

**THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
(DISTRICT REGISTRY OF MTWARA)
AT MTWARA**

MISC. APPLICATION NO. 26 OF 2020

(Originating from Misc. Civil Application No. 2 of 2019)

THE PERMANENT SECRETARY MINISTRY OF

WATER AND IRRIGATION1ST APPLICANT

THE HON. ATTORNEY GENERAL2ND APPLICANT

VERSUS

OVERSEAS INFRASTRUCTURE

ALLIANCE (INDIA) PVT LTD.....RESPONDENT

RULING

Hearing date on: 05/02/2021

Ruling date on: 12/2/2021

NGWEMBE, J:

The applicants are seeking substantially one order in their chamber summons, to wit; *the court be pleased to stay execution of this court's decree delivered in Misc. Application No. 2 of 2019 as a result of Deed of Settlement entered by the disputants and registered in this court on 11th June, 2020.* The application is supported by an affidavit sworn by Lilian



Machagge, State Attorney in the Office of the Solicitor General. Her affidavit comprised twelve paragraphs among them, specifically, paragraphs 8, 9, 10 and 11 disclosed the reasons as to why they have decided to apply for stay of execution of this court's decree in **Misc. Civil Application No. 2 of 2019.**

The application, though was served to the respondent timeously, but opted not to oppose it by filing necessary defence in terms of a counter affidavit. Thus, failed to appear in court and argue against or in favour of the application.

On the hearing date of this application, the applicant came with a team of lawyers led by Solicitor General Mr. Gabriel Pascal Malata, assisted by Ms. Lilian Machagge, Sabina Faire and Getruda Songoi. The learned Solicitor General boldly argued that the gist of this application is to Stay Execution of this court's order/decreed in Misc. Application No. 2 of 2019, pending final determination of Civil Case No. 5 of 2020. The Civil case is intended to challenge the Deed of Settlement pending in this court. The court's order/decreed.

Rested by arguing that, since the application was not opposed, this court may be pleased to grant the prayer based on the reasons comprised in paragraphs 8, 9, 10 & 11 of the affidavit in support of the chamber summons.

For better understanding, I find important to quote the four paragraphs of the affidavit in support to the chamber summons:

8. *That upon being served with the Application of the execution the Applicants prepared and filed a suit before the High Court Mtwara District Registry on 17th November, 2020 to challenge and set aside the settlement agreement entered between the parties which resulted to the consent order that respondent is executing before the court;*
9. *That for the above reasons the Applicants are seeking for an order of stay of execution to this Hon. Court pending determination of the civil case filed on 17th November, 2020 to challenge the settlement agreement that resulted to consent order dated 11th June, 2020 issued by Hon. Dyansobera, J.*
10. *That if the application for execution of the decree is not stayed, the applicants will suffer a great economic loss on the Lindi Water Supply and Sanitation Project; and*
11. *That the suit filed raised serious and legal issues for determination of the court, and the same has overwhelming chances of success, and if an order staying execution is not made the entire suit will be rendered a nugatory and academic exercise.*

I am certain that the term Stay of Execution is a legal process guided by Civil Procedure Code, specifically Order XX1 Rules 24 – 27. For clarity, the term **stay** is a normal English word, which means stop, restrain, suspend or refrain from doing something. Black's Law Dictionary defines the word **stay** to mean postponement or halting of a proceeding or judgment. It is an order intended to suspend all or part of a judicial proceeding or a judgment. Likewise, the term "**Execution**" at a certain point in time, the

court of England was confronted by the problem of defining it. In turn Lord Denning M.R (Master of Rolls) ventured to define it in a case of **Overseas Aviation Engineering (G.B.) Ltd [1962] 3 ALL ER. 12 AT PAGE 16** as follows:

"Execution means, quite simply, the process of enforcing or giving effect to the judgment of the court, and it is completed when the judgment creditor gets the money or other thing awarded to him by the judgment."

Legally, "stay of execution" is an equitable remedy in a nature of an injunctive relief. It is a command of the court, intended to stop a particular act from being done or that a certain act be prohibited from being actualized or realized. It is an order of a court to stop a process of actualizing another lawful court order. It is an obstruction of a process of execution of a lawful court decree or order. The same position was likewise, urged in **Civil Application No. 108 of 2003 between Bank of Tanzania versus Said A. Marinda.**

Above all, Order XXI Rule 24 – 27 of Civil Procedure Code Act, Cap 33 R.E. 20019, provide a legal procedure of staying execution. Rule 24 is quoted hereunder:-

"The court shall upon sufficient cause being shown, stay the execution of such decree for a reasonable time, to enable the judgment debtor to apply to the court by which the decree was passed or to any court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay



execution or for any other order relating to the decree or execution which might have been issued thereby or if application for execution had been made thereto. A judgement debtor has been in the situation whereby the property or seized under an execution, the court which issued the execution may order the restitution/ return of such property to the owner or discharge the judgement debtor pending the result of the application or appeal”.

In deciding whether stay of execution be granted or otherwise, the court is purely exercising discretionary powers. In exercising that discretion, the trial judge or magistrate use, reasonability, logic and common sense. However, the court is always mindful of the warning enunciated by Lord Manfield (in **Rex vs Wilkes (1770) 4 Burr 2257** as cited by **Sir Jocelyn, P, in Povey Vs. Povey (1971) 2 WLR 381 at 387**) when held:-

“.....discretion, when applied to a court of justice means sound discretion guided by law. It must be governed by rule and not by humour. It must not be arbitrary and fanciful but legal and regular”

It has been the trend of our jurisdiction, to exercise discretionary powers judiciously. The term judiciously, in respect to exercise of court's discretion, means consideration of sufficient reasons to convince the conscience of the trial judge or magistrate before such discretion is invoked. Without any form of contradiction, that is the legal position upon which, judicial

discretion may be exercised. The same inference may be drawn from the case of **Ngao Godwin Losero Vs. Julius Mwarabu, Civil Application No. 10 of 2015** and in the case of **Selina Chibago Vs. Finihas Chibago, Civil Application No. 182 'A' of 2007**.

In essence, the court's discretion is limited to the extent that, such discretion means no discretion in the absence of sufficient reason for stay of execution. Therefore, the duty of the applicant is to provide sufficient reason capable of moving the court to exercise its discretionary powers.

Having laid down those principles, the question is how do they apply in this application at hand? It means, the applicant must submit without any form of contradictions the existence of special circumstances upon which, the court may be moved to exercise its discretionary powers to grant the prayer for stay of execution or otherwise.

The term special circumstances constitute several grounds upon which, the court should consider. The oldest precedents laid down three grounds, which constitute special circumstances. Sir Georges, former chief justice of Tanzania, in the famous case of **Attilio Vs. Mbowe [1969] HCD 284**, amplified those three grounds to mean:-

1. High chances of success on the main case;
2. Balance of Convenience; and
3. Irreparable loss.

In other words, these principles, inter alia, demand occurrence of irreparable loss, which cannot be atoned by an award of damages if stay of execution is not granted; that if refusal will render the success of the suit

or appeal nugatory; and where on a balance of convenience, it is in the parties' interest to grant the prayer for stay of execution.

I need not to venture on prima facie chances of succeeding of either party, because due to the nature of this suit, that will only depend on strength of evidences yet to be adduced in court. The same position was arrived by the much celebrated Nigerian case of **State versus Nwabu Wanne (1981) (1) N.C.L.R 367**, held:-

"We are not prepared to prejudge the issues before the appeal is heard. In our view, to follow the practice will tend to make a mockery of the substantive appeal if and when it eventually comes up for hearing"

In similar vein, Justice of Appeal Ramadhan J.A. in the case of **Robert Edward Hawkins and Another versus Patrice P. Mwaigomole (Civil Application No. 60 2005** (unreported), had this to say:-

"I am always uncomfortable with this submission and I rarely take it in because it is not easy to assess the outcome of litigation."

In the same spirit, Justice of Appeal Lubuva, J.A in the case of the **University of Dar es Salaam versus Richard Kajuma Muzo (Civil Application No. 117 of 2001** (unreported) had similar sentiments when he said:-

"On a number of occasions, this Court has held that one of the circumstances in which stay of execution is granted is a



situation where on the face of the record, prima facie the appeal stands reasonable chances of success. It is however, not in every case or situation that it is apparent on the face of the record that it can with certainty be that the appeal has great chances of successit is, however possible in certain situations on the face of the record, to gauge the prospects of the appeal on the face of the record”.

To the best, all precedents cited above meet into one point that high chances of success prior to hearing is only probable upon perusing only the filed records. I therefore, adopt that guidance in consideration of this application which I would only rely on what is provided for in the supporting affidavit.

In respect to this application, the applicants have strongly stated in paragraphs 10 & 11 of the affidavit, the apparent threat of irrecoverable loss should stay of execution is not ordered. That the likelihood of suffering an irreparable loss, injury or damage which cannot be atoned by an award of damages to the applicants is always a good reason for stay of execution. In the case of **Tanzania Cotton Marketing Board Vs. Cogecot Cotton Co SA (1997) T.L.R 63**, two important points of law were stated by the Court of Appeal namely:-

- 1. Where the applicant had not gone beyond mere assertion that it would suffer great loss but the particulars and details of that loss were not specified, there would be no basis upon*



which the court would satisfy itself that such loss would be incurred.

2. In order to succeed, the applicant must satisfy, beyond vague and generalized assertion of the substantial and irreparable loss, and further, that such loss could not be adequately compensated for by an award of damages.

Therefore, in order for the applicant to successfully move the court to grant stay of execution, detailed and particulars of loss (damage or injury), must be given and/or specified. In the instant application, it is apparent that, the applicants' fears cannot be dismissed without good reason. The applicants have raised the issue of fraud in arriving to the alleged Deed of Settlement which led into executable court order dated 11th June, 2020. Fraud is a serious allegation of criminal in nature, which any court properly guided by law must allow the allegations be proved by evidence on the hearing of the main case. In any event, fraud, coercion or misrepresentation when proved do vitiate a consent decree. It is imperative therefore, that evidence be adduced in support of such factual claims. Thus, in order to hear that evidence, stay of execution is inevitable to allow both parties be heard on factual claims.

Since the respondent willingly, opted not to oppose this application, I find no cogent reason to labour much on balance of convenience. That would be important had the respondent ventured to oppose it. It seems to me the respondent will not be disadvantaged by granting stay of execution, that is why failed to oppose the application.

In the circumstances of this application, it is only prudent, logical and for the benefit of both parties to grant the prayer for stay of execution. I accordingly grant as prayed with no order as to costs.

I accordingly Order.

Dated at Mtwara this 12th day of February, 2021.

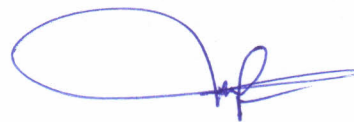
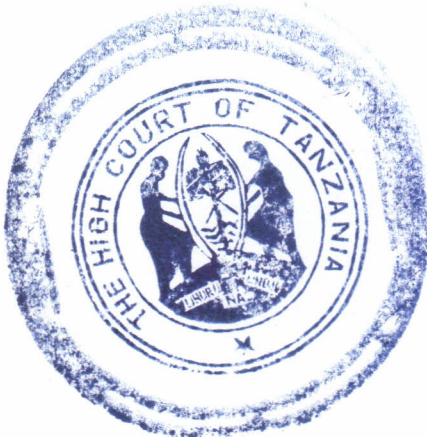


P.J. Ngwembe

Judge

12/02/2021

Court: this ruling delivered in chambers this 12th day of February, 2021 in the presence of Mr. Gabriel Pascal Malata (SG) assisted by Ms. Lilian Machagge, Getruda Songoi and Sabina Faire State Attorneys appearing for the applicants and WinJaneth Lema appeared for the respondent.



P.J. Ngwembe

Judge

12/2/2021