

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

AR CIVIL APPLICATION NO. 2 OF 1997

BETWEEN

NATIONAL BANK OF COMMERCE. APPLICANT

AND

JUSTO MSECHU & SONS LTD. RESPONDENT

(Application from the Judgement of the
High Court of Tanzania at Arusha)

(Mroso, J.)

dated the 24th day of December, 1996

in

Civil Case No. 40 of 1995

R U L I N G

LURUVA, J.A.:

In this application, the applicant, the National Bank of Commerce is seeking to stay the execution of the decree dated 24th December, 1996 pending the intended appeal. The decree was issued by the High Court at Arusha (Mroso, J.) in Civil Case No. 40 of 1995. In that case, the Respondent was awarded specific damages at a sum of shillings 26,240,000/=. Being dissatisfied with the decision the applicant has lodged a notice of appeal.

The application by way of a notice of motion supported by an affidavit sworn by Wilfred Mirambo, learned Counsel who together with Mr. Maira, learned Counsel had represented the applicant before the High Court. From the affidavit the main ground for seeking stay of execution is that the applicant would suffer great hardship if an order for stay of execution is not granted. Furthermore, it is also stated in the affidavit that the intended appeal has great chances of success. At the hearing of this application before me, the applicant was again

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advocated for by Messrs Maira and Mirambo, learned Counsel. In elaboration, Mr. Maira, learned Counsel emphasized the fact that as the respondent company is dormant with no return filed since 1987, the applicant is likely to suffer irreparable loss if the appeal succeeds in his favour. This is so, he stated, because the respondent is so heavily indebted to the applicant bank that it would not be possible for the applicant to recover the decretal amount once execution takes place. In the course of his submission, Mr. Maira revealed that the decretal amount of shillings 26,240,000/- has been paid under protest after the seizure and attachment of the applicant's motor vehicles. Prompted by the Court as to what the application seeks to achieve if execution has been effected, Mr. Maira, learned Counsel while conceding and correctly so in my considered view that with the decretal amount paid the application for stay of execution had been overtaken by events, he urged the court to issue an order for the respondent to deposit the amount of money in Court. In his submission, Mr. Maira was of the view that it was safer to have the money deposited in Court than leaving it in the custody of the respondent. He submitted further that the Court could do so by invoking rule 3 of the Court's rules in order to ensure that justice is done.

Mr. D. Ngalo, learned Counsel for the respondent vehemently opposed the application. He availed to the Court a copy of the letter from the applicant dated 29th May, 1997 addressed to the Respondent enclosing a cheque for shillings 26,240,000/=. It was Mr. Ngalo's view that in terms of the provisions of rule 2 (2) the institution of an appeal shall not operate to suspend the execution of a decree. In this case, the execution having taken place, there was no basis for sustaining the application for stay,

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he urged. Elaborating further, Mr. Ngalo submitted that as a matter of principle, no stay of execution order can be issued after execution has been carried out. In support of this proposition, he referred to MLLA on Civil Procedure Code, 14th Edition, Vol. 2 p.1188. He prayed for the dismissal of the application.

From the affidavit deposition by the applicant and the oral submissions by both the learned Counsel for each of the parties, it is common ground that shillings 26,240,000/= has been paid by the applicant in satisfaction of the decree in respect of the High Court (Arusha) Civil Case No. 40 of 1995. In the letter of 29.5.1997 addressed by the Applicant's Zonal Director to the Respondent, it is stated:

"Enclosed herewith please find our
• BP cheque No. A 050862 for
Shs. 26,240,000/= being payment in
satisfaction of the decree in
respect of the above case. We
therefore expect that the bank's
three vehicles attached by the
Court Broker in execution of the
decree will be released immediately".

The notice of motion filed under rule 9 (2) (b) of the Court of Appeal Rules, 1979 seeks the Court's order in these terms:

"That the execution of decree in
High Court Civil Case No. 40/1995
delivered at Arusha on 24/12/1996
be stayed until the determination
of the intended appeal to the
Court of Appeal of Tanzania".

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From these facts and as already indicated, Counsel for both parties are agreed, it is beyond dispute that what was sought to be achieved in the application for stay has already been accomplished. That is, as Mr. Maira, learned Counsel for the applicant described it, the stage for stay order is over. In Mulla, Civil Procedure Code, 14th Edition, p.1188, it is stated:

"An order for a stay of execution implies that the decree has not been executed. Therefore, where a decree has been executed, no order can be made under this rule."

And so, as correctly conceded by the learned Counsel for both parties, this application has been overtaken by events. There is hardly anything that this Court could do at this stage in this application in restoring the status quo which is the object of such an application. The granting of a stay order would not therefore serve any useful purpose.

At this juncture it is relevant to observe that the application by way of a notice of motion was filed in the Court at the Arusha Registry way back on 3rd January, 1997. This was reasonably soon after the decree was delivered on 24.12.1996. However, it is unfortunate that while the application was still pending, a warrant of attachment was issued on 9.5.1997 resulting in the attachment of the applicant's motor vehicles. Although as a matter of law under the provisions of rule 9 (2) that course of action cannot be faulted because the institution of an appeal is not a ground for suspending the execution of a decree, nonetheless, if the fact that the application was already before the Court was brought to the attention of the High Court, it

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could well be considered before the issuance of the execution order. In the event of a refusal to stay the execution of the decree, it would be open for the party aggrieved to appeal against that decision. As matters stand now, apart from sympathizing with the applicant, as a matter of law and procedure, this Court has no legal basis upon which to issue a stay order.

As mentioned before, Mr. Maira, learned Counsel for the applicant made strenuous effort to convince the Court to invoke rule 3 of the Court's Rules, 1979 to order the Respondent to deposit in court the money paid by the applicant in satisfaction of the decree i.e. Shs. 26,240,000/=. Needless to go into the details of this aspect, suffice it to state that rule 3 is meant to cover matters which are before the Court and for which no provision is made under the rules. In the instant case, it is clear to me that the matter pertaining to that aspect is not before this Court. That is, what is sought by Mr. Mairo, namely, depositing the decretal amount in Court is an aspect touching on the process of execution. It concerns the alteration of the conditions or terms of the execution and attachment process which is the concern of the High Court. It should have been raised with the High Court if at all it was felt desirable. For that reason and with due respect to Mr. Maira, learned Counsel, I am unable to accept his prayer to have the money deposited in Court.

In the event, and for the foregoing reasons, the application is dismissed with costs.

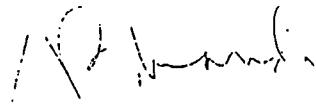
DATED at DAR ES SALAAM this 24th day of June, 1997.

D.Z. LUBUVA
JUSTICE OF APPEAL

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



(U.M. LUANDA)

SENIOR DEPUTY REGISTRAR