

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISC. COMMERCIAL APPLICATION NO. 43 OF 2015

**NATIONAL BANK OF
COMMERCE LIMITED..... APPLICANT**

VERSUS

**MANSOOR DAYA
CHEMICALS LIMITED..... RESPONDENT**

RULING

Mansoor, J:

Date of Ruling- 15 MAY 2015

The Applicant filed an application under Section 95 of the Civil Procedure Code, Cap 33 R:E 2002, praying for this Court to



issue an order staying execution of the decree of the Resident Magistrate's Court of Dar es Salaam at Kisumu dated 4th March 2015 in Civil Case No. 64 of 2013 between Mansoor Daya Chemicals Limited and the National Bank of Commerce Limited which was ordered to proceed pursuant to the order of the Court on 4th March 2015 pending the hearing and determination of the application for revision.

Against this Application, the Respondent took an objection that this court is functus officio to issue an order of stay of execution of the decree because a similar application was brought under Misc. Commercial Application No. 132/2014, which was determined by this court, and that by virtue of the provisions of Section 38 (1) of the Civil procedure Code, Act Cap 33 R:E 2002, this Court is not competent to deal with and determine the questions raised by the Applicant in its application as they are matters to be dealt with by the Executing Court.

The arguments of the Applicant is that this Court is not functus officio for the reasons that the present application is seeking



stay of execution of the Decree of the Resident Magistrate Court pending hearing and determination of the Revision Proceedings while the order given in Misc. Commercial Application no. 132 of 2014 was for refusal of stay of execution of the Decree of the Resident Magistrate Court pending hearing and determination of the Appeal, and that the present application was made under Section 95 of the civil Procedure Code while the previous application was made under Order XXXVII Rule 5 (3) of the Civil Procedure Code.

Firstly, I agree that the intention of the Applicant is indeed to mislead this Court, as clearly, the Applicant knows that he is applying for stay of execution of a Decree passed by the Resident Magistrate Court of Dar es Salaam at Kisutu on 18th March 2014, but in its application the Applicant is seeking the orders of stay of execution of a Decree passed by the Resident magistrate Court of Dar es Salaam at Kisutu on 4th March 2015. There is no such Decree dated 4th March 2015 attached to the affidavit of the Applicant supporting this application. The only available Decree is that Decree dated 18th March 2014, in which



this Court through Misc. Civil /Commercial Application No. 132 of 2014 determined by His Lordship Makaramba J since 8th December 2014, and the Application was dismissed. I take the view of the case of **Blue Star Service Station vs. Jackson Musseti t/a Musseti Enterprises** (1999) TLR 80, the Court of Appeal of Tanzania sitting at Mwanza, in which it was held (obiter) that where an application for stay of execution of a decree or other order is dismissed on merits, it would be an abuse of the Court process to subsequently file a similar application in the Court.”

An application was made before this Court for stay of the same Decree passed by the RM Court at Kisutu in Civil Case No. 64 of 2013. This Court had determined that application on merit and dismissed it. This Court became functus officio and it is prevented from entertaining or re-opening of this same matter before the same court. This Court had already rendered its final decision with regards to an application for stay of execution of the Decree passed by the Resident Magistrate Court at Kisutu passed on 18th March 2014, and it cannot reopen it. There is no



exceptions instances, by asking this Court to determine again for the second time, an application which was already determined by this court, is similar to asking this to authorize variations of the original decision, and revisit the previous decision.

The general rule is that a final decision of a court cannot be reopened. The decision was clear, there was no slip in drawing it up, and there was no error in expressing the manifest intention of the court. I would not want to go into the merits of an application for Revision pending before this Court, my focus has been for the present application, which has already been determined by this Court.

In the premises and for the reasons given above, this Court is functus officio to determine an application for stay of execution of a decree passed by the Resident Magistrate Court of Dar es Salaam at Kisutu in RM Civil case No. 64/2013. The first preliminary objection is therefore upheld.



Coming to the second preliminary objection, in which it was objected the competency of this Court to try the matter which ought to have been tried by an executing Court, the Applicant has argued that the application does not seek for the Court to determine the validity of the amount sought to be executed, the Applicant says the Applicant will suffer loss if execution will proceed in the manner ordered by the Court. The Applicant says, it was summoned by the RM Court to show cause why execution should not proceed. The Applicant says they had objected the amount of the Decree as computed by the Executing Court, and have asked this Court to intervene so that it quash the decision of the RM Court and order that Court to consider the objections under Section 38 of the Civil Procedure Code.

There was notice to show cause why execution should not proceed issued to the Applicant by the RM Court. The Applicant had already filed an affidavit to show cause since 21 October 2014. Again on 4th March 2015, the applicant appeared before the RM Court and asked for leave to file another affidavit. The



RM Court ordered execution to proceed, and this is why the applicant has applied for Revision of the Execution Orders of the Executing Court. The Applicant concedes that he has never made any application before the Executing Court under Section 38 of the Civil Procedure Code but preferred a Revision.

Section 38 is the section that deals with the jurisdiction of an executing court. It is confined to determining all questions arising between the parties to the suit and relating to the execution, discharge or satisfaction of the decree. It enjoins that all these questions of whether the amount of the decree was exaggerated or not should be determined by the executing court and not by a separate suit. This is the question that does relate to the execution, discharge or satisfaction of the decree, thus it is within the jurisdiction of the executing court. If a decree-holder wants to enforce a liability other than the judgment-debtor's decretal liability, then this is not a question to be determined by the executing court but in this case the judgment debtor is required to pay the decretal amount, and he is claiming that there was wrong computation of the decretal

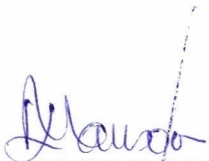


amount, that question should be determined by the executing court.

The Applicant is duty bound to make an application under Section 38 so that any question between the parties to the suit in which the decree was passed, relating to, discharge or satisfaction of the decree should be determined by the executing court. The Applicant has not made such an application but opted for Revision of the Execution Order issued by the Executing Court, it is a wrong step taken by the Applicant.

Thus, and for the above given reasons the application for stay of the Decree passed on 18th March 2014 by the Resident Magistrate Court of Dar es Salaam at Kisutu in Civil Case No. 64 of 2013, is dismissed with costs.

DATED at DAR ES SALAAM this 15th day of MAY, 2015


MANSOOR
JUDGE
15th MAY 2015

