

IN THE COURT OF APPEAL OF TANZANIA

AT DAR-ES-SALAAM

CIVIL APPLICATION NO. 14 OF 1997
In the Matter of an Intended Appeal

BETWEEN

TANZANIA POSTS & TELECOMMUNICATIONS
CORPORATION APPLICANT

AND

M/s B.S. HENRITA SUPPLIES RESPONDENT

(Application for Stay of Execution
from the decision of the High Court
of Tanzania at Dar-es-Salaam)

(Kyando, J.)

dated the 4th day of February, 1997

in

Civil Case No. 283 of 1988

R U L I N G

LUBUVA, J.A.:

This is an application for stay of execution. It is filed under Rule 9 (2) (b) of the Court's rules. The applicant is seeking an order from this Court that the execution of the High Court decision in Civil Case No. 283 of 1988 dated 4th February, 1997 be stayed pending the determination of the intended appeal in respect of which a notice of appeal has been filed.

Before the High Court, the respondent in this application had filed a suit against the applicant, Tanzania Posts and Telecommunications Corporation. The suit was fixed for hearing on 20.5.1994 when the respondent failed to appear in court. As a result, an order was issued granting the respondent leave to

prove the suit ex parte. The applicant filed an application for setting aside the order of 20.5.1994 for ex parte proof. On 4.2.1997 The High Court (Kyando, J.) held that the applicant had failed to show good cause for the failure to appear before the court on 20.5.1994. The application was dismissed. In the same proceedings judgment was entered for the respondent on the basis of the affidavit filed by the respondent for ex parte proof. That decision (4.2.1997) is the subject of this application.

The application is supported by an affidavit deposed by one M.C. Ndunguru, a legal officer with the applicant corporation. In the affidavit it is deposed that if execution is not granted the applicant will suffer great loss and damage as the amount involved is very big which would cause the applicant's business to come to a stand still. Mrs. Gama, learned Counsel from the Tanzania Legal Corporation appeared for the applicant. In her submission she urged two points. First that if the execution takes place the applicant would suffer an irreparable loss and damage. As the amount involved is a large sum of money, the business of the applicant would be so affected that it would be brought to a stand still, she insisted. Secondly, that the intended appeal has great chance of success because, she said, the decision of the High Court of 4.2.1997 raises fundamental legal issues. For these reasons, she urged the Court to exercise its discretionary powers under rule 9 (2) (b) of the Court's Rules, 1979.

Opposing the application, Mr. Maira, learned Counsel represented the respondent. He advanced the following reasons for opposing the application: that there was no merit in the application because, apart from asserting that the amount

involved is large and that if execution takes place, the business of the applicant would be brought to a stand still, otherwise no special circumstances have been advanced for the stay order. He submitted further that his client, the respondent is in sound financial position in which case, in the event the applicant succeeds in the intended appeal, the amount, the subject matter of the decree would be repaid. Thirdly, Mr. Maira pressed that the intended appeal has very slim chances of success. And so, Mr. Maira invited the Court to dismiss the application because, in his view, there was no reason why the respondent should be denied of his right to enjoy the fruits of his successful litigation.

I will first deal with the discretionary powers of the Court in matters pertaining to application for stay of execution under rule 9(2)(b) of the Court's Rules, 1979. As rightly submitted by Mr. Maira, learned Counsel, in exercising the Court's discretion, such discretion should at all times be exercised judicially. This is in order to ensure that the ends of justice in each case are attained. In order for this to be achieved, each case must be taken on its merits and circumstances. In the light of this general principle I will next examine the relevant factors for the granting or otherwise of the stay order in the instant case.

In the first place, what is the loss and damage that the applicant is likely to sustain if no stay order is granted. As already indicated, Mrs. Gama, learned Counsel for the applicant had urged that because the amount involved is huge, the applicant's business would be brought to a stand still. With respect, I am unable to accept this as sufficient reason for the granting of a stay of execution. It is elementary that the loss involved should be such as would not be atoned by way of an award

of damages. On this, there is an unbroken chain of authorities including decisions of this Court. Very recently, in Civil Application No. 52 of 1996, Tanzania Cotton Marketing Board v Cogecot Cotton Company S.A. (unreported) this principle was revisited. In this case, I am respectively in agreement with Mr. Maira that the decretal amount if paid is capable of being repaid by the respondent. I cannot accept the submission by Mrs. Gama that if a stay order is not granted, the applicant, a renowned public Corporation would suffer such irreparable loss that is incapable of being atoned by way of damages. Furthermore, in the instant matter, no sufficient ground has been laid upon which the Court could satisfy itself that infact, such substantial loss would occur. With respect, mere claim that the applicant's business would be affected is not enough.

I would now consider the other factor, namely, the chances of success of the intended appeal. Mrs. Gama has vehemently urged that the intended appeal has overwhelming chances of success. This of course was strongly resisted by Mr. Maira, learned Counsel for the respondent. It is however relevant at this juncture, to reflect that this Court has on numerous occasions taken the view that the chances of success of an intended appeal though a relevant factor in certain situations, it can only meaningfully be assessed later on appeal after hearing arguments from both sides. See Transport Equipment Ltd. and Reginald John Nolan, Civil Application No. 19 of 1993 (unreported); Joseph K. Mlay v Ahmed Mohamed, Civil Application No. 39 of 1995 (unreported). This, it is common knowledge is but a general principle which in my view, is not without exception. There are situations in which as a matter of exception to the

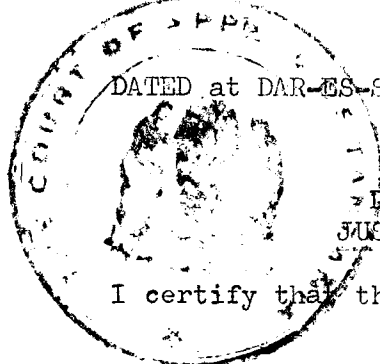
rule and depending on the circumstances of the case, the chances of success can be gauged right away. In this case, one peculiar feature emerges quite clearly from the ruling of the High Court. That is that, on 4.2.1997, the matter was set for a decision on the application for setting aside the order of 20.5.1994 which granted leave to the respondent to prove the suit ex parte. Having decided on that by rejecting and dismissing the application the matter did not end there. The learned judge embarked on another exercise i.e. judgment was entered for the respondent on the basis of the affidavit as ex parte proof. Ordinarily, with the dismissal of the application for setting aside the order of 20.5.1994, the matter should have been set for another date for ex parte proof. As it was done, the opportunity for the applicant to appeal against that decision refusing to set aside the order of 20.5.1994 was shuttered by the entry of the ex parte judgment. The propriety of this in my view, may well be a deserving legal point for close examination on appeal.

Lastly, I think it desirable to consider the case within the principle of the balance of convenience. It is all the more so in matters involving the exercise of discretionary powers after considering the various relevant factors. The modern and current trend in this direction is demonstrated by the following English case of Winchester Cigarette Machinery Ltd. v Payne and Another (No. 2). The Times Law Reports, December, 15, 1993 in which it was inter alia stated:

"In recent cases it has been said that the practice of the court had moved on from the principle that the only ground for a stay was the reasonable probability that damages

and costs paid would not be repaid if the appeal succeeded. Those cases hale that the approach of the court now was a matter of common sense and a balance of advantage ...” (emphasis supplied)

In the instant case, the circumstances are such that even though the loss and damage that the applicant is likely to sustain if stay of execution is not granted can be atoned by way of damages, still I have lingering doubts in my mind whether a stay order is not warranted on account of other factors. These are, as already pointed out, the prospects of the intended appeal and the balance of convenience. Consequently, having regard to the circumstances of the case, I am convinced that it accords with common sense and a sense of convenience that the discretionary powers of the Court under rule 9(2)(b) to grant a stay of execution be granted pending appeal could appropriately be invoked. Accordingly, it is ordered that the execution of the decision of the High Court in Civil Case No. 283 of 1988 dated 4.2.1997 be stayed pending the determination of the intended appeal. It is further ordered that the stay order is granted upon the condition that the applicant deposits the decretal amount in court. Costs in the cause. It is so ordered.



DATED at DAR-ES-SALAAM this 12th day of May, 1997.

D. Z. LJUBUVA
JUSTICE OF APPEAL

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

(M.S. SHANGALI)
DEPUTY REGISTRAR