IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: RAMADHANI, J.A., NSEKELA J.A., And KAJI, J.A.)

CIVIL REFERENCE NO. 7 OF 2004

BETWEEN

EAST AFRICAN DEVELOPMENT BANK ..... APPLICANT

AND

BLUELINE ENTERPRISES LIMITED..... 1ST RESPONDENT
A.T.H. MWAKYUSA ..... 2ND RESPONDENT

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

(Munuo, J.A.)

dated the 28th day of June, 2004
in
Civil Application No. 57 of 2004

RULING OF THE COURT

NSEKELA, J.A.:

In High Court Civil Cause No. 324 of 2003, the applicant was the East African Development Bank and the respondent was Blueline Enterprises Ltd. & Another. The applicant had filed a petition under the Arbitration Ordinance, Cap. 15 and rules made thereunder seeking the removal of the 2nd respondent, one Ambwene T. H. Mwakyusa as the Sole Arbitrator. On the 11.5.2004, Massati, J. struck out with costs the petition as incompetent. Aggrieved by this decision, the applicant filed in this Court Civil Application No. 57 of

2004 seeking stay of execution in Misc. Civil Cause No. 324 of 2003 pending the determination of an intended appeal, notice of which had been given. The Court struck out the application as incompetent on the ground that leave to appeal to the Court had not been obtained. Apparently an application for leave to appeal had been filed but not determined as yet.

On the 2.7.2004, Ms. Maajar, Rwechungura, Nguluma & Makani, learned advocates for the applicant wrote a letter to the Registrar seeking a reference of the decision of a single Judge of this Court (Munuo, J.A.) dated the 28.6.2004 in terms of Rule 57 (1) (b) of the Court Rules. This was followed by a subsequent letter dated the 5.7.2004 whose effect is being disputed by Mr. Bwahama, learned advocate for the respondents. It reads in part as follows –

> "After filing the said application we discovered that we had advertently (sic) omitted to include the name of the 2nd respondent A.T.H. Mwakyusa. We regret the omission and we are hereby withdrawing the said application and replacing it by this letter of application." (emphasis supplied)

Mr. Bwahama, learned advocate for the respondents raised a preliminary objection essentially questioning the manner in which the first letter of reference dated the 2.7.2004 was withdrawn by the second letter dated the 5.7.2004. the complaint by the learned advocate is in the following terms –

> "2. That the 2nd application dated 5th July 2004 withdrawing the first application dated 2nd July 2004 was withdrawn without first applying for leave of the court to amend it and add the 2nd respondent in compliance with rule 47 (1) and (2) of the Court of Appeal Rules, 1979. It is mandatory that leave of the court should first be obtained before adding the 2nd respondent. Failure to do so renders the application for reference incompetent and should be struck out with costs."

The essence of Mr. Bwahama's complaint is to the effect that in the first letter of reference dated the 2.7.2004, there was only one respondent, but in the second letter there is added a second respondent, Mr. A.T.H. Mwakyusa who was included without leave of the Court in contravention of Rule 47 (1) and (2) of the Court Rules.

We think that the answer to this complaint depends on true construction of Rule 57 (1), which provides –

> "57 (1) Where any person is dissatisfied with the decision of a single Judge exercising the powers conferred by section 68G of the Constitution he may apply informally to the Judge at the time when the decision is given or by writing to the Registrar within seven days after the decision of the Judge –
>
> (a) ... ...
>
> (b) in any civil matter, to have any order, direction or decision of a single Judge varied, discharged or reversed by the Court.

Under Rule 57 (1), informal applications may be made orally to a single Judge of the Court at the time of making the decision complained against, or in writing to the Registrar within seven days thereafter. The learned advocate for the applicant preferred the second option, that of writing a letter of reference to the Registrar. There was no need for the applicant to file a formal application before the Court under Rules 45 and 46 since the matter was

governed by Rule 57 (1) (b). The applicant, being aggrieved by a decision of a single Judge made on the 28.6.2004, the procedure for making reference to the Court is as prescribed under Rule 57 (1). A reference to the Court is different from a formal application. The latter falls under Rules 45 and 46 and the applicant did not write the two letters dated 2.7.2004 and 5.7.2004 under the said Rules. Under the circumstances, Mr. Bwahama's contention that the applicant should have complied with Rule 47 (1) and (2) which deal with amendment of documents is totally misconceived. What is before us is a reference under Rule 57 (1) (b) which has its own prescribed procedure.

The question still remains, could the applicant withdraw the letter of reference dated the 2.7.2004 without a court order to that effect? On the 5.7.2004, the learned advocates for the applicant wrote another letter to the Registrar which withdrew the first letter dated the 2.7.2004. As far as civil appeals to the Court are concerned, the procedure for such withdrawal is prescribed under Rule 95. We have not been able to find in the Court Rules a procedure for withdrawing a letter of reference. As explained before, a reference to the Court may be made in writing to the registrar

under Rule 57 (1) (b). We do not see any reason in the absence of a specific rule to that effect, why the same procedure of writing a letter to the Registrar should not be invoked to withdraw a letter of reference. The Court will then record the reference as withdrawn under Rule 3 (2) (a) of the Court Rules when the reference is called for hearing.

The letter of reference dated the 2.7.2004 is accordingly marked as withdrawn under Rule 3 (2) (a) of the Court Rules.

We now turn our attention to the substantive issue in the reference. Was the learned single Judge correct in striking out the application for stay of execution on the ground that the applicant had not first obtained leave to appeal? Mr. Bwahama referred the Court to **Willow Investment v. Mbombo Ntumba and Two Others** (1997) TLR 93; **Said Amid Mwilima v. Tabora Regional Trading Co.** (1997) TLR 156 which held that the power of the Court to grant a stay under Rule 9 was exercisable only in proceedings which were properly before the Court. It is now settled law that an application for stay of execution is to be decided on the merits whether or not there is leave to appeal provided that there is a notice of appeal.

This was authoritatively stated in Civil Reference No. 29 of 1997, **Sadik Abdallah Alawi and (1) Zulekha Suleman Alawi (2) National Bank of Commerce** (unreported) wherein the Court stated thus –

> "Rule 9 (2) (b) ... ... which sanction a stay of execution does not make such leave a pre-requisite, and the question is whether there is justification for reading that requirement into the provision. Can the framers of the rule have intended that leave to appeal should be a requisite for granting a stay of execution? We think not. Under the rule, only the notice of appeal is made a pre-requisite for granting a stay of execution. We think that if it was intended that leave to appeal also be made a pre-requisite, then it was only too easy for the framers of the rule to say so but they did not."

What is required under Rule 9 (2) is the presence of a notice of appeal. Since the learned single Judge struck out the applicant's application for stay of execution without considering its merits, we direct that the matter be placed before a single Judge of this Court

for hearing of the application on the merits in terms of Rule 55 (1) of the Court Rules. Costs to be in the cause.

DATED at DAR ES SALAAM this 12th day of November, 2004.

A.S.L. RAMADHANI
JUSTICE OF APPEAL

H.R. NSEKELA
JUSTICE OF APPEAL

S.N. KAJI
JUSTICE OF APPEAL

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

(S.A.N. WAMBURA)
SENIOR DEPUTY REGISTRAR