

IN THE COURT OF APPEAL OF TANZANIA  
AT DAR ES SALAAM

(CORAM: RAMADHANI, J.A., LUEBUVA, J.A., And MROSO, J.A.)

CIVIL REFERENCES NOS. 15 OF 2001 AND 3 OF 2002

BETWEEN

PHANTOM MODERN TRANSPORT (1985) LIMITED ... APPLICANT

AND

D.T. DOBIE (TANZANIA) LIMITED ..... RESPONDENT

(REFERENCE from the Ruling of the Court  
of Appeal of Tanzania at Dar es Salaam)

Lugakingira, J.A.)

dated 12th February, 2002

in

Civil Application No. 141 of 2001

R U L I N G

MROSO, J.A.

Following a decision in Civil Case No. 132 of 2000 of the High Court (Chipeta, J.) in which the applicant obtained a favourable decree, the respondent sought to appeal against that decision to this Court and, in the meantime, filed in this Court Application No. 141 of 2001 for stay of execution of the High Court decree. At the hearing of the application for stay of execution a preliminary objection was raised by the advocates for the applicant. The single judge of this Court (Lugakingira, J.A.) who heard the preliminary objection reserved his ruling but granted in favour of the respondent an interim order for stay of payment to the applicant's advocates monies which, by a garnishee order, were to be paid from respondent's bank accounts.

The advocates for the applicant felt that the interim order

reference No. 15 of 2001, to challenge the order before the full court.

On 12th February, 2002 Lugakingira, J.A. gave his reasoned ruling on the preliminary objection, overruling it. Again the advocates for the applicants were dissatisfied with it and filed another reference to the full court, Civil Reference No. 3 of 2002. The Court consolidated both references for hearing and in this ruling.

We intend to dispose of Civil Reference No. 15 of 2001 quickly. As mentioned earlier, the single judge reserved his ruling on the preliminary objection. Although the proceedings before the single judge are not before us, we learn from the brief ruling of the single judge dated 13th December, 2001 that Mr. Mujulizi, learned advocate from Ishengoma, Masha, Mujulizi and Magai, Advocates for the respondent, prayed that pending delivery of the ruling on the preliminary objection, the status quo be maintained. Presumably, the monies which had been attached from the accounts of the respondent in the bank by way of a garnishee order had not yet been paid out to the advocates for the applicant. In order not to pre-empt the pending ruling the single judge considered it proper to make the interim order now being impugned.

Mr. C. Ngalo and Mr. M.J.T. Ngalo, learned advocates for the applicant, appeared before us. It is at least certain that Mr. C. Ngalo also appeared for the applicant before the single judge. Mr. Mujulizi who appeared for the respondent before the single judge also appeared before us. Mr. C. Ngalo urged before us that

.../3

the interim order of stay of execution was in fact pre-emptive of the very application for stay.

With respect, we do not agree. At that stage it was not yet known if the preliminary objection would be upheld or overruled. At the same time there was the possibility that during the period before the ruling was given the respondent's monies could be paid over to applicant's advocates. If that happened and, later, the preliminary objection was overruled, as in fact happened, then the application for stay of execution would have been overtaken by that event. So, the application for stay of execution would have been pre-empted if an interim order was refused rather than if it was granted. We think, therefore, that the single judge cannot be validly criticised for granting the interim order at that stage.

We dismiss Civil Reference No. 15 of 2001.

Again, as mentioned earlier in this ruling, the objection proceedings before Lugakingira, J.A. are not before us. We can, however, gather from his ruling of 12th February, 2002, that four grounds of objection were raised before the single judge. The first ground of objection was that the affidavit of one Mr. John Dapling of the Respondent Company, which was filed in support of the application for stay of execution, offended the sub-judice rule. Paragraphs 10 and 11 of the affidavit had alleged that the applicant was indebted to various creditors and that there was a Civil Case No. 351 of 2000 against it in that regard which was pending in the High Court. It was further alleged that unless execution was stayed the amount of the decree would be used to pay its debts. The advocate for the respondent disputed that those paragraphs in the affidavit violated the sub-judice rule.

The single judge rejected the contention that paragraphs 10 and 11 of the affidavit offended the sub-judice rule or were prejudicial to the applicant. The judge, however, agreed that paragraph 11 was speculative, although he proceeded to say that it was only improperly on the affidavit and it would not render the affidavit incurably defective. It could be removed "without harm".

Before us Mr. Ngalo said that that was precisely what should have been avoided because speculations in an affidavit were likely to influence the court wrongly by prejudicing its judgment on whether or not to grant stay of execution. Mr. Mujulizi maintained that the sub-judice rule had been misunderstood.

We think it will be useful to quote here in full paragraphs 10 and 11 of the affidavit. Paragraph 10 reads:-

"That I am reliably informed which information I believe to be true, that the Decree-holder is highly indebted to and (sic) creditors including the National Bank of Commerce Limited, which debt amounting TShs. 486,172,555.85 as of July, 2000 is subject of High Court Civil Case No. 351 of 2000 NEC Ltd. Vs. Phantom Modern Transport (1985) Limited & Others (Chipeta, J.), which is also pending in the same Court. Attached herewith and "Exhibit D.T. Dobie 4" are documents filed in the High Court by the Respondent and 4 others in Civil Case No. 351 of 2000 referred herein."

Paragraph 11 reads:

"That unless the Honourable Court stays execution of the decree and suspends the Garnishee Order the amount of money if paid to the decree-holder will not be easily recovered from the decree-holder as it will be used towards settlement of those outstanding debts."

To buttress up the allegations in paragraph 10 of the affidavit, copies of a plaint and other documents which were filed in High Court Civil Case No. 351 of 2000 were annexed to Mr. Dapling's affidavit.

Osborn's Concise Law Dictionary, 5th Edition, explains sub-judice to mean "In course of trial". The phrase also means "under investigation".

It would appear that High Court Civil Case No. 351 of 2000 was still pending trial or judgment at the time the impugned affidavit was filed in this Court. The existence of the case was a fact and, according to the copy of the plaint in the case, the applicant was indebted to the National Bank of Commerce to the tune of Shs. 353,867,989.85. That was also a fact which the applicant itself put forward. So, when Dapling mentioned those facts in his affidavit he was not violating the sub-judice rule. To that extent the single judge cannot be faulted. However, the question is whether paragraphs 10 and 11 of Dapling's affidavit, on the whole, are prejudicial to the applicant.

The amount of Shs. 486,172,555.85 which is mentioned in paragraph 10 of Dapling's affidavit and which the applicant is alleged to owe the National Bank of Commerce is not disclosed

in the plaint for Civil Case No. 351 of 2000 or in any other document before the court. Dapling says in his affidavit that he obtained that information from his lawyers. The identity of the particular lawyers is not disclosed. Clearly the information regarding a debt of TShs. 486,172,555.85 was hearsay and must have been calculated to prejudice the mind of the single judge.

Regarding paragraph 11 of Dapling's affidavit the single judge, as mentioned earlier, agreed, correctly, that it was speculative. But with respect, we think he erred when he proceeded to say that that defect would not render the affidavit incurably defective and that it could be removed without harm.

In Uganda v. Commissioner of Prisons, Ex parte Matovu  
[1966] E.A. 514 at page 520, a three judge panel of the High Court of Uganda said:-

"... as a general rule of practice and procedure, an affidavit for use in court, being a substitute for oral evidence, should only contain statements of facts and circumstances to which the witness deposes either of his own knowledge or ... Such an affidavit should not contain extraneous matters by way of objection or prayer or legal argument or conclusion."

The court was of the view that an affidavit which violates those conditions should be struck out. This Court accepts that that law on affidavits is sound.

Mr. Ngalo referred to other defects in Dapling's affidavit, the cumulative effect of which was also to render the affidavit incurably defective. He said that paragraphs 18 to 22 were argumentative and the verification clause in paragraph 28 was no verification in law, so that it could be said that the contents of the affidavit had not been verified.

Mr. Mujulizi took the position that, in the first place, an affidavit is not defined in the Court of Appeal Rules. Secondly, that according to ex parte Matovu, an affidavit is essentially a substitution of oral evidence. Thirdly, that in the Court of Appeal it will be enough if an affidavit conforms to section 62 of the Law of Evidence Act, No. 6 of 1967. In the fourth place, a defective affidavit can be amended so that the offensive parts can be expunged, leaving the rest of the paragraphs intact. He submitted that Mr. Ngalo had not made out a point to justify a revisit of the ruling by the single judge.

Before the single judge it would appear from his ruling that Mr. Ngalo had complained that the greater part of Mr. Dapling's affidavit was a story and an attempt to reconstruct the evidence in the case in the High Court, to the prejudice of the applicant.

The single judge thought that Mr. Ngalo was exaggerating in saying that the greater part of the affidavit was a story. Even so, the judge agreed with Mr. Ngalo that paragraphs 2, 15, 16 and 17 of the affidavit purported to restate the evidence in the High Court suit. But that defect could be cured by amendments to the affidavit.

overlooked, leaving the remaining part of the affidavit intact. .  
He contends however, that the defects in the impugned affidavit  
are fatal and cannot be overlooked or expunged, leaving the rest  
of it intact, as there would not be anything of substance left.

There are a number of decisions of this Court which say that  
a defective affidavit can be amended. In Salima Vuai Foum v.  
Registrar of Cooperative Societies and Three Others [1995] T.L.R.  
75 this Court accepted that it is in the discretion of a court to  
allow amendments of a defective affidavit. In University of  
Dar es Salaam v. Mwenge Gas and Luboil Ltd., Civil Application  
No. 76 of 1999 (unreported), this Court, Samatta, C.J., after  
referring to the Salima Vuai Foum case, had this to say of a  
defective affidavit.

[I]t would appear that a court has a  
discretion to allow a deponent of an  
affidavit lacking a verification clause  
to amend the affidavit. I take it that  
by using the word "amend" this Court  
meant that the court can, if circum-  
stances justify it, grant leave to the  
deponent to file an affidavit having a  
verification clause. I hold this view  
because I take [it] to be an undisputed  
proposition of law that something that  
is null and void is incapable of being  
amended. You cannot amend nothing.  
Being a discretionary power, the power  
to grant leave to a deponent to file an  
affidavit which has a verification  
clause must be exercised with justice  
and common sense.



considered the cumulative effect of the defects in the affidavit, he would have sustained the preliminary objection.

We allow this reference and set aside the decision of the single judge. We further quash the interim order of stay of execution. The effect of this ruling is that the application by the respondent for stay of execution stands dismissed.

The applicant will get its costs.

DATED at DAR ES SALAAM this 10th day of December, 2002.

A.S.I. RAMADHANI  
JUSTICE OF APPEAL

D. Z. LUBUVA  
JUSTICE OF APPEAL

J. A. MROSO  
JUSTICE OF APPEAL

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

F.L.K. WAMBALI  
DEPUTY REGISTRAR