

**IN THE COURT OF APPEAL OF TANZANIA**

**AT DAR ES SALAAM**

**(CORAM: MJASIRI, J.A., JUMA, J.A. And LILA, J.A.)**

**CIVIL APPLICATION NO 233 OF 2016**

**SERENGETI BREWERIES LIMITED.....APPLICANT**

**VERSUS**

**HECTOR SEQUIRAA.....RESPONDENT**

**(Application from the decision of the High Court of Tanzania**

**at Dar es Salaam)**

**(Mipawa, J.)**

**dated the 2<sup>nd</sup> day of June, 2016**

**in**

**Civil Revision No. 287 of 2015**

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**RULING OF THE COURT**

**28<sup>th</sup> & 2<sup>nd</sup> December, 2016:**

**JUMA, J.A.:**

SERENGETI BREWERIES LIMITED, the applicant, is urging the Court to stay the execution of the decision of the High Court of Tanzania (Labour Division) given by Mipawa, J. on 2<sup>nd</sup> June, 2016 in Revision No. 287 of 2015. To move the Court, the applicant placed reliance on Rule 11 (2) (b), (c) and (d) (i), (ii) and (iii) of the Tanzania Court of Appeal Rules, 2009

**(the Rules)**. The Notice of Motion is predicated on four grounds which were expounded in the affidavit sworn to by LUCIA MINDE the Company Secretary of the applicant.

Although the Respondent did not file an affidavit in reply, he all the same opposed this application by a Notice of Preliminary Objection dated the 13<sup>th</sup> day of September, 2016 and filed on the same day under Rule 4 (2) (a) and (b) of the Rules. The objection reads:

*"TAKE NOTICE that on the first day of hearing of this Application, the Respondent shall raise a Preliminary Objection on a point of law to the effect that no Notice of Appeal has been served on him, contrary to the mandatory provisions of **Rule 84 (1) of the Tanzania Court of Appeal Rules, 2009.***

*The Respondent will therefore pray that the Application should be struck out with costs, for being incompetent."*

At the hearing of the preliminary point of objection on 28<sup>th</sup> November, 2016, learned counsel Mr. George Kilindu represented the Respondent while learned counsel Mr. Waziri Mchome appeared for the Applicant.

Submitting that the Respondent has not to the date of hearing been served with any Notice of Appeal, Mr. Kilindu referred to Rule 84 (1) of the Rules to contend that the application for stay of execution is incompetent. Rule 84 (1) of *the* Rules states:

*"84 (1) - An intended appellant shall, before, or within fourteen days after lodging a notice of appeal, serve copies of it on all persons who seem to him to be directly affected by the appeal; but the Court may, on an ex parte application, direct that service need not be effected on any person who took no part in the proceedings in the High Court."*

Placing reliance in **Ibrahim Seleman Sindila vs. Ahmed Juma**, Civil Appeal No. 49 of 2014 and **Regional Manager-TANROADS Lindi vs. DB Shapriya and Company Limited**, Civil Application No. 126 of 2011 (both unreported) and Mr. Kilindu forcefully argued that as long as the Respondent was not served with a Notice of Appeal, he cannot be

called upon to respond to an application for a stay of execution because the latter application is not competent for want of a valid Notice of Appeal. He added that the affidavit in support of an application should at the very least have averred that the intending appellant served the Respondent with a copy of the Notice of Appeal.

Submitting to oppose the preliminary objection, Mr. Mchome insisted that an application seeking an order of stay of execution made under Rule 11 (2) of the Rules does not require an applicant to show proof of service of Notice of Appeal on the Respondent as suggested by the Respondent's counsel. What the Applicant Company herein needed to show, he submitted, is that the Company had lodged its Notice of Appeal with the Registrar of the High Court under Rule 83 of the Rules, which it has averred to under paragraph 18 of the supporting affidavit which states:

*"18.-The applicant has lodged notice of appeal against the decision of the High Court of Tanzania (Labour Division) at Dar es Salaam and has also applied for copies of proceedings, decree*

*and certified exhibits for purposes of appeal. Copy of the notice of appeal and letter applying for proceedings, decree and certified exhibits are annexed hereto collectively marked ANNEX 'SBL-8' to be read as forming part of this affidavit."*

The learned counsel for the Applicant proceeded to highlight the significance of the failure of the Respondent to lodge an affidavit in reply wherein the Respondent would have averred that he was not served with, but also countered what the applicant had averred under paragraph 18 of the supporting affidavit.

Further, Mr. Mchome submitted that had the Respondent raised the issue of lack of service of the Notice of Appeal in his affidavit in reply, the Applicant Company would have in his written submissions disclosed the salient events that followed subsequent to lodging the Notice of Appeal. These events included how on 2<sup>nd</sup> August 2016 by way of the Civil Application No. 178 of 2016, the Applicant Company applied for an extension of time to serve the Respondent with a Notice of Appeal.

Although that application for extension of time was struck out on 24<sup>th</sup> October 2016, the Applicant would have submitted on how it filed a fresh application (i.e. the Civil Application No. 469 of 2016 which is still pending in this Court) for extension of time to serve the Respondent with a copy of the Notice of Appeal.

In urging us to dismiss the preliminary point of objection, Mr. Mchome submitted that the two decisions of the Court which Mr. Kilindu placed reliance on were not relevant to an application for a stay of execution. He pointed out that **Ibrahim Seleman Sindila vs. Ahmed Juma (supra)** did not deal with an application for stay. It was an appeal, whose record was found incomplete because the Notice of Appeal had not been served on the Respondent therein. Mr. Mchome similarly submitted that although the decision of the Court in **Regional Manager-TANROADS Lindi vs. DB Shapriya and Company Limited (supra)** was about an application for stay of execution, the first objection that was raised therein was about competence of an application for stay that was not accompanied with a Notice of Appeal.

In rejoinder, Mr. Kilindu submitted that by identifying the two applications [Civil Application No. 178 of 2016 and Civil Application No. 469 of 2016] for extension of time within which to serve the Respondent with the Notice of Appeal, Mr. Mchome has conceded that this application is incompetent for failing to comply with Rule 84 (1) of the Rules.

From submissions of the two learned Counsel, the main issue calling for our determination of the preliminary objection is whether the objection raises a pure point of law within the parameters set in the decision of the Eastern Africa Court of Appeal in **Mukisa Biscuit Manufacturing Company Limited vs. West End Distributors Limited** [1969] EA 696 as expounded by the Court in **Hezron M. Nyachiya vs. 1. Tanzania Union of Industrial and Commercial Workers, 2. Organisation of Tanzania Workers Union**, Civil Appeal No. 79 of 2001 (unreported) to the effect that there can be no pure point of law where there are certain facts that require proof by evidence.

In **Hotels and Lodges (T) Limited vs. The Attorney General and Chapwani Hotels Limited**, Civil Appeal No. 27 of 2013 (unreported)

the Court insisted that pure points of law must be strictly be discerned from within the parameters of the pleadings, but not from matters not pleaded:

*"...We think that pure points of law for the purposes of determination of preliminary objections arising from suits must be found strictly within the parameters of the pleadings. This has been the position taken by this Court ever since the decision of the Eastern African Court of Appeal in **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696**. This Court has determined the existence or otherwise, of pure points of law by looking at what the parties have stated in their pleadings and not from any other matters that are outside the parameters of the pleadings. (See- **Shahida Abdul Hassanaii Kassam v. Mahed Mohamed Gulamali Kanji**, Civil Application No. 42 of 1999 (unreported) and **Hezron M. Nyachiya vs. 1. Tanzania Union of Industrial and Commercial Workers 2. Organization of Tanzania Workers Union**, Civil Appeal No. 79 OF 2001 (unreported)."*



Back to the instant application before us, apart from statements made by the two learned advocates from the bar, there is nothing in the affidavit on record wherein the applicant concedes as a matter of fact that the Respondent was not served with a Notice of Appeal. It is not in dispute that the learned counsel for the Respondent did not seize the opportunity provided for under Rule 56 (1) of the Rules to file an affidavit in reply wherein he had the chance to assert the matter of fact that he was not after all served with the Notice of Appeal. The relevant Rule 56 (1) states:

*" 56(1) Any person served with a notice of motion under Rule 54 **may lodge one or more affidavits in reply and shall as soon as practicable, serve a copy or copies of the affidavit or affidavits on the applicant**"* [Emphasis ours].

Although Rule 56 (1) of the Rules is evidently not couched in mandatory terms and leaves much room to the Respondent to just enter an appearance at the date of hearing and orally oppose the application,

ramifications for failure to file affidavit in reply may be adverse to such respondent where like in the instant application a preliminary objection is raised on a matter requiring proof and the Court needs to be satisfied that the objection raises a pure point of law over matters that do not require further proof beyond what is averred in the affidavits.

It is therefore academic for this Court to delve into the legal proposition which Mr. Kilindu invited us to consider; to the effect that failure of the Applicant to serve a Notice of Appeal on the Respondent rendered the application for a stay of execution filed under Rule 11 (2) of the Rules, incompetent before the Court.

As long as the pleadings do not settle the question of fact whether the Applicant served the Respondent with a Notice of Appeal in terms of Rule 84 (1) of the Rules; the preliminary point of objection before us does not raise any pure point of law sufficient to dispose of this application at this stage.

In the upshot, the preliminary objection is hereby dismissed. The costs shall abide the outcome of the Notice of Motion to be heard on the date to be fixed by the Registrar.


**DATED** at **DAR ES SALAAM** this 29<sup>th</sup> day of November, 2016.

S. MJASIRI  
**JUSTICE OF APPEAL**

I.H. JUMA  
**JUSTICE OF APPEAL**

S.A. LILA  
**JUSTICE OF APPEAL**

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

  
B.R. NYAKI  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**

