited** Civil