IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL CAUSE NO. 36 OF 2015

(Arising from Commercial Case No. 11 of 2014)

NATIONAL CHICKS CORPORATION LIMITED
ISSACK BUGALI MWAMASIKA
HAROLD ISSACK MWAMASIKA } **..... APPLICANTS**
ATUGANILE ISSACK MWAMASIKA
INNOCENT ISSACK MWAMASIKA

VERSUS

NATIONAL BANK OF COMMERCE .... RESPONDENT

30th April & 11th June, 2015

RULING

MWAMBEGELE, J.:

This is a ruling in respect of preliminary points of objection (hereinafter "the PO") fronted by Mr. Nyika, learned advocate, for and on behalf of the National Bank of Commerce against an application filed by the five applicants; National Chicks Corporation Limited, Issack Bugali Mwamasika, Harold Issack Mwamasika, Atuganile Issack Mwamasika and Innocent Issack Mwamasika.

In order to have a better understanding of the present PO, I find it appropriate to narrate, albeit briefly, the background facts to the present

application before me. The respondent was the plaintiff in Commercial Case No. 11 of 2013 in which he had sued the five applicants claiming for:

(a) Payment of a total of Tshs. 2,424,507,855.42 being an outstanding amount comprised of Tshs. 1,435,630,742.42 on account of the Overdraft Facility and Tshs. 988,877,113.00 being the outstanding amount on account of the term loan;

(b) Interest on the above at the rate of 20% from September 14,2011 to the date of judgment;

(c) Interest on the decretal amount at the rate of 7% from the date of judgment until full and final payment;

(d) In the alternative and upon failure by the Defendants to pay the amount in (a) above:

i. appointment of Mr. Sadock Magai as a receiver Manager with powers to sale the mortgaged properties to wit CT 7963 Plot No. 1028, Block 'G' Boko Area in Dar es Salaam City and CT. No. 7484-MBYLR, Plot. No. 777, Located in Rungwe District, Mbewe and Ndaga, Mbeya Region.

ii. Appointment of Mr. Sadock Magai as a Receiver Manager over the assets charged under the debenture;

iii. An order for vacant possession of the mortgaged properties on CT No. 7963, Plot No. 1028, Block 'G' Boko Areaa in Dar es Salaam City and CT. No. 7484 MBYLR, Plot No. 777 Located in Rungwe District Mbewe and Ndaga, Mbeya Region.

iv. payment of the balance of outstanding amount minus the amount to be recovered from the sale of the mortgaged property at (d) and (e) above;

(e) Costs of the suit; and

(f) Any other reliefs which this Honourable Court may deem just to grant in favour of the Plaintiff.

The applicants did, *inter alia*, alongside with their joint Written Statement of Defence, raise the following preliminary points of objection on point of law:

1. The Defendants hereby raise the following preliminary objections on points of law, that is to say;
   a) The suit is not maintainable Under XXXV as a summary suit and the plaint must be rejected by this Honourable court Under Order VII rule 11 (a) & (c) of the Civil Procedure Code. Cap 33R.E 2002;
   b) That the suit, having been endorsed as summary suit Under Order XXXV of the Civil procedure Code Cap 33 R. E. 2002 cannot lawfully proceed to be tried as an ordinary suit;
   c) That the 1st, 3rd, 4th and 5th defendants, not being mortgagors, cannot be sued Under Order XXXV of the Civil procedure Code, Cap 33 R.E. 2002;
   d) That Honourable Court has no jurisdiction to try this mortgage suit as a commercial case; and
   e) That the suit against the 2nd Defendant is incompetent and bad in law for being premature for want of a statutory notice of default.

This court (Nyangarika, J.), in its ruling handed down on 04.11.2014, sustained the preliminary objection having found that the preliminary point of objection regarding jurisdiction and a default notice having not issued to the

defendants therein, were meritorious. The plaintiff's suit was therefore struck out with costs in favour of the defendants.

Thus the plaintiff's suit was struck out for want of jurisdiction and the default notice. But that was not the end of the matter. It happened that the defendant; the applicant herein, had pleaded a counterclaim in the Written Statement of Defence (hereinafter "the WSD"). The issue that came to the fore and is the subject of this two point PO was: the main suit having been dismissed, what was the fate of the counterclaim raised by the defendants; the applicants herein. The defendants are of the view that it is still alive and pending in this court while the plaintiffs had and still have the view that it died a natural death with the striking out of the suit on which it clung.

Perhaps basing on that belief, the applicants filed an application under the provisions of section 68 (e) and Order XXXVII rules 1 (a) and 2 (1) of the Civil Procedure Code, Cap. 33 of the Revised Edition, 2002 (hereinafter "the CPC") seeking for the following orders:

(a) That the National Bank of Commerce, the Respondent its, Servants workman or agents in whatever capacity may be temporarily restrained from exercising any of its rights under the mortgages of properties known as Plot No. 1028 Blo0ck "G" Boko Area, Kinondoni C.T. No. 79631;
(b) That the National Bank of Commerce, the Respondent its servants, workmen, or agents of whatever description, be temporarily restrained from effecting receivership and taking possession of and exercising all or any powers conferred upon receivers in respect of the mortgaged

properties hereinabove mentioned, until the final determination of Commercial Case No. 11 of 2014; and

(c) That costs of this application be provided for

The application filed by the applicants has, as already shown at the beginning of this ruling, been objected by the respondents on the following two points of preliminary objection; namely:

1. To the extent that Commercial case No. 11 of 2014 was struck out on November 4, 2014 the present application is incompetent and not maintainable in law for want of a suit upon which such application could be based; and
2. To the extent that there is a notice of appeal filed against the decision of the court striking out Commercial Case No. 11 of 2014 the Honourable Court lacks jurisdiction to hear and determine the Application has ceased.

This is a ruling in respect of this preliminary objection (henceforth "the PO").

The PO was argued before me on 30.04.2015 during which the applicants were represented by three seasoned lawyers; Mr. Mabere Marando, Mr. Martin Matunda and Mr. Burton Mwakisu, learned advocates. The respondent had the gracious services of Mr. Gasper Nyika, learned advocate. The *viva voce* hearing was preceded by the parties filing skeleton written arguments as dictated by rule 64 of the High Court (Commercial Division) Procedure Rules, 2012 – GN No. 250 of 2012 (hereinafter "the Rules").

Mr. Nyika, learned counsel, was the first to submit. He adopted the skeleton written arguments earlier filed and submitted in support of the first preliminary point of objection. In essence, Mr. Nyika's submission on the first point of PO is to the effect that, in view of the fact that Commercial Case No. 11 of 2014 was struck out by this court on 04.11.2014, the present application is incompetent and not maintainable in law for want of suit upon which the present application could be based.

The anchor of Mr. Nyikas's argument is section 68 (e) of the CPC as confirmed in the decision of this court of ***Tanzania Electric Supply Company Vs Independent Power Tanzania Ltd & 2 others*** [2000] TLR 324 to the effect that these provisions can only be invoked when there is a suit pending before the court.

Mr. Nyika distinguished the decisions cited in the applicants' skeleton written arguments stating that the same were not terminated on account of want of jurisdiction. In the cases, including the ***East African Seed*** case (infra), the case was dismissed for want of prosecution and it was ruled that the case should proceed with the counterclaim notwithstanding the dismissal of the suit, he argued. Mr. Nyika, learned counsel, went on to submit that in the case at hand, the court ruled that it had no jurisdiction to deal with the case and proceeded to strike it out. He submitted that the counterclaim arose out of the same transaction which the court said it had no jurisdiction to entertain. In those premises, it was not possible to preserve the jurisdiction on the counterclaim and, worse more, there was no specific order made by the court for the counterclaim, he submitted. If the court wanted to preserve

its jurisdiction to deal with the counterclaim, he charged, it would not have failed to state so in clear and certain terms.

In regard to the second point of PO, Mr. Nyika had nothing to add at the oral hearing. Through the skeleton arguments earlier filed, Mr. Nyika had argued that to the extent that there is notice of appeal filed in respect of Commercial Case No. 11 of 2014, this court lacks jurisdiction to hear and determine the present application. He relied on ***Aero Helicopter (T) Ltd Vs Jansen*** [1990] TLR 142 which was followed with approval in ***Pradeep Kumar Lalji & another Vs Vita Grain Limited***, Miscellaneous Commercial Application No. 181 of 2014 (unreported) to reinforce the proposition that once a notice of appeal is filed, the jurisdiction of the High Court to entertain the matter ceases, save for matters relating to applications for leave, a certificate that a point of law exists and execution where there is no stay of execution granted by the Court of Appeal. In these premises, Mr. Nyika, learned counsel, argues that this court, a notice of appeal having been filed against the decision of this court striking out Commercial Case No. 11 of 2014, has no jurisdiction to entertain and hear this application.

Mr. Marando, lead counsel for the counsel for the applicants, strenuously opposed the PO. Like the Mr. Nyika, having adopted the skeleton written arguments earlier filed, he amplified on the same in respect of the first point of PO that it was the plaintiff's suit which was struck out adding that the judge did not pronounce himself on the same because he was never called upon by anybody to do so. Mr. Marando, learned counsel relied on the provisions of Order VIII rule 9 to buttress the point that a counterclaim is a cross-suit and that the provisions of Order VIII (in respect plaints) applied

mutatis mutandis to the counterclaim as if it were a plaint. Mr Marando referred the court to the book titled **Civil Procedure in Uganda** by M. Ssekaana & S. N Sekaana wherein, relying on ***Lwanga Vs Centenary Rural Development Bank*** [1999] 1 EA 175 at 197, it is stated at page 136 that where a suit by a plaintiff containing a counterclaim of the defendant is stayed or discontinued or dismissed, a counterclaim may nevertheless be proceeded with.

The learned counsel also referred the court to cases No. 704 and 707 cited at pages 281 and 282 in the **Digest on Civil Case Laws and Procedure** by G. V Odunga; the cases of ***East African Seed Company Ltd Vs Tornado Carriers Ltd***, Nairobi High Court Civil Case No. 1515 of 1997 (Oluoch, J. on 15.02.2001) and ***Norlake Investment Ltd Vs Alliance Bank Ltd***, Kisumu High Court Civil Case No. 326 of 1999 (Tanui, J. on 18.09.2001) respectively. It is his view, therefore, that the counterclaim is still alive as it did not die a natural death at the eve of the plaintiff's suit being struck out for want of jurisdiction.

On the second point of the PO, Mr. Marando, learned counsel, felt that he should not be detained by it arguing that if the respondent appreciated the pendency of the appeal, it should not have issued the notice of intention to sell the mortgaged property. The learned counsel concluded that the notice of appeal is a bar to the respondent's right to proceed under the mortgage until the appeal is heard and determined.

Mr. Nyika, learned counsel, had very little to rejoin. He stated in the short rejoinder that the counterclaim was in respect of a loan facility and not "on a totally different matter" as claimed by the learned counsel for the applicants.

Having summarized the rival submissions of the arguments of the learned counsel for both parties, the ball is now in my court to decide on them. I have given due consideration to the rival submissions by the learned advocates for the parties with an utmost sober mind. As for the first point of PO there do not seem to be much dispute as to the issue whether a counterclaim remains when a suit by the plaintiff is struck out. Mr. Nyika seems to argue that despite that stance, it is not always the case that the counterclaim will remain alive once the main suit is terminated. He seems to argue that once a suit is terminated for want of jurisdiction, like in the instant case, the counterclaim cannot remain in that the court cannot have jurisdiction to try the main suit and yet retain jurisdiction to entertain a counterclaim emanating from the same main suit which the court ruled out that it had no jurisdiction to entertain. I get this impression from the anecdotal made by Mr. Nyika when distinguishing the cases cited by the applicants. This point may be clear shortly in the course of this ruling.

Be that as it may, as rightly pointed out by the learned counsel for the applicants, the law is clear that a counterclaim is a cross-suit and governed by rules applicable to plaints *mutatis mutandis*. This is the tenor and import of the provisions of Order VIII rule 9 (2) of the CPC. Let the sub-rule speak for itself:

> "Where a counterclaim is set-up in a written statement of defence, the counterclaim shall be treated as a cross-suit and the written statement shall have the same effect as a plaint in a cross-suit, and the provisions of Order VII shall apply *mutatis mutandis* to such written statement as if it were a plaint."

But the bone of contention is the question what happens to the counterclaim once the main suit is terminated. Apparently, our CPC is silent on the answer to this question. In the Indian Code of Civil Procedure, 1908, there is a provision which specifically deals with the point. This is none other than Order VIII rule 6D which was inserted by the CPC (Amendment) Act 104 of 1976; as appearing at page 1924 of **Mulla; the Code of Civil Procedure**, by Sir Dinshah Fardunji Mulla (18th Edn Reprint 2012). Its marginal note reads:

> "Effect of Discontinuance of Suit".

And it provides:

> "If in any case in which the defendant sets up a counter-claim, the suit of the plaintiff is stayed, discontinued or dismissed, the counterclaim may nevertheless be proceeded with."

I have also read the gist of cases referred to the court by the learned counsel for the applicants extracted from **Digest on Civil Case Laws and Procedure** by G. V Odunga; the cases the ***East African Seed*** and ***Norlake Investment*** (supra). In the edition of the work I could lay my hands on (2nd Edition 2010), they are cases number 2778 and 2781 respectively and they appear at page 1241. The gist of the ***East African Seed*** is shown as follows:

> "[a] Where the plaintiff's case is dismissed for want of prosecution and the defendant has filed a counter claim, the counterclaim is to be heard.
> [b] Where the defendant produces documentary evidence in support of his counterclaim and the plaintiff's advocate though served does not appear, the defendant has proved his counterclaim."

And the gist of the ***Norlake Investment*** case is shown as follows:

> "A counterclaim is a cross-suit and where the plaintiff withdraws a suit after a counterclaim has been filed and files another suit the filing of a similar counterclaim is an abuse of the process of the Court and is struck out."

Also in the book titled **Civil Procedure in Uganda** (supra); a book referred to me by the learned counsel for the applicants, the foregoing provision in the

Indian Code of Civil Procedure, 1908; that is Order VIII rule 6D, was recited at page 136 of the book whereat, relying on Order 8 rule 13 of the Ugandan Civil Procedure Rules and ***British General Insurance Company Limited Vs Moshanlul Sulan***, CACA No. 30 of 1997 (UR) and ***Charles Lwanga Vs Centenary Rural Bank***, [1999] 1 EA 175, as follows:

> "When a defendant sets up a counter-claim, the suit of the plaintiff is stayed, discontinued or dismissed, the counterclaim may nevertheless be proceeded with. The principle is that the counter-claim is a cross action and is not affected by anything which relates only to the plaintiff's case".

Back to the position in this jurisdiction, the practice is not different from that obtaining in India and Uganda. It has been the practice of this court to proceed with a counterclaim once the plaintiff's suit is stayed, discontinued, struck out or dismissed – see for instance ***Francis Andrew Vs Kamyn Industries (T) Ltd*** [1986] TLR 31.

But Mr. Nyika, learned counsel seems to argue that this court cannot proceed with the counterclaim in situations where the court has ruled that it has no jurisdiction to entertain the plaintiff's suit. He argues that once the court decides that it has no jurisdiction to entertain the plaintiff's suit and strikes it out, it (the court) cannot retain jurisdiction to entertain a counterclaim which, apparently, emanates from the plaintiff's suit which has been struck out for want of jurisdiction. With utmost due respect to Mr. Nyika, I find myself unable to swim his current on this contention. To me, it does not make any

difference. In my considered view, the counterclaim may be proceeded with once the plaintiffs' suit comes to an end, even is instances when the same is terminated for want of jurisdiction. I find fortification on this stance in the ***Francis Andrew*** case (supra). In that case, the court found itself that it had no jurisdiction to entertain the plaintiff's suit for want of pecuniary jurisdiction but, nevertheless, proceeded to entertain the counterclaim raised by the defendant in that same suit.

In the premises, however much Mr. Nyika's argument might look convincing at first sight, but in the light of the practice obtaining in India, and in the light of the practice of other Commonwealth jurisdictions as well as the practice of this court as discussed above, I, with due respect, find his argument to be but unfounded. In the premises, I find and hold that in any suit, a counterclaim set up by a defendant, like in the present instance, it being a cross-suit, can be proceeded with once the plaintiff's suit is stayed, discontinued, struck out or dismissed. The position is the same even in instances when the plaintiff's suit is dismissed for want of jurisdiction. I therefore refuse Mr. Nyika's argument and proceed to overrule the first point of the PO.

The foregoing conclusion takes me to the second point of PO which is that: in view of the fact that a notice of appeal has been preferred to the Court of Appeal, this court has no jurisdiction to entertain this application. Mr. Nyika relies on the ***Aero Helicopter*** case to reinforce this point. Mr. Nyika, generally, is right. The ***Aero Helicopter*** case is oft-cited as an authority for, *inter alia*, the proposition that once a notice of appeal has been filed, the proceedings of appeal are taken to have been commenced in the Court of Appeal and therefore the High Court is no longer seized with the matter; an

application for stay of execution should therefore be filed in the Court of Appeal. This can be deciphered from the third and fourth holdings appearing in the headnote thereof as follows:

> "(iii) once appeal proceedings have been commenced by filing notice of appeal to the Court of Appeal of Tanzania, the law makes specific provision, relating to the stay of execution by the court, under rule 9 (2) (b) of the Court of Appeal Rules; [and]
> (iv) once appeal proceedings to this court have been commenced by filing notice of appeal, the High Court has no inherent jurisdiction under section 95 of the Civil Procedure Code to order a stay of execution pending appeal to this court."

But it is worth noting that the Court of Appeal in the ***Aero Helicopter*** case, as appearing in holding (iii) above, was grappling with rule 9 (2) (b) of the Court of Appeal Rules, 1979 (hereinafter " the Old Rules"). The Court of Appeal Rules, 1979 were revoked by the Court of Appeal Rules, 2009 (henceforth "the New Rules") which, by virtue of GN No. 36 of 2010, came into force on 01.02.2010. The position of the law in the Old Rules was, I think, somewhat dissimilar in the New Rules. I shall demonstrate.

Rule 9 (2) (b) of the Old Rules, as far as is relevant to the present discussion, provided:

> "... the institution of an appeal shall not operate to stay execution, but the Court may–
> (a) N/A;
> (b) in any civil proceedings, where a notice of appeal has been lodged in accordance with Rule 76, order a stay of execution, on such terms as the Court may think just."

But the above provision of the Old Rules has been slightly modified in the New Rules. The corresponding provision in the New Rules is rule 11 (2) (b) which, again, so far as is relevant to the case at hand, provides:

> "... the institution of an appeal shall not operate to stay execution, but the Court may–
> (a) N/A;
> (b) in any civil proceedings, where a notice of appeal has been lodged in accordance with Rule 83, an appeal, shall not operate as a stay of execution of the decree or order appealed from, **except so far as the High court or the tribunal may order**, nor shall execution of the decree stayed by reason only of an appeal having been preferred from the decree or order; but the Court may upon good cause shown, order stay execution of such decree or order ..."
> [Emphasis supplied].

It is worth noting that neither the High Court nor the Tribunal was mentioned in the relevant provision of the Old Rules. The bolded clause above - **except so far as the High court or the tribunal may order** - was added in the New Rules with a purpose; it was not intended to be an embellishment. However, I have serious doubts if the insertion of the phrase "**except so far as the High court or the tribunal may order**" has brought about the outcome it intended to. I have had an occasion of discussing this point in ***Ramadhani Mriri & & Others Vs Mbata Gari Ouno,*** Land Case Revison No. 41 of 2010 (unreported). At the risk of being challenged to quote my own decision, this is what I observed in that case:

> "The mention of the High Court and Tribunal in Rule 11 (2) (b) of the New Rules was perhaps intended to grant the High Court and Tribunals concurrent jurisdiction with the Court of Appeal in determining applications for stay of execution. That is perhaps the reason why the wording of Rule 9 (2) (b) of the Old Rules was changed in the New Rules. If my thinking is correct, which I think indeed it is, I am afraid, Rule 11 (2) (b) of the New Rules has not addressed the problem it intended to. If anything, confusion has been created in its stead. I say so because it is not apparently clear at what point in time will the High Court (or Tribunal) cease to have jurisdiction to entertain an application for stay of execution of its order. Likewise, it does not come out clearly

when will the Court of Appeal be said to have been seized of the matter so as to be clothed with jurisdiction to entertain such an application.

I am inclined to share the views of my brother Twaib, J. expressed in the **Tanzania Electric Supply Co. Ltd** case (supra) in which he said the mention of the High Court and Tribunal in Rule 11 (2) (b) of the New Rules does not mean they (the High Court and Tribunal) have powers to order stay of execution once a Notice of Appeal has been lodged. But rather, such reference is in relation to the exercise of such powers under the provisions of Order XXXIX Rule 5 (1) of the Civil Procedure Code, Cap. 33 which power is only exercisable before the lodging of a Notice of Appeal to the Court of Appeal.

It is my considered view that if no Notice of appeal has been filed, the application for stay of execution should be made to the court which has passed the decree; that is, the court that has given the order sought to be impugned; in this case the High Court. Such application will be made under the provisions of Order XXXIX Rule 5 (1) of the Civil Procedure Code, Cap 33. However, once a process of appeal has been commenced by lodging a Notice of Appeal, the application for stay of execution should be made to the appellate

court; in this case the Court of Appeal. That application will be made under Rule 11 (2) (b), (c) and (d) of the Court of Appeal Rules, 2009.

The process of appeal is triggered by lodging of a Notice of Appeal. In my view, for the purposes of stay of execution, an appeal is deemed to have been filed as soon as the Notice of Appeal is lodged. It therefore follows that, as already alluded to above, the provisions of Rule 11 (2) (b) of the New Rules have not changed the position under Rule 9 (2) (b) of the Old Rules in respect of where to file an application for stay of execution once a Notice of Appeal has been filed. What Rule 11 (2) (b) of the New Rules has successfully done is, unlike Rule 9 (2) (b) of the Old Rules, to equip the Court of Appeal with specific guidelines regarding stay of execution"

The ruling on ***Ramadhani Mriri*** (supra) was handed down on 27.03.2013. Coincidentally, on the same date, the Court of Appeal pronounced a ruling in the case of ***Tanzania Electric Supply Company Ltd Vs Dowans Holdings SA (Costa Rica) & another***, Civil Application No. 142 of 2012 (unreported) which confirmed the position I took in ***Ramadhani Mriri***. In that case; the ***Dowans*** case (supra), Mr. Rweyongeza, learned counsel for the respondents therein, had fronted an argument that the phrase "**except so far as the High court or the tribunal may order**" in rule 11 (2) (b) of the New Rules conferred the High Court and the Court of Appeal with

concurrent jurisdiction to grant stay orders even after a notice of appeal had been lodged. Disagreeing with Mr. Fungamtama, the Court of Appeal had this to say:

> "The inclusion of the words [except so far as the High court or the tribunal may order] ... was not meant to change the prevailing law ... Although unnecessary, it was only a recognition of the prevailing view of law that the High Court and/or Tribunals had actually their inherent jurisdiction to grant stay of execution pending appeal saved under section 95 of the Civil Procedure Code, Cap. 33. This, however, has always been subject to one condition that no proceedings in the matter have been commenced in this Court [the CAT]. For the order of the High Court or Tribunal ... to be be valid, it should be or should have been made before a notice of appeal is lodged. This ... is the only logical conclusion to be derived from the fact that the Rules exclusively apply to the Court of Appeal."

The decision in ***Dowans*** confirmed the earlier positions taken on that aspect like in ***Matsushita Electric Co. (EA) Limited Vs Charles George t/a C.G. Traders,*** Civil Application No. 71 of 2001 (unreported) in which it held:

> "... once a notice of appeal is filed under Rule 76 [rule 83 in the New Rules], 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."

[See also: ***Tanzania Electric Supply Co. Ltd Vs Interbest Investment Company Ltd*** Misc. Civil Application No. 312 of 2013 (unreported); the decision of this court].

Actually, there are instances where this court has gone to the extent of refusing to entertain and hear Taxation Proceedings because such proceedings are not one such applications envisaged by the rule and the cases cited above – see: ***Noman-Mahboub (T/A Noman Al Mahboub General Trading Corporation Vs Milcafe Limited*** Commercial Case No. 41 of 2003 (unreported). In that case, Kimaro, J. (as she then was) observed:

> "The Taxation proceedings, as the title shows, are before the High Court. Since a notice of appeal has been issued, the jurisdiction of the High Court has ceased. Taxation is not a matter which has been specifically allowed to proceed even after issuance of a notice of appeal to the Court of Appeal. Moreover the notice of appeal given shows that the respondent was aggrieved by the

> same decision for which taxation is sought, and wants to impugn it in the Court of Appeal. It is improper to proceed with taxation under the circumstances."

The foregoing sets clear the law that once a notice of appeal has been lodged, except for matters specifically provided for, the High Court ceases to have jurisdiction to entertain injunctive applications to stay application of the decree it passed. That was the position in the Old Rules and it is still the position in the New Rules.

I would have rested in peace if the foregoing discussion had perfectly answered the question I am faced with in the instant case. The present case has peculiar circumstances which, in my considered view, make the ***Dowans*** and ***Matsushita*** cases distinguishable. The peculiarity of the present case lies in the fact that much as it is agreed there is a notice of appeal filed to the Court of Appeal, that notice is in respect of the order of this court striking out the plaintiff's suit. It is not in respect of the counterclaim which I have already ruled this court can still proceed with. And to clinch it all, the orders sought by the applicants in the present application are not in respect of the decree passed by this court. As seen above, the reliefs sought by the applicants are, *inter alia*, to restrain the respondent from exercising its rights under the mortgage while the court process it opted for from the outset is still in progress. In my considered opinion, the ***Aero Helicopter*** case and other cases falling into that basket, for the reasons given above, are not applicable to the present instance.

But there is yet another peculiarity of this case. This is the fact that the respondent has lodged an appeal to the Court of Appeal but it does not seem to be interested in the same. I shall demonstrate.

The respondent (the plaintiff in that suit), so the record of this case reveals, after the main suit was struck out for want of prosecution on 04.11.2014, filed a Notice of Appeal on 18.11.2014; a fortnight after the order. This court, quite expeditiously, transmitted the Notice of Appeal to the Court of Appeal on the following day; that is, 19.11.2014. The record of this case further unveil that the record for purposes of appeal was ready for collection as from 16.12.2014; when the Registrar of this court certified the typed proceedings and judgment as true copies of the original. It is today about six months since the same were ready for collection. Put differently, the documents for purposes of appeal are lying idle in this court for about six months awaiting the respondent to collect them and file a memorandum of appeal to the Court of Appeal.

The Notice of Appeal is still pending in the Court of Appeal and the respondent has not been vigilant to follow the matter up. It is not vividly clear whether the lack of interest in the documents of appeal is deliberate. But what I can decipher from the proceedings in Miscellaneous Commercial Cause No. 111 of 2015; a kith and kin application, whose ruling I delivered on 25.05.2015, I have serious doubts if the respondent is interested in preferring an appeal after lodging the notice. I say so because as per that application, the respondent has embarked on steps to exercise its rights under the mortgage under the pretext that the Notice of Appeal will automatically be overtaken by events once the rights under the mortgage are exercised. This,

in my view, is an abuse of the court process. The court does not understand why such a course is taken by the respondent while the court process, which was opted for by the respondent from the outset, has not come to an end. Agreeably, the respondent had a right to exercise such a right before coming to court and still has such rights after coming to court unless restrained from doing so. However, in situations as the present one, where the respondent holds the applicants' rights in the court process by the Notice of Appeal and in the meantime proceeding to exercise the rights under the mortgage (of selling by way of public auction the mortgaged property), the court feels that the course of action is calculated at obstructing the course of justice. On other words, by lodging the Notice of Appeal and all of a sudden becoming disinterested in lodging a memorandum of appeal for about six months and at the same time proceeding to exercise the rights under the mortgage, it seems to me, the respondent bank is using the court to obstruct the respondents' legal rights. It is tantamount to pouncing below the belt. The court cannot be ready to condone such a process. The court asks itself, and perhaps any reasonable man would ask himself, why did the respondent bank come to court in the first place?

There is yet another disquieting feature in the instant case. What has remained in court as answered in the first point of the PO, is the counterclaim. The counterclaim, in my view, has not gone to the court of appeal with the Notice of Appeal; it still is a matter for determination by this court. And even when the relevant case file will be forwarded to the Court of Appeal, the same will still be pending in this court, for the Court of Appeal cannot decide on it as a fresh suit.

In my view, the circumstances of this case as discussed above, and the ends of justice support, are such that this court can entertain this application despite a notice of appeal being preferred in respect of the plaintiff's suit. The second point of PO, like the first of point, is overruled for want of merit.

In the peculiar circumstances of this case, in my view, the counterclaim is still pending in this court. It must continue to be entertained until such point when the record of the matter will be forwarded to the Court of Appeal to deal with the appeal in respect of the plaintiff's suit.

Consequent upon the foregoing findings, I make an order that the applicants' application; Miscellaneous Commercial Cause No. 36 of 2015 and Commercial Case No. 11 of 2014, should proceed for hearing in this court until such date when the records of the case; Commercial Case No. 11 of 2014, will be called by and forwarded to the Court of Appeal pursuant to the Notice of Appeal lodged on 18.11.2014.

All said and done, the two point PO fronted by the respondent bank is accordingly overruled. Costs will be in the cause.

Order accordingly.

DATED at DAR ES SALAAM this 11th day of June, 2015.

J. C. M. MWAMBEGELE
JUDGE