

IN THE HIGH COURT OF TANZANIA
AT SONGEA
CIVIL REVISION NO. 1 OF 2006
MBINGA DISTRICT COUNCIL APPLICANT
VERSUS:
JACK'S CONSTRUCTION CO. LTD. RESPONDENT

28/09/2006 HEARING CONCLUDED

26/10/2006 RULING DELIVERED

R U L I N G:

The Applicants Mbinga District Council have filed an application for the revision of the District Courts Order. The applicant had filed an application before that Court for the stay of Execution of the decree pending determination of an appeal still lying before the High Court. Originally the Respondent had filed a suit for breach of contract against the applicants. In summary the Respondents had hired same machinery for contraction of roads. An agreement was signed showing terms and conditions to that contract. At the conclusion there was unfair payment. The trial court resolved the matter basing on four issues. Those were:-

- (i) Total cost for hiring the equipments.
- (ii) Amount legally deductible.
- (iii) Amount purported to be overdeducted.
- (iv) Relief's for each party.

The court held for the Respondents and ordered the defendants to pay shilling 3,237,000/= which was over deducted money; two million shillings

general damages plus twenty five percent interest per annum from January, 2005 to the date of judgment which was 4th May 2006.

An appeal was filed before this court and an application for stay of execution was also filed before the trial court. The applicant have advanced five grounds of appeal, namely:-

1. That the trial magistrate erred in Law and fact in interpreting clause 2.1 of equipment Hire Agreement so entered between the Appellant and the Respondent to mean that contract was for work per hours and not per day whereas reading in the fourth column of the table in the preamble and the provisions of clause 2:7 of the said Agreement show the intention of the parties to that Agreement was hat the equipment were to be hired and charged in terms of days.
2. That the trial magistrate erred in Law and fact to hold hat the Appellant maliciously used clause 2.7 of the said equipment Hire Agreement to the decrement of the Respondent in the sense that there was no way the letter could have use for work all the plants at the same time whereas it was the duty of the Respondent himself to plan for his work in order to know which particular plant should be taken at first and which is to follow before he could offer at once to hire all disputed plants from the Appellant.
3. That the trial magistrate erred in Law

and fact to order the appellant to pay the Respondent the amount so over deducted Tshs.3,236,000/=, With interest at 25% per annum from January 2005 to the date of judgment while there was no such over deductions.

4. That the trial magistrate erred in Law and fact to award general damages at Tshs.2,000,000/= to the Respondent while there was no breach of contract committed by the Appellant.
5. That in alternative but without prejudice to the above grounds the trial magistrate erred in Law and fact to order the Appellant to refund the Respondent the amount of Shs. 3,236,000/= as claimed by the latter without considering that, that amount included he charges for the unsigned items so recorded in the work sheet as NO DIESEL and that in his conclusion he adjudged that the incidents of NO DIESEL are chargeable.

The application for stay of execution was dismissed on reason that the applicants had failed to show or elaborate on how they would suffer substantial loss if the decree were to be executed. The total amount to be recovered on attachment of the applicants property was less than seven million shillings. In the affidavit filed by Onesmo Birago, under 13, he claimed that, the Nyamako Auction March and Court Brokers had issued a 14 days notice for attachment of their vehicle, Nissan Patrol, SM 2553.

Onesmo pleaded under para 12 of same affidavit that being a Government entity they were protected from attachment of their property under section 15(3) of the Government Proceedings Act No. 16 of 1967. That Law provides:-

“Save as is provided in this section, no execution attachment or similar process shall be issued out of any court for enforcing payment by the Government of any money or costs referred to in this section; and no person shall be individually liable under any order for payment by the Government or any Government department or any officer of the Government as such of the money or costs”.

That Law is very clear and it does not need any elaboration. In the revised Edition of 2002 that Law appear under Cap. 5 Section 16 (3).

Mr. Waryuba defence counsel for Respondents vehemently objected to the application on reason that the court is barred by Law to review the District Court ruling of Mr. Lemboko RM. Made n 17th August, 2006. He argued that the ruling was made on interlocutory matter as such it could not be appealed or revised. He cited similar observations made in the case of Niaz Sons (K) Ltd. V. China Road and Bridge Corporation (K) 2001 Vol. II EA. Another case, Uunet (K) Ltd. V. Telecom (K) Ltd. 2004 Vol. I E.A. Those cases are just persuasive to this Court. He further argued that our domestic Law calls for similar view, that is the magistrates Courts Act No. 25/2005 Looking at the decision in the case of Hanry Lyimo V. Eliab Matei [1991] TLR, Kyondo, J. (as he then was) held that:-

“The order made by the learned magistrate is clearly an interlocutory one. It is an interim

order pending the determination of the case.

It is therefore not a case decided within the meaning of the provisions of section 79(1) of the CPC and this court has no jurisdiction to invoke its revisional powers as provided for in that section”.

In that case the respondent filed a suit and then applied for temporary injunction to restrain the applicant from doing several things. He also prayed for a temporary closure of business pending final disposal of the suit. The application was granted hence the application for revision. Definitely that is distinguishable to the present application. In the case at hand the case had been finally disposed and the application is for the execution of the decree obtained from the trial Courts judgment. I would therefore look at the Law under Act 25 of 2002 the Appellate Jurisdiction Act 1979 as amended section 5(2) (d) which provides:-

(d) No appeal or application for revision shall be against or be made in respect of any preliminary or interlocutory decision or order of the High Court unless such decision or order has the effect of finally determining the criminal charge or suit”.

That Law is specifically provided for interlocutory decisions made by the High Court, since the case at hand concerns an order of the District Court, the cited Law is inapplicable. The relevant provision is seen under section 43 (1)(2) of Act no. 25/2002 which (amended) the Magistrates Courts Act, 1984. That Law provides:-

“Subject to the provisions of subsection (3) no appeal or application for revision shall lie against or be made in respect of any preliminary

or interlocutory decision or order of the district Court or a Court of a resident Magistrate **unless such decision or order has the effect of finally determining the criminal charge or the suit.**

(underline for emphasis).

The issue at hand is whether the District Courts decision to dismiss the application for stay of execution could result on the determination of the suit.

The suit before that court was for breach of contract and the plaintiff prayed for money to a tune of shillings three million, five hundred thirty six thousand being over deducted money. Interest at a rate of 25% of that amount for the period between January, 2005 to 4th May, 2006 which was the date of Judgment. Two million shillings, general damages and costs to the suit. Having obtained judgment and decree, the payment was to be effected after the sale of a motor vehicle to be attached by the Court Broker. The application was for staying the attachment and the sale, the proceeds to the sale was meant to settle the amount prayed for in Civil Suit No. 1 of 2005 That means once the execution was to be effected the suit would have been finally determined and the appeal would be meaningless.

I have discussed earlier on whether Government property is subject for attachment or not and I resolved it in the negative. I am now of the settled mind that since the execution of the decree would have disposed of the suit, then allowing the stay was the property is subject for attachment or not and I resolved it in the negative. I am now of the settled mind that since the execution of the decree would have disposed of the suit, then allowing the stay was the proper decision not otherwise. The District Court ruling did not agree with the provisions of the Law under Act No. 25 of 2005 section 43(1)(2) which amended the Magistrates courts Act No. 2 of 1984.

In the event I allow the application by exercising the revisional and inherent powers provided for under section 95 C.P.C. and section 44 (1) (b) of the Magistrate's Courts Act, 1984. The execution of the decree on the judgment entered by the District Court is hereby stayed until the determination of the Appeal. Costs follow the event.

26/10/2006

Coram: Hon S.S. Kaganda, J.

For the Applicant:- Present in person.

For the Respondent:- Mr. Waryuba Advocates

C/C:- S. Ndunguru.

Court:

Judgment read over and delivered to the parties
this 26th October, 2006.

S.S. KAGANDA

JUDGE

26/10/2006.



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

A.M. FUNGO
DISTRICT REGISTRAR
SONGEA.

SSK/PJL.