

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

MISCELLANEOUS COMMERCIAL CAUSE NO. 328 OF 2015
(Arising from Commercial Case No. 117 of 2011)

STEP IN LIMITED APPLICANT
AND
DAR ES SALAAM INSTITUTE OF TECHNOLOGIES RESPONDENT

19th May & 16th June, 2016

RULING

MWAMBEGELE, J.:

This ruling is on an application for leave to appeal to the Court of Appeal of Tanzania. According to the Chamber Summons, the intended appeal is against the decision of this Court (Makaramba, J.) dated 08.12.2015 in Commercial Case No. 117 of 2011. The application has been made under section 5 (1) (c) of the Appellate Jurisdiction Act, Cap. 141 of the Revised Edition, 2002 and rules 45 (a) and 47 of the Tanzania Court of Appeal Rules, 2009. It is supported by an affidavit of one Rajesh Balubhai Mistry; principal officer of the applicant.

In the affidavit, the deponent deposes that the applicant's default judgment and decree in Commercial Case No. 117 of 2011 was not honoured by the respondent hence an application for execution. That upon filing the same this

court issued a garnishee order nisi against CRDB Bank Vijana Branch for the amount claimed of Tshs. 74,432,420/= but later-on the respondent wrote to the court complaining that it had discharged the decree by paying the amount through Mdamu and Associates who were acting for the applicant following an out-of-court settlement while in the actual fact the applicant was not involved. Further, that upon the respondents filing the counter-affidavit, this court heard them and dismissed all the grounds of objection and lifted the garnishee without giving direction as to how the applicant could get its money, and being dissatisfied, it wished to appeal to the court of appeal against the whole of the ruling.

A counter-affidavit thereto was deposed by one Professor John W. A. Kondoro and filed in this court on 18.02.2016. Therein, he categorically denies the allegations putting that the decreed amount had been settled after an out-of-court settlement between the parties whereby the applicant was represented by Mdamu and Associates, Advocates. He states that the intended appeal is not meritorious and an endless litigation which is a misuse of the court's time and further that the application for leave to appeal to the Court of Appeal is without good grounds.

The applicants were represented by Mr. Magusu, learned counsel whereas the respondent was represented by Mr. Ndelwa, learned advocate. They had both filed their skeleton written argument well before hearing in the dictates of rule 64 of the Rules and they sought to adopt the same during the oral hearing. I have gone through the record of the case file including the proceedings, the rulings, the affidavit and counter-affidavit as well as skeleton written arguments. From all these, I gather the story behind this application to be briefly as follows:

That the respondents herein, having failed to appear for the first pre-trial conference on the 02.10.2013 in respect of Commercial Case No. 117 of 2011 against them, their defence was struck out in terms of Rule 31 (1) of the Rules, a step which paved way for the applicant's application for default judgment. The same having been granted, it is evident that the applicant herein made an application for execution of the same by way a garnishee order for the amount of Tshs. 74,432,420/=. Upon this court issuing a garnishee order nisi to that effect, the respondent herein informed the court that there had been an out-of-court settlement of the decree whereby it was agreed that it could pay to the applicant through its lawyers styled as Mdamu and Associates, Advocates a total of Tshs. 40,000,000/= as full settlement of the decree and that actually that agreement was effected. This court then halted the garnishee pending investigations whereby parties and their respective counsel including the said Mdamu, learned counsel, were summoned to inquire as to the veracity of the said settlement. This court (Makaramba, J.), after hearing the respective parties, ordered the respondent herein to file a counter-affidavit in respect of the application for execution and thereafter both parties were heard. This court, after hearing both parties, and evaluating the evidence presented concluded that indeed there had been such a settlement and that the same had actually been effected and was so acknowledged by the decree holder; the applicant herein and thereby refused to confirm the garnishee nisi and, instead, lifted the same.

In his arguments, Mr. Magusu, learned counsel, mainly contends, without expressly stating the point of law involved, that there is point of law involved which needs a direction of the higher court of this land following the ruling of

this court which left the parties without direction as to how the decree holder could recover its money as the decree is not yet honoured without the purported out-of-court settlement on record for the purpose of executing the same. He maintains that the said out-of-court settlement which is not on record cannot be relied upon by this court which has a duty to execute its decree only and further that the applicant was not part of the said negotiations, that the money was not paid to it but to Mdamu and Associates, Advocates.

In opposition thereto, Mr. Ndelwa learned counsel, maintains that following the settlement negotiated between Advocate Mdamu for the applicant and the respondent herein, an amount of Tshs. 40,000,000/= was paid to them as a full settlement of the decree and therefore there was no decree to be settled. He maintains that the applicant does not dispute the fact of having instructed advocate Mdamu and that they had never changed the advocate at any time.

As clearly requested, this court is implored to grant leave to the applicant to appeal to the court of appeal against the ruling of this court dated 08.12.2015. The said ruling in effect refused to confirm the garnishee order nisi and in its stead lifted the same after having satisfied itself that the decree which was sought to be executed had actually been executed by way of an out-of-court settlement between the parties.

In ***Harban Haji Mosi & another Vs Omar Hilal Seif & another***, Civil Reference No. 19 of 1999 (unreported) the Court of Appeal of Tanzania stated:

“Leave is grantable where the proposed appeal stands reasonable chances of success or where,

but not necessarily, the proceedings as a whole reveal such disturbing features as to require the guidance of the Court of Appeal. The purpose of the provision is therefore to spare the court the spectre of unmeriting matters and to enable it to give adequate attention to cases of true public importance."

[Quoted in ***Abubakar Ali Himid Vs Edward Nyelusye***, Civil Application No. 51 of 2007 (unreported)].

In that accord, therefore, I am called to determined as to whether there are reasonable chances of success or whether the proceedings reveals disturbing features as to require guidance of the Court of Appeal. Outrightly, and with due respect to the learned counsel for the applicant, I deem there to be neither disturbing features requiring guidance of the Court of Appeal nor any reasonable chances of success on appeal.

Apparently, the learned counsel, apart from stating there to be a ground of appeal, he has stated none expressly and neither does the affidavit disclose any legal ground requiring attention of the Court of Appeal. In my considered opinion, the learned counsel wants the court of Appeal to re-examine the facts as to the existence of the said settlement and payment of the said amount, facts which are well canvassed in the said ruling. These are pure points of facts which were not disputed by the applicants themselves before this Court (Makaramba, J.). This court categorically stated at page 10 of the said ruling that:

"It is on the strength of the evidence produced by the Judgment debtor and which evidence the Decree Holder has not been able to contest, that this court is satisfied that, the payment of TZS. 40,000,000/= was made by the Judgment Debtor and acknowledged to have been received by Mdamu & Associates (Advocates) on behalf of their client, the plaintiff/Decree Holder, Step In Ltd as settlement of the Court Decree."

Evidently, it is incomprehensible for the learned counsel of the applicant to maintain that this court (Makaramba, J.) dismissed the objections without giving direction as to how the decree holder could obtain its money while indeed the ruling is to the effect that the decree had been settled. In my considered opinion, the applicant having fully partaken in the proceedings before this court (Makaramba, J.) which resulted into the said ruling, there is no legal or factual basis from whence a guidance of the Court of Appeal could be sought. It is for this reason that I find this to be a fit case for sparing the Court of Appeal the spectre of unmeriting matters and to enable it to give adequate attention to cases of true public importance. I would therefore dismiss this application with costs for want of merit.

Order accordingly.

DATED at DAR ES SALAAM this 16th day of June, 2016.

J. C. M. MWAMBEGELE
JUDGE