

IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL CAUSE NO. 110 OF 2015
(Arising from Miscellaneous Commercial Causes No. 169 & 186 of 2014)

VODACOM TANZANIA LIMITED APPLICANT
VERSUS
FTS SERVICES LIMITED RESPONDENT

15th June & 8th July, 2015

RULING

MWAMBEGELE, J.:

The applicant Vodacom Tanzania Limited is one of the main Telecommunication service providers in Tanzania. It filed an application in this court seeking for the following *ex parte* interim and *inter partes* orders as follows:

Ex parte:

- a) The honourable court be pleased to grant an interim order for stay of execution/enforcement of the Arbitral Award dated 6th June, 2014 filed in court vide an order dated 29th July, 2014 pending hearing and determination of the application for extension of time to apply for stay of execution and the application for stay of execution/enforcement of the arbitral award.

Inter partes

- b) The honorable court be pleased to grant an order extending time within which to file an application for stay of execution of the arbitral award dated 9th June, 2014 and filed in court vide an order dated 29th July, 2014; or
- c) In the alternative to (b) above in computing the time limited for filing an application for stay of execution the Honorable Court be pleased to exclude the time within which the applicant was diligently and *bonafide* prosecuting Application No. 194 of 2014;
- d) The honourable Court be pleased to grant an order staying execution of the arbitral award dated 9th June, 2014 which was filed in Court vide order dated 29th July 2014 pending the hearing and determination of the intended appeal to the Court of Appeal against the Commercial Division of the High Court's decision refusing to set aside the award in Miscellaneous Commercial case No. 186 of 2014; and
- e) For an order that costs of and incidental to this application abide by the result of the application.

The application is supported by an affidavit sworn by one Olaf Peter Mumburi and countered by the counter affidavit of one Frank Goyayi. The latter however, prefaced his counter affidavit with a notice of preliminary objection premised on four grounds, namely:

- (a) The application for interim order for stay of execution/enforcement of the arbitral award is legally untenable and is misconceived in that

- an order for stay of execution cannot be applied for and or be granted in the absence of an appeal pending or being contemplated;
- (b) There being no notice of appeal by the applicant against the order of 29th July 2014 as correctly found by the Court of Appeal in Civil Application No. 194/2014 the Honourable court lacks jurisdiction to entertain the application;
 - (c) The application is bad in law for combining distinct and unrelated prayers in one chamber summons; and
 - (d) There is pending in the court of Appeal, Civil Application No. 92/2015 lodged by the applicant herein seeking review of that court's Ruling dated 30th April 2014 in Civil Application No. 194/2014 which was an application for stay of execution by this same applicant.

On the 28.05.2015 the learned counsel Ms. Samah Salah entered appearance for and on behalf of the applicant while Messrs Michael Ngalo and James Bwana appeared for the respondent. They both agreed to be in command of the application and accordingly sought for indulgence of this court to file respective responses and have this matter slated for the hearing of the above raised preliminary points of objection (henceforth "the PO"). Ms. Samah Salah for the applicant pressed this court that an interim order for preservation of the *status quo* should be made by this court or else the respondent may move on with execution and render their application nugatory. I granted the said order and set the matter for hearing of the PO on the 15.06.2015. They accordingly appeared and argued the PO though this time it was Mr. Gaspar Nyika, learned counsel who appeared for the applicant.

At the hearing, Messrs Michael Ngalo and James Bwana, learned counsel who had raised the PO for and on behalf of the respondent, speaking through Mr. Ngalo, told this court that they did not comply with Rule 64 of the High Court (Commercial Division) Procedure Rules, 2012 – GN No. 250 of 2012 which requires them to file skeleton written arguments three working days before the date set for oral submissions. He ascribed from the bar the “busy schedule in the court of appeal during last week” as a reason for their failure to comply with that requirement. On the other hand, Mr. Gasper Nyika, learned counsel for the applicant had dutifully filed his in compliance with the rule. The failure by the learned counsel for the respondent notwithstanding, the hearing proceeded orally as required by the Rules. I do not intend to reproduce their arguments at length but, rather, I will attempt to have a brief summary thereof in so far as they relate to the issues raised in the course of hearing of the PO.

Mr. Ngalo kicked off his submission by informing this court of his intention and decision to abandon the third ground of objection. He then went on to submit in respect of the first and second grounds as consolidated which, to his mind and this court thinks rightly so, were intertwined. The fourth ground was argued separately.

Submitting in respect of the consolidated two grounds, Mr. Ngalo, learned counsel, stated that since the Court of Appeal in Civil Case No. 194 of 2014 has stated that an order of this court dated 29.07.2014 is executable and appealable, and since there are no proceedings neither in this court nor in the Court of Appeal in relation to that order, an application for extension of time

to apply for stay of execution and an application for stay of execution of that order is misconceived and cannot be entertained. To bolster up his point, he cited and supplied to me the decision of the Court of Appeal in the case of ***National Housing Corporation Vs Etiennes Hotel***, Civil Application No. 175 of 2004. He also posed a question: if there is no appeal contemplated why order for stay of execution? It was his contention that prayer (d) in the chamber summons wants to confuse this court because there is no appeal against an order of this court dated 29.07.2014 but there is properly notice of appeal against an order of this court refusing to set aside the arbitral award in Miscellaneous Commercial case No. 186 of 2014 and that the two orders are not related in any way. To hammer home this proposition on the distinction of these orders, he referred me to Civil Case No. 194 of 2014 particularly at pages 14 and 15 as well as page 3 of the ***NHC*** case (supra). For these, he surmised that the prayers in ground (a) and (b) of the application are misconceived and untenable.

As to ground (d) of the PO, the learned counsel raises the issue of *subjudice* putting that there is notice of motion in the Court of Appeal by the same applicant seeking for review of its ruling and hear an application for stay of execution, that the same applicant is riding two horses at the same time which is not proper. He submitted that since the application in this court was filed on 13.05.2015 and the one in the Court of Appeal was filed on 06.05.2015 the applicant ought to have waited the finalization of Civil Application No. 92 of 2015 in the Court of Appeal. Pursuing the matter simultaneously as the applicant has done, he argued, is tantamount to an abuse of the court process.

In opposition, Mr. Nyika, learned counsel, adopted his skeleton written arguments as part of his arguments and stated in addition that prayer (a) for interim order was made *ex parte* and has been dealt with. He stated further that there is no requirement in law that in order to grant stay of execution there must be an appeal or intended appeal and therefore it is not correct to say that an application is incompetent for failure to show an intended appeal. He maintained that the only question to be determined is whether the applicant has disclosed sufficient reasons for stay to be granted as per Order XXXIX rule 5 (1) of the CPC and that that question cannot be determined at this stage of the preliminary objection but rather at the hearing of the application on merits.

Mr. Nyika, learned counsel for the applicant, continued to state that the reason for seeking to stay the 29.07.2014 order pending hearing and determination of intended appeal against the 16.10.2014 order is that enforcement of the arbitral award has two stages: the first one is the filing of the award under section 17 (1) of Arbitration Act, Cap. 15 of the Revised Edition, 2002 (henceforth "the Arbitration Act"). And secondly, once the arbitral award is filed, the right of the opposite party is to apply to have it set aside under section 16 of the Arbitration Act, and further that their application to do so was refused and they have filed a notice of appeal against that refusal. His contention is that if the applicant filed an appeal against the 29.07.2014 order then this court could not have jurisdiction to entertain this application. On this procedure, the learned counsel referred the court to the decisions of ***Tanzania Cotton Marketing Board Vs Cogecoat Cotton Company SA*** [1997] TLR 165, at 171, 172. On the court's power in this application, the learned counsel cited the decision of this court in ***Tanzania***

Electric Supplies Company Limited Vs Dowans and another,
Miscellaneous Civil Cause No. 8 of 2011 at page 5.

As to ground (d) of objection, the learned counsel stated that there is no application for stay in the Court of Appeal because it was struck out and the pending application is for review of the decision of 22.04.2015 to the extent of errors therein as shown in the notice of appeal that it was not correct for the Court of Appeal to hold that section 74 (1) (f) of the CPC makes an order of this court appealable to the Court of Appeal; that it erred to hold that the arbitral award cannot be enforced unless converted into a decree by an order of the Court. He went on to submit that it is therefore not correct to say that the application in the Court of Appeal is for stay of execution to render this application *subjudice*. Surmising on this take, he referred me to an order of this court of 19.05.2015 confirming that there is no pending application for stay of execution in the Court of Appeal.

Finally the learned counsel distinguished the ***NHC*** case (supra) with the present application putting that in the said case, the Court of Appeal was dealing with an application for stay in the Court of Appeal under the Court of Appeal Rules which requires there to be a notice of appeal but in the present case there is no requirement for notice of appeal for application in this court and therefore prayed that the PO should be dismissed.

In a short rejoinder, Mr. Ngalo, learned counsel, stated that he had no qualm with the powers of this court under Order XXXIX rule 5 (1) of the CPC for issuing a stay of execution order, but quickly added that it is not always so. Explaining his view, he submitted that there has to be something pending

either in this Court or Court of Appeal for one to apply for stay of execution and it is not correct to say that the only requirement is sufficient cause. He went on to fault the application saying that if at all the applicants have no qualm with an order of the Court made on the 29.07.2014, why apply for stay which would amount to sheer academic exercise?

The learned counsel for the respondent maintained further that since the Court of Appeal has said that the order of 29.07.2014 is appealable and executable, this court is bound to follow that decision even if it appears to be wrong. He argued that since the Court in ***Dowans*** case (supra) dismissed the application because there was a notice of appeal in the Court of Appeal then in so far as the decision of 29.07.2014 and 16.10.2014 are related, this court has no jurisdiction to entertain this application because there is a notice of Appeal in the Court of Appeal against the decision of 16.10.2014.

Finally he submitted that there being an order of this Court of 19.05.2015 for execution to proceed, it is a contradiction in terms for the applicant to come seeking for stay of that execution in this court because this court is *functus officio*. The learned counsel rested his case there and thence, the ball was into my court to decide.

I appreciate both learned counsel's arguments in respect of their respective positions. Indeed the same have been handy in the course of composing this ruling. Apparently, the PO seeks to impeach the application on the ground of incompetency. The reasons thereof are that there is no notice of appeal neither here nor in the Court of Appeal against an order of this Court dated 29.07.2014 subject of an application for stay of execution, and secondly that

the application is *subjudice*. From a rear angle, the question of this court being *functus officio* in so far as that order is concerned was also raised. That too, in my view, is an additional ground to this preliminary objection which requires attention as well. I must assure the counsel for the parties that I have given due consideration to each and every argument they fronted with utmost sobriety. This now is my ruling.

Out of the main grounds fronted for the impeachment of an application and the respective arguments for and against, as well as the surrounding circumstances of this matter, the main questions that I am called to answer, I think, are: one; whether the notice of appeal is or is not a requirement for an order of stay of execution to be issued in this court, two; whether or not this application is *subjudice*, and three; whether or not this court is *functus officio* in relation to an order dated 29.07.2014.

I find it apposite to start with the last question; that is whether or not this court, having decided on 19.05.2015 that execution of the decree issued on 29.05.2014 should proceed, is *functus officio*. Or, put differently, can this court, after making an order allowing execution process to start, subsequently make an order allowing an applicant to file an application of stay of the said execution?

The applicant's counsel seems to suggest in the affirmative. The respondent's counsel, however, maintains the view that the hands of the court are tied, it having ordered execution to proceed.

I find the view held by counsel for the respondent to be more enticing. This is because the applicant herein had instituted stay of execution proceedings which were successfully challenged in the Court of Appeal. Thereafter, back in this court, my brother Songoro, J., on the 19.05.2015, made an order putting the execution machinery into motion. This very same court cannot, in my view, justifiably go back to halt that process, unless the order is lifted first. Simply put, what has been done by this court is done and cannot be undone by this same court. That is to say this court, having been seized with an application for execution of the order of this court dated 29.07.2014 and finally ordered execution to proceed, the same court cannot go back again to unsay what it said; it cannot go back to say the execution it said should proceed should now be stayed or that time should be extended so that an application for stay may be filed. I therefore find and hold that once the court has ordered that execution of a decree it issued should be executed, it cannot go back again to say that it should not unless that order is lifted first. The court cannot do so because after making the order for execution, it became *functus officio*. I would therefore sustain this ground of objection.

But assuming that I am wrong in the foregoing finding, which, of course, I think I am not, let me canvass the first question as well. This is; whether the notice of appeal is or is not a requirement for an order of stay of execution to be issued in this court. Apparently, Mr. Nyika, learned counsel is right that there is no requirement of law that there must be a notice of intention to appeal or a notice thereof filed for this court to grant stay orders. This is the tenor and import of the provisions of Order XXXIX rule 5 (3) of the CPC which gives three condition which should be fulfilled before a stay order is granted. Mr. Ngalo does not seem to object to that proposition but states that "there

has to be something pending either in this Court or Court of Appeal for one to apply for stay of execution". Mr. Ngalo does not seem to be catching the correct train here. Surely, the applicant's application having been struck out in the Court of Appeal (in ***Vodacom Tanzania Limited Vs FTS Services Limited***, Civil Application No. 194 of 2015 whose ruling was pronounced to the parties on 30.04.2015), there still is pending in this court the order which the applicant unsuccessfully sought to impugn.

But my problem is on Mr. Nyika's statement to the effect that they are not intending to challenge that order; that is the order of 29.07.2014. I wonder and pose to myself a question, as Mr. Ngalo did, if the applicant has no qualm with that order and he has no intention of appealing against the same, appealable as it has been ruled by the Court of Appeal, why ask for stay orders in the first place? It is the law in this jurisdiction founded upon prudence that a successful litigant should enjoy the fruits of his litigation unless the judgment debtor shows justification for him (the successful litigant/decreed holder) to continue to be deprived of them (the fruits of his litigation) – see: ***Mrs Wajibu Magungu & Others Vs NBC*** Civil Application No. 176 of 2003, ***Abdul Hamid Mohamed Kassam & Abdullatif I. Murudeker Vs Aman Mohamed & 2 Others***, Civil Application No. 176 of 2006 ***Peter P. Temba t/a Mahenge Timber & Enterprises Vs Dar es Salaam City Council & Hassan Ibrahim Sobo***, Civil Application No. 149 of 2009; all unreported decisions of the Court of Appeal. This court, on the basis of the foregoing authorities, cannot condone Mr. Nyika's course of action of attempting to deprive the decreed holder of its fruits of litigation for no apparent reason. For these reasons I would have sustained the first point of the PO as well.

All the above said and done, I do not see the need to decide on the remaining question as posed above. The preliminary points of objection raised by the respondent are sustained, and, consequently, the application for extending time within which to file an application for stay of execution of an order of this court dated 29.07.2014 is hereby struck out with costs for being incompetent.

Order accordingly.

DATED at DAR ES SALAAM this 8th day of July, 2015.

J. C. M. MWAMBEGELE
JUDGE