IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MMILLA, J.A., MWANGESI, J.A., AND MWAMBEGELE, J.A.)

CIVIL APPLICATION NO. 98 OF 2016

AFRICHICK HATCHERS LIMITED ..... APPLICANTS
VERSUS

CRDB BANK PLC ..... RESPONDENT

[Application for stay of execution of the decree of the High Court of Tanzania (Commercial Division) at Dar es Salaam]
(Maige, J.)

dated the 9th day of February, 2016
in
Commercial Case No. 97 of 2014

DISSENTING RULING

25th February & 15 March, 2019

MWAMBEGELE, J.A.:

I have parted ways with my two brothers Mmilla and Mwangesi, JJA. They are of the view that in an application for stay of execution, an encumbered property which secured a loan the subject of the dispute, whose value is superior to the decretal amount can be good security for the due performance of the decree or order as may ultimately be binding upon an applicant in case he loses in an appeal on which the application for stay is pegged. I, with the greatest respect, am of a different view

hence this ruling in dissent. My stance is: an encumbered property, however much it may be superior in value to the decretal sum on which it is to stand as security, cannot stand as good security for the due performance of the decree in an application for stay of execution. The rest of this Ruling demonstrates why I parted ways with my brothers.

The material background facts of this application have been meticulously set out in the majority ruling of the Court which I have had the advantage of reading in draft. I shall therefore not restate them here. Likewise, the law governing stay of execution as it currently stands in this jurisdiction has been succinctly expounded in that ruling. I entirely subscribe to it, save for the item to stand as security for the due performance of the decree as may ultimately be binding upon the applicant in case the pending appeal fails which is the gist of this dissenting ruling.

Let me start with the premise that in an application of this nature, for an applicant to succeed to get the orders sought, he must satisfy the conditions set out in rule 11 (2) (d) – now rule 11 (5) of the Tanzania Court of Appeal Rules, 2009 – GN No. 368 of 2009 as amended by the Tanzania Court of Appeal (Amendments) Rules, 2017 – GN No. 362 of 2017

(hereinafter referred to as the Rules). For easiness of reference, I take the liberty to reproduce it hereunder:

> *"(5) No order for stay of execution shall be made under this rule unless the Court is satisfied that:-*
> *(a) substantial loss may result to the party applying for stay of execution unless the order is made;*
> *(b) the application has been made without unreasonable delay; and*
> *(c) security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him."*

In the case at hand, items (a) and (b) were not at issue and the Court blessed the agreement of the advocates for the parties – Messrs Gabriel Mnyele and Mpaya Kamara, learned advocates, for the applicant and Messrs Richard Rweyongeza and Joseph Sang'udi and Ms. Jacqueline Rweyongeza, also learned advocates, for the respondents – that they should not address the Court on them. What was at issue was in respect of item (c) only on which we called upon the learned advocates to address us on.

With regard to the ingredient in item (c) above, case law has it that the property the subject of litigation cannot act as security for the due

performance of the decree in an application for stay of execution – see: **Anthony Ngoo & another v. Kitinda Kimaro**, Civil Application No. 12 of 2012, **Mohamed Rajuu Hassan v. Almahri Mohsen Ghaleb (Administrator of the Estate of the Late Salim Ally Al Saad) & two others**, Civil Application No. 570/17 of 2017, **Rehema Emmanuel & two others v. Alois Boniface**, Civil Application No. 5 of 2015, **Mohamed Said Seif & another v. Abdulaziz Hageb**, Civil Application No. 9 of 2016 and **Hydrox Industrial Services Ltd & another v. CRDB (1996) Ltd & two others**, Civil Application No. 87 of 2015 (all unreported decisions of the Court), to mention but a few. In **Mohamed Said Seif & another** (supra), for instance, an applicant had deposed:

> *"The respondent is in possession of the disputed house thus security for due performance of the said decree is not necessary and if stay of the execution is granted the respondent shall not be prejudiced."*

The Court observed that "furnishing security is a legal requirement of which its requirement gives no option to the applicant. In the circumstances, it was improper for the first applicant to state in his affidavit that, there is no necessity to furnish security for costs before an order for stay of execution can be granted."

Likewise, case law has interpreted the provisions of 11 (2) (d) (iii) – now rule 11 (5) (c) - above to mean not strictly demand security but that a firm undertaking by the applicant to provide security may be sufficient. That was stated by the Court in **Mantrac Tanzania Ltd v. Raymond Costa**, Civil Application No. 11 of 2010 (unreported) as follows:

> *"... the other condition is that the applicant for stay order must give security for due performance of the decree against him. To meet this condition, the law does not strictly demand the said security must be given prior to the grant of stay order. To us, a firm undertaking by the applicant to provide for security might prove sufficient to move the Court, all things being equal, to grant a stay order, provided the Court sets a reasonable time limit within which the applicant should give the same."*

In the matter at hand, there is an affidavit supporting the notice of motion. The deponent to that affidavit is Issack Bugali Mwamasika; the Chief Executive Officer of the applicant company. In that affidavit, it is deposed, crystal clearly in my view, that the applicant company offers two options of what should stand as security for the due performance of the decree that may ultimately be binding upon her in case the intended

appeal does not succeed. The first option is in para 15 (b) thereof. It reads:

> *"The property on Plot No. 1027 Block G Boko Area, Kinondoni District, Dar es Salaam, CT No. 78288 measuring 7.436 hacters (sic) worth undisputed value of over Tshs. 20,000,000,000/= which is mortgaged to the respondent constitutes sufficient security for due performance of the decree as may ultimately be binding upon the applicant. Further the original Title Deed is in possession of the respondent."*

The other security, is, presumably, given in the alternative just in case the Court finds that the foregoing security is not sufficient. I say presumably because the deponent used the words "additional security". It is deposed at para 17 of the same affidavit as follows:

> *"17. Further to what is stated in paragraph 15 (b) hereinabove, the applicant undertakes to procure and furnish additional security from its directors and or sister companies and institutions if so ordered by the Court for due performance of the decree as may ultimately be binding upon it."*

Much as I agree that the application has merit, I do not think, however, that an encumbered property may be good security for the due performance of the decree that may ultimately be binding upon the applicant in an eventuality when the appeal is not decided in favour of her. This is because a mortgaged property, in my view, unless the loan is paid in full, is no longer the property of the applicant like it was before charging it. The mortgagee bank acquires an interest in it. As such, a mortgagor is no longer free to deal with it as he chooses. After all, the provisions of section 112 of the Land Act, Cap. 113 of the Revised Edition, 2002 (hereinafter referred to as the Land Act), has it that an occupier of land under a right of occupancy "may, by an instrument in the prescribed form, mortgage his interest in the land or a part thereof to secure the payment of an existing or a future or a contingent debt or other money or money's worth or the fulfilment of a condition". Under subsection (2) of that section, the power under subsection (1) includes the power to create second and subsequent mortgages. The affidavit supporting the application is silent on whether or not the powers under the subsection have been exercised by the applicant. The affidavit just tells the Court the value of the charged property.

As an extension to the foregoing argument, the provisions of section 112 (4) of the Land Act state that the power conferred by subsection (1) and (2) of section 112 of the Land Act are exercisable subject to:

> *"(a) any prohibition or limitation imposed by this act or any written law;*
>
> *(b) any restriction contained in an instrument creating or affecting the interest in land which is to be the subject of a mortgage."*

These details are wanting in the affidavit and affidavit in reply. That is, the Court has not been informed of the contents of the instrument which created the mortgage; whether or not there are such restrictions. The sum total of this discussion is that, even if I was to agree that the charged property can stand as security for due performance of the decree, the detail that the value of the charged property is superior to the decretal sum has not been substantiated. We have just a word from the deponent that it was worth Tshs 20,000,000,000/= as of April 2013 when the valuation was carried out and just a word from the respondent that a "mortgaged property cannot constitute a proper security". Both the affidavit and affidavit in reply do not tell us whether or not the value of that property still stands at Tshs. Tshs 20,000,000,000/= today in 2019.

I underline that what the law provides as one of the conditions precedent for allowing an application for stay of execution as contained in rule 11 (2) (d) (iii) – now rule 11 (5) (c) – is provision of security for the due performance of the decree in case the appeal fails. Has the applicant satisfied this condition? For the reasons stated, I think the applicant has succeeded to satisfy this condition on the strength of para 17 of the affidavit; not para 15 (b) thereof.

We grappled with an akin situation in the recent past in the case of **Hydrox Industrial Services Ltd** (supra) where, like here, one of the applicants deposed in the affidavit supporting the affidavit, *inter alia*, that there was no need to provide security for the due performance of the decree in that the Certificate of Title of the property whose value was higher than the decretal sum was in the hands of the first respondent. For easy reference I find it apt to reproduce the two relevant paragraphs. Paragraph 12 of that affidavit read:

> *"12. That, the value of the property ordered to be sold is higher than the outstanding loan amount; hence for the interest of justice the property should*

not be disposed of pending determination of the appeal."

In paragraph 14 thereof, it was deposed:

"14. That, the requirement for the provision of security in not relevant in this case as the 1st Respondent is already in possession of the original Certificate of No. 45667 belonging to the 1st Applicant, hence, Applicants cannot dispose it in any way; thus, the 1st Respondent is not at any risk".

Having revisited the position of the law on the point and relying on our previous decisions in **Rehema Emmanuel** and **Mohamed Said Seif** (supra), we observed at page 11 of the typed judgment:

"... the 1st applicant deponed in his affidavit that, provision of security is not relevant here because the original Certificate of Title No. 45667 in respect of the property ordered to be sold, which belongs to the 1st applicant, is in custody of the 1st respondent. This Court agrees with the 1st respondent that, even if the original title deed of the said property is in its hands, the applicants ought to furnish other form of security to ensure

that, the respondents would not be deprived of the fruits of the decree in the event the appeal ends in disfavour of the applicants. Also, the impugned decree says that the mortgaged property with Certificate of Title No. 45667 should be sold by the 1st respondent to realize the outstanding debt. That means that, the property cannot be security for the applicants because it is the subject of the decretal order. Hence the property is no longer in the hands of the applicant, it cannot therefore, be used to furnish security for due performance of the decree."

Having so observed, we proceeded to hold that the applicants failed to furnish security for the due performance of the decree which would ultimately be binding upon them in case the appeal would not be successful. Accordingly, we dismissed the application for stay of execution.

In that case, despite the fact that the value of the property was said to be higher than the decretal amount or outstanding loan, we observed that as the property was charged as security of the loan, the applicants had nothing to give as security for the due performance of the decree that may ultimately be binding upon them in the event the appeal failed. That

case is an authority for the proposition that an applicant is bound to furnish security for the due performance of the decree regardless of the fact that the respondent holds security in relation to the loan. I would add that the fact that the collateral is superior in value to the decretal sum is immaterial. I subscribe to that stance and apply it in the instant application.

To canvass the point a little bit further, a somewhat akin situation was the case in **Century Oil Trading Co Ltd v. Kenya Shell Ltd** [2003] 1 EA 41; the decision of the Commercial Court of Kenya. There, like here, the applicant for stay of execution wanted the charged property to be the security for the due performance of the decree and, in addition, offered to give others of its properties as security. The court observed:

> *"The court directs that the Plaintiff in 30 days furnishes security for due performance by way of depositing title(s) of property of up to KShs 10 million in value with the Defendant.* ***This Court is not comfortable to order that the properties already charged to the Bank be subject of this security****. Suppose the Bank declines further charges over its securities?* ***After all it was***

deposed in the further affidavit that the Plaintiff would give others of its properties as security here."

[Emphasis supplied].

Admittedly, unlike here where the mortgagee is also the decree holder, the mortgagee bank in **Century Oil Trading Co Ltd** was not the decree holder but a third party. Nonetheless, in my considered view, the principle in that case holds true that the offering of a charged property as security for performance of the decree would require the consent of the mortgagee. This is so essentially because, at law, once charged, the mortgagor no longer has that property to give as security.

I thus find the position taken by the Commercial Court of Kenya as highly persuasive and subscribe.

Adverting to the matter at hand, as already alluded to above, the applicant has offered the charged property, and, alternatively, undertook "to procure and furnish additional security from its directors and or sister companies and institutions if so ordered by the Court for due performance of the decree as may ultimately be binding upon it" as security for the due performance of the decree in case that appeal fails. I find it legally

inappropriate for a charged property, irrespective of its value, to stand as security for the due performance of a decree in an application for stay of execution. This is even more so in a situation like the present one where the applicant has provided for an alternative. As we observed in **Hydrox Industrial Services Ltd** (supra), the applicant does not have the property he claims to offer as security for the due performance of the decree in case her appeal fails. In my view, security must be given; it must not be perceived. The applicant cannot give, as security for the due performance of the decree, what was already given as security for the loan. In my view, security for the due performance of a decree must be independent and free from any encumbrance. The applicant cannot give what had already been given. It is not in her hands to give. For the avoidance of doubt, it behooves me to state that I am quite alive to the provisions of section 115 of the Land Act which provide that "a mortgage shall have effect as a security only and shall not operate as a transfer of any interests or rights in the land from the borrower to the lender". My argument is that despite retaining title to the land through this provision, a mortgagor will not have anything to offer as security for the due the performance of the decree.

I wish to underline here that the foregoing stance does not in any way punish the applicant. A bank guarantee cannot be taken to be punitive on the part of the applicant. It is a process that will ensure each party secured. That is what, I think, their lordships in **Rosengrens Ltd v. Safe Deposit Centres Ltd** [1984] 3 All ER 198, meant by holding the ring even-handedly. After all, in that case what was at issue was the question whether furnishing the banker's guarantee as security, in lieu of bringing the sum ordered into court, was appropriate security and the issue was answered in the affirmative. The court allowed the defendants to produce a bank guarantee in lieu of payment into court.

Having stated as above, let me recap. In an application for stay of execution, an encumbered property, irrespective of its value, cannot stand as good security for the due performance of the decree as may ultimately be binding upon the applicant in case the appeal fails. This includes a charged property which secured the loan the subject of the decretal sum. In such an application, a different security must be given to hold even for both parties. Holding otherwise would mean opening a pandora's box inviting judgment debtors to furnish any encumbered property for the due performance of the decree provided that its value is superior to the

decretal sum. That course will, in the long run, I think, be to the detriment of decree holders. I am not prepared to open that box.

In the final analysis, I would have granted the application and ordered that the applicant furnish a bank guarantee for the decretal sum within thirty days of the delivery of this ruling. I also would have ordered that the stay order was conditional upon the applicant furnishing such bank guarantee. Ultimately, I would have ordered costs in this application to abide by the outcome of the appeal.

DATED at **DAR ES SALAAM** this 15th day of March, 2019.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

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

B.A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL