

IN THE COURT OF APPEAL OF TANZANIA

AT Mwanza

CIVIL APPLICATION NO. 43 OF 1999

BETWEEN

KAMPUNI YA UCHUKUZI TABORA (LTD) ..... APPLICANT

AND

1. PRAXEDA PAULO }  
2. T.M.K. MREMA } .....

(Application for stay of execution of  
the judgment and decree of the High  
Court of Tanzania at Tabora)

(Masanche, J.)

dated the 4th day of May, 1999

in

Civil Appeal No: 15 of 1998

R U L I N G

KISANGA, J.A.:

This is an application for stay of execution pending appeal to this Court. The notice of motion is duly supported by the affidavit of Mr. M.K. Mutaki, counsel for the applicant, while Mr. K.K. Kayaga and Mr. J.T. Boaz, advocates, have filed counter-affidavit on behalf of the 1st and 2nd respondents, respectively. Mr. Kayaga's counter-affidavit contains a preliminary objection challenging the competency of the application, but I directed that in the interest of time saving that objection be argued along with counsel's reply to the submission of the applicant's advocate.

Mr. Mutaki's main ground for the application is that the respondents who are judgement creditors are threatening to execute the decree against the applicant, the judgement debtor, and that such move is illegal because the applicant is now placed under receivership of the Presidential Sector Reform Unit (PSRU).

vide Government Notice No. 543 of 22.8.97. Elaborating on this counsel stated that the effect of being placed under receivership is that from the effective date all properties of the applicant company are now under direct control of PSRC in terms of the provisions of section 39 of the Public Corporations Amendment Act No. 16 of 1993. So that, counsel went on, if the respondents wish to execute the decree, they can only do so by attaching the properties of PSRC and not against those of the applicant company which is non-existent in law.

Mr. Kayaga's preliminary objection concerned this view. It was that since the applicant company has thus been placed under receivership, the present proceedings could only be brought at the instance of the PSRC and not by the applicant company. Mr. Kayaga took the view that the act of placing the applicant company under receivership had the effect of transferring all its assets and liabilities to the PSRC. Nevertheless he contended that this was the more reason it was necessary to proceed with the execution immediately so that his client does not end up with an empty decree.

The crucial question raised in this application is: What are the effects of placing the applicant corporation under receivership of PSRC? Section 39 (1) of the Public Corporations (Amendment) Act which Mr. Mutaki relied on provides that:

"39 (1) Where a public corporation has been declared a specified public corporation, the Commission shall from the effective date be responsible for the restructuring of that specified public corporation."

I can see nothing in this provision which suggests that upon being placed under receivership a public corporation ceases to exist as

a legal person or ceases to own property. What the provision says is that from the effective date the PSRC shall be responsible for the restructuring of the corporation, which continues to be a living legal person, with a view to improving its performance.

Mr. Boaz made reference to section 43 of the Act and section 9 of the Bankruptcy Ordinance to show that upon being declared a specified public corporation all its assets and liabilities are transferred to the PSRC as the official receiver. Section 43 of the Act says that:-

"43. - (1) Notwithstanding any other law to the contrary, with effect from the date of publication of an order declaring a public corporation to be a specified public corporation the Commission shall -

(a) without further assurance or appointment have the power to act as the official receiver of the specified public corporation; and

(b) have the power and all the rights of a receiver appointed in accordance with or pursuant to the Bankruptcy Ordinance."

The provision vests in the PSRC the power to act as the official receiver of the specified public corporation, and also the power and the rights of a receiver appointed under the Bankruptcy Ordinance (Cap. 25). Under section 9 (1) of the Bankruptcy Ordinance,

"9. (1) On the making of a receiving order the official receiver shall be thereby constituted receiver of the property

of the debtor, and thereafter, except as directed by this Ordinance, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall commence any action or other legal proceedings, unless with the leave of the court and on such terms as the court may impose."

The provision does not transfer the assets and liabilities of the specified public corporation to the ESRC as claimed by counsel. It merely constitute ESRC the receiver of the property of the corporation in question, but it does not say that the corporation ceases to own that property. My understanding of the provision is that a public corporation under receivership continues to own property, and that its creditor of any debt provable in bankruptcy can, with the leave of the court, proceed against its property. Of course there is nothing to prevent a creditor from joining the ESRC, the receiver, as a co-defendant.

In my view, therefore, Mr. Nutaki's submission cannot succeed. He cannot seek stay of execution against the property of the applicant corporation on the ground that the Corporation, being under receivership, does not exist or does not own property. I think that the applicant corporation continues to exist and continues to be the owner of its property and that, with the leave of the court, a creditor of a debt provable in bankruptcy can proceed against its property. And to grant stay of execution as prayed at this stage would amount to pre-empting such creditor with,

with the leave of the court, to proceed against the property of the applicant. That would not be right.

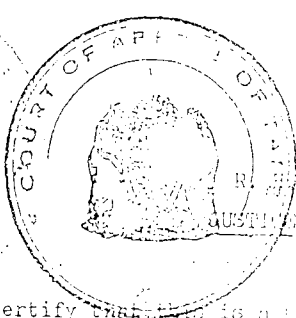
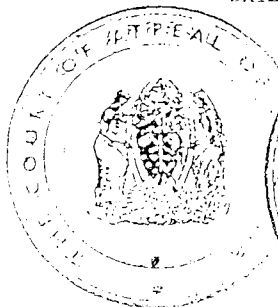
The remaining three grounds advanced for the appeal be disposed of briefly. There was the ground that the appeal has overwhelming chances of success. However the court said time and again that this cannot constitute a ground for granting stay of execution. Now, among other reasons, at this stage cannot really verify this allegation. For instance, the applicant has filed the draft memorandum of appeal as the sole basis on which to find that the appeal has overwhelming chances of success. But it is obvious in the absence of any other material, that cannot reasonably be said

There was also the allegation that if the stay is not granted the applicant company stands to suffer substantial and irreparable loss. No particulars were given of how the applicant will suffer substantial and irreparable loss. The court has repeatedly held that such a bare allegation cannot form a basis for granting stay of execution.

And lastly it was stated that the applicant was prepared to offer its immovable property valued at Shs. 100,000,000/- as security of execution. However Mr. Kayaga, counsel for the respondent particularly objected to this saying that the offer was vague. The applicant did not disclose the particulars of the alleged immovable properties including their title deeds and whether or not they involve any incumbrances. That is the substance in that objection.

In the result, and for the reasons given, I am of the opinion that the applicant has failed to advance any grounds for the grant of an order for stay of execution. In the result, the application is dismissed with costs.

DATED at MWANZA this 1st day of December, 1960.



R. KISAIGA  
JUSTICE OF APPEAL

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

*N. M. Mwanika*

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SENIOR DEPUTY REGISTRAR