

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DAR ES SALAAM SUB-REGISTRY

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 9629 OF 2024

(Originating from Execution number 104 of 2023)

BETWEEN

TANZANIA CIGARETTE PUBLIC LIMITED COMPANY APPLICANT

VERSUS

OMARY MOHAMED IBRAHIM..... RESPONDENT

RULING


Date of Last Order: 21/05/2024

Date of Ruling: 05/06/2024

NGUNYALE, J.

The applicant filed the present application under certificate of urgency praying the court to be pleased to lift and set aside garnishee order nisi of account No. 0106005461300 maintained at Standard Chartered Bank issued by this court on 16th April, 2024 pending hearing and determination of Civil Reference No.23 of 2023 pending before Hon. Philip J.

The application was brought under Sections 38(1), 68(e) & 95 of the **Civil Procedure Code**, Cap. 33 (R.E 2019) (the CPC) and any other enabling provision of the law.

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For the sake of clarity and being guided by the pleadings and submissions, the respondent herein was awarded costs in Misc. Civil application No. 124 of 2022, he then filed a Taxation Cause no. 72 of 2022 against the applicant herein where he was awarded Tsh. 3,400,000/=. The applicant being dissatisfied with the ruling on taxation, filed Civil Reference No. 23 of 2023 which is pending before this court, meanwhile the respondent herein filed Execution No. 104 of 2023 to execute the award in the taxation cause, and the executing court issued a garnishee order nisi which is now the subject of this application.


The applicant was enjoying the service of Sabas Shayo, advocate while the respondent was represented by Ms. Joyce Sojo, advocate. Upon being served with the application the respondent filed his counter affidavit, on consensus the matter was heard by oral submission.

Submitting in support of the application, Mr. Shayo craved leave of the court to adopted the affidavit sworn by Peter Lyakurwa to form part of his submissions. He prayed the court to lift and set aside the garnishee order nisi of account no. 0106005461300 Standard Chartered Bank issued on 16th April, 2024 pending hearing and determination of Civil Reference No. 23 of 2023 which is pending before Hon. Philip J, in this court. The reasons he advanced for the application to be granted are three. **One**, that the

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garnishee order nisi was issued without notice to the applicant that in Taxation Cause No. 72/2022 there was an order of serving the applicant (TCC) but perusal indicates that summons was not issued. **Two**, that there is a pending reference (Civil Reference No. 23 of 2023) before this court challenging the decision in Taxation Cause No. 72/2022 and the respondent is aware of it. It was his submission that execution should not continue as there is a civil reference to challenge the decision which the respondent is executing. **Three**, it was his submission that the respondent is not entitled to receive instruction fees because he was receiving legal aid as per this court ruling dated 29th August, 2023 in Civil Reference No. 2 of 2023 before Hon. Bwegoge, J. (Annexure TCC4 to the application). He concluded his submission by stating that it is not the first time where the court decide to lift garnishee order. He cited the case of **UAP Insurance Tanzania Company Ltd vs Akiba Commercial Bank PLC** Misc Commercial Application No. 47 of 2022 where the court lifted garnishee order nisi upon sufficient reasons. And for the reasons he stated, he prayed the court to grant the application with costs.

Rebutting the applicant's submission, Ms. Sojo craved leave of the court to adopt the contents of counter affidavit and submitted that the application is brought under wrong provision of law because section 38,



in this application there is no question whatsoever which arose between the parties also section 68 (e) and Section 95 are interrelated as they refer where there is prevention or defeat of ends of justice. On the grounds for granting the application, she submitted that garnishee order nisi is a normal procedure in court and it has a peculiar procedure starting with ex-parte order. Therefore, according to her failure to notify the applicant is not fatal as the execution was in the first stage of ex-parte, and by the way there was no order of issuing summons in the taxation cause. It was her contention that, the grounds cannot be good reason for the court to uplift the garnishee order nisi. She cited the case of **St John University of Tanzania versus Jeffery Industries Saini Ltd** Misc Commercial App No. 64 of 2021. Regarding the submission that the respondent is not entitled to costs as he enjoyed legal aid, she submitted nothing has been brought to prove that they real provided legal aid and added that they have appealed to the Court of Appeal against the decision of Hon. Bwegoge, J. Lastly, regarding the presence of a civil reference before Hon. Philip J., she submitted that the application has nothing to do with the instant application which is improper, he could opt to stay execution. She prayed the application be dismissed with costs.

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On his rejoinder, Mr. Shayo reiterated his earlier submissions and added that the cited provisions are proper. The respondent act of executing the order while they are aware that it has been challenged by way of reference is not right. Regarding the issue of being notified on the execution he rejoined that applicant was not aware of the orders because he was never served, the next stage the court had justification to issue garnishee order absolute. He distinguished the case of **St. John** (supra) cited by the respondent by stating that once a garnishee order is issued there will be nothing left to be determined by the same court. Therefore, the hands of the court are not tied up because garnishee order absolute has not been issued.

Appreciating the rival submissions, this court is called to decide whether to grant the prayers sought or not. The application stands under the provisions of sections 38(1), 68(e) & 95 of the **Civil Procedure Code**, Cap. 33 (R.E 2019).

From the upright, having considered the provisions of the law which this application is brought under, the pleadings with relevant submissions; the prayer of lifting the garnishee order nisi is in the nature of a stay of execution pending hearing and determination of Civil Reference No. 23 of 2023 before Hon. Philip J. This position was propounded in the case of



Tanzania Electric Supply Co. Ltd versus Mafungo Leonard Majura & 14 others, Civil Application no. 210 of 2015 where the court of appeal had this to say:

*"The position in the present matter is similar to that which pertained in the above cited case. 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.** Thus, the Court is improperly moved firstly because Rule 4 (2) (a) (b) and (c) of the Rules is non-existent, and secondly that because we have said **lifting of the garnishee order nisi is a process of execution, therefore is tantamount to stay of execution,**"(emphasis added).*

Now, after being in a firm stand that the application of lifting the garnishee order nisi is tantamount to stay of execution, the next question which follows is whether the court has been properly moved. In her submission Ms. Sojo claimed that the court has not been properly moved as the application was brought under wrong provision of law. It is wrong provision because section 38 (1) is about questions arising between the parties, but in this application, there is no question soever which arose between the parties, also section 68 (e) and Section 95 are interrelated



as they refer where there is prevention or defeat of ends of justice. On his reply the applicant claimed to have moved the court properly.

Generally, execution of court decrees is regulated by the **Civil Procedure Code** under order XXI. The same Order under rule 24 to 27 provides for the manner of staying execution pending determination of a suit between the parties. This means the application of lifting the garnishee order nisi should have been preferred under the provision of order XXI of the Civil Procedure Code. In **Joseph Shumbusho vs Mary Grace Tigerwa & Others** (Civil Appeal 183 of 2016) [2020] TZCA 1803 (6 October 2020), pages 15-16, the Court of Appeal had stated that:

*“Given the fact that the respondents had cited section 99 of the Probate and Administration Act which deals with revocation and removal of the administrator the citation of the inapplicable provision of the law did not make the respondents' application incompetent Admittedly, the respondents did not go further to mention the specific subsection that was applicable. But, as rightly submitted by the learned counsel for the respondents, **the failure to cite specific subsection of the law did not make the application incompetent**” (Emphasis added)*

From the above position, I also invoke the overriding objective and hold that failure to cite the proper citation to move the court in uplifting the



garnishee nisi order is not fatal provided that this court is vested with jurisdiction under section 38(1) of the Civil Procedure Code to hear and determine the application.

The applicant submitted that the application should be granted as the respondent ought not to continue with execution as he was aware of the pending civil reference in court. In the case of **UAP Insurance** (supra) the Court of Appeal had this to say:

*"It is true that when a notice of appeal is filed at the Court of Appeal, the trial court is barred from entertaining any other matter relating to the decision appealed against. **Applications for execution of court decrees fall within the exception to the rule hereinabove. That is why the Judgment Debtor had to move the Court of Appeal for an order of stay of execution which she obtained on 2nd March 2022**"*
(emphasis added)

I understand that this is not an appeal as submitted by the applicant, however the principle remains the same that staying of an execution is not automatic when one prefers to challenge the decision which has to be executed.

Now, as this application stands for lifting the garnishee order nisi which is equivalent to stay of execution and further there is no doubt that there is



a pending reference before this court between the parties challenging the taxation cause where the execution emanates. I think it is prudent for this court to grant an order of staying execution pending determination of the reference. I choose to order for stay of execution because it is an order which is addressed to the court to suspend or delay the execution process. Taking in mind that the garnishee order nisi was issued at the earliest stage of execution, further stage of garnishee order absolute need to be stayed pending determination of the Civil Reference. In the case of **National Housing Corporation versus Peter Kassidi and 4 Others**, Civil Application No. 243 of 2016 the CAT held that:

*"...while an order of stay of execution is also in the nature of prohibitory order, **it is addressed to the court carrying out the execution to suspend or delay the enforcement of the decree concerned pending hearing and determination of a proceeding, most certainly an appeal. What a stay of execution does, therefore, is to prohibit the Court from proceeding with the execution further.**"*

Having said and done, I hereby order the Execution No. 104 of 2023 be stayed pending hearing and determination of Civil Reference No. 23 of 2023. Order accordingly.



Dated at Dar es Salaam this **05th** day of **June, 2024**.



A handwritten signature in blue ink, appearing to read "D. P. Ngunyale".

D. P. Ngunyale

JUDGE

Ruling delivered this **05th** day of **June, 2024** in presence of Ms. Joyce Sojo for the respondent and hold brief for Mr. Sabas Shayo for the applicant.



A handwritten signature in blue ink, identical to the one above, appearing to read "D. P. Ngunyale".

D. P. Ngunyale

JUDGE