

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DAR ES SALAAM DISTRICT REGISTRY

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 28537 OF 2023

(Arising from Execution No. 35 of 2020)

**PHOENIX OF TANZANIA INSURANCE
COMPANY LIMITED.....APPLICANT**

VERSUS

JILALA JULIUS KAKENYELI..... 1ST RESPONDENT

BILLY BALI.....2ND RESPONDENT

RULING

8th February 2024 & 14th February 2024

MTEMBWA, J.:

Under *section 14 (1) of the Law of Limitation Act, Cap 89 RE 2019, Order XXI Rule 24 (2) and sections 68 (e) and 95 of the Civil Procedure Code RE 2019*, the Applicant is seeking for, in the first prayer, an order of extension of time within which to file an Application for lifting of the **Garnishee Order Nisi** and in the second prayer, upon enlarging time, this Court be pleased to lift the **Garnishee Order Nisi** dated **31st May 2023** issued against the

Applicant's Bank Account No. 3300140110 operated by **KCB Bank (T) Limited** and Bank Account No. 0401241009 operated by **Diamond Trust Bank Tanzania Plc.** The same was brought under the certificate of urgency and is supported by an affidavit of **Mr. Godfrey Bedeleya**, the principal officer of the Applicant.

The facts, albeit briefly, as may be gathered from the records, on 1st July, 2007, the 1st Respondent herein instituted Civil Case No. 64 of 2007 against the Applicant and the 2nd Respondent in this Court claiming for compensation for bodily injuries sustained and loss of personal belongings as a result of an accident which occurred on 20th October, 2005 involving the 2nd Respondent's Motor Vehicle with Registration No. T 124 ACY which on the material time, was being driven by the 2nd Respondent and validly insured by the Applicant.

Having evaluated the evidence adduced during hearing, the Judgement was delivered in favour of the 1st Respondent thereby awarded specific and general damages. Aggrieved by the said Judgement and Decree, the Applicant herein appealed to the Court of Appeal of Tanzania in Civil Appeal No. 14 of 2017 which was heard and struck out for being incompetent. Still aggrieved, the Applicant successfully obtained an order extending time within which to lodge a

Notice of Appeal and thereafter filed Civil Appeal No. 376 of 2023 in the Court of Appeal of Tanzania which is pending.

The records reveal further that, while the appeal process was under way, the 1st Respondent applied for and was issued with a Garnishee Order Nisi for the balance 50% of the amount subject for execution which is **Tshs 136,746.998.35/=** and the same was served to two banks as narrated before. The move triggered the Applicant who applied for and successfully obtained an order for Stay of Execution in the Court of Appeal of Tanzania in Misc. Civil Application No. 461/01 of 2023 which however, did not lift the two bank accounts which were frozen by this Court in Execution No. 35 of 2020. It is for this reason that the Applicant is seeking for orders as prefaced before.

While the matter remained pending, the 1st Respondent raised the following two preliminary objections; **one**, that this Court has no jurisdiction to determine this Application following the pendency of Civil Appeal No. 376 of 2023 at the Court of Appeal between the parties herein and, **two**, that this Court has no jurisdiction to determine prayer No. 2 in the Chamber Summons.

In the conduct of the preliminary objections, the Applicant was represented by **Mr. Odhiambo Kobas**, the learned Counsel while the 1st Respondent enjoyed the service of **Mr. Erick Denga**, the learned counsel. Hearing proceeded orally.

Taking the podium on the first preliminary objection, Mr. Denga submitted that it is not in dispute that this Application forms its bases from the decree of this Court in Civil case No. 64 of 2007 that was delivered in favour of the 1st Respondent in 2015. He added further that it is also not in dispute that there is a pending appeal at the Court of Appeal between the parties challenging the decree of this Court in Civil Case No. 64 of 2007 which led to the Execution No. 35 of 2020, the subject of this application.

Mr. Denga continued to note that it is a trite law that an appeal to the Court of Appeal of Tanzania is initiated by a Notice of appeal. Thus, that since both the Notice of appeal and the Appeal are pending, this Court lack jurisdiction to entertain this matter. He cited the case of ***Exaud Gabriel Mmari (as legal personal representative of the estate of the late Gabriel Barnabas Mmari) Vs. Yona Setyi Akyo and 9 others, Civil Appeal No. 91 of 2019, CA at Arusha*** where it was observed that once the Notice

of appeal is filed, the High Court ceases the jurisdiction to entertain the matter. That in view of the cited case, this Court lacks jurisdiction to entertain the matter due to the pendency of Civil Appeal No. 376 of 2023 in the Court of Appeal of Tanzania, Mr. Denga added.

On the second preliminary objection Mr. Denga attacked the second prayer in the chamber summons where this Court is requested to lift the Garnishee Order Nisi and in that he submitted that the same is not amenable from this Court, but the Court of Appeal of Tanzania. He said, it is on records that the Applicant herein successfully applied for an order staying execution at the Court of Appeal in Civil Application No. 461/01 of 2025. In that Application, the Court of Appeal issued an *exparte* order staying execution of decree in Civil Case No. 64 of 2007 pending hearing of the said Application interpaties. He was of the views that the Applicant ought to have asked for the order in the Court of Appeal in Civil Application 461/01 of 2023. In other words, the Court of Appeal could have issued the stay of execution orders and lifted the Garnishee Order Nisi.

To substantiate further, Mr. Denga cited the case of ***CRDB Insurance Brokers Limited Vs. Yuko Enterprises (EA) Limited and 2 others, Civil Application No. 548/16 of 2022, Court of***

Appeal of Tanzania at Dar es Salaam where the Court stayed execution of the decree and at the same time lifted the Garnishee Order Nisi.

Mr. Denga argued other way around that since this Court is not sitting as an executing Court, it cannot determine the second prayer in the Chamber Summons. He cited the case of ***Tanzania Electric Supply Co. Limited Vs. Mafungo Leonard Majura and 14 others, Civil Application No. 210 of 2015, Court of Appeal of Tanzania at Dar es salaam***, where it was observed that lifting of the Garnishee Order Nisi is part of an execution process because in essence, it entails moving the Court to stop the process of execution. He added further that, in this case the Court noted that lifting of Garnishee Order Nisi is tantamount to stay execution. He thus opined that, in view of the position of the law, this court cannot, in any way, determine second prayer because this Court is not sitting as an executing Court.

He then lastly implored this to struck out this Application with Costs.

In reply, Mr. Kobas prefaced that the preliminary objections raised by the 1st Respondent were all devoid of merits. He then

continued to agree with Mr. Denga on a salutary position of the law that once a notice of appeal has been filed or an appeal to the Court of Appeal, the High Court ceases the jurisdiction on matters of staying execution but it continues to have jurisdiction on matters of execution of the Decree itself. He added further that a person, therefore, seeking for stay of execution should apply it in the Court of appeal.

Mr. Kobas was of the view that the Applicant before this Court is not seeking for stay of execution of the decree rather she seeks for the implementation of an order staying execution that was issued by the Court of Appeal of Tanzania. He noted further that the Applicant obtained an order of stay execution but very unfortunate the Garnishee Order Nisi was not lifted by this Court and thus the Applicant's bank accounts have been frozen. He was of the views that under **section 38 of Civil Procedure Code**, this Court has jurisdiction to implement the Court of appeal order by issuing an order discharging the Garnishee Order Nisi.

To buttress, Mr. Kobas cited the case of ***Phoenix of Tanzania Assurance Company Limited and Another Vs. Panache Limited, Misc. Commercial Application No. 28 of 2020, High Court, Commercial Division, at Dar es Salaam***, where the Court

lifted the Garnishee Order Nisi under ***section 38 of the Civil Procedure Code*** notwithstanding the presence of notice of appeal filed to the Court of appeal. That, the Court observed further that by doing so it was not interfering with the Court of appeal decision but enhancing it.

Mr. Kobas continued to note that even in the case of ***UAP Insurance Tanzania Limited Company LTD Vs. Akiba Commercial Bank, Misc. Commercial Application No. 47 of 2022, High Court of Tanzania, Commercial Division, at Dar es Salaam*** the court observed that it enjoyed the jurisdiction notwithstanding the presence of notice of appeal. He added further that this court therefore has jurisdiction to entertain this Application aiming at implementing the order of the Court of Appeal which has already granted an order of stay of execution. He then distinguished the cited cases of ***Exaud Gabriel Mmari (supra), Tanzania Electric Supply Co. Limited (supra)*** and ***CRDB Insurance Brokers Limited (supra)***. Mr. Kobas lastly implored this Court to overrule the objections with costs.

In his brief rejoinder Mr. Denga agreed with Mr. Kobas that all cases cited by him are distinguishable in as far as material facts are

concerned. He observed however, that the principles contained therein are not distinguishable. He added further that the principle that lifting of the Garnishee Order Nisi is part of the execution and lifting is tantamount to execution was not distinguished. He then added that the cases cited by the learned counsel for the Applicant were not binding to this Court. Equally, he submitted that, very unfortunate, the cited ***section 38 (1) of the Civil Procedure Code*** was not cited in the chamber summons. He insisted that the Applicant was supposed to apply for lifting Garnishee Order Nisi in the Court of appeal of Tanzania and not this Court. Lastly, Mr. Denga beseeched this Court to struck out the application with costs.

Indeed, I have dispassionately pondered the rival submissions by the parties and in the course, I have formulated two issues which, in my opinion, will finally determine the raised preliminary objections; **one**, whether lifting of Garnishee Order Nisi is tantamount to stay execution and thus part of execution process and **two**, given the circumstances, whether this Court has jurisdiction to entertain the matter.

To begin with, execution of the Decrees is an inherent component of the administration of civil justice. It is a process for

enforcing or giving effect to the Judgement of the Court and is completed when the Judgement creditor gets the money or other thing awarded to him by the Judgement (see ***Re Overseas Aviation Engineering (GB)Limited (1962) 3 All E. R 12***). It goes therefore that the process must be carried out judiciously in order to avoid public outcries and or judicial interventions where necessary.

In view of ***Order XX1 Rule 9 of the Civil Procedure Code (supra)***, whoever wishes to execute a decree, he or she shall apply to the Court which passed the decree or an officer (if any) appointed on his behalf, or if the decree has been sent to another Court, then to such Court or to the proper officer thereof. If the Decree holder is of the opinion that a decree maybe executed peacefully, need not to involve the Court's assistance (see ***Shell and B.P Tanzania Limited Vs. University of Darv es Salaam (2002) TLR 225***). When the assistance of the Court is so required, then the law should be followed strictly.

The execution process begins with a formal or written application under the provisions of ***Order XX1 Rule 10 (2) of the Civil procedure Code*** and once admitted under rule 15 (4) thereof, the Court should order execution of the Decree according to the

nature of application. In ***Ms. Sykes Insurance Consultants Co. Limited vs. MS SAM Construction Co, Limited, Civil Revision No. 8 of 2010*** (unreported), the Court noted that;

Sub-rule (4) casts a mandatory duty on the Court to make a specific order for the execution of the decree in the mode applied for. In our considered view, it is this formal order which forms the legal basis for the issuance of, say, garnishee order, warrant of attachment of movable property, prohibitory orders, etc, under rule 22.

In the cause, under the provisions of rule 24 of the Code, upon a prayer by a Judgement Debtor, a Court that passed a decree or the court to which a decree has been sent for execution, upon sufficient cause being shown, may stay the execution of such decree for a reasonable period of time. Stay of execution or as commonly known in Latin language as *cesset executio*, ("let execution cease") is essentially a court order to temporarily suspend the execution of a court judgement or other court order.

As prefaced above, Civil Case No. 64 of 2007 ended in favour of the 1st Respondent who later on, upon application obtained Garnishee Order Nisi in respect to Applicant's Bank Account No. 3300140110 operated by **KCB Bank (T) Limited**, and Account No. 0401241009 operated and maintained by **Diamond Trust Bank Tanzania Plc**. It

could appear, both counsels for the parties are alive to the facts that, the said Bank accounts are still attached to date.

The Applicant herein is seeking for, in the first prayer, an order of extension of time within which to file an Application for lifting of the Garnishee Order Nisi and in the second prayer, upon enlarging time, this Court be pleased to lift the Garnishee Order nisi dated 31st May 2023 that was issued by this Court in Execution No. 35 of 2020. In my considered opinion therefore, the Applicant desires this Court to stop execution process by lifting the Garnishee Order nisi. It is therefore tantamount to stay execution of orders issued by this Court in Execution No. 35 of 2020.

From the above, the decision of ***Tanzania Electric Supply Co. Limited (supra)*** which Mr. Denga cited to me is correct to the position of the law that;

The request by the applicant to lift a garnishee order nisi is part of the process of execution because in essence it entails moving the Court to stop the process of execution.

Having so arrived, the next question would be whether this Court has jurisdiction to lift the Garnishee Order Nisi or essentially stay execution of the decree in the circumstances of this matter. Mr. Denga raised two issues for observation, **one**, whether with the presence of the Notice of appeal and appeal itself in the Court of appeal, this Court can still proceed to stay execution by lifting Garnishee Order Nisi and, **two**, with the presence of an order of stay execution of the Decree by the Court of appeal, whether this Court can still lift the Garnishee Order Nisi.

It was the submissions by Mr. Denga that once the Notice of appeal is filed, the High Court ceases the jurisdiction to entertain the matter. He reminded this Court of the pendency of Civil Appeal No. 376 of 2023 in the Court of Appeal of Tanzania between the parties. To bolster his arguments, he cited the case of ***Exaud Gabriel Mmari (as legal personal representative of the estate of the late Gabriel Barnabas Mmari) (supra)***.

Mr. Kobas was not far from conceding to the very salutary principle of the law that a notice of appeal once filed, the High Court ceases the jurisdiction on matters of staying execution. He added however that the High Court continues to have jurisdiction on matters

of execution of the decree itself. He was of the views that this Court has jurisdiction to lift the Garnishee Order Nisi in furtherance of the Court of appeal orders of stay execution. In line with ***Section 38 of Civil Procedure Code***, Mr. Kobas cited the cases of ***UAP Insurance Tanzania Limited Company LTD (supra)*** and ***Phoenix of Tanzania Assurance Company Limited and Another (supra)***.

With respect to Mr. Kobas, I am unable to buy his idea that once a Notice of appeal is filed to the Court of Appeal, the High Court ceases the jurisdiction on matters of staying execution but it continues to have jurisdiction on matters of execution of the decree itself. Since I have already arrived at the conclusion that lifting of the garnishee order is tantamount to stay execution, I see no reason to hold otherwise. With the presence of the Notice of appeal in the Court of appeal, which seems to be not in dispute, this Court cannot venture to unknown by staying execution. The Applicant if she so wishes, may go back to the Court of Appeal and apply for such orders.

I am mindful of the everlasting salutary principle in the case of ***Ally Linus and 11 Others Vs. THA and Another (1998) TLR 5***, that it's not a matter of courtesy but a matter of duty to act judicially that requires a Judge not to lightly dissent from the considered

opinions of his brethren but on this, with respect to Mr. Kobas, although reluctantly, I am prepared to find that the cited cases ***UAP Insurance Tanzania Limited Company LTD (supra)*** and ***Phoenix of Tanzania Assurance Company Limited and Another (supra)*** are highly persuasive to me.

As correctly alluded by Mr. Denga which I find to be correct, If the Court of appeal intended that its order of stay execution be implemented or enhanced by the High Court, it could have specifically stated so to avoid ambiguities. The Garnishee Order Nisi cannot be lifted on the pretext that this Court is implementing or enhancing the Court of appeal's stay of execution order in the circumstance of this Case. For the above reasons, although reluctantly, I depart from the cited decisions of the High Court by Mr. Kobas.

There is more on this. As correctly submitted by Mr. Denga which Mr. Kobas finds to be correct, the Court of appeal has already stayed the execution of the Decree in Civil Application No. 461/01 of 2023. In such circumstances, much as I know, for the time being, nothing has been left for this court to attend. All matters relating to execution of the Decree in Civil Case No. 64 of 2007 have been stayed pending finalization of the Appeal in the Court of Appeal. It is for this

reason I sympathize with the Applicant for failure to apply for lifting of the Garnishee Order Nisi when she applied for stay execution in the Court of Appeal. Simply to put, this Court has no jurisdiction to associate itself with execution issues relating to a Decree in Civil Case No. 64 of 2007.

As said before, the Chamber Summons includes two prayers; one, extension of time within which to file application to lift garnishee order nisi and two, having granted the same, this Court be pleased to lift the garnishee order nisi. Although the preliminary objections were raised at a very early stage, I am of the settled mind that in determining the propriety of the Application for extension of time, this Court should not detain or limit itself to the reasons for the delay. The Court must go further and determine the implications or the end results of the main Application if time is extended. The order would not be issued if will serve no purposes or abuse Court processes.

In this matter, even if time is extended, the Applicant will go nowhere for reasons advanced above. I am guided by the decision of ***Reuben Lubanga Vs. Moza Gilbert and 2 Others, Civil Application No. 533 of 2021, Court of Appeal of Tanzania at Dar es Salaam (Unreported)*** where the Court observed;

It is equally the law that, in deciding whether or not to grant an extension of time, the Court should not limit itself to the delay. Instead, it has to consider as well the weight and implications of the issues involved in the intended action and whether the same is prima facie maintainable. This is because, the order being equitable, it cannot be granted where it will serve no purpose or where it is a mere abuse of the court process.

That said, the preliminary objections raised by the 1st Respondent are sustained. The Application, therefore, is hereby struck out with costs.

I order accordingly.

Right of appeal explained.

DATED at DAR ES SALAAM this 14th February 2024.



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H.S. MTEMBWA

JUDGE