IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MAKAME, J.A., SAMATTA, J.A., And LUGAKINGIRA, J.A.)

CIVIL REFERENCE NO. 12 OF 1998

BETWEEN

ELNASR EXPORT & IMPORT COMPANY. . . . . APPLICANT

AND

NAHD TRADING COMPANY. . . . . RESPONDENT

(Reference from the Ruling of a single Judge of the Court of Appeal of Tanzania at Dar es Salaam)

(Lubuva, J.A.)

dated the 4th day of September, 1998

in

Civil Application No. 10 of 1998

RULING OF THE COURT

SAMATTA, J.A.:

This is a reference brought under Rule 57 (1) (b) of the Tanzania Court of Appeal Rules, 1979 (hereinafter referred to as "the Rules") from a ruling of a single judge of this Court (Lubuva, J.A.). In that ruling, the learned single Judge dismissed the applicant's application for stay of execution of a decree passed by the High Court (Kaji, J.) following an ex parte judgment entered in favour of the respondent.

The following is the background to the application. In July 1994 the respondent filed a suit in the High Court against the applicant, claiming from it a collosal sum of money. Following non-appearance of the applicant's counsel at the hearing of the case, on July 10, 1997, Kaji, J., entered an ex parte judgment in the respondent's favour. It is not in dispute that no notice of appeal was lodged in respect of that decision. On August 15, 1997, following an application by the respondent for execution of the decree the High Court issued an

.../2

order for attachment of the applicant's property and a garnishee order against its (the applicant's) bank account. Having become aware of those legal steps, the applicant rushed to the High Court and there filed an application for (1) setting aside the ex parte judgment; (2) an order raising the attachment order; and (3) stay of execution. The application was heard by Chipeta, J. The learned Judge dismissed it. The applicant was aggrieved by that decision. Six days later, it lodged a notice of appeal in respect of it. The body of that notice read as follows:

> "TAKE NOTICE that EL NASR EXPORT & IMPORT COMPANY LTD., the Appellant above-named, being dissatisfied with the decision of the Honourable Mr. Justice B.D. CHIPETA, given at Dar es Salaam on the 16th day of February 1998, intends to appeal to the Court of Appeal of Tanzania against the whole of the said ruling".

The applicant then filed the application before this Court, which eventually the learned single Judge dismissed. The learned single Judge held that as the applicant had filed no notice of appeal in respect of Kaji, J.'s judgment, the subject of the application for stay of execution, the application for stay of execution was incompetent in law. In the course of his ruling, he cited the provisions of Rules 9 (2) (b) and 76 (6) of the Rules and went on to say:

> "From the provisions of these rules, I am increasingly of the view that the notice of appeal necessarily has to specify the particular decision or such part of the decision against which it is desired to appeal. In this case, it is common ground that the notice of appeal lodged on 24.2.1998, pertains to the decision

.../3

> of 18.2.1998 by Hon. Chipeta, J. However, the application indicates that it involves the ex-parte judgment in the High Court by Hon. Kaji, J. This was as well conceded by Dr. Lamwai in his oral submission before me. His argument however, was that even though it was not specified which decision it was intended to be stayed, both the decisions concerned the same decision of the High Court i.e. Civil Case No. 159 of 1994. With respect, it is my view that Dr. Lamwai is wrong on this point. As the notice of appeal filed pertains to the decision of 18.2.1998 (Chipeta, J.) and not that of 10.7.1998 (Kaji, J.) which it is intended to be stayed, it goes without saying that the application for stay of execution before me, was without the requisite notice of appeal. For that reason, it was, as submitted by Dr. Mwaikusa, incompetent."

Before us, it was contended by Dr. Lamwai, on behalf of the applicant, that the learned single Judge strayed into an error in law in dismissing the application for stay of execution on the ground that no notice of appeal had been lodged in respect of Kaji, J.'s decision. According to the learned advocate, if the learned single Judge had taken into account the following three points he would have arrived at a decision in favour of the applicant: (1) no notice of appeal could have been lodged in respect of Kaji, J.'s judgment before the applicant was granted extension of time to lodge the same; (2) the applicant could not take the first step of appealing against Kaji, J.'s decision before moving the High Court to set aside that that decision; and (3) the ex parte judgment suffered from illegality because it was based on an affidavit and not oral evidence. Counsel sought to bolster that submission by reference to the decision of

.../4

this Court in Faizen Enterprises Limited v Africarriers Limited, Civil Appeal No. 38 of 1997 (unreported), a case which concerned, among other things, the question whether an ex parte judgment may be entered entirely on the basis of affidavit evidence. He strenously contended that the ex parte judgment in the present case was in law no judgment. The learned advocate concluded his submission by arguing that since the application before Chipeta, J., was for setting aside the "ex parte decree", by necessary implation Kaji, J.'s judgment was on agenda. He urged us to reverse the learned single Judge's decision. On behalf of the respondent, Dr. Mwaikusa made a simple and straightforward response. He contended that since no notice of appeal has been lodged in respect of Kaji, J.'s decision, the stay of execution of which was being sought before the learned single Judge, that decision has not in law been brought before this Court and therefore no stay of execution of it can be ordered.

We have carefully considered counsel's rival arguments and in the upshot we agree with Dr. Mwaikusa that there is no basis for taking a view different from that arrived at by the learned single Judge. We are of the settled opinion that the learned single Judge was perfectly right in holding, as he did, that the absence of a notice of appeal in respect of the decision the execution of which the applicant sought to be stayed was fatal to the application for stay of execution. As aptly put by Dr. Mwaikusa, a notice of appeal is the gear, so to speak, which moves this Court to exercise its power under Rule 9 (2) (b) of the Rules. In spite of Dr. Lamwai's ingenious argument, we entertain no doubt that lodging of a notice of appeal by an indirect method is a notion unknown to the law of this country. The provisions of Rule 76 (2) and (3) of the Rules as read with Form D in the First Schedule of those Rules plainly rule out that notion.

.../5

Those provisions require an appellant to expressly specify in his notice of appeal the decision of the High Court which he intends to appeal against. Form D requires that the name of the judge who gave that decision be disclosed. Since, in the present case, no notice of appeal was lodged in respect of Kaji, J.'s judgment this Court clearly lacked jurisdiction to order stay of execution of the decree arising therefrom.

For the reasons we have given, albeit briefly, we can find no warrant for holding that the learned single Judge was not entitled to reach the conclusion he did. Accordingly, we dismiss the application. The respondent company will have its costs.

DATED at DAR ES SALAAM this day of 1999.

L.M. MAKAME
JUSTICE OF APPEAL

B.A. SAMATTA
JUSTICE OF APPEAL

K.S.K. LUGAKINGIRA
JUSTICE OF APPEAL

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

(A.G. MWARIJA)
DEPUTY REGISTRAR