While it may be true that placing an accused into hands of his prosecutors when it comes to granting bail, as Mwengela submitted (though I failed to trace the relevant authority which he simply cited as "the case of *Seif Shariff Hamad*"), considering the fact that this is not an ordinary criminal matter I was not prepared to disturb the imposed bail conditions but for one factor. The record shows that the Applicant has in between, been granted special release permits to travel outside Tanzania and has always returned. This is a positive pointer on his reliability on meeting bail conditions. For this reason condition four- reporting to the Regional Crimes Officer three times a week is hereby set aside. However bail conditions one to three remain undisturbed.

In conclusion the application for revision is hereby refused except to the extent indicated in respect of bail conditions.

TANZANIA PHARMACEUTICAL INDUSTRIES LTD *v.* DR. EPHRAIM NJAU (NUMBER 1)

COURT OF APPEAL OF TANZANIA
AT ARUSHA

(Lubuva, J.A.)

CIVIL APPLICATION No. 5 OF 1996

(Application for execution of the decree from the judgment of the High Court of Tanzania at Arusha, Munuo, J., dated 23 August 1996, in Civil Case No.3 of 1993)

Court of Appeal – Affidavits – Supplementary affidavit – Conditions for filing supplementary affidavit – Rule 46(3) of the Court of Appeal Rules of 1979.

Public Corporation – Specified Public Corporations – Public corporation declared a specified public corporation – Effects thereof – Sections 38(1) and 39 of the Public Corporations (Amendment) Act of 1993.

Appeal – Legal issues on appeal – Whether a legal issue not raised at the trial may be raised on appeal.

A This is an application for stay of execution of a decree pending appeal. The application was filed without attaching a copy of the High Court decision sought to be stayed. Also the applicant filed a supplementary affidavit without seeking leave of the court or the consent of the other party. It was argued for the respondent that firstly the
B application was defective for lack of a copy of the High Court decision, and that the supplementary affidavit be expunged from the record. The applicant argued, *inter alia*, that the court should grant stay of execution as the applicant had been declared a specified corporation and therefore changed its legal status and if execution
C proceeded, it could be against a wrong party. It was argued for the respondent that the question of legal status of the applicant could not be raised now as it was not raised at the trial. It was noted that while the interest on the decretal sum was shown in the judgment to be 8% p.m, the decree showed it as 25% p.a.

D **Held:** (i) Although under the court's rules there is no express requirement to attach to the application for stay of execution a copy of the decision sought to be stayed, logic and reason dictate that as it is the basis of the application, it should form part of the record;

E (ii) Under rule 46(3) of the Tanzania Court of Appeal Rules 1979 a party wishing to file a supplementary affidavit has no choice but to seek leave of the court or the consent of the other party; as the supplementary affidavit was lodged contrary to this requirement, it is rejected and expunged from the record;

F (iii) As the amount involved in the decretal sum is substantial, it is important to ascertain the applicable rate of interest at which the execution of the decree is to be effected; as such, it would not be in the interests of justice to carry on with the execution of the decree in its present form exhibiting a different rate of interest
G between the decree and the judgment;

(iv) A legal issue not raised at the trial can be raised at the appellate stage; the legal status of the judgment debtor corporation may have to be ascertained on appeal to ensure that the decree is executed against the right party.

H ***Application allowed; costs in the cause***

Cases referred to:

I (1) *Febronia Gasper Maro and Evarist Gasper Maro v. Agnes G. Maro*, CAT – AR – Civil Application Number 2 of 1996 (unreported)

(2) *National Bank of Commerce v. Walter T. Czurn,* CAT – AR-Civil Application Number 2 of 1994 (unreported)

Statutory provisions referred to:

(1) Public Corporations (Amendment) Act of 1993, sections 38(1) and 39

(2) Tanzania Court of Appeal Rules 1979, rule 46(3)

Mr Ben Lobulu, for the Applicant

Mr C. Ngalo, for the Respondent

RULING

(Dated 17 August 1998)

LUBUVA, J.A.: In this application, Tanzania Pharmaceutical Industries Limited, the applicant is seeking to have the decree and judgment in Arusha High Court Civil Case Number 3 of 1993 of 23 August 1996, stayed pending the determination of the intended appeal. The Notice of Appeal was lodged in this court on 26 August 1996.

In the High Court Arusha, the respondent (original plaintiff) successfully sued the applicant (original respondent). He was awarded TZS. 43 732 800 salary entitlement, fringe benefits; pension; interest at 25% on the decretal amount plus costs. The applicant was employed by the respondent as General Manager based in Arusha. He was transferred from Arusha to Dar es Salaam. Dissatisfied with the transfer he filed a suit against the applicant in this application. From the decision of the High Court, (Munuo, J.) this application has been filed.

When this matter was called on for hearing on 21 July 1998, upon the court's observation that the copy of the High Court decision in respect of which stay of execution is sought, Mr Lobulu for the applicant in agreement with Mr Ngalo, learned counsel for the respondent, sought an adjournment. The hearing of the application was adjourned to 24 July 1998 in order to enable counsel to regularize the application.

It should be made clear that although there is no express requirement under the court's rules to the decree and judgment to the application, logic and reason dictate that as that is the basis of the application, it should form part of the record. Both the learned Counsel before me were in agreement as to the logic behind it. And so, as this court decided in AR-Civil Application Number 2 of 1996, *Febronia Gasper Maro and Evarist Gasper Maro v. Agnes G. Maro* (1) as a matter of practice, as far as it is practicable, it is desirable in my view, that a copy of the decision in respect of which stay of execution is sought should form part of the record for the application. Having regularized the application, the hearing of the matter resumed on 24 July 1998.

I intend to deal first with the issue touching on the supplementary affidavit filed on 10 July 1998 by the applicant. This, Mr Ngalo, learned counsel for the respondent submitted, was incurably defective because it violates rule 46(2) of the court's rules which requires such affidavits to be lodged with leave of the court or with the consent of the other party. In here, Mr Ngalo charged, neither the court's leave nor the consent of the respondent was sought. He urged the court to have the supplementary affidavit to be expunged from the record. Responding to these submissions, Mr Lobulu, learned counsel for the applicant conceded that the supplementary affidavit was irregularly filed. However, he urged the court to waive the requirement for leave of the court so as to ensure that justice was done in the case because he said, it was a mere procedural irregularity.

The provisions of rule 46(3) are clear and simple. Under this rule, it is optional for a party to file a supplementary affidavit. But once it is decided to file such a supplementary affidavit, the party so wishing to file the supplementary affidavit has no choice but to seek leave of the court or the consent of the other party. In this application, as correctly conceded by Mr Lobulu, no such leave was obtained. It follows that the supplementary affidavit was lodged contrary to the requirement of the Rule. Mr Lobulu's urge that the court waives the requirements of rule 46(3) can hardly be entertained because as yet there is no application made either formally or informally for

leave to lodge a supplementary affidavit. It seems to me that Mr Lobulu's request to waive the requirement of the Rule was as it were, incidentally bounced upon at the last minute in reply to Mr Ngalo's submission. In the circumstances, I reject the supplementary affidavit and order it to be expunged from the record.

Next, I shall deal with the decree in respect of which stay of execution is sought. At first, when Mr Lobulu, learned counsel raised it as one of the grounds for seeking the court's order for stay of execution, I was not, I must confess, impressed that raised a legal matter of considerable importance. On reflection however, and after a close scrutiny of the text of the decree, I was convinced that this could, possibly be the gravemen of the application. It was Mr Lobulu's submission that the decree was incapable of execution without attracting legal wrangle. In an endeavour to elaborate, he stated that it was incapable of execution because the claim for pension and costs was unquantified. On this, Mr Ngalo did not see any difficulty, for according to him, the decree was properly drawn up fully reflecting what was decided in the judgment.

With respect to Mr Lobulu, learned counsel, I do not accept the assertion that the decree is incapable of execution. That I think, is much of a generalized statement because, in my view, the decree by and large reflects what was decided in the judgment. To that extent it is therefore capable of execution. Furthermore, the situation here is different from a case in which the decision sought to be stayed is, for instance, merely declaratory in which case, there would be nothing in respect of which stay order could be, granted. Such is not the case here.

A cursory glance through the judgment, the basis of the decree, shows that most of the items awarded to the respondent, are reflected in the decree. These range from TZS. 43 732 800 salary entitlement, fringe benefits, other emoluments; pension; interest at 25% p.a. on the decretal amount from the date of the suit till payment in full and costs. The drawn up decree however, reflects an interest rate which

A is different from that awarded in the judgment. In the decree an interest on the decretal amount at 8% p.m. from the date of judgment till payment in full is shown. It is therefore not certain at which rate of interest is the decree holder to be paid i.e. at the rate which is reflected
B in the judgment or in the decree. As the amount involved in the decretal sum is substantial, it is important that the applicable rate of interest at which the execution of the decree is to be effected should be ascertained. In a somewhat similar case, in AR-Civil Application
C Number 2 of 1994, *National Bank of Commerce v. Walter T. Czurn* (2) (unreported) this court granted stay of execution on the ground that it would be unjust to allow the decree to be executed in the form it was drawn up in which reliefs which were not shown in the
D plaint were included. Likewise, in the instance case the interest rate awarded in the judgment does not tally with that shown in the decree. In such circumstances, it would not be in the interest of justice to carry on with the execution of the decree at this stage.

E There is yet another aspect of the matter. Referring to Government Notice Number 400 of 28 July 1995, Mr Lobulu insisted in his submission that as a result of this notice, great legal difficulties would be caused if execution is effected before the intended appeal is determined,
F In his view, this notice changed the legal status of the applicant company in which case if execution of the decree takes place before the issue on the legal status is resolved on appeal, the decree could be levied against a wrong party. Mr Ngalo discounted this argument as baseless
G because Mr Lobulu did not raise this issue at the trial since by then the Government Notice Number 400 of 1995 had long been published. In addition, Mr Ngalo said, a search at the Registry of Companies had revealed no change in the legal status of the applicant company in 1998.

H In terms of section 38(1) of the Public Corporations (Amendment) Act, 1993, the Minister responsible is empowered to declare by order published in the Gazette a public corporation to be a specified
I public corporation. By Government Notice Number 400 of 28 July 1995, Tanzania Pharmaceuticals Industries Limited, the applicant,

was declared a specified public corporation. As a result, from the date of publication, the provisions of the Public Corporations Act, 1992 applied once a public corporation has been declared a specified corporation, section 39 of the Act, empowers the Presidential Parastatal Sector Reform Commission to restructure such a specified public corporation. With the restructuring of the corporation in place, the legal status of the applicant company may well have been affected. I accept Mr Ngalo's complaint that at the trial, the issue relating to the legal status of the applicant company was not raised. But as Mr Ngalo would no doubt be aware, a legal issue even though not raised at the trial, can be raised at the appeal state. In similar vein, the legal status of the applicant company and the consequence of its being declared a specified public corporation under Government Notice Number 400 of 29 July 1995 could well be looked into when the intended appeal is heard. With the appeal heard and the legal status of the applicant company examined, it would then be possible to ascertain that the decree would be executed against the right party.

For these reasons, I am satisfied that there are special circumstances in this case warranting the court's grant of an order for stay of execution. Accordingly, I allow the application and order that the execution in Arusha High Court Civil Case Number 3 of 1993 be stayed pending the determination of the intended appeal to this court.

The applicant is however, ordered to furnish security in favour of the respondent for the sum of TZS. 43 732 800 in the form of banker's guarantees. Costs of this application to be in the cause.