

10

IN THE HIGH COURT OF TANZANIA
AT DAR ES SALAAM

CIVIL APPLICATION NO. 53 OF 1998

MOHSIN MOHAMED TAKI ABDALLAH.....PETITIONER

VERSUS

TARIQ MIRZA)
DEUSDEDIT KISTISIWE)
MOHAMED DAMJI).....RESPONDENTS
TILE AND TUB LTD)
REGISTRAR OF COMPANIES)

R U L I N G

KALIGEYA, J.

Dissatisfied with the ruling of this court (Nsekela, J), which dismissed their preliminary objections, the 1st and 4th Respondents filed a notice of Appeal to the Court of Appeal and proceeded to apply for copies of proceedings, ruling and order, which up to the time of this ruling (as per representations made by parties during the hearing of the matter leading to this ruling) the same have not been supplied. Matters being as they are the Petitioner applied to the court to have his application for temporary injunction heard, which prayer attracted a stiff objection from Respondents who countered that as there is a notice of Appeal to the Court of Appeal this courts' hands are tied and cannot proceed with such application. This ruling is in respect of that controversy.

For clarity some background to the whole issue is necessary.

According to the records at hand, the Petitioner\Applicant, Mohsin Mohamed Taki Abdallah and the 1st - 3rd Respondents (Tariq Mizra, Deusdedit Kikisiwe, Mohamed Damji) formed a company in the name of the 4th Respondent (Tile and Tub Ltd) in 1992. Their business went on undisturbed until 1997 when they fell apart.

Joint deliberations settled on an understanding, among others, that the 1st and 2nd Respondents buy out the Petitioner from the 4th Respondent. The terms, as well as whether those terms were fulfilled are contested between them. The Petitioner alleges that not only were the terms not complied with but also the Respondents went further to fraudulently manufacture a document which purports to show that he had already transferred his shares. The Petitioner therefore urged this court for judgement and decree against Respondents for, among others,

"(a) A declaratory order that the purported transfer of the Petitioner's share to the 2nd and 3rd Respondents is null and void.

(b) That this.....court be pleased to order the winding-up of the 4th Respondent Company".

The Petitioner did not end there for he filed a chamber summons supported by affidavit praying for

"(a) Exparte (This was heard and dismissed with directions that the application should be heard 'Interpartes').

(b) INTERPARTES

1. That this Honourable court be pleased to issue a temporary injunction restraining the 1st, 2nd and 3rd Respondents from moving or transferring in any way the stock of the 4th Respondent Company by locking up the showroom and warehouse of the aforementioned Company situated on Plot No. 4 Nyerere Road pending the hearing and determination of the Petition.
2. That this Honourable Court be pleased to issue a temporary injunction restraining the 1st, 2nd and 3rd Respondents from conducting and/or managing the affairs of the 4th Respondent Company pending the hearing and determination of the Petition".

In response to the whole issue and when the application for temporary injunction was about to be heard the 1st and 4th

Respondents raised preliminary objections that,

- "(a) That this Honourable Court has no jurisdiction to entertain both the application for temporary injunction and the Petition.
- (b) That the Applicant\Petitioner has no locus standi
- (c) That the Petitioner has no cause of action against the Respondents".

The court tackled the objections first which were dismissed and this was followed by the lodging of the Notice of Appeal as already referred to. The Petitioner insists that let the appeal against the ruling proceed but that the application for temporary injunction should meanwhile be heard and decided, which is being vigorously contested by the Respondents.

The only issue in this matter is whether in the circumstances this court can now proceed to hear and determine the application for temporary injunction. Having carefully considered the same I have arrived at the opinion that it can't. I purposely quoted above the prayers contained in the petition; the preliminary objections and the prayers that are to be considered in the application for temporary injunction - just for clarity, by putting together the gist of the whole controversy.

The Respondents are contesting among others, the jurisdiction of this court and the existence of a cause of action. In the circumstances, would it be proper to proceed with the hearing of the application for temporary injunction when the main body on which that application is hinged is being challenged in the Court of Appeal? My simple answer is no. The matter for which the temporary injunction is being applied for is no longer within the powers of this court but that of the Court of Appeal by virtue of the Notice of Appeal already filed. On this I am treading on the guidance of the Court of Appeal of Tanzania in CIVIL REFERENCE NO. 25 OF 1997, In the Matter of an Intended

Appeal between THE NATIONAL INSURANCE CORPORATION (Applicant) and KWEYAMBAH QUAKER (Respondent), Dsm Registry, unreported.

In the abovesaid case, following a dismissal of his two applications - an application to set aside an *ex parte* judgement and stay of execution, the applicant filed two applications, namely, an application for extension of time to present a fresh application to set aside the *ex parte* judgement and a fresh application for stay of execution. A week later the applicant employed another tactic, for, he lodged a notice of Appeal against the *ex parte* judgement. Again, shortly thereafter, the applicant's Counsel approached the High Court with a certificate of urgency urging for early hearing of the two applications, adding that he was withdrawing the appeal. Before the Court of Appeal, the argument, among others was whether the High Court could proceed with the hearing of the two applications while the notice of Appeal subsisted. The Court of Appeal after holding that the notice could not be removed by the High Court also decided that once there is such notice the matter is removed from the High Court unto the Court of Appeal. The Court held,

"There are therefore two issues for consideration and determination, that is, whether a notice of Appeal removes a case from the High Court to the Court of Appeal andbeginning with the first issue, we have no hesitation answering it in the positive, and for these reasons. First of all, as pointed out by the Learned single judge, a notice of appeal, is as per Form D, instituted 'In the Court of Appeal of Tanzania', and this in our view, means that the notice is addressed to the Court of Appeal
.....
.....
We are satisfied having regard to these factors, and agree with Kisanga, J.A, that a notice of Appeal has the effect of removing a case to the Court of Appeal".

In that case, the Counsel for the applicant also argued that notwithstanding the lodging of a notice of appeal the High may

still deal with the matter and cited the question of granting leave or deciding on the existence or otherwise of a point of law. The Court of Appeal responded as under,

".....The provision is merely procedural and its primary purpose is to provide that a notice of appeal can be lodged before leave to appeal or a certificate on a point of law is obtained: cf. Motel Schweitzer v T..E. Cunningham & Another, (1955) 22 EACA 252, 254. The rule takes into account the fact that it involves a process, which invariably spills into weeks and months to obtain leave to appeal or to obtain a certificate on a point of law, whereas a notice of appeal has to be lodged within fourteen days of the decision against which it is desired to appeal. The rule does not purport to bring back for the attention of the High Court a matter already before the Court of Appeal" (emphasis mine).

In the circumstances therefore, the Respondents argument is sound. They are saying that there should be no case against them in this court. This court decided that the case is properly filed before it. The Respondents are challenging this before the Court of Appeal. They are challenging the whole decision hence everything has been removed unto the Court of Appeal. What then can be said to have remained with this court on which the application as the one at hand can be based? I see nothing. For the clear reasons discussed above the application by the Petitioner that the application for temporary injunction should be heard by this court is dismissed.

(L. B. Kalegeya)

JUDGE

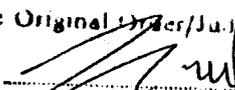
Delivered in the presence of Mr. Msemwa, Miss Sheikh and Magafu.

AT DAR ES SALAAM
2ND NOVEMBER, 1998

(L. B. Kalegeya)

JUDGE

I certify that this is a true and correct copy
of the Original Order/Judgment/Kaling.


Senior Deputy Registrar
High Court of Tanzania

Dated 6-11-98 at 98