

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

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 395 OF 2020

(Arising from Miscellaneous Civil Application No. 314 of 2020)

JUBILEE INSURANCE COMPANY LIMITED APPLICANT

VERSUS

AFRICARIES COMPANY LIMITED 1ST RESPONDENT

RAFIKI DHALLA t/a MORE AGENCY 2ND RESPONDENT

RULING

06th Oct & 08th Oct, 2020.

E. E. KAKOLAKI J

This is an application for stay of execution of the Judgment and decree of the District Court of Ilala at Samora in Civil Case No. 184 of 2016 pending hearing of the applicant's application in this Court in Misc. Application No. 314 of 2020 which is for extension of time within which to lodge an application for re-admission of appeal, re-admission of Civil Appeal No. 72 of 2018 and consequently if allowed determination of the Appeal. It has been preferred under Section 68(e) and 95 of the Civil Procedure Code, [Cap. 33 R.E 2019] and Section 14(1) of the Law of Limitation Act, [Cap. 89 R.E 2019] supported by the affidavit of one **Mutakyamirwa Philemon** advocate for

the applicant. On the other side the application is strongly resisted by the 1st Respondent who filed the counter affidavit through her principal officer one **Mustafa Rashid** challenging its merits. Further to that she raised preliminary points of objection on two points going as follows:

1. This Honourable Court has no jurisdiction to entertain this application.
2. The application is bad in law for want of decree/order.

Briefly the applicant in this application had filed the appeal in this Court against the respondents in Civil Appeal No. 72 of 2018 challenging the decision of the District Court of Ilala at Samora in Civil Case No. 284 of 2016 before the same was dismissed for want of prosecution on 28/05/2020. Following that dismissal the respondents being judgment creditors on the 09/07/2020 in the District court of Ilala initiated execution proceedings seeking to execute the decree issued in Civil Case No. 284 of 2016 against the applicant vide Execution Case No. 46 of 2020. It is from that execution proceedings pending in the trial court (District Court of Ilala) the applicant has preferred this application praying this court to intervene by staying the said execution proceedings.

When the matter came for hearing as a matter of practice parties agreed and this court endorsed their agreement to dispose of first the preliminary objections before going into the merits of the application. The applicant was represented by Mr. Obed Kasambala, learned advocate who was also holding brief for Mr. Geoffrey Martine, advocate for the 2nd respondent whereas the 1st respondent enjoyed the services of Ms. Mborancia John assisted by Mr. Haji Sama, learned advocates.

Ms. Mborancia prefaced her submission by notifying the court that she will address the first limb of the preliminary objection and the second was left for Mr. Sama to proceed with. Submitting on the first limb Ms. Mborancia said this court has no jurisdiction to entertain this application as for so doing will be contravening the provisions of Order XXI Rule 24(1) of the Civil Procedure Code, [Cap. 33 R.E 2019]. She contended that, the said provision requires the executing court to consider the grounds advanced by the applicant before granting stay of execution. She had it that, in this matter the executing court is the District Court of Ilala where the execution proceedings are pending in Execution Case No. 46 of 2020, therefore this application by the applicant ought to have been filed there and not in this court. For that reason she invited the court to dismiss the application with costs.

Submitting on the second limb Mr. Sama for the 1st respondent alleged that the application is bad in law for want of decree. He said, the applicant is seeking to stay execution of the decree which he has failed to attach to the application for this court to make reference to, which to his view is fatal and renders the application incompetent. He referred the court to the Court of Appeal decision in the case of **Consolidated Holding Corporation Vs. JIT Finance Ltd, The Registered Trustees of Tanzania National Parks, Joseph Laiser**, Civil Application No. 120 of 2003 where the Court held the application incompetent for failure to be accompanied with the decree/order. For that reason he invited the court to dismiss the application for want of decree.

Mr. Kasambala for the applicant strongly resisted the submissions by the counsel, for the 1st respondent. On the first limb he responded that the applicant did not contravene the provisions of Order XXI Rule 24(1) of the CPC as contended by the 1st respondent. He said the provision empowers two courts to entertain the application for stay of execution mentioning them to be, **first**, the trial court that passed the decree and **secondly**, any court having appellate jurisdiction. In this application the applicant opted to apply in this court not only in compliance with the provision but also because there is pending application before it in Misc. Application No. 314 of 2020 which is for extension of time within which to lodge an application for re-admission, re-admission of Civil Appeal No. 72 of 2018 and consequently if allowed determination of the Appeal, he stated. So automatically the trial court records will be in this court hence easy for the court to entertain the application, Mr. Kasambala argued. He therefore invited the court to dismiss the ground.

On the second limb, Mr. Kasambala's response was that, there is no provision of the law known to him that requires the applicant to attach the decree in the application for stay of execution as Mr. Sama would want this court to believe. On the case of **Consolidated Holding Corporation** (supra) relied on by Mr. Sama to support his point of the requirement of attaching the decree to the application of this nature, he countered was inapplicable in the circumstances of this matter. He stated, the said case was decided basing on the rules governing the Court of Appeal and not the CPC which governs the procedure of this Court, thus should be disregarded. To him none accompanying of a decree was not fatal, thus could not affect competence

of the application. He therefore asked the court to overrule the objection with costs and proceed to hear and determine the application.

In brief rejoinder submission Ms. Mborancia and Mr Sama for the 1st respondent reiterated their submission in chief and prayers while Mr. Sama adding that the case cited applies to this court as the requirement of accompanying the decree to the application applies to both Court of Appeal and this Court. He added that, though the requirement is not provided anywhere in the law it is a Court practice adopted and endorsed by the Court of Appeal. Otherwise both counsels pressed the court to dismiss the application for being incompetent.

I have carefully gone through the competing arguments by both learned counsels which I find to be very convincing. In determining this application let me start to consider the application of the provisions of Order XXI Rule 24(1) of the CPC governing execution of decree in both subordinate courts and this Court as submitted by both parties. The provision provides:

24.-(1) The court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time, to enable the judgment debtor to apply to the court by which the decree was passed or to any court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay execution or for any other order relating to the decree or execution which might have been made by such court of first instance or appellate court

if execution had been issued thereby, or if application for execution had been made thereto.

My interpretation of the provision is that, it provides for three situations and forums under which the application for stay of execution can be made, upon sufficient cause being shown or the judgment debtor furnishing security or fulfilling such conditions as may be imposed on him. **Firstly**, is the transferee Court when an application is made there. This is a court where the decree is transferred to by the court that passed it for execution purposes, or **secondly**, to the court that passed the decree or **thirdly**, to the appellate court, if execution has been issued there, or the application for execution has been made thereto.

In the present matter on the first limb of objection, Ms. Mborancia is submitting that this court has no jurisdiction to entertain the application for the same ought to have been filed in the District Court of Ilala which is an executing court. Mr. Kasambala is of the contrary view in that, the applicant complied with the provision of Order XXI Rule 24(1) of the CPC for filing the application in this court as appellate court where her application for extension of time within which to lodge an application for re-admission, re-admission of Civil Appeal No. 72 of 2018 is pending. And further that, since the application is lying before this court it is obvious the lower court record are in this court, so it is the competent court to issue the order for stay of execution.

There is no dispute that an application for execution of the decree of the District Court of Ilala in Civil Case No. 284 of 2016 is pending in the same

court in Execution Case No. 46 of 2020, as executing Court. There is no reasons advanced by the applicant leave alone reasonable ones, explaining what prevented her from lodging this application in the said executing court. Mr. Kasambala is trying to convince the Court that the applicant opted this Court for only one reason that, it is an appellate court exercising appellate jurisdiction and the court where the applicant's application for extension of time to file an application for re-admission, re-admission of Civil Appeal No. 72 of 2018, lays. With due respect to Mr. Kasambala I am not prepared to purchase his views. The applicant would have rightly applied to this court as discussed above in the third option, only and only if there was a proof that this court is seized with jurisdiction to sit as appellate court in respect of the decree sought to be stayed. That means there is pending appeal before this court challenging the said decree. As it can rightly be observed none is existing apart from the application in Misc. Application No. 314 of 2020, for extension of time to file an application for re-admission, re-admission of Civil Appeal No. 72 of 2018 and determination of the Appeal upon the said application being allowed, which its fate is yet to be determined. It is from those reasons I am of the finding that this application is incompetent before the court and therefore shoulder up with Ms. Mborancia's submission that, this court has no jurisdiction to entertain this application for not being the executing court as the applicant ought to have filed it in the executing court. Thus the objection in this limb is sustained.

The first limb of objection having disposed of the application, I fill obliged to further address the second limb which appears also to be very interesting to me. It is Mr. Masa's submission that, though not a requirement of the law it

is a requirement under the practice of the court that in applications of this nature a decree sought to be stayed must be accompanied with the application, failure of which renders the application incompetent. He implored the court to dismiss the application with costs. Mr. Masa's stance is challenged by Mr. Kasambala who argued that, it is not a known requirement of the law to him that a decree must be attached to the application for stay of execution. And that in the present application non attachment of the decree is not fatal and cannot under any circumstance affect the competence of the application. He therefore invited the court to dismiss the ground.

I agree with Mr. Kasambala's submission that attachment of the decree is not a requirement of the law. However, I wish to state that, it is a practice of the Court of Appeal that acquired the force of law which this court adopts that, non-accompanying of the decree or order sought to be stayed renders the application incompetent. The reason for adopting this practice is not far from fetching. It is in both logic and common sense that, the court cannot be expected to consider staying a decree it has not seen. This practice of the court was discussed in the plethora of cases. To mention the least in **East African Development Bank Vs. Blueline Enterprises Ltd**, Civil Appeal No. 35 of 2003 (CAT-Unreported), **Consolidated Holdings Corporation Vs. Rajan Industries Limited**, Civil Application No. 138 of 2000 (CAT-unreported) and **Hassan Ramadhan Vs. Saada Mussa**, Civil Application No 84 of 2003 (CAT-unreported).

In the case of **East African Development Bank**, the Court of Appeal had an opportunity to discuss the requirement of attaching a decree to the application for stay of execution and said:

"Both logic and common sense demand that the Court cannot order stay of execution of an order which it has not seen, furthermore, by precedent, the practice of the Court in such a situation is that an application for stay of execution which is not attached with the order sought to be stayed is held to be incompetent."

The requirement was overstressed by a single Judge in the case of **Consolidated Holdings Corporation** (supra) when the Court echoed that:

"I am in no doubt that application for stay of execution of decree, which is filed without being accompanied by a copy of the decree sought to be stayed, would be incompetent. The court cannot be expected to consider staying a decree it has not seen."

As to whether it is a requirement of the law or not to attach the decree to the application for stay of execution, the case of **Hassan Ramadhan** (supra) addressed the issue and the Court had this to say:

"It is the practice of the Court and not the requirement of the rules to require the attachment of the order to the application. Nonetheless, it is also common ground in my view that the practice and procedure by the Court in connection with appeals or applications has the same legal force as express provisions of the rules."

As alluded earlier, in the application beforehand there is no decree attached by the applicant from the decision of the District court of Ilala in Civil Case

No. 284 of 2016, sought to be stayed. Applying the position of the law in the above cited cases, I would agree with Mr. Sama's submission and find that non attachment of the decree/order sought to be stayed by the applicant is fatal and has the effect of rendering the application incompetent. The second limb of objection is therefore sustained.

In the circumstances and with the two points of objection sustain, I hold that the application is incompetent before the court and is hereby struck out with costs.

It is so ordered.

DATED at DAR ES SALAAM this 08th day of October, 2020.



E. E. KAKOLAKI

JUDGE

08/10/2020

Delivered at Dar es Salaam today this 08th day of October in the presence of Mr Obed Kasambala, advocate for the applicant, Ms. Mborancia John, advocate for the respondent and Ms. Lulu Masasi, court clerk.

Right of appeal explained



E. E. Kakolaki

JUDGE

08/10/2020