

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION

AT DAR ES SALAAM

COMMERCIAL CASE NO. 57 OF 2001

A&SD COMPANY.....1ST APPLICANT

ALBERT MALANGALILA.....2ND APPLICANT

VERSUS

CRDB BANK LIMITED.....1ST RESPONDENT

AMBASSADOR HASSAN OMARY

GUMBO KIBELLOH.....2ND DEFENDANT

Date of oral submission: 04 November, 2010.

Date of Ruling: 05 November, 2010.

RULING

BUKUKU, J.:

Under a Certificate of Urgency, the Applicant filed this Application in this Court, praying for the following Orders:

- (i) That, this Honourable Court may be pleased to grant an Order for stay of execution of this Honourable Court's Order dated 20th November, 2010 pending the determination of the Applicant's intended appeal;

- (ii) That, this Honourable Court may be pleased to grant an Order restraining the respondents by themselves, or through their agents, workmen, assignees, or any other person working on that behalf from effecting a transfer of ownership of landed property in plots No. 682 and 683 block F, Tegeta Area, Kinondoni District in Dar Es Salaam and comprised of C.T No. 43780 from 1st Respondent to any other person pending the intended appeal;
- (iii) Costs of this application; and
- (iv) Any other orders and or/reliefs that this Honourable Court may deem just and fit to grant.

That application is supported by an affidavit of one, Albert Malangalila, the applicant in this matter.

In brief, the facts of this case are as follows: Way back in 2001, the Applicant secured a loan from the 1st Respondent. As security, the applicant mortgaged his property (now in question), situate at Plot No. 682 & 683 Block F, Tegeta Area Dar Es Salaam, comprised in the Certificate of Title No. 43780.

As it transpired, the applicant has failed to liquidate his loan despite several correspondences, repeated reminders and exchanges which transpired between the parties. Upon an application to this court made by the defendant, it was ordered that the said landed property be disposed of by way of public auction. The public auction was conducted on 14th February, 2009, and the 2nd Respondent purchased the property at a total price of T.shs. 130,000,000.00/, which he paid accordingly.

Having been dissatisfied with the outcome of the sale of the landed property, the applicant filed objection proceedings pursuant to section 14 (1) of the Law of Limitation Act, Cap 89 R:E 2002, Order XXI Rule 87 (1) and section 95 of the Civil Procedure Code (Cap 33 RE: 2002). On the 20th of October, 2010, this Court dismissed with costs, the said application on grounds that, the application filed by applicant could not be entertained for want of satisfaction of the provisions of Rule 87(1) of Order XX1 of the CPC, which requires inter-alia, the applicant to deposit in court, a sum equal to five percent of the purchase money for payment to the purchaser, and also to deposit the amount specified in the proclamation of sale for the payment of the decree holder. Having been aggrieved by the ruling of Hon Makaramba, J. dated 20th October, 2010, the Applicant filed this application.

This application was fixed for hearing on the 04th of November, 2010. Both parties were duly informed. On the said date, the Respondent appeared while the Applicant did not make appearance.

It is a fact that, the Applicant, who has filed a chamber summons under a certificate of urgency, having been aware of the hearing date, entered no appearance in Court when his application was called on for hearing before me. No apparent reasons were advanced for non appearance on the hearing date.

I wish to stress here that, this is one of those old cases which have dragged on for so long since way back in 2001. It seems that the Applicant is not serious in pursuing his case or else, he is aware of its predicaments and thus trying to use some delaying tactics in order to prevent the ends of justice to prevail.

The provisions of Order IX Rule 8 of the CPC are very clear as to the procedure where defendant only appears when the suit is called for hearing.

The said rule states:

"8. Where the defendant appears and the plaintiff does not appear when the suit is called on for hearing, the court shall make an order that the suit be dismissed unless the defendant admits the claim, or part thereof, in which case the court shall pass a decree against the defendant upon such admission and, where part only of the claim has been admitted, shall dismiss the suit as so far it relates to the reminder."

On this, I am satisfied that, the Applicant had knowledge of the hearing date and made no appearance in court on the said date, without any reason of whatever nature agreeable to this Court.

Either, it is the Applicant himself who moved this Court to entertain the hearing of his application under a certificate of urgency, and decided not to appear on the date of hearing. It is from this that I found it appropriate to allow the application be heard ex-parte.

In proceeding ex-parte, the Defendant, represented by their Counsel, Mr. Mpoki presented lengthy submissions. Equipped with case law citations such as **Alliance Insurance Corporation & nine others Vs. The Commissioner for Insurance & two others Civil Ref. No 5/2005; Shell (T) Limited Vs. Scandinavia Express Services Ltd, Msc. C.C No. 36/2005 and the case of Norman Mahboob Vs. Milcafe Limited C.C No. 41/2003**, together with a number of authorities, Counsel for the Respondent submitted that, this application is not properly filed for reasons that this court has no jurisdiction to hear and determine this case on grounds that, once a notice of appeal has been lodged in the Court of Appeal, the High Court ceases to have jurisdiction on the matter, unless there are exceptional circumstances on points of law.

He averred that, the appeal before this Court does not fall within those exceptions. Further to that, it is his submission that, once proceedings of appeal to the Court of Appeal have been commenced, the High Court could not properly apply section 95 of the CPC for simple reasons that, the proceedings are no longer in the Court. Against that background, the Counsel prayed that, this application be dismissed with costs for lack of jurisdiction.

With regard to this issue, the real question is whether with the existence of an appeal against Commercial Case No. 57 of 2001, this Court has jurisdiction to entertain any further matters in respect of that same matter. In the case of **Matsushita Electric Co. (E.A) Limited Vs. Charles George t/a G.G Traders Civil Appeal No. 71 of 2001 (CAT) (Unreported)** Justice Ramadhani held that:

" I am of the considered opinion that once a notice of appeal is filed under Rule 76, then this Court is seized of the matter in exclusion of the High Court except for application specifically provided for such as leave to appeal, provision for a certificate of point of law or execution where there is no order of stay from this Court".

Likewise, in the **Alliance Insurance Corporation** case (Supra) Lubuva, J.A (as he then was), stated,

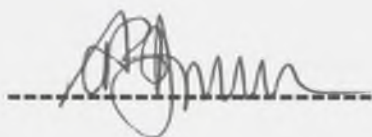
"It is now settled that, once a notice of appeal has been filed, the High Court has no jurisdiction to entertain an application for stay of execution."

The above decisions are very clear. They reflect the submissions by the Counsel for the Respondent that, once a notice of appeal has been issued,

the jurisdiction of the High Court ceases except for matters specifically provided for.

In this instant case, it is not in dispute that, there is a notice of appeal lodged by the Applicant on 22 October, 2010 in this court. Since a notice of appeal has been issued, I am at one with the Counsel for the Respondent that, the jurisdiction of the High Court has ceased. As a consequence of the above findings, I dismiss this application with costs.

It is accordingly ordered.

A handwritten signature in dark ink, appearing to be 'A.E. Bukuku', is written over a horizontal dashed line.

A.E. BUKUKU

JUDGE

05 November, 2010.

1,328 words.