

**IN THE HIGH COURT OF TANZANIA**

**(COMERCIAL DIVISION)**

**AT DAR ES SALAAM**

**MISC. COMMERCIAL APPLICATION NO. 272 OF 2018**

**NZITO LIFESTYLE LIMITED .....APPLICANT**

**VERSUS**

**CORDURA LIMITED .....RESPONDENT**

*13/12/2018&21/01/2019*

**REASONS FOR DECISION**

**MWANDAMBO, J**

On 13<sup>th</sup> December, 2018 I dismissed an application for stay of execution in Miscellaneous Commercial Cause No. 13 of 2018 but reserved my reasons which I am now set to give.

The background to the application are fairly not in dispute. The respondent was at the material time landlord and the applicant a tenant operating a shop in the respondent's premises at Oysterbay, Dar es Salaam city. The applicant defaulted in payment of rent resulting into the respondent petitioning for the winding up of the applicant in Misc Commercial Cause No. 13 of 2018. By a deed of settlement executed on 13 August, 2018, the petition for winding up was marked settled and a decree extracted from it dated 17 August, 2018. Amongst the terms of the decree, the applicant was ordered to pay the outstanding rent within 30 days from the date of filing the deed of settlement that is to say; by 13<sup>th</sup> September, 2018 the latest failing which, the applicant was to vacate from the demised premises. Despite the above, the applicant did not discharge its obligation and that prompted the respondent applying for execution of the decree on 9<sup>th</sup> October, 2018 by attachment and sale of the applicant's

shop on the demised premise. A warrant of attachment was accordingly issued commanding a Court Broker to attach the applicant's shop and return the said warrant on/before 15<sup>th</sup> December, 2018. That warrant bears the same date as that of the decree and that ignited strong criticism from the learned advocate for the applicant contending that the warrant was aimed at frustrating the deed of settlement and hence the application made by way of chamber summons under section 95 and Order XXI rule 24(1) of the Civil Procedure Code, Cap 33 R.E 2002 supported by an affidavit deposed to by Rukshana Iqbal Chaudhary, a principal officer of the applicant. The grounds upon which the applicant sought for stay of execution are; one, that the warrant of attachment was irregular in that it aimed at frustrating the deed of settlement two, the attachment was made without prior mandatory notice to the respondent.

The respondent who acted through Mr. Makarious Tairo learned advocate countered the application through a counter affidavit deposed to by the said advocate. The counter affidavit gave a chronology of events prior to and after the issue of the consent decree. What is notable from the said counter affidavit is that the warrant of attachment was issued following an application for execution of the decree after the applicant had failed to comply with the terms of the decree. The fact that the applicant had not complied with the decree has not been disputed neither has the applicant made any averments to prove compliance.

I heard Mr. Gwamaka Mwaikugile and Makarious Tairo learned advocates for the applicant and respondent respectively for and against the application. Mr. Mwaikugile's arguments were centred on the date the warrant of attachment was made in relation to the date of the consent decree from a deed of settlement, want of mandatory fourteen (14) days' notice prior to the attachment. In the course of his arguments Mr. Mwaikugile conceded that his client had not complied with the terms of the decree. Without any further ado, on that account alone, the application for stay of the same decree is factually and legally misconceived. Legally, a warrant can only be issued after an application for execution following default to comply with the decree. In this application, the application for execution was lodged on 9<sup>th</sup> October, 2018 and so, the

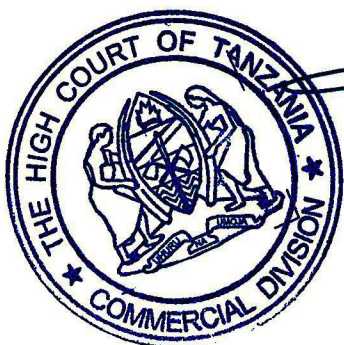


warrant of attachment could only have been issued thereafter. Indeed, the said warrant of attachment was served on the applicant on 4<sup>th</sup> December, 2018 which appears to be inconsistent with any claim that it was issued on the same date the decree was issued. In my view, given the sequence of events I am more than prepared to accept Mr. Tairo's submission that the date was a result of the slip of the pen and so it could not have prejudiced the defaulting judgment debtor in any manner whatsoever and consequently, there could not have been any basis for stay of execution of the said decree.

The other point worth discussion relates to the power of the Court to stay execution of a decree under Order XXI Rule 24(1) of the CPC. Mr. Tairo argued and indeed rightly so that the power under that rule is exercisable by an executing court to which the decree is sent for execution by the court which passed the decree. Mr. Mwaikugile did not address his mind to that argument. It is clear in this application that this decree to be whose execution was sought to be stayed was made by this very Court and the execution was by the same court. The Deputy Registrar who signed the warrant of attachment was not a court to which the decree was sent for execution but even if it was so, the application for stay could not have been made to the court which passed the decree pursuant to the provisions of Order XXI Rule 24 (1) of the CPC. In other words the application was legally flawed for it was made under wrong provision of the law which boils down to the fact the Court had no jurisdiction to entertain the same.

It is on the basis of the foregoing that the Court found the application wanting resulting into the order dismissing the same on 13<sup>th</sup> December, 2018. The respondent is awarded her costs. Order accordingly.

Dated at Dar es Salaam this 21<sup>st</sup> day of January 2019



  
L. J. S. Mwandambo,

JUDGE