

IN THE UNITED REPUBLIC OF TANZANIA
IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 509 OF 2017

*(Arising from Judgement and Decree of the High Court of Tanzania issued by Hon. F. Twaib. J
in Civil Case No. 67 of 2007 dated 22nd September 2011)*

JUBILEE INSURANCE CO. LTD..... APPLICANT

VERSUS

- 1. SOPHIA ALLY**
- 2. NEEMA OSCAR**
- 3. RUKIA JOHN MSUNGU**
- 4. SESILIA MLAY**
- 5. NEEMA OSCAR MAWOLE**
(As next friend of SIA OSCAR)
- 6. LUKIA JOHN MSUNGU**
*(As next friend of SEBASTIAN MSUNGU,
JENIFFER MSUNGU and GLORIA MSUNGU)*
- 7. ELIANGIRINGA**
- 8. GIFT ELIANGIRINGA** *(As next friend of
EMMANUEL ELIANGIRINGA and RUTH ELIANGIRINGA (minor))*
- 9. SOPHIA MLAY** *(As next friend of
RAYMOND MLAY and SESILIA/HILDA MLAY)*
- 10. DOREEN ALBERT TEMU**
- 11. PHILIP MLAY**

RESPONDENTS

Date of the last Order, 23rd April 2018
Date of the Ruling, 11th May 2018

RULING

SAMEJI, J.

After a long route of trying in vain to stay the execution of *exparte* Judgement and Decree of this Court issued by Hon. Dr. Fauz Twaib. J on 22nd September 2011 in respect of *Civil Case 67 of 2007*, the applicant on 17th August 2017, has lodged this Application seeking for an order of this Court to restrain the respondents (*Decree holders*) from executing the very same Decree pending finalization of the appeal in the Court of Appeal against the decision of this Court issued by Hon. Kibela, J delivered on 22nd December 2015. The Application was filed under Section 95 of the Civil Procedure Code, Cap. 33 [R.E. 2002]. The Application is supported by the Affidavit deponed by one Aurelia Flavian Kimaryo, the Assistant Claims Manager for the applicant.

On the other hand, the respondents in reply, through a Counter Affidavit have vehemently challenged the applicant's Application and specifically under paragraph 7 stated that, the Court has no jurisdiction to entertain the matter, as the same was already considered by the same Court under *Application No. 795 of 2015*. That, the applicant is bringing the same matter under the same provision of the law.

The applicant herein is enjoying services of Mr. Yohanes Konda, Esq, the learned Counsel, while the respondents are represented by Tenga NL & Partners (Advocates), specifically Mrs. Nakazael Tenga, the learned senior Counsel assisted by Mr. Stanslaus Ishengoma, the learned Counsel and Mr. Mfinanga, the learned Counsel as well.

By consent of the parties, the Application was argued by way of written submissions. This was adequately done and I am grateful to the Counsel for the parties for the energy and industrious research involved in canvassing the issues herein. I have thoroughly considered the written submissions by both parties which are in the record of this case and I do not need to reproduce the same verbatim, but will be analyzed when considering a specific issue.

Having scrutinized thoroughly the record of the case and the submissions made by the Counsel for the parties, I have observed that, in their reply submission filed on 25th April 2018, the Counsel for the respondents have challenged the competence of applicant's Application and, among others have listed the following issues:-

- (a) *Whether stay of execution can be granted if no security is given by the applicant;*
- (b) *Whether the applicant can complain about irreparable loss while performing his duties;*
- (c) *Whether the applicant can complain that he had no knowledge of the case while there are plenty of proof of service of summons and other documents;*
- (d) *Whether this Court has jurisdiction to entertain the present Application after a similar Application was struck out without leave to re-file; and*
- (e) *Whether there are two Judgements as alleged by the applicant.*

It is important to point out right at the outset that, in the course of perusing the above points raised by the Counsel for the respondents, among others, I have observed that, the fourth point (d) seeks to question the jurisdiction of this Court to entertain the Application before me. Since jurisdiction is fundamental issue to the Court's authority to determine any matter, I shall begin with that issue.

While discussing the issue of jurisdiction of this Court to entertain the matter, Mr. Konda at paragraph 6 of his reply filed in Court on 27th October 2017 he indicated that Applications No. 795 of 2015 and Application No. 509 of 2017 are different both in purpose and procedure. That, after the Court has dismissed the applicant's Application to set aside the ex parte decree in issue, there is no provision of law covering the applicant's predicament except through this Application. Furthermore, at page 3 paragraphs 2 of the submission in chief filed on 10th January 2018, Mr. Konda argued also that, the argument of the Counsel for the respondent that, this Court has no jurisdiction to deal with this Application does not stand. He said, It is trite law that, any appeal to the Court of Appeal is initiated by the *Notice of Appeal*, which is yet to be lodged. He thus, stated that, the matter still falls under the jurisdiction of the High Court.

On the other side, Counsel for the respondents submitted that, the applicant is trying to mislead the Court that *Application No. 795 of 2015* and this current *Application No. 509 of 2017* are different. They spiritedly argued that, this claim is not true, as both Applications aimed at staying the execution of the same Judgement and Decree *in Civil Case No. 67 of*

2007 and that all were made ***under Section 95*** of the Civil Procedure Code and were for the same reliefs.

In rejoinder submission, Mr. Konda insisted that, the current Application and *Misc. Civil Application No. 795 of 2015* are different and distinguishable though, he said, *all aim at staying execution of the ex parte decree in issue.*

I have anxiously and carefully considered the record of the matter and the submissions made by the Counsel for the parties and I feel that, the questions that calls for my consideration are *whether this Court has jurisdiction to entertain this matter or whether the Application has been filed under the proper provision(s) of the law and has properly moved the Court to grant the remedy so sought in the Chamber Summons.*

These issues should not detain me much, as it is settled law in this Country that, an application brought under wrong provision(s) or non-citation of enabling provision(s) of the law is incompetent and ought to be struck out. There are numerous authorities to this effect and some of these include **Edward Bachwa & 3 others v. Attorney General & others**, Civil Application No.128 OF 2008; **China Henan International Co-operation Group v. Salvand K. A. Rwegasira**, Civil Application (2006) TLR 220 and

Citibank Tanzania Limited v. Tanzania Telecommunication Co. Ltd & 4 Others, Civil Application No.64 of 2009 Court of Appeal of Tanzania, to mention but a few.

The Application before me is on the ***stay of execution*** of exparte Judgement and Decree issued by Hon. Dr. Fauz Twaib. J on 22nd September, 2011 in respect of *Civil Case No. 67 of 2007*. I am aware that, in his submission Mr. Konda has tried to meander and use several terminologies to justify that the same is only *to restrain the respondents (Decree holders) from executing the very same Decree*. With due respect, whatever terminology used, still the Application before me is on the stay of execution. It is also a fact that, the said Application is brought under ***Section 95*** of Civil Procedure Code. Now, the issue is *whether the section 95 alone can support this Application and properly move the Court to grant the prayers sought*.

In respect of the above issue, I have since perused the decision of this Court in **Hassan Karim & Co. Limited V Africa Import and Export Central Corporation Ltd** [1960] EA 369 commenting on Section 151 of the Indian Code of Civil Procedure as applied to Tanganyika then and now Section 95 of the Civil Procedure Code, where the Court held that Section

95 of the Civil Procedure Code does not independently confer any power on the court nor any rights to the litigants. See also the decision in **Omari Mbuzini Kilama v Nehemiah Jeremiah Makofia**, Civil Case No. 92 of 1995. The same position was also adopted by the Court of Appeal of Tanzania in **Tanzania Electric Supply Co. Ltd V Independent Power Tanzania Ltd & Others Consolidated**, Civil Application No. 19 of 1999 and 27 of 1999 (unreported).

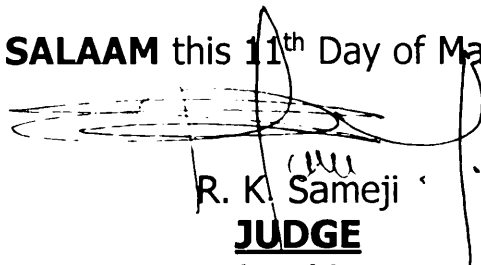
In the circumstance, I feel no remorse in saying that, I need not be detained by Mr. Konda's obvious confusion and misconception of the law on the jurisdiction of this Court and the applicability of Section 95 of the Civil Procedure Code in the current Application.

It is therefore my respectful view that, there is considerable merit in the Counsel for the respondent's submission that, the Court has no jurisdiction to entertain this matter, as it has not been properly moved to grant the prayer sought in the Chamber summons. In my view, this point alone suffices to dispose of the matter and I feel that it is not necessary to dwell on discussing the remaining issues, since I have no powers to do so. Mr. Konda has since filed a frivolous application before the Court.

In the event and for the foregoing reasons, I hereby proceed to strike out the *Misc. Application No. 509 of 2017* with costs for being incompetent before this Court.

It is so ordered.

DATED at **DAR ES SALAAM** this 11th Day of May, 2018.



R. K. Sameji
JUDGE
11/05/2018