

**IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA**

(CORAM: BWANA, J.A., MJASIRI, J.A., And MANDIA, J.A.)

MZA. CIVIL APPLICATION NO. 8 OF 2011

EUSTO NTAGALINDA APPLICANT

VERSUS

TANZANIA FISH PROCESS LTD..... RESPONDENT

**(Application for stay of execution of the decree of the High Court
of Tanzania (Commercial Division at Mwanza))**

(Mruma, J.)

dated 13th day of September, 2009

in

Commercial Case No. 20 of 2009

RULING OF THE COURT

11th & 13th September, 2012

BWANA, J.A.:

By Notice of Motion filed before this Court pursuant to Rule 11 (2) (b) and (d) (i) (ii) and (iii) of the Court of Appeal Rules, 2009 (the Rules), the applicant, Eusto K. Ntagalinda, moved the court for an order that-

*"...stay the execution of the decree and judgment
in the High Court of Tanzania (Commercial
Division) in commercial case no. 20 of 2009*

pending the hearing and the determination of the appeal..."

The applicant herein was the defendant in the original suit before the High Court. He filed a counter claim. In its judgment delivered on 13 September, 2011, the High Court entered judgment in favour of the plaintiff (respondent herein) and dismissed the counter claim.

Dissatisfied with that decision of the High Court, he lodged an appeal and filed this application for stay of execution. That application is supported by an affidavit of Mathias Rweyemamu, learned counsel.

That application prompted the respondent herein to raise a Notice of Preliminary Objection couched in the following terms:-

"That the appellant has violated the provisions of Rule 106 (1) of the Tanzania Court of Appeal Rules, 2009 for failure to file his written submission within the prescribed time of sixty (60) days in support of the Notice of Motion lodged on 10.11.2011."

When the application came up for hearing both parties agreed with the Court that in order to expedite these proceedings, the Court deals with both matters consecutively, that is, that we first hear arguments for and against the preliminary objection. That would be followed by hearing arguments on the main application. The Court's decision will then be in the same manner – should the preliminary objection succeed, the application will be dismissed. However, if we dismiss the said preliminary objection, then the main application will be determined on its merits.

Therefore, we start by considering the preliminary objection. Essentially, the preliminary objection requests this Court to dismiss the application for non compliance with the provisions of Rule 106 (1) of the Rules - a rule that mandatorily requires an applicant to file written submissions within sixty (60) days in support of his application. In the instant matter, it was submitted by Mr. Costantine Mtalemwa, learned counsel for the respondent, that since the applicant filed a notice of motion on 10 November, 2011, he should have filed his written submissions by 9 January 2012. He did not do so and there was no application for extension of time [Rule 106 (9)]. The applicant filed the written submissions on 17 February

2012, that is, 45 days after the lapse of the prescribed period. The main reason advanced by Mr. Mathias Rweyemamu, learned counsel for the applicant, is that he was late to file the said written submissions because he was misled by a court clerk that the registry offices were closed as it was during court vacation. He asked the court for adjournment so that he could secure an affidavit of the clerk who misled him. To that, Mr. Mtalemwa countered, submitting that since registry offices are not closed during court vacation (but only court business is not conducted), Mr. Rweyemamu's submission was a wrong interpretation of Rule 3 of the Rules which defines "court vacation."

The law on preliminary objections is well settled. From the much celebrated decision in the case of **Mukisa Biscuit Manufacturing Company Ltd vs West End Distributors Ltd** (1969) EA 696 to more recent decisions of this Court (See **Cotwu (T) Ottu Union and Another vs Iddi Simba And 7 Others**, Civil Application No. 40 of 2000; **Citibank (T) Ltd v TTCL and Others**, Civil Application No. 64 of 2003 – both unreported), it is clearly spelt out that a preliminary objection raises a point of law which if upheld, disposes of the suit and saves the time of the court

and of the parties by not going into the merits of the application as the point of law disposes of the matter summarily (See, **The Bank of Tanzania v Devram P. Valambia**, Civil Application No. 15 of 2002; **The National Bureau de Change Ltd vs Tanganyika Cheap Stores Ltd & Others**, Commercial Case No. 236 of 2001 – both unreported). Should the matter consist of points of law and fact, which requires evidential proof (as is being suggested herein by Mr. Rweyemamu), then the purpose of the preliminary objection cannot be met. It should be dismissed.

In the instant matter before us, it is evident that the claims raised by Mr. Mtalemwa and countered by Mr. Rweyemamu, require further proof by way of either affidavital proof or oral evidence. That defeats the purpose of preliminary objection.

Further, as stated earlier, the issue at hand is the failure to file written submissions within the prescribed period as provided for under Rule 106 (1) of the Rules. While we do appreciate the mandatory nature in which Rule 106 (1) is couched, we are alive to the provisions of Rule 106 (19) which in essence gives power to this Court, in the interest of justice and

taking into consideration the circumstances of each application, to waive compliance with the provisions of this Rule in so far as they relate to the preparation and filing of written submissions. We have taken into consideration the matters at stake in this application particularly the need to call for additional proof in the form of evidence and came to hold that the preliminary objection as filed herein does not meet the criteria of the law as rightly stated in the Mukisa Biscuit case (supra). Accordingly we dismiss it.

On the issues raised in the main application for stay of execution, again the law is well settled. Rule 11 (2) (c) of the Rules gives the Court powers to grant an application for stay of execution upon the affected party, that is, the applicant, showing good cause. What amounts to good cause is stated in Rule 11 (2) (d) namely that if the Court is satisfied:-

- That a substantial loss may result to the party applying for stay of execution unless the order is made.

- That the application has been made without unreasonable delay; and
- That security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him.

Both counsel to this application addressed us on this pertinent issue and they cited a number of authorities in support of their respective positions.

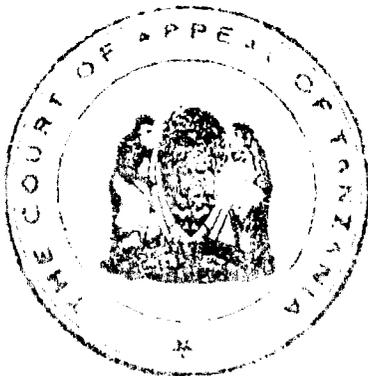
This application has its genesis in the judgment of the High Court of Tanzania at Mwanza in Commercial Case No. 20 of 2009 when the respondent company emerged the winner and was awarded the sum of Tsh. 209,012,396/12 which was accompanied with a commercial interest of 21% per annum and a further interest of 7% per annum, together with costs. The applicant herein had raised a counter claim amounting to Tsh. 517,082,500/=. That counter claim was dismissed by the trial court. However, in his submission in support of this application, Mr. Rweyemamu drew our attention to the following facts.

- That the applicant's boats which were his main source of livelihood have been seized, thus putting him out of business. That has led him to suffer substantial loss.
- That the applicant has committed himself to give his registered right of occupancy with title No. 32815, L.O. No. 399618, L.A. No. KGR/BMC/AR/4758; as well as a Petrol Station at Kashozi Road Bukoba town, as due performance of the decree to be stayed. We note that the respondent has not controverted this offer by the applicant.
- On his part therefore, the applicant has shown that he has property which can act as security.
- That in the event stay of execution is not granted, then the applicant stands to lose as all his tools of trade will have been seized. This cannot be said of the respondent who is (as per plaint) a body

corporate which carries on business within
Tanzania.

All the foregoing considered, we are of the settled view that the applicant,
an individual fisherman, stands to lose more should this application be
dismissed. Accordingly, we grant the application for stay of execution in
favour of the applicant. Costs of this application be in the event. We order
so.

DATED at MWANZA this 13th day of September, 2012.



S. J. BWANA
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

W. S. MANDIA
JUSTICE OF APPEAL

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

Z.A. MARUMA
DEPUTY REGISTRAR
COURT OF APPEAL