**East African Development Bank v Blueline Enterprises Limited**

**Division:** Court of Appeal of Tanzania at Dar-es-Salaam

**Date of judgment:** 5 May 2006

**Case Number:** 130/05

**Before:** Lubuva JA

**Sourced by:** LawAfrica

**Summarised by:** R Rogo

*[1] Evidence – Admissibility of tape recordings – Exceptions to admissibility of relevant material –*

*Standard of proof of prosecution to prove admissibility of tape recording – Duty to keep original*

*recording in safe custody at all times.*

**RULING**

**Lubuva JA:** In this application, the applicant, East African Development Bank, is seeking an order that the execution of the order of the High Court (Mihayo J) of 23 August 2005 in reference on taxation miscellaneous civil cause number 307 of 2001 be stayed pending the determination of the intended appeal to this Court. In this application, Mrs Lyimo *Makani*, learned Counsel, appeared for the applicant, and Mr T *Kalunga*, learned Counsel appeared for the respondent. In support of the application an affidavit duly sworn by Mrs *Makani* was filed. The background giving rise to the case is straightforward. In miscellaneous civil case number 324 of 2003 the taxing officer SA Lila on sixth awarded to the respondent, Blue Line Enterprises Limited, costs at USD 275 099 and Tanzania Shillings 161 000. The applicant was dissatisfied and hence an application for reference before a judge of the High Court was filed on 9 August 2004. The ground of complaint was that the costs awarded were excessive and contrary to the law. In his ruling, the learned Judge while sustaining the costs awarded by the taxing officer, partly allowed some adjustment. The respondent was awarded USD 180 000 and Tanzania Shillings 161 000. Still, the applicant was dissatisfied and so notice of appeal to this Court was filed. Pending hearing and determination of the intended appeal, this application for stay of execution was filed. In support of the application, Mrs *Makani*, learned Counsel, made submissions, the essence of which is as follows. Firstly, that an important point of law was involved for consideration of the Court of Appeal. The point of law is whether it was proper for the High Court to peg the instruction fees on the arbitration award while the reliefs sought were declaratory and no monitory amount was involved. Secondly, in the event the appeal succeeds, the execution would render the outcome of the appeal nugatory and that the applicant would suffer substantial loss which is tax payers’ money. She also contended that as the intended appeal has great chances of success on appeal and there is no proof that the applicant would recover from the respondent the costs if paid on execution, the balance of convenience tilts in favour of the applicant to have stay of execution granted. Mrs *Makani* referred to the decision of this Court in *Stanbic Bank Tanzania Limited v Woods Tanzania Limited* civil application number 196 of 2001 (UR) and *Tanzania Telecommunications Company Limited v MIC Tanzania Limited*, civil application number 125 of 2002 (UR). In these cases the court set out factors which are to be considered by the court in deciding whether or not to grant stay of execution. Mr *Kalunga*, learned Counsel, vehemently opposed the application. Firstly, he made the blunt point that he has stated on a number of occasions that in matters relating to application for stay of execution, no decision of guidance has been made by this Court. This is so, he said because there are many conflicting decisions of the court regarding the guiding principle to be followed in applications for stay of execution. For instance, he submitted, in some cases the court has held that the chances of success in an intended appeal is not sufficient ground for granting stay of execution. On the other hand, he said in some cases the court has upheld the same as sufficient ground to grant stay of execution. So, Mr *Kalunga* firmly maintained that the principles relating to stay of execution have not as yet been settled by the court. He lamented that there is no ray of light that the principles would ever be settled by the court in the foreseeable future. Furthermore, he urged that in granting stay of execution under rule l9(2)(*b*) the court must at all times be guided by the following principles. The right of the decree holder to enjoy the fruits of the judgment and decree in his favour. For this reason, Counsel submitted, cogent reasons showing why the decree holder is to be deprived of his right by way of an immediate order of execution. On the other hand, he also pointed out the second principle that the judgment debtor has the right to appeal if dissatisfied and so desires to appeal. These two principles, Mr *Kalunga* insisted, should be properly balanced. In this case, he contended that as the application is based on the ground that *prima facie*, there are overwhelming chances of the appeal succeeding, this is not a sufficient ground for granting stay. On the basis of the decision of two judges of this Court sitting as single judges in *Tanzania Cotton Marketing Board v Cogecot Cotton Company SA* [1997] TLR 63 and *Ignazio Mesina and National Shipping Agencies v Willow Investment and Costa Shinyanga* civil reference number 8 of 1999 (UR) he urged the court to dismiss the application. With regard to the claim that the applicant would suffer irreparable loss if no stay of execution is granted Mr *Kalunga* submitted that this ground was also baseless. This is so, counsel maintained, because no particulars of the loss have been shown. All this has shown in this application is nothing other than generalised assertion, he concluded. He relied on the decision of the court in *Tanzania Cotton Marketing* (*supra*) in support of this submission. Finally, Mr *Kalunga* conceded that it is a matter of discretion for the court to grant stay of execution. In this case, he said if the court is inclined to grant stay of execution, the applicant should be ordered to deposit the amount, subject of the application in court as a condition. As a rejoinder Mrs *Makani* submitted that the guiding principle pertaining to *prima facie* likelihood of success of the intended appeal should be considered in a holistic manner and not in isolation as Mr *Kalunga* apparently had urged. Each case should be taken on its own individual circumstances, she said. At the outset, it is to be observed that the intended appeal is with regard to the costs as awarded by the Taxing Officer. The position therefore is different from the situation in which stay of execution is sought pending hearing and determination of an intended appeal against the judgment and decree. I intend to examine this matter in this light. I shall start with the complaint by Mr *Kalunga* that the guiding principles to be considered in granting or otherwise stay of execution have not been settled by this Court. With great respect, I need not belabour the point at this stage. In the case of *Ignazio Mesina and National Shipping Agencies v Willow Investment and Costa Shinyanga* civil reference number 8 of 1999 (*supra*) in which incidentally, Mr *Kalunga* learned Counsel, raised the same complaint in more or less similar fashion, the court among other things stated: “Thus, for instance, 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 balance of convenience to the parties to do so. . . . these principles were reviewed and elaborated on at considerable length by this Court in the two cases of *Tanzania Cotton Marketing Board v Cogecot Cotton Company SA* [1997] TLR 63 and *Kuljeet Singh Naha v Indevjeet Kaul Nahal* civil application number 90 of 1998 (UR). In fact the first of these cases is among the long list of cases cited by Mr *Kalunga* to demonstrate his contention that the court is not guided by any settled principles when considering whether or not to grant a stay order . . . But why Mr *Kalunga* should cite the said case as demonstrating how the court was approaching haphazardly the issue of whether or not to grant a stay if far from clear.” On this, I need say no more. Insofaras the court is concerned, so far, the guiding factors in considering stay of execution are settled. However, as correctly stated by Mrs *Makani*, learned Counsel, the application of these guiding principles would depend on the individual circumstances and merit of each case. The individual circumstances of each case would determine whether the case falls within the scope and parameters of any of the laid down principles. As indicated in the cases of *Tanzania Cotton Marketing Board* (*supra*) and *Tanzania Electrical Supply Company and others v Independent Power Tanzania Limited* consolidated civil applications numbers 10 and 22 of 1997 (UR) one of the factors to be considered in an application for stay of execution is whether the outcome of the appeal if successful would be rendered nugatory if execution is not stayed as urged by Mrs *Makani*. For my part, in this case I do not think that the outcome of the appeal would be rendered nugatory if stay of execution is not granted. The issue as already indicated, pertains to costs after the decision of the High Court was passed in favour of the respondent. Costs indisputably, follow the event in favour of the winning party, the respondent, in this case. Whatever, the outcome of the intended appeal against the decision of the High Court following the taxation of bill of costs by the Taxing Officer, the applicant cannot escape paying some costs incurred by the winning party in prosecuting the case to the stage of taxation of bill of costs. The appeal if successful would in any event only affect the quantum of the costs and not exoneration from payment of costs. In that situation, the outcome of the appeal would not be rendered nugatory. The other factor raised by Mrs *Makani* relates to substantial loss that the applicant would suffer if stay of execution is not granted. Mr *Kalunga* categorically said no such loss would be incurred. I agree with Mr *Kalunga*, learned counsel on this point. Apart from the fact that such loss has not been specified beyond mere assertion and generalised claim, there is yet another dimension. This, Mr *Kalunga* did not allude to. It is my view that the guiding factor relating to substantial loss to be incurred if stay of execution is not granted relates to loss that would follow from the execution of judgment and decree and not from costs on bill of taxation as in this case. These as already indicated are costs that a winning party is entitled to be paid after the suit or petition is over. I reject the claim of the applicant suffering substantial loss on account of payment of costs on bill of taxation. I shall now deal with the ground relating to the balance of convenience. The question is whether as submitted by Mrs *Makani* it would be on a balance of convenience to the applicant to grant stay of execution in the circumstances of the case. In this case, it is trite knowledge that what is in issue is payment of costs as taxed by the taxing officer which were in part sustained by the learned Judge. Dealing with this principle, in *Tanzania Cotton Marketing Board v Cogecot Cotton Company SA* [1997] TLR 63, this Court cited with approval the English case of *Winchester Cigarret Machinery Limited v Payne and another* (number 2) TLR 15 December 1993 wherein it was stated *inter alia*: “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 succeeds. These cases held that the approach of the court now was a matter of common sense and a balance of advantage . . . But in holding any such balance of advantage full and proper weight had to be given by the court to the starting principle that there had to be a good reason for depriving a plaintiff from obtaining the fruits of a judgment.” In this case, as said before, the intended appeal is not against the judgment it is against costs. If stay of execution is not granted, is there good reason why the respondent should be deprived of the enjoyment of the fruits the judgment in his favour. Here the contentious issue is centered on costs involved in conducting the case which, depending on the circumstances of the case, may be paid even after the execution of judgment and decree. In this case the execution of the order in favour of the respondent is not in issue. In that situation, I pose to ask, is it reasonable to stay execution as sought with regard to costs. The bone of contention is that in view of the reliefs sought in the petition it was wrong in law to peg the instruction fees on the arbitration award. If the intended appeal on this legal point succeeds, then the situation would change insofaras the costs are concerned. In that case the quantum would also change as well. At any rate, in my view, whether or not the instruction fees are not sustained on appeal, payment of some costs cannot be avoided all together infavour of the winning party. This is because as said before, it is common knowledge that costs follow the event, irrespective of whether or not the matter arose from a suit or a petition. In the circumstances, I am increasingly of the view that it would be prudent to stay payment of costs until the intended appeal against costs is heard and determined. Upon the determination of the appeal, the applicant would be certain of the amount involved in the costs, if any. In *Zacharia Barie Bura v Theresia Maria John Mubiru* civil application number 10 of 1991 (UR) a case involving stay of an eviction order, a single judge of this Court *inter alia* stated: “I am satisfied that it would be imprudent to have him and his family evicted while there is pending in this Court an appeal against the very decision sought to be used to evict him. The prudent thing to do would be to await the result the appeal when execution can take place in an atmosphere of certainty.” Similarly, in *Ravindra R Desai and another v Co-operative and Rural Development Bank* civil reference number 2 and 3 of 1996 (UR) the decision, subject of appeal was problematic. The case was partly dealt with by the district registrar who had no jurisdiction and partly by the judge. Granting the application for stay of execution, the full court in part, stated: “We think in a case like this one, where there is a notice of appeal against a problematic judgment, the interest of justice require a stay of execution to be granted pending the hearing and decision of the appeal so that the judgment of the High Court may be sorted out.” In similar vein, in the instant case, I am satisfied that there is sufficiently good reason for granting stay of execution. There is an appeal pending in this Court against the very decision of the learned Judge on costs which is sought to be stayed. Granting stay of execution would, in my opinion be in the interests of justice rather than carrying on the execution process pertaining the costs in which there is some uncertainty. I am, with respect, in agreement with Mrs *Makani*, learned Counsel, that having regard to the circumstances of the case, balance of convenience and common sense tilts in favour of the applicant to grant stay of execution. Accordingly, in exercise of the court’s discretionary powers vested under the provision of rule 9(2)(*b*), the application is granted. Consequently, the High Court order of 23 August 2005 in miscellaneous case number 307 of 2002 is ordered to be stayed pending the determination of the intended appeal. Costs of this application to be costs in the cause. For the appellant:

Mrs Lyimo *Makani*

For the respondent:

Mr T *Kalunga*