

**IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM
COMMERCIAL CASE NO. 80 OF 2016**

BETWEEN

ONGUJO WAKIBARA NYAMARWA.....DECREE HOLDER

Versus

PRIME CATCH (EXPORTS) CO LTD.....1stJUDGMENT DEBTOR

ZULFIKAR JESSA.....2ndJUDGMENT DEBTOR

Last Order: 19th Nov, 2020

Date of Ruling: 17th Feb, 2021

RULING

FIKIRINI, J.

This is a ruling in respect of the notice to show cause why the application for execution of the decree in Commercial Case No. 80 of 2016 should not proceed as decreed. The affidavit of Zulfikar Jessa the Principal officer of the 1st judgment debtor supported the application while the decree holder opposed the application.

During the hearing, learned counsels argued the application orally. Whereas Mr. Geoffrey Geay Paul appeared for the judgment debtors, and the decree holder enjoyed the legal service of Mr. Michael Kamba

Assigning reasons as to why this opposition to the execution of the decree should be considered positively Mr. Paul submitted that, there was a notice of appeal filed to the Court of Appeal on 24th October,

2017, the notice was still valid and it has never been struck out, and the judgment debtors were in the process of lodging notice of appeal therefore to that effect the presence of notice of appeal the jurisdiction of this Court ceases. To buttress his position, he cited the case of **Mohamed Enterprises (T) Limited v The Chief Harbour Master & Another, Civil Appeal No. 24 of 2015.**

Disputing the argument of the decree holder that the notice of appeal was time bared, it was Mr. Paul's submission that, the decree holder did not produce any proof to substantiate that averment, and to strengthen his argument he referred to the case of **Mohammed Enterprises** (supra) at p.9 whereby the Court of Appeal of Tanzania has this to say:

"a notice of appeal ceases to have effect upon the court orders deeming it to have been withdrawn."

Extending his submission, he submitted that, there was no any order withdrawing the notice of appeal by the judgment debtors hence the notice was still valid. Based on that ground it was the counsel's submission that the application for execution should not be granted as it will be against the well settled decision of the Court of Appeal of Tanzania.

Submitting on the properties intended to be attached and sold; it was his submission that, the said properties were subject to credit facility, and there was already a summary judgment of this Court in Commercial Case No. 93 of 2016, as exhibited by annexure PC-5 to the affidavit.

On the strength of his submission, he submitted that, in order to avoid multiplicity of applications this Court can exercise its discretion under section 95 and order the execution not to proceed in order to avoid abuse of the Court process.

Mr. Kamba for the decree holder submitted in reply that, it was now the 2nd year since the matter has been concluded by this Court and the judgment debtors have been seeking for stay of execution and there was a specific prayer to the Court of Appeal that if given time, they will file security as per Court of Appeal Rules. The Court of Appeal granted the application for stay of execution provided that, they furnished security for costs of Usd 651,191 and the same be deposited in Court within three weeks. The judgment debtors have failed to comply and that is why the decree holder is reverting to this Court for the execution of the decree. The counsel further submitted that, the judgment debtors have filed for revision to the Court of Appeal as well as opposing the application for the execution of the decree.

Opposing the assigned reasons submitted by the judgment debtors, it Mr. Kamba's argument that in view of the length of time in between from when the unsatisfied stay of execution was granted by the Court of Appeal of Tanzania to when this opposing application was filed, and considering the vandalism of the property in Musomo-Fish factor which had continued to be done by the judgment debtors during the period in between, infers this application was not brought in good faith.

Expanding his submission, Mr. Kamba also brought on board the judgment debtors' representation before the Court history, that they were initially being represented by IMMA Advocates and have now changed to be represented by Mr. Paul learned counsel. Taking into consideration that the decree holder was dealing with a foreigner's company whereby all the directors are Indians from Kenya and the decree holder was waiting anxiously to be allowed to enjoy the fruits of the decree stressed Mr. Kamba.

On top of that, Mr. Kamba submitted that, the judgment debtors have not shown cause why the application for the execution should not be carried out rather it was delaying tactics as they have not provided any proof why the execution should not proceed.

Contesting the validity of the notice of appeal, it was Mr. Kamba's submission that, there was no valid notice of appeal because after filing the notice, the judgment debtors just stayed and waited rather than taking steps as provided under the Court of Appeal Rules. In addition to that, the judgment debtors wrote the letter to this Court to be supplied with necessary documents of which they were supplied yet to date nothing has happened.

Admitting that the property which the decree holder intended to attach was subject to other orders, it was his submission that, what the decree holder wanted was for the judgment debtors to tell as to when they will comply with the Court of Appeal orders of depositing security.

Winding up his submission, he submitted that, since this Court was a proper Court for the execution, there was no valid notice of appeal, no appeal has been lodged and the judgment debtors have failed to take essential steps as per Court of Appeal of Rules, urged the Court to allow the execution to proceed.

Submitting in alternative, the decree holder prayed that the judgment debtors be summoned in Court to state as to when they are going to deposit stated amount in Court.

In re-joining submission, Mr. Paul submitted that, the judgment debtors were aggrieved by the decision and order by the Court of Appeal, which required them to furnish security for costs and thus why they were seeking for review. Among the orders sought was that the time given was not enough. As for the validity of the notice of appeal, it was his submission that, the notice was still valid.

Reacting further he submitted that, no documents have been supplied to the judgment debtors so far. Still on validity of notice of appeal lodged he contended that even though no essential steps have been taken yet the notice of appeal was still valid because the Court of Appeal Rules are clear on what to do if a party has not taken any steps of which the decree holder has not done anything.

On the foreign company's submission, it was Mr. Paul response that, the submission was from the bar and cannot be substitute of the evidence and therefore should be ignored.

Concluding his re-joining submission, the judgment debtors' counsel submitted that, summoning of the judgment debtors it was not part of the application; the counsel was making prayer in the course of submission instead of an application and therefore, prayed the application to be rejected.

I have given due consideration to the rival submissions of the two learned counsels. The pertinent question for determination is **whether this application for execution should be granted as prayed or not.**

It is settled legal position that the Court can only stop to grant execution order based on the two main grounds: **first**, once the decree has been satisfied, and **second** if there is stay of execution order from the court with the competent jurisdiction.

Again, it is a trite law that where there is an application for stay of execution before the Court of Appeal, the High Court ceases to have jurisdiction over the matter. This means the trial Court is stopped from issuing the execution order. Stay of execution order was also discussed in the case of **TanESCO v Dowans & Another, Civil Application No. 142 of 2012** whereby the Court has this to say:

"the court in the absence of an order of stay of execution from the competent court, this court still have jurisdiction"

[emphasized mine]

Furthermore, in fulfilling the requirement under Order XXI Rule 20 (1) of the Civil Procedure Code, Cap 33 R.E 2019 (the CPC), the Court in carrying out its task, has to make sure that, the principle of natural

justice is judiciously observed and parties are fairly and justly treated by being afforded opportunity to be heard before any adverse order is made against any of the parties.

Now embarking on examining the reasons advanced by the judgment debtors as to why the execution should not proceed as prayed by the decree holder, from the submission made it is evident that, there is conditional order for stay of execution before the Court of Appeal of Tanzania. The judgment debtors were subjected to the payment of security for costs within the period of three weeks.

This Court in actual fact has no jurisdiction over matters decided and orders given by the Court of Appeal, unless it is an order given as direction to the High court and its sub-ordinate courts. In the present application the security for costs ordered seemed not yet to be paid as there is no proof to that effect. However, this Court does not have jurisdiction to proceed with the execution unless and until the Court of Appeal makes an order in that regard. Sound reason does not stop logic and common-sense dictates that it is prudent and proper to wait for further orders, in relation to the matter, from the Court of Appeal. Taking that into consideration, it is obvious that this Court cannot

interfere with or ignore the Court of Appeal decision instead it is duty bound to respect and uphold it.

Another point raised is the fact that, the intended to be attached property is subject to another Court decision stemming from a summary judgment in Commercial Case No. 93 of 2015. This point has no legal basis, for two reasons: **one**, the issue is not the attachment of the decree twice or thrice but whether the amount intended is sufficient to accommodate all the decrees against the same judgment. What matters is proof of the value of the intended to be attached property, which in the case at hand is nowhere to be seen. **Two**, it is not the duty of the decree holder to hustle before enjoying the fruits of the decree. **Three**, this was submission from the bar, which is ardently discouraged.

Answering the question as to whether the existence of a notice of appeal is sufficient reason as to why the execution should not be granted as decreed, it is a legal position that notice of appeal shall not operate as a bar. What can cease this Court's jurisdiction is when there a valid order from the Court of Appeal staying the execution or at least an existing registered application for stay of execution. Therefore, the mere fact that, the notice of appeal has been filed has no any legal basis

and that will not be considered as a ground to stop the execution once no good cause has been furnished to stop it.

The essence of executing a decree is to let the decree holder enjoy the fruits of the judgment and decree in her favour without much hustle. Therefore, once the judgment is pronounced, it is the obligation of the judgment debtors to either to comply by satisfying the decree or to process the appeal proceedings including seeking an order for stay of execution. Short of that this Court is bound to act by granting the application for execution as prayed.

All said, in the present application, since there is still a Court of Appeal order for security for costs, even though the order has not been complied with yet this Court's hands are tied. In addition, Mr. Kamba's submission that the judgment debtors have not taken steps since filing of the notice of appeal, *first and foremost*, is unsupported as amidst the notice of appeal, there was an application for stay of execution which was granted. *Second*, if what he stated is the correct position, the decree holder was anticipated to take action by filing for a motion to strike pursuant to Rule 89 (2) of the Tanzania Court of Appeal Rules, 2009, as amended by GN. No. 344 of 2019, the step which she has not taken.

In the light of the above, I proceed to order for suspension of this application pending the final order from the Court of Appeal. I also order for the matter be mentioned after every three months to avoid losing track of the record and the progress in the Court of Appeal. It is so ordered.



A handwritten signature in black ink, appearing to read "P. S. FIKIRINI", with a long horizontal line extending to the right.

P. S FIKIRINI

JUDGE

17th FEBRUARY, 2021