

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MASSATI, J.A., ORIYO, J.A., And MMILLA, J.A.)

CIVIL APPLICATION NO. 70 OF 2014

**MEIS INDUSTRIES COMPANY LIMITEDAPPLICANT
VERSUS**

**EXIM BANK (TANZANIA LIMITED).....RESPONDENT
(Appeal from the Ruling and Orders of the High Court of Tanzania
(Commercial Division) at Dar es Salaam)**

(Makaramba, J.)

**Dated the 11th day of April, 2014
in
Commercial Case No. 11 of 2008**

.....

RULING OF THE COURT

9th & 17th February, 2015

MASSATI, J.A:

There is in this Court an application for stay of execution. It is filed under Rule 11(2)(b)(c) and (d) of the Court of Appeal Rules, 2009 (the Rules). According to the Notice of Motion, the application seeks to stay the execution of the Ruling and Order of Makaramba, J dated 11th April, 2014 in Commercial Case No 11 of 2008. The application was filed on 16th April, 2014.

Resisting the application, the Respondent **EXIM BANK TANZANIA LIMITED** filed an affidavit in reply through a certain, **PRAVEEN MEHRA**, an official of the bank, to oppose the contents of the affidavit of one **MEREY ALLY SALEH** earlier filed in support of the Notice of Motion. But in addition, Ms MARANDO, MNYELE & CO ADVOCATES, learned Counsel for the Respondent, filed a notice of preliminary objections. In this ruling, we intend to dispose of those preliminary objections.

Initially there were a total of 6 grounds of preliminary objections. However at the hearing, the respondent abandoned four and agued only two of them, which could be paraphrased as follows:-

- (1) That the Notice of Appeal was incurably defective, and could not support an application for stay of execution.
- (2) The application is time barred as it aims at staying a decree dated 30th June, 2009 more than four years ago.

Mr Gabriel Mnyele, learned counsel, appeared to argue the preliminary objections. He premised his argument on the first preliminary objection on Rule 11(2)(b) of the Rules. According to that Rule, he submitted, the Court derives jurisdiction to determine an application for

stay, from a valid Notice of Appeal. He went on to submit that in terms of Rule 83(1) and (6) of the Rules, a valid Notice of Appeal is one that substantially complies with Form D in the First Schedule to the Rules. In the present case, he submitted, the Notice of Appeal does not substantially comply with Form D because; **first** in the body of the notice the words "**being dissatisfied** are missing; **second**; the date of the decision is not mentioned in the body; **third**; the words "...**which the execution of as fraudulent** ... are not found in the wording in form D, but a creation of the advocate who drafted it. He emphatically argued that those defects rendered the Notice of Appeal to be incurable, and so cannot support a valid application for stay of execution, which is thereby rendered incompetent and should be struck out. In support he referred us to the unreported decision of this Court in **TANZANIA POSTAL BANK v MUYWANGA GENERAL SUPPLES** (Civil Application No. 154 of 2005).

Mr. Charles Sengalawe, learned counsel appeared for the respondent. His brief response to that objection was that, although the Notice of Appeal did not cite all the words contained in Form D, the intention is clear and this is what matters. It was therefore his view, that

the Notice substantially complies with Form D, and therefore valid. As such the application for stay was properly founded and competent.

We agree with Mr. Mnyele that under the Rules, it is a Notice of Appeal which clothes this Court with jurisdiction to entertain an application for stay of execution. (See **RAMADHANI ALLY & 2 OTHERS VS SHABANI ALLY** (Civil Application No. 3 of 2008 (unreported)). We also agree with him that such notice must be a valid one in the eyes of the law. The only issue here, is whether in the present case there is a valid notice of appeal?

Notices of appeal in civil appeals are governed by Rule 83; and its Form is prescribed by Rule 83(6) which reads as follows:-

" 83(6) A notice of appeal shall be substantially in the Form D in the First Schedule to these Rules and shall be signed by or on behalf of the appellant".

We think that the catchword in this rule is "substantially". According to the New Oxford Advanced Learners Dictionary (at p. 1531) that word means among others *"..mainly, in most details, even if not completely..."*

The purpose of a notice of appeal is to inform the opposite party in a proceeding, and the Court, of an aggrieved party's intention to appeal whether against the whole or part of a decision. To achieve that aim the legislator has deemed it necessary to prescribe the minimum requirements of the contents of each notice of appeal. These are contained in Rule 83(3), which provides as follows:-

"Every notice of appeal shall state whether it is intended to appeal against the whole or part only of the decision and where it is intended to appeal against part only of the decision, shall specify the part complained of, shall state the address for service of the appellant and shall state the names and addresses of all persons intended to be served with copies of the notice".

So in our view, if a notice of appeal is in the prescribed form and contains the requisite information demanded in Rule 83(3), is lodged within the prescribed time, dated and signed by or on behalf of the intended appellant, that notice must be deemed to have substantially complied with Form D.

In the present case, the Notice of Appeal filed by the applicant reads as follows:-

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM
CIVIL APPLICATION NO.....2014
IN THE MATTER OF AN INTENDED APPEAL NO.....2014
BETWEEN
MEIS INDUSTRIES COMPANY LIMITED.....APPELLANT
AND
EXIM BANK (TANZANIA) LIMITED.....RESPONDENT.

(Appeal from the Ruling and Orders of the High Court of Tanzania (commercial Division) at Dar es Salaam (Mr. Justice MAKARAMBA) Dated the 11th day of April 2014 in the Commercial Case No. 11 of 2008).

NOTICE OF APPEAL

TAKE NOTICE that **MEIS INDUSTRIES COMPANY LIMITED**, appeals to the Court of Appeal of Tanzania against the decision of the Honourable **Mr. Justice MAKARAMBA** whereby the execution of a fraudulent judgment and decree was ordered to proceed despite a Civil Case (Commercial Case No. 177 of 2013) is pending in the same Court disputing the execution of the fraudulent judgment and decree being executed. The Appeal is against the whole Ruling.

The address of service of the Appellant is in the case of:

J.E.A.MWAKAJINGA
ADVOCATE
4th Floor, Haidery Plaza Complex,
P.O. Box 22497,
DAR ES SALAAM.

The address of the Respondent for the purpose of service of summons in this Appeal is in the care of:-

Marando, Mnyele & Co. Advocates,
Plot No. 352/64, Makunganya Street,
Adjacent to Heritage Hotel,
P.O. Box 12519
DAR ES SALAAM.

Dated at Dar es Salaam this 14th day of April, 2014

.....
J.E.A.MWAKAJINGA
ADVOCATE FOR THE APPELLANT.

To:
The Registrar,
High Court of Tanzania (Commercial Division),
DAR ES SALAAM.

Lodged in the High Court of Tanzania (Commercial Division) at Dar es Salaam on the 15th day of 04, 2014.

.....
REGISTRAR
15.4.2014

Drawn and Filed by:
J.E.A.Mwakajinga
ADVOCATE,
4th Floor, Haidery Plaza Complex,
P.o. Box 22497,
DAR ES SALAAM.

Mr. Mnyele is right that, in this notice, some words that appear in Form D, do not surface. However, we are satisfied that all the necessary statutory information listed in Rule 83(3) and (6) is present. We also agree that the words coined by the learned counsel who drafted the notice cannot be found in Form D but we do not think that this did any violence to the true intent of Form D, which is to convey to the parties of the part of the decision sought to be challenged in appeal. Besides, unlike in the **TANZANIA POSTAL BANK** case the present notice is in the prescribed form and not a mere letter. On the whole therefore, we find that the impugned notice of appeal substantially complies with Form D, and is

therefore capable of hinging the application for stay of execution in terms of Rule 11 (2)(b) of the Rules. This preliminary objection is therefore devoid of substance and is accordingly dismissed.

The second preliminary objection is that the application for stay of execution is time barred.

According to Mr. Mnye, the decree whose execution is sought to be stayed is dated 30th June, 2009. This application was filed on 16th April, 2014, almost five years later. This, he argued, is contrary to Rule 11(2)(d)(ii) of the Rules which requires applications for stay to be made “without unreasonable delay”. However, Mr. Mnye conceded that his application was filed one day after the notice of appeal had been lodged. Nevertheless, he urged the Court to find the application incompetent on the ground of limitation and have it dismissed.

Mr. Semgalawe submitted that the applicant seeks to challenge the order of Makaramba, J dated 11th April, 2014. This could not by any stretch of imagination be labelled as unreasonable delay, he argued. So the issue of limitation did not arise. He thus prayed that this objection too, be dismissed.

Rule 11(2) (b) of the Rules, provides as follows:-

- (b) in any civil proceedings, where a notice of appeal has been lodged in accordance with Rule 83, an appeal, shall not operate as a stay of execution of the decree or order appealed from except so far as the High Court or tribunal may order, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree or order; but the Court, may upon good cause shown, order stay of execution of such decree or order.

To our understanding, this Rule gives jurisdiction to the Court to order stay of execution of a **decree** or **Order** appealed from. Mr. Semgalawe has submitted and Mr. Mnyeale has accepted that the applicant does not seek to appeal against the consent decree of 30/6/2009 but against the Order of the High Court dated 11th April, 2014. As such, we do not see how and why should time be reckoned from 30th June, 2009 for purposes of limitation. That part of Mr. Mnyeale's argument does not therefore find purchase with us. We reject it.

Rule 11(2)(c) of the Rules, in our view, sets out the timeline for filing applications for stay. The Rule provides:-

- (c) where an application is made for stay of execution of an appealable decree or order before the expiration of the time allowed for appealing therefrom, the Court, may upon good cause shown, order the execution to be stayed.

This Rule has been interpreted to mean that an application for stay must be filed before the expiration of time allowed for appealing of an appealable decree or order (See **MOHONGE KITEGE v ISSA ELIAS** Civil Application No. 5 of 2011 **ANDREA MSABILA v JOSEPH MASANJA**, Civil Application No.4 of 2004 (both unreported))

In the present case, the period allowed for appealing against the impugned order is 60 days from the date of filing the notice of appeal, which was on 15th April, 2014. This is according to Rule 90(1). Since the Notice of Motion was filed on 16th April, 2014 the application was lodged well within time. We are therefore not impressed, and so also reject this preliminary objection.

The preliminary objections are therefore misconceived. They are accordingly dismissed with costs. The substantive application for stay should now be placed for hearing on merit.

DATED at DAR ES SALAAM this 12th day of February, 2015

S. A. MASSATI
JUSTICE OF APPEAL

K. K. ORIYO
JUSTICE OF APPEAL

B.M.K.MMILLA
JUSTICE OF APPEAL

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



Malewo M.A
DEPUTY REGISTRAR
COURT OF APPEAL