IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

CIVIL APPLICATION NO. 71 OF 2005

CHINA HENAN INTERNATIONAL
COOPERATION GROUP CO. LTD. ..... APPLICANT
VERSUS
SALVAND K.A. RWEGASIRA ..... RESPONDENT

(Application from the decision of the High Court
Of Tanzania at Bukoba)

(Luanda, J.)

dated 7th day of December, 2004
in
Civil Case No. 5 of 2003

RULING

NSEKELA, J.A.:

On the 19.5.2005 the applicant, China Henan International Cooperation Group Co. Ltd., filed a notice of motion under Rule 9(2)(b) of the Court Rules, 1979, seeking an order of stay of execution. In High Court Civil Case No. 5 of 2003 at Bukoba, the applicant was the defendant and losing party. The applicant was aggrieved by the decision of the High Court (Luanda, J.) and so lodged a notice of appeal against that decision on the 13.12.2004. The notice of motion was supported by an affidavit affirmed by one Guo Xin Shing. The said affidavit reads in part as follows:-

"4. That it was the respondent's contention that he was granted Primary Mining Licences over the disputed plot on 28.8.2000 by the Commissioner for Minerals. Further that the applicant entered the disputed plot on May, 2001, and in the absence of the respondent's consent and excavated minerals, stones and stones pebbles for Mutukula – Bukoba – Muhute Road construction.

5. That the applicant disputed the respondent's claim on the ground that by the time the respondent obtained the Primary Mining Licences, the disputed plot had been designated by the Ministry of Works to the applicant for Mutukula – Bukoba – Muhute road construction.

II. That if the respondent is allowed to levy execution against the applicant's properties before the hearing of the intended appeal, the applicant who won contracts with the Ministry of Works for road construction in Singida Region, will suffer irreparably in that the base capital will dwindle and road construction projects brought to stand still."

Mr. Ndyanabo, learned advocate, appeared on behalf of the applicant. He submitted that in the event the Court declined to grant a stay order, the applicant is bound to suffer irreparable loss which cannot be atoned by an award of damages. The Tanzania National Roads Agency (TANROADS) had awarded to the applicants three contracts for road construction. The projects had already commenced and scheduled to be completed in three years time. The estimated costs of the projects was Shs. 45 billion and if a stay order is not granted, the applicant will be unable to perform its contractual

obligation with TANROADS. In addition, he submitted, this amount of money is "colossal" as he put it, and the respondent will be unable to refund the same since the respondent has no means to compensate the applicant in case the appeal should succeed. The learned advocate also submitted that the appeal stands a good chance of success. He was of the view that the import of section 95 of the Mining Act was not properly considered by the court. Lastly, Mr. Ndyanabo informed the court that a warrant of attachment of the applicant's properly had been issued but that so far no proclamation of sale has been made.

On his part, Mr. Kamugisha, learned advocate for the respondent, strongly resisted the application. First, he submitted that the process of attachment had already been set in motion as the warrant of attachment was issued on the 23.5.2005, though the learned advocate was not certain as to whether or not a proclamation of sale had been made. Second, he submitted that the applicant had not particularized the irreparable loss he alleges he is going to suffer. Third, the learned advocate submitted that the applicant is a foreign company and there is no assurance that the appeal will be heard

and determined before the completion of the projects with TANROADS. This means that the respondent stands to suffer more than the applicant if a stay order is granted. Lastly, Mr. Kamugisha submitted that the appellant should deposit the decretal sum in Court if the Court is inclined to grant a stay order.

In his reply, Mr. Ndyanabo submitted that the process of execution has not been completed since the applicant has not so far received a copy of a proclamation for sale. Furthermore, he stated that payment of the decretal sum in Court will take away the substratum of the appeal. As regards the allegation that the applicant has not given the particulars of the irreparable loss, Mr. Ndyanabo stated that the contracts between the applicant and TANROADS referred to in paragraph II of the affidavit in support were annexed to the notice of motion.

I think I should first make a general remark. The Court's power to grant or refuse a stay order under Rule 9(2)(b) of the Court Rules, 1979, is unfettered and discretionary. This Court has, however, established certain principles which guide it in deciding

whether or not to grant stay of execution. For instance in Civil Application No. 8 of 1999 between (1) **Ignazio Messina** (2) **National Shipping Agencies** and (1) **Willow Investment** (2) **Costa Shinyanga** (unreported), this Court stated thus: -

> "..... It is now settled that the Court will grant a stay of execution if the applicant can show that refusal to do so would cause substantial irreparable loss to him which cannot be atoned by an award of damages. It is equally settled that the Court will order a stay if refusal to do so would, in the event the intended appeal succeeds, render that success nugatory. Again the Court will grant a stay if, in its opinion, it would be on a balance of convenience to the parties to do so."

With this background of the applicable principles, let me start with the question of the attachment of property. This point, if I may say so, was not well articulated by both learned advocates. The thrust of this is that the Court cannot grant a stay order if execution

has already been completed. Paragraph 8 of the counter – affidavit sworn by Salvand Kagaruki Alphonce Rwegasira is in the following terms –

> "8. That the contents of paragraph 10 of the affidavit are noted. I wish to add that the execution process has already commenced by the High Court issuing the warrant of attachment of the applicant's properties in order to recover the sum stated in the warrant of attachment ....."

Indeed, the warrant of attachment of movable property of the applicant was issued on the 23.5.2005. The property itemized to be attached included earth moving machine and plants such as rollers bulldozers; excavators; bitumen spreader; grader Komatsu No. 305-03 & 04; crushers; rock drilling wagon; hand drills; Low loader truck and chipping spreacher. "Execution" is the enforcement by the process of court. It is the process of carrying into effect a court's judgment, decree or order. It is the end of the law and gives the

successful party the fruits of his judgment. In this case the mere issuance of a warrant of attachment of the applicant's property does not mean that the execution has been completed and consequently a stay order cannot be made. Both Mr. Kamugisha and Mr. Ndyanabo, learned advocates did not categorically state that the respondent was now enjoying the fruits of his decree in High Court Civil Case No. 5 of 2003.

Paragraph II of the affidavit in support of the application has already been reproduced earlier on. In his submissions Mr. Kamugisha strongly argued that the applicant had not in his affidavit disclosed the extent of the irreparable damage and loss that the applicant will suffer. I am inclined to agree with the learned advocate. It is trite law that it is not enough to simply state that the applicant will suffer irreparable loss which cannot be atoned by way of damages. Particulars of such irreparable loss should be given in order to satisfy the conscience of the Court that the applicant will suffer such irreparable loss or damage. (see: **Tanzania Cotton Marketing Board v Cogecot Cotton S.A.** (1997) TLR 63, 67).

How can the Court exercise its judicial discretion without such particulars?

Mr. Ndyanabo also canvassed the point that the appeal stands a reasonable chance of success. His anchor was section 95(1) of the Mining Act as submitted in his oral submissions before the Court. This is also reflected in paragraph 9 of the affidavit in support. Admittedly, paragraph 9 raises a number of interesting legal issues but at the moment I hesitate to hazard an informed opinion as to whether or not the appeal, on the face of it, stands a good chance of success. This point will be fully ventilated in the course of hearing the appeal. It is true that this Court has an unfettered discretion to stay execution, but this does not extend to grounds which should be properly raised in appeal itself. I do not think that the validity or correctness of the judgment or the merits of the appeal should be considered.

I now proceed to consider the principle of balance of convenience. Mr. Ndayanabo strenuously contended that the applicant stands to lose more than the respondent if a stay order is

not granted. He submitted that the applicant has been awarded contracts for road construction and if the equipment used for the performance of these contracts is attached, the applicant will be unable to perform his contractual obligation. He added that the applicant is a "vibrant" company as he put it. And would be able to pay the decretal sum in the event of losing the appeal.

In Civil Application No. 13 of 2003 between **Tanzania Fishing Processors Ltd. and Christopher Luhanyula** (unreported), a single judge of this Court (Ramadhani, J.A.) had this to say:-

> "A balance of convenience to me, is struck when this Court gives an order that would not put either party in jeopardy. The applicant would not be allowed to be in a position of flourishing in his business as if, there is no order against him. At the same time the applicant should not be exposed to the peril of having to do on uphill task of recovering his monies. On the other hand the respondent

> should not be the one denied to start afresh because of a stay of execution. There is also a need to protect him from undue anxiety when he will carve his pound of flesh. There as to be away of making the applicant serious in prosecuting the appeal and should not be allowed to play cat and mouse with the respondent."

The applicant has indeed signed three contracts with TANROADS for upgrading of Singida – Shelui Road to Bituminous standard; Package 1: Singida Town to Iguguno Package 2: Iguguno – Sekenke; and Package 3: Sekenke Diversion – Shelui Section. If the equipment itemized in the warrant of attachment is attached, this will undoubtedly affect the applicant's performance of these contracts and may possibly lead to its cancellation by TANROADS. Apart from the applicant, (a legal person) taxpayers money will be lost and there will be no improved road. This will cause a lot of inconvenience, both short-term and long term to users of the road, a factor which has to be taken into consideration. I have no doubt in

my mind that the balance of convenience tilts in favour of the applicant. On the other hand, if the applicant performs these contractual obligations with TANROADS income delivered therefrom will be able to meet the decretal amount should the applicant's appeal be dismissed.

On this ground alone, I am satisfied that this is a fit case in which to grant a stay of execution. On the balance of convenience, the applicant is likely to suffer greater hardship and loss than the respondent if execution is not stayed. It is accordingly ordered. Costs to be in the cause.

DATED at DAR ES SALAAM this 21st day of June, 2005.



H.R. NSEKELA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

S.A.N. WAMBURA
SENIOR DEPUTY REGISTRAR