IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

CIVIL APPLICATION NO. 93 OF 2015

(CORAM: RUTAKANGWA,J.A., KIMARO, J.A., And KAIJAGE, J.A.)

HAMMERS INCORPORATION CO. LTD ..... APPLICANT

VERSUS

THE BOARD OF TRUSTEES OF THE CASHEWNUT INDUSTRY DEVELOPMENT TRUST FUND .....RESPONDENT

(Application to Rescind the Order of stay of Execution from the decision of the High Court of Tanzania at Dar es Salaam)

(Nyangarika, J.)

dated 31st day of July, 2014
in
Commercial Case No. 108 of 2013

RULING OF THE COURT

21st August & 23rd September, 2015

RUTAKANGWA, J.A.:

Nearly half a century ago, the erstwhile Court of Appeal for East Africa in the case of **MUKISA BISCUT MANUFACTURING CO. LTD v. WEST END DISTRIBUTORS LTD** [1969] E.A. 696, made this pertinent observation. It said:

> *"The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of*

preliminary objection. The improper raising of points of preliminary objection does nothing but unnecessarily increases costs and, on occasion, confuses issues. ***This improper practice should stop".*** [Emphasis is ours].

It was hoping against hope. We believe that had that Court survived to this day it would have issued a sterner warning. This is because the ***"improper practice"*** never stopped. Neither did it ebb away. On the contrary, it is on the increase. This forced the Full Bench of this Court in **KARATA ERNEST & OTHERS v THE ATTORNEY GENERAL**, Civil Revision No. 10 of 2010 (unreported) to mildly urge all parties in judicial proceedings to pay heed to what was aptly pronounced in the **MUKISA BISCUIT** case (supra). The late call appears to be falling on deaf ears as this ruling will demonstrate.

The application before the Court is seeking an order to vary or rescind the order of stay of execution issued by the Court on 30th September, 2014 in Civil Application No. 156 of 2014. The application is brought under Rule 64(2) of the Tanzania Court of Appeal Rules, 2009

("the Rules"). We are convinced that a brief background of it will tell it all. It is as follows:-

On 31st July, 2014 the High Court (Commercial Division) issued a decree against the respondent in Commercial Case No. 108 of 2013. Thereafter, the respondent lodged a notice of appeal to this Court as well as Misc. Commercial Cause No. 207 of 2014 in the High Court seeking a stay of execution order. The application in the High Court was struck out on grounds of want of jurisdiction. Unperturbed, the respondent lodged Civil Application No. 156 of 2014 in this Court seeking a stay order under Rule 11(2) (b), (c) and (e) of the Rules. The order was granted on 30th September, 2014.

On 7th October, 2014, the Applicant lodged in this Court Civil Application No. 166 of 2014 requesting the Court to strike out the notice of appeal on which, admittedly, the stay of execution order had been predicated on account of failure on the part of the respondent/intended appellant to take essential steps, and to rescind the stay order.

When Civil Application No. 166 of 2014 was called on for hearing, Mr. Peter Kibatala, learned advocate for the respondent, rose to inform the

Court that he was not opposed to the notice of appeal being struck out. However, he resisted the second prayer as the Court had not been properly moved. He strongly submitted that the Court could properly rescind or vary the stay of execution order, if moved only under Rule 64(2) of the Rules. The Court agreed with him.

Rule 64 of the Rules reads as follows:

> *"64.-(1)An order made on an application heard by a single Justice may be varied or rescinded by that Justice or any other Justice or by the Court on the application of any person affected by it, if-*
>
> *(a) the order was one extending the time for doing any act otherwise than to a specific date, or*
>
> *(b) the order was one permitting the doing of some act without specifying the date by which the act was to be done and the person on whose application the order was made has failed to show reasonable diligence in the matter.*
>
> *(2) An order made on an application to the Court may similarly be varied or rescinded by the Court."*

In upholding Mr. Kibatala, the Court had lucidly reasoned thus:-

> *"On our part, we wish to state that since the respondent does not contest the application to strike out the notice of appeal, the same is accordingly struck out under Rule 89(2) of the Court of Appeal Rules, 2009. Secondly, we agree with Mr. Kibatala, that it is not true that once a notice of appeal is struck out, an order of stay which has already been granted is also automatically vacated. That is not the law. A notice of appeal only supports an application for stay. Once the order of stay is granted it operates independently of the notice of appeal unless it is varied or vacated by the Court under Rule 64(2) of the Rules. But since this provision was not cited to us, the Court was not properly moved. There is now a thick forest of authorities, including Rule 48(1) of the Rules that any relief sought must be supported by a specific rule under which it is brought. This was not cited, and so the Court cannot grant such relief".*

Having accepted, with grace, the above ruling, the applicant came up with Civil Application No. 213 of 2014 seeking a similar order. He was again unsuccessful as it was struck out on the ground that it had failed to

attach a copy of the Court's ruling and order striking out the earlier application, hence this application. The same is brought under Rule 64(2) of the Rules.

Before this application was called on for hearing, Mr. Kibatala lodged a notice of preliminary objection with four points. These are:-

> "1. *That the Application is incurably defective in that it is supported by wrong and inapplicable provisions of the law.*
> 2. *The Application is time-barred.*
> 3. *That, the Affidavit in support of the Application is fatally defective in that the jurat of attestation does not show if the Affidavit is Affirmed and* ***Delivered*** *at Dar es salaam or just Affirmed at Dar es salaam.*
> 4. *That, the* ***Applicant*** *is fatally defective in that paragraph 2 contains prayer and/or arguments."* [Emphasis is ours].

At the hearing of the application the applicant was advocated for by Mr. Nduruma Keya Majembe and Mr. John Mhozya, learned advocates. Mr. Kibatala represented the respondent. We heard oral submissions in respect of the points of preliminary objection and reserved our ruling

thereon in order to save time, undertaking to incorporate it in the ruling on the determination of the application on merit. We shall accordingly start with the ruling on the points of preliminary objection.

It was Mr. Kibatala's contention before us that the sought order of rescinding or varying the stay of execution order should not be issued as the Court has been wrongly moved under Rule 64(2) of the Rules. Abandoning his earlier position on the issue, he strenuously argued that he had then erroneously misinterpreted Rule 64 as he now believes that the entire Rule covers only the situations prescribed in paragraphs (a) and (b) of sub-rule (1). To him, therefore, the proper enabling provision would be Rule 4(2) (a), (b) and (c). The response of Mr. Majembe was brief. He submitted that they cited the proper Rule and this point of objection should be rejected.

In resolving this issue we have found it unavoidable to observe that inasmuch as Mr. Kibatala seeks to rely on Rule 4(2), he appears to be engaged in a shot in the dark exercise, the type of practice frowned upon in the **MUKISA BISCUT** case (supra). We are saying so advisedly because Rule 4(2) is disjunctive and is meant to cover diverse and distinct situations. Indeed, after reading the ruling of the Court in Civil Application

No. 166 of 2014, we would have justifiably invoked Rule 4(2), (c) of the Rules and rejected this point of preliminary objection at the threshold. We did not do so in order to avail ourselves of the opportunity to put more flesh on the Court's reasoning in the said ruling.

Rule 64 in its entirety clothes this Court with jurisdiction to rescind or vary its own orders given under various provisions of the Rules. Rule 64(1) specifically deals with rescinding of orders made by a single Judge of the Court. The varying or rescinding order may be made by the Judge who had earlier given the order, another Judge of the Court or by the Full Court or Bench. However, these orders must be in relation to:

> *(a) extension of time for doing any act, otherwise than to a specific date, and/or*
>
> (b) *permitting the doing of some act, without specifying the date by which the act was to be done* ***and*** *the person on whose application the order was made fails to show reasonable diligence in the matter.*

Yet, the Court makes or issues many orders, which do not necessarily grant extensions of time or permit the applicant to perform a specified act within a given time or otherwise.

The application before us, is for varying or rescinding the stay of execution order which was given in favour of the respondent upon its application. It cannot be brought within the ambit of Rule 64(1) as the stay order did not require or permit the respondent to do any act which it has failed to do. The order was self-executing. So should the applicant be kept without a remedy, if indeed it has a legal right to protect? Our firm answer is in the negative, for it is trite law that where there is a right, there is a remedy. This remedy is enshrined in Rule 64(2) of the Rules. Under this provision, an order made by the Court in situations other than those mentioned in sub-rule (1) may for the same reason (similarly) be varied or rescinded by the Court and not a single Judge of the Court, regardless of whether it had been issued by a single Judge or Full Court, that is, if the person on whose application it was made fails to show diligence in the matter. A clear example is where one gets a stay of execution pending appeal and does not institute the appeal.

Indeed, that was the spirit of the ruling of the Court in Civil Application No. 166 of 2014. We accordingly hold that the Court has been properly moved under Rule 64(2) of the Rules, and proceed to dismiss the first point of preliminary objection.

After studying Rule 64 as a whole, we have found ourselves constrained to hold without any demur that the second point of preliminary objection lacks merit too. No time limit has been imposed at all as to when applications of this nature should be brought.

Mr. Kibatala, relying on **AMOUR HABIBU v. HUSSEIN BAPAGI,** Civil Revision No. 101 of 2004, had urged us to draw inspiration from the Law of Limitation Act, Cap 89 and impose a sixty-day limitation period. The idea is attractive but, to us, it is inexpedient in the circumstances. We think that counsel should always keep in mind that judicial legislation is in millimeters and not in kilometers. We are asserting so deliberately because the 1979 Court Rules contained an identical provision (Rule 59). When the Rules were promulgated in 2009, and became effective on 1/02/2010, a year after the ruling in **Amour's** case, it was not found desirable to impose such a limitation in applications under Rule 64, as was done in relation to applications for execution (Rule 11(2) (c)), revision (Rule 65(4)) and a review (Rule 66(3)). We shall not do so here lest we defeat the vested right of the applicant.

Before leaving this point, we have this further observation to make. People cherish the idea of drawing inspiration from the Law of Limitation Act, which does not apply to this Court at all. However, they do not realize the insidious dangers inherent in the process. This advocated for process if lavishly embraced, will eventually lead us to the strict provisions of s. 3 of this Act, which enjoins courts to dismiss and not strike out, as we do, time barred proceedings.

With this caution in mind, we dismiss this point of objection also.

We should state at the outset that we have found the third point of preliminary objection to be as novel as it is ingenious. Nevertheless, we gathered from Mr. Kibatala's submission before us that it is rooted on section 8 of the Notaries Public and Commissioners for Oaths Act, Cap. 12.

The said section 8 of Cap. 12 provides as follows: -

> *"Every notary public and commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat of attestation at what place and on what date the oath or affidavit is taken or made."*

In the case of the **DIRECTOR OF PUBLIC PROSECUTIONS v DODOLI KAPUFI & ANOTHER**, Criminal Application No. 11 of 2008, the Court lucidly held as follows: -

> *"Of greater significance in the determination of this application, in our considered opinion, is the "jurat". The word "jurat" has its origin in the latin word "jurare" which meant "to swear". In its brevity a jurat is a certification added to an affidavit or deposition stating when, where and before what authority (whom) the affidavit was made. See, section 8 of the Notaries Public and Commissioners for Oaths Act, Cap 12 R.E. 2002. Such authority, usually a Notary Public and/or Commissioner for Oaths, has to certify three matters, namely:-*
>
> *(i) that the person signing the document did so in his presence,*
>
> *(ii) that the signer appeared before him on the date and at the place indicated thereon, and*
>
> *(iii) that he administered an oath or affirmation to the signer, who swore to or affirmed the contents of the document.*
>
> *[see BLACK'S LAW DICTIONARY, (supra)].*

Total absence of the jurat, or omission to show the date and place where the oath was administered or the name of the authority and/or the signature of the deponent against the jurat, renders the affidavit incurably defective. There are a plethora of authorities to bear us out on this assertion."

Reading section 8 of Cap 12 together with the above holding of the Court, it becomes obvious that neither statutory law nor case law demands the inclusion of the word "DELIVERED" in the jurat. Mr. Kilibata readily conceded this glaring fact, but urged us to read that word into section 8. For the reasons stated in our discourse on the second point of preliminary objection, we shall not do so. Since, therefore, the third point of preliminary objection is, unarguably, misconceived, we are enjoined by law to dismiss it as we hereby do.

The last point of objection is equally less intractable. We should be our own vindicators in so asserting. There is no gainsaying here that the Applicant in this case is a legal personality, i.e. **Hammers Incorporation Co. Ltd.** That being the case, it does not add up that "the Applicant is **fatally defective**". Mr. Kibatala did not demonstrate to us how Hammers Incorporation Co. Ltd, is or could be "fatally defective." But we shall

benevolently assume that he had meant 'Affidavit" and indeed he submitted along those lines.

The thrust of Mr. Kibatala's submission is that the affidavit in support of the notice of motion is fatally defective "in that paragraph 2 contains **prayers and/or arguments"**. Again here, Mr. Kibatala cannot escape criticism for, in our respectful opinion, being ambivalent. Even in his submissions he generally contended that paragraph 2 contains prayers and arguments because it is averred therein that "the hearing and determination of this Application is a matter of **extreme urgency"**. He accordingly pressed us to strike it out and once it is struck out the "affidavit collapses."

Responding to this apparent onslaught, Mr. Majembe argued that the averments in paragraph 2 are factual assertions containing neither prayers nor arguments.

The law on affidavits, which should be confined to facts, was further articulated by this Court in **JUMA SAID & YAHAYA ABDALLAH v R**, Criminal Application No. 4 of 2010. It succinctly said:

"The purpose of an affidavit, therefore, is to convey to the court and the other party some facts material to the case from the best sources... According to ***DODOLI KAPUFI's*** *case (supra), the purpose of the verification clause is to show whether the facts asserted by the deponent are true of his own knowledge or based on information or beliefs."*

We have had the opportunity of studying the impugned affidavit. In accordance with the mandatory statutory requirements, it contains a verification clause. This clause reads thus:

"I, Haroun Rashid Maarifa being the Principal Officer of the Applicant authorized and sufficiently versed with the facts of the suit hereby verify that all what is stated in paragraphs 1, 2, 3, 4, 5, 6, 7, 8 and 9 hereinabove are true to the best of my knowledge."

We have found the above quoted verification clause to be perfectly in order. As correctly submitted by Mr. Majembe, the averments in paragraph 2 of the 9-paragraph affidavit, including the urgency of the matters, appear to us to be mere factual assertions of fact within the personal knowledge of the deponent for the reasons stated therein. For this reason, we find the

affidavit in support of the notice of motion, to be legally proper. We overrule, therefore, the fourth point of preliminary objection.

All said and done, we dismiss the four points of preliminary objection with costs to the applicant.

Coming to the substantive application, it was Mr. Majembe's strong contention that the application ought to be allowed and the existing stay of execution order be rescinded. The notice of appeal on which it was premised having been struck out, he argued, the stay order has no legal leg to stand on. It was his submission that the respondent having failed to institute the intended appeal, it should not be allowed to continue *"to benefit from the order for stay of execution while there is nothing pending before the Court".*

In his brief oral submission in response, Mr. Kibatala posited that "*orders of stay of execution are issued to preserve the meaning of the appellate process".* From this premiss he submitted that as a proper notice of appeal has already been lodged and served on the applicant, "the purpose of stay still exist" and the sought order should be denied. Responding to a question from the Court, Mr. Kibatala conceded that the

existing notice of appeal was lodged not only after the institution of these proceedings, but after counsel for the applicant had lodged the written submissions.

Mr. Majembe's rejoinder was equally brief. He tellingly said:-

> *"The existing order of stay is based on Civil Application No. 156 of 2014 and cannot be pegged on a new notice of appeal whose validity is yet is yet to be tested".*

After considering the material before us, we have found that the pertinent issue requiring our determination is whether the applicant has presented a strong case to deserve the grant of the sought relief. In resolving this issue we have found it not only convenient but also unavoidable to commence with one major premiss which is located in Rule 11(2) of the Rules. This is that in all civil appeals to this Court, an institution of an appeal "shall not" automatically "operate as a stay of execution of the decree or order appealed from". From the above flows a minor premiss to the effect that, however, after a notice of appeal has been lodged, the Court, in its absolute discretion, may upon good cause shown, order the execution to be stayed following full compliance by the

applicant with the provisions of Rule 11(2)(d) of the Rules. It goes without saying, therefore, that under the scheme of Rule 11(2) of the Rules the sole condition precedent for the institution of an application for grant of stay of execution of decree is the existence of a notice of appeal duly lodged in accordance with Rule 83 of the Rules. A stay of execution order cannot either be sought or granted in the absence of or in the anticipation of lodging of a notice of appeal. Therefore, to have legal effect a stay of execution order must be supported by an existing notice of appeal duly lodged in the Court.

The conclusion to be drawn from the above premise is that once a notice of appeal on which a given stay of execution order rested is found wanting in validity, and/or is withdrawn or struck out under Rule 89 or is deemed withdrawn under Rule 91 of the Rules, then the substratum of the stay order collapses. This is because a stay of execution is granted for the sole purpose of preserving the status quo pending the hearing and determination of the appeal or *"to preserve the meaning of the appellate process"* as Mr. Kibatala philosophically put it. If there is no appeal, the stay order becomes meaningless and indeed an unjustifiable denial of the decree holder's vested right to enjoy the fruits of the decree in his favour

without let or hindrance: See, **IGNAZIO MESSINA & NATIONAL SUPPLIES AGENCIES V. WILLOIN INVESTMENT & COSTA SHINYANGA,** Civil Reference No. 8 of 1999.

As correctly argued by Mr. Majembe and not disputed by Mr. Kibatala, the existing stay order was granted in Civil Application No. 156 of 2014 on the strength of an appeal brought into existence by the notice of appeal which was struck out.

The Court, indeed, categorically said:-

> *"We therefore order that the execution of the High Court decree* ***be stayed pending the determination of the applicant's appeal in this court."***

That appeal, it is our conclusive finding, collapsed on 10th December, 2014, when the notice of appeal on which it was based was struck out. What remained was for the applicant to take the necessary steps under Rule 64(2) of the Rules to have the stay order granted on 30th September, 2014, which was left hanging in the air, rescinded. This is what the applicant is seeking in this application.

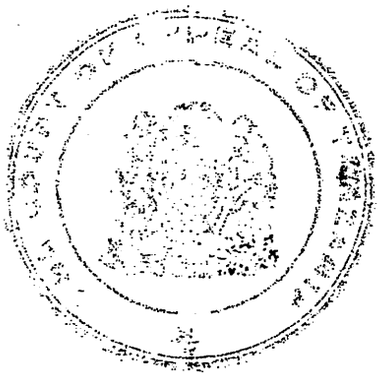
We have noted and Mr. Kibatala has conceded that much, that this application was lodged on 8th May, 2015, long before the respondent lodged a fresh notice of appeal, whose "validity is yet to be tested" as aptly observed by Mr. Majembe. It will accordingly be accepted without further argument that by the time the applicant sought the indulgence of the Court to have the stay order rescinded, there was no pending appeal by the respondent in this Court on which the stay order could be pegged. The right of the applicant to have the stay order rescinded accrued on 8th May, 2015 and in our respectful opinion, it was not extinguished by the respondent's subsequent lodging of another notice of appeal. This application, in our view, must be determined on the basis of the circumstances obtaining on 8th May, 2015. It is from this perspective that we have found ourselves constrained to hold that the applicant has presented a good case for the grant of the order sought in these proceedings.

In fine, we allow this application in its totality. The stay of execution order granted by the Court on 29th September, 2014, is hereby rescinded

under Rule 64(2) of the Rules. The respondent is at liberty to seek a fresh stay order. The applicant to have its costs.

It is so Ordered.

DATED at **DAR ES SALAAM** this 17th day of September, 2015.



E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

N. P. KIMARO
JUSTICE OF APPEAL

S. S. KAIJAGE
JUSTICE OF APPEAL

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

E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL