IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL CAUSE NO. 40 OF 2015

(Arising from Commercial Case No. 130 of 2013)

NASRA SAID ..... APPLICANT

VERSUS

KCB BANK TANZANIA LIMITED ..... RESPONDENT

2nd & 21st April, 2015

REASONS FOR DECISION

MWAMBEGELE, J.:

On 06.03.2015 I sustained two points of preliminary objection raised by Mr. Elisa Msuya, learned advocate for the respondent and struck out with costs two out of three applications - for stay of execution and for leave to file written statement of defence - brought by the applicant Nasra Said through Mr. Russumo, learned advocate. I reserved reasons for so doing which reasons I am now set to give.

Briefly stated, the facts of the matter are as follows: Nasra Said, the applicant, brought the application under certificate of urgency seeking to be heard for following orders:

i. This honorable court be pleased to grant an order for stay of execution of the *ex parte* Decree pending the determination of application for extension of time to file an application to set aside *ex parte* decree and the judgment delivered on 16th April 2014;
ii. That this honourable court be pleased to grant an order for extension of time in order to file an application to set *aside ex parte* Decree delivered on 16th April 2014;
iii. That this honourable Court be pleased to grant an order for leave to file written statement of Defence for interest of justice;
iv. That costs be paid; and
v. That this honourable court be pleased to grant any other relief it may deem fit and just to grant.

An affidavit in support of the application was sworn by Mr. Samson Russumo, counsel for the applicant. The respondent opposed the application through a counter affidavit which was sworn by a certain Samuel Mangesho.

On 06.03.2015 when the matter came up for hearing, Mr. Msuya learned counsel for the respondent suggested told the court that he had

preliminary points of objection which suggested that it was better to hear them before we could proceed with the hearing of the application. In response, Mr. Russumo learned counsel for the applicant, stated that he was ready to hear the preliminary objection though he was surprised. He thus opted to hear the submissions by the learned counsel for the respondent after which he would pray to court for an adjournment in order to prepare his response, if need would arise. Luckily, after hearing the submissions by Mr. Msuya, learned counsel for the respondent, Mr. Russumo felt he could take it and responded accordingly.

Upon being allowed to argue his points of preliminary objection, Mr. Msuya, learned counsel, submitted that the objection is in respect of an application for stay of execution of the *ex parte* decree and the one for leave to file a written statement of defence. The objection was mainly premised on the wrong citation of enabling provisions of the law. Mr. Msuya argued that Order XXI rule 24 (1) of the Civil Procedure Code, Cap. 33 of the Revised Edition, 2002 (hereinafter "the CPC") is applicable where an application of this nature is brought before a court which did not issue the judgment and decree intended to be impugned. This was not the case in the present instance. He then cited to me the case of ***Citibank Tanzania Vs TTCL & 4 Others***, Civil Application No. 64 of 2003 (unreported) to support the proposition that the application was incompetent for non-citation of enabling provisions of the law.

With regard to the third application pegged under Order XXXV rule 3 (1) (b) the CPC, it was his contention that that too was a wrong provision because the judgment and decree were still in place. It was his contention that that provision could be applicable only if the decree and order were vacated since the judgment was not *ex parte* but a default judgment and therefore the application was misplaced.

Mr. Russumo, in retaliation, contended that there is a *lacuna* in the law since there is no specific provision to deal with the situation and therefore citing order XXI rule 24 (1) was apposite. It was his argument that the cited authority is distinguishable from the present case because it speaks generally and the counsel for the respondent was supposed to mention what is the appropriate provision in order to rely on that provision.

On the second objection, it was Mr. Russumo's submission that the third application was brought in anticipation that the second application would be successful, he stated that they combined the applications since there are high court and court of appeal decisions which support that course. He surmised that the applications therefore are not misplaced and the objections should be dismissed with costs.

Rejoining, Mr. Msuya, learned counsel, reiterated his position in the submissions in chief, adding that there is no *lacuna* in the CPC and that the learned counsel for the applicants ought to have applied Order XXXV

rule 4 thereof and that he ought to have resorted to section 95 of the CPC. As regards the third application, he rejoined that since there was no prayer for vacation of the judgment and the decree, the application is misplaced. It was for these reasons that he concluded that the applications are misplaced and ought to be struck out with costs.

Having heard both learned counsel and having made my mind, as already alluded to in the first paragraph hereinabove, I struck out with costs the two applications namely that for stay of execution and for leave to file a written statement of defence. That conclusion was premised on none other than non-citation of proper provisions of the law.

Without much ado, I agree with counsel for the respondent that the two applications are firstly brought under wrong provisions and henceforth misplaced. For avoidance of doubt I will reproduce the provisions under which the said applications are indisputably premised.

These are Order XXI Rule 24 (1) which party reads:

> "The court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such ..."

And Order XXXV Rule 3 (1) (b) reads thus:

> "The Court shall, upon application by the defendant, give leave to appear and defend the suit, upon affidavits which-
> b) disclose such facts as the court may deem sufficient to support the application"

Looking at order XXI rule 24 (1), indeed, it is not hard to reckon that the same envisages a situation whereby a decree has been sent to a court different from that which issued it for execution. In the present instance, the impugned judgment and decree were issued by this court. This, therefore, cannot be said to be the provision under which the sought order can be validly made.

As to the second provision, as rightly submitted by Mr. Msuya, counsel for the respondent, this provision could only be resorted to by the counsel for the applicant only where the judgment of this court and a decree thereof were vacated. Newbold, P., was confronted with an identical situation in the case of ***Nanjibhai Prabuhudas & Co Ltd Vs The Standard Bank Limited*** [1968] 1 EA 670 (also available at www.saflii.org/ea/cases/EACA/1968/5.html). In that case, the defendant asked that the time for entering a defence be extended in an application of this judgment in which judgment had been entered for the plaintiff by the High Court and that judgment had not been

challenged on appeal. His lordship observed in passing at page 8 as follows:

> "To make an order extending the time in which a defence could be entered would not, it seems to me, be possible without also setting aside the judgment ..."

In my considered opinion, that observation, somehow, fits in all fours with the present circumstance. This is so because in the present application the applicant is seeking to be granted leave to defend the suit which clearly does not exist, a fact which makes it impossible for the order sought to be granted.

Mr. Russumo has stated that he made the three applications together to avoid multiplicity of proceedings. He is right. Multiplicity of proceedings is not encouraged in this jurisdiction. As was observed by this court (Mapigano, J.) in ***Tanzania Knitwear Ltd Vs Shamshu Esmail*** [1989] TLR 48, at 51:

> "... the combination of the two applications is not bad at law. I know of no law that forbids such a course. Courts of law abhor multiplicity of proceedings. Courts of law encourage the opposite."

Thus, inasmuch as I am not at qualm with the lumped up applications in this application, yet, the order sought for leave to defend the suit, cannot be legally made with the suit still demised. This is so because, it is until the second application; that is, for extension of time in order to file an application for setting aside the said default judgment, sails through, and then until that application for setting aside the default judgment is successfully made, when the sought order can be legally and procedurally granted.

It is now settled law that non-citation of an enabling law to support an application renders it incompetent. There is a plethora of case law to support this proposition. The ***Citibank*** case cited by the learned counsel for the respondent is just among many cases on this point. Others are ***National Bank of Commerce Vs Sadrudin Meghji*** [1998] TLR 503, ***NBC (1997) Ltd Vs Thomas K. Chacha t/a Ibora Timber Supply (T) Ltd*** Civil Application No. 3 of 2000 (unreported), ***Almas Iddie Mwinyi Vs NBC & Another*** [2001] TLR 83, ***Antony J. Tesha Vs Anita Tesha*** Civil Application No. 10 of 2003 (unreported), ***China Henan International Co-operation Group Vs Salvand K. A. Rwegasira*** [2006] TLR 220, and ***Edward Bachwa & 3 Others Vs the Attorney General & Another*** Civil Application No. 128 of 2006 (DSM Unreported) to mention but a few.

The above shows reasons why I sustained the two points of preliminary objection raised by Mr. Msuya, learned counsel for the respondent, and struck out the said two applications with costs.

DATED at DAR ES SALAAM this 21st day of April, 2015.

J. C. M. MWAMBEGELE
JUDGE