IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL CAUSE NO. 87 OF 2015

(Arising from Commercial Case No. 67 of 2012)

HAMIDU SALEHE KUNGULE ..... APPLICANT

VERSUS

CHARLES FRANCIS NSHANGEKI ..... RESPONDENTS

10th December, 2015 & 26th May, 2016

REASONS

MWAMBEGELE, J.:

On 10.04.2015, the applicant presented for filing an application seeking for *exparte* and *interpartes* orders that:

1. That this Honourable court be pleased to stay execution of the judgment and decree of Commercial Case No. 67/2012 delivered on the 16/09/2013 by Hon. Nchimbi, J. pending hearing of this application *interpartes*;
2. That this Honourable court be pleased to stay execution of the judgment and decree of Commercial Case No. 67/2012 delivered on the 16/09/2013 by Hon. Nchimbi, J. pending lodging, hearing, and determination of an intended appeal after being supplied with a copy of judgment, decree and proceedings;

3. Costs of this Application to follow event; and
4. Any other order (s)or/and relief(s)as this Honorable court may deem fit to grant.

On 10.12.2015 I dismissed the application after I had heard the respective submissions of counsel for the parties and reserved the reasons thereof which I am now set to give.

Before I proceed further, I find it apposite to recount what transpired in court and the learned counsel's submissions made on the date they were heard. On that day Ms. Kamanga, the learned counsel who appeared for the applicant told the court that she was seeking for adjournment of hearing of that application. The reason she stated was that her client - the applicant, had told her that he conceded that he was indebted to the respondent and that he was asking for the month of December to settle the decree. Mr. Luguwa, the learned counsel who appeared for the respondent, opposed the prayer for adjournment and time for settling the decree putting that he (the applicant) had never been honest and that he once summoned the respondent at Sinza, made promise to pay but has never done so.

Ms. Kamanga said that they were asking for adjournment in good faith and as such asked the court to adjourn the hearing. I refused the prayer on ground of want of merit thereof. The application had to be heard.

Then, onwards, Ms. Kamanga, arguing for the application on behalf of the judgment debtor, submitted that they had applied for stay of execution because they intended to appeal against the decisions of this court. She

stated further that they have not filed any notice of appeal but have applied for a copy of judgment and decree for appeal purposes and further that they were aggrieved with the judgment. She then prayed for the application to be allowed.

On the other hand Mr. Luguwa, learned counsel for the respondent decree holder, opposing the application, submitted that stay of execution pending determination of any matter is a statutory right but that that exercisable only where there is a Notice of Appeal which the applicant has not filed. The learned counsel went on to argue that there is no seriousness on the part of the applicant judgment debtor in following up the documents because the letter requesting for the decree and copies of the judgment is dated 02.04.2015 while the judgment was delivered on 16.09.2013 and a decree thereof extracted on 14.4.2014. It was his submission that the applicant judgment debtor does not want to walk the talk because the judgment was entered by consent and the applicant does not deny the debt. Learned counsel finally maintained that the prayer for stay of execution is a mere delaying tactic which should not be allowed.

In rejoinder, Ms. Kamanga argued that Mr. Luguwa has based his arguments on technicalities to oppose the application. It was her gesture that this court should not entertain this approach.

Despite the labyrinth brought about by Ms. Kamanga; conceding indebtedness and at the same time wishing or purporting to appeal against the decree, and unfortunately as it turned out for the applicant, I was convinced by the submissions of the learned counsel for the respondent

decree holder and dismissed the application with costs. Two main reasons account for my decision. One, mainly, it is obvious from the facts of the case. As rightly stated by the counsel for respondent, the judgment and decree which the applicant judgment debtor wishes to challenge was by consent of both parties. As such, the record discloses that there was no judgment *per se* but rather a settlement order. This, apparently, was after mediation succeeded on 16.9.2013 before my Brother at the Bench, Nchimbi, J. Therefrom a consent decree was extracted for the purpose of execution.

Thus, apart from the legal position that a consent decree is not appealable unless leave of the high court is sought and obtained [see section 5 (2) (a) (i) of the Appellate Jurisdiction Act, Cap. 141 of the Revised Edition, 2002], it is very absurd for the counsel to argue that the applicant was "aggrieved" by the judgment and decree and intends to challenge the same. The immediate question is where is that judgment? And how can one be aggrieved by his own settlement arrangement to the extent of appealing against the same? In my view the whole application as well as the intended appeal, if any, are nothing but abuse of court process aiming at delaying justice which course cannot be condoned by this court.

Secondly, as rightly put by Mr. Luguwa, a Notice of Appeal is important in an application for stay of execution. Therefore, assuming the decree was appealable, yet there is nothing in this court to show any intention by the applicant to appeal. It is trite law in our jurisdiction that a decree holder should be left to enjoy the fruits of its litigation unless justification is shown for him (the decree holder) to continue to be deprived of them – see: ***Peter P. Temba t/a Mahenge Timber & Ent Vs Dar Es Salaam City Council &***

Hassan Ibrahim Sobo Civil Application No.149 of 2009 (CAT unreported) ***Matsushita Electric Co. (EA) Ltd Vs Charles George t/a C. G. Traders***, Civil Application No. 71 of 2001 and ***Ignazio Messina & National Shipping Agencies Vs Willow investment & Costa Shinganya***, Civil Reference No. 8 of 1999; all unreported decisions of the Court of Appeal. The applicant in this matter, who admits indebtedness and has not made any plausible steps to challenge the decree which was extracted from a consent order, has miserably failed to justify why the decree holder should continue to be deprived of the fruits of his litigation. In the premises, stay of execution of the same cannot be allowed on mere flimsy grounds or, rather, imaginary steps to be taken at the option of the judgment debtor.

The events in this case disclose nothing but unscrupulousness of the judgment debtor. Thus from the date a settlement order was made to the date of extraction of a decree therefrom and the date of applying a copy of decree demonstrate nothing but disinterest in complying with the same.

It is for the foregoing reasons that I found the application seriously wanting in merit and dismissed it with costs to the respondent.

DATED at DAR ES SALAAM this 26th day of May, 2016.

J. C. M. MWAMBEGELE
JUDGE