

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISC.COMMERCIAL APPLICATION NO. 185 OF 2021

(Arising From Commercial Case No.140 of 2018)

MO ASSURANCE COMPANY LIMITED.....APPLICANT

VERSUS

TWALIB RAMADHAN MSANGI.....RESPONDENT

Date Last order 02/03/2022

Date of Ruling 18/03/2022.

RULING.

Z.A MARUMA J.

This is an application brought under section 2(3) of the Judicature and Application of Laws Act Cap 358 R.E 2019 read together with section 95 of the Civil Procedure Code cap 33 R.E 2019 by a chamber summons supported by an affidavit of one Gregory Forters filed in this Court on 30th November 2021. The applicant **MO ASSURANCE COMPANY LIMITED** moved the Court with a prayer to uplift the garnishee order dated 17th November 2021 issued by Hon. Mushi (Deputy Registrar) in respect to the decision in Civil Case No. 140 of 2018 and other relief the Court will deemed fit to grant.

The brief facts leading to this application filed under the certificate of urgency is that, the applicant herein was a defendant in Commercial Case No.140 of 2018 whereby the judgment was delivered on 1st December 2020 in favor of the respondent.

On 15th December 2020, the applicant requested from the High Court a copy of judgment and decree for appeal purposes of which to the date this application was filed in Court on November 2021 was yet supplied to him. The respondent was served with a notice of appeal on 17th December 2020 however, on 29th January 2021 he filed a bill of cost No. 9 of 2021 arising from a Civil Case No.140 of 2018. When the applicant was waiting for the documents to process his appeal, he was informed by his Bank (The Diamond Trust Bank) that, the bank has received a Garnishee order nisi in respect to his account no. 0404063001 restricted it to remit an amount of TZS 70,053,000 neither to the applicant nor to any person. This was done without the knowledge of the applicant that there is an application for execution in relation to the judgment and decree in Commercial Case No. 140 of 2018. Becoming aware of execution process the applicant on 26th November 2021 filed an application of stay of execution through the Civil Application no. 605/16 of 2021 before the Court of Appeal. The applicant also filed this Misc. Commercial Application number 185 of 2021 to uplift Garnishee order nisi in this Court.

When the parties in this application appeared before this Court on 2nd February, 2022 for orders, they were represented by their advocates, Ms. Neema Mahunga learned advocate for the applicant and Ms. Loveness Denis, learned advocate for the respondent.

The learned advocate for the applicant made a prayer to this Court to stay proceedings of the present application to uplift the garnishee order nisi following an order of stay of execution granted by the Court of Appeal on 17th February, 2022

pending interparty hearing in Civil Application No. 605/16 of 2021 between the applicant and respondent herein.

She submitted that since there is an order of Court Appeal stayed the execution of a decree in Civil Case 140 of 2018. The proceedings in the present application should also be stayed waiting the final determination of the application before the Court of Appeal which would pave a way for the applicant to be able to challenge the decision in Civil Case No.140 of 2018 in the intended appeal.

Responding to the submissions made by the applicant's advocate. Ms. Loveness, learned advocate for the respondent submitted that, the application before this Court is for uplifting the garnishee order dated 17th November 2021. She said that the aim is to stay the Garnishee order nisi and since the applicant has filed a notice of appeal to the Court of appeal, this Court has no jurisdiction to entertain this matter. To support her argument, she cited decisions of the Court of Appeal which provide a guide that "wherever there is an appeal filed in the Court of Appeal, the High Court is seized with the jurisdiction to proceed with any matter pending in Court". She referred this Court to the case of **Tanzania Electric Supply Company Limited Versus Dowans holdings SA (Costa Rica)**, Civil Application No. 142 of 2012, At pages 8-9. She also referred this Court to the case of **Mohamed Enterprises Tanzania Limited Versus The Chief Harbour Master & Another**, Civil Appeal No. 24 of 2015. At page 12 The Court of Appeal explains on the issue of the High Court's jurisdiction once a notice of appeal has been lodged. She therefore, submitted that, this Court has no Jurisdiction to order stay of the proceedings and instead the application be dismissed for the lack of jurisdiction. She further submitted that this

application is an abuse of the Court process as the applicant has filed this application for lifting up of garnishee order and also filed an application of stay of execution which have the same effect with the aim of stay. Therefore, she prayed the same be dismissed with costs.

In her rejoinder, the learned advocate for the applicant responded that, the application before this Court is for uplifting of garnishee order nisi and is not the same as an application of stay of execution as argued by the learned advocate for the respondent. She pointed out that the application before this Court is brought under section 2(3) of the Judicature and Application of laws Act, Cap of 358 R.E 2019 (JALA) and section 95 of the Civil Procedure Code, Cap 33 RE of 2019. She argued that, section 2 (3) of JALA is a receiving clause of statute of general application as well as common law by the High Court of Tanzania, and section 95 of the Civil Procedure Code empowers this Court to exercise its inherent powers over matters which it has jurisdiction to entertain which are not clearly provided by our laws. She reasoned out that, the Hon. Deputy Registrar ordered a garnishee order nisi against the applicant and the said order is not final and also not provided in the Civil Procedure Code, Cap 33 of RE of 2019. She further submitted that its grant and how to challenge it, is when this Court is mandated to use the receiving clause under section 2(3) of the JALA. She submitted that under the common law the garnishee order nisi is challenged by a way of filling an application before the Court praying to uplift since the garnishee order nisi is issued in the absence of judgement debtor. She insisted that, it is in this application the applicant who is the judgment debtor in the application of these proceedings is given an opportunity to show cause why garnishee order

complete should not be issued by this Court. She further clarified that, the application before this Court is not an application for stay of execution rather in a simple way, it is an application to show cause why the money attached in the applicant account should not be released to the respondent as ordered in garnishee order nisi. She said that, thus why even the stay of execution of proceedings before this Court are not initiated under section 2 (3) of the JALA but they are preferred under order XXXIX rule 5 (1) the whole rule of the CPC. She further argued that the two cases presented by the learned counsel for the defendants are quite distinguishable to the application at hand. She explained that the cases were on the stay of execution of the decree which is not the case of this application. Further to this, she submitted that the prayer made is to stay of these proceedings pending determination of the Civil Application no. 605/16 of 2021 which would pave a way to the order of the Hon. Deputy Registrar either to issue or not to issue garnishee order complete since there is an execution order to be executed in absence of stay of execution by the Court of Appeal. She argued that understanding the circumstances thus why the they made an application before the Court of Appeal to stay execution of the Deputy Registrar's ex parte order pending determination of the application interparty. She further submitted that she is not agreeing with the argument that the existence of notice of appeal at the Court of Appeal seized this Court with the jurisdiction to entertain stay of execution as there is no such application preferred to this Court. She said the aim of this application is clearly provided in paragraph 10 of the affidavit. This Court was informed that the applicant has filed an application for stay of execution at the Court of Appeal that is

why among other reasons the Court is called upon to satisfy itself on whether there are sufficient reasons to uplift garnishee order nisi by the Hon. Deputy Registrar.

Arguing on the issue of an abuse of court process, she distinguished the two applications that the application before this Court is for uplifting of garnishee order nisi preferred under section 2(3) of the JALA and section 95 of the CPC, as to show cause why the Hon Deputy Registrar should not issue garnishee order complete, which will allow the applicant (Bank) to transfer the money which is held under garnishee order nisi to the respondent. While, the application before the Court of Appeal is to stay execution of decree in Civil Appeal No. 140 of 2018. She submitted that in the premises, since there is an exparte order of stay of execution by the Court of Appeal, all proceedings before this Court, including the execution proceedings are to be stayed pending interparty hearing at the Court of Appeal. She insisted that if this Court proceeds with the hearing of the present application that will be an abuse of court process and wastage of Court's time and not otherwise as submitted by the learned advocate for the Applicant.

Considering the submissions made by the learned advocates in regard to the prayer of staying proceedings in the present application pending the determination of Civil Application No. 605/16 of 2021 before the Court of Appeal. This Court has directed itself on whether it can stay the said proceedings or dismissed the application for the lack of jurisdiction as argued by the advocate for the respondent.

Starting with the argument raised by the respondent's advocate based on the position of the law in the two decisions of the Court of Appeal in the cases of **Tanzania Electric Supply Company Limited Versus Dowans holdings SA (Costa Rica)**

and that of **Mohamed Enterprises Tanzania Limited** (Supra) that, whenever there is an appeal filed in the Court of Appeal, the High Court is seized with the jurisdiction to proceed with the same matter which is directly proportional relating with that matter pending in lower court.

In fact, that is the position of the law as it has been guided by the two cited cases above, however that is not the position in the present application. As the learned advocate for the applicant distinguished the above decisions with the present application that are two deferent applications with different effects.

It goes without saying that the application before this Court has been brought under section 2(3) of the JALA and section 95 of the Civil Procedure Code and not under order XXXIX rule 5 (1) the whole rule of the Civil Procedure Code, Cap 33 RE of 2019 applied to the latter one. Also, the application is to uplift the garnishee order nisi which means to show cause why the money attached in the applicant account should not be released to the respondent as ordered in garnishee order nisi and the latter is to stay of execution of the decree in Commercial Case No. 140 of 2018.

At this point, I have to agree with the learned advocate that there is no provision which provides for a nature of the present application in the CPC, hence the use of section 2(3) of JALA as a receiving clause of statute of general application as well as common law by the High Court of Tanzania, reading with section 95 of the CPC which empowers this Court to exercise its inherent powers over matters which it has jurisdiction where the CPC is silent for the present application to uplift the garnishee order nisi. This is also stated in the case of **Tanzania Electric Supply**

Company Versus The Independent Power (T) limited (IPTL) (2000) TLR

324. Whereby at page 14 the Court held that,

" The Civil Procedure Code cannot be said to be exhaustive. It is legitimate therefore, to apply section 2(2) of the Judicature and Application of Laws Ordinance, relevant rules of Common Law and Statutes of General Application in force in England on the 22nd July 1920, where the code is silent".

Besides, the positions given in the two cited case (**Supra**) were based on the existence of notice of appeal, which is not the subject in the instant application. The prayer in the present application is to stay proceedings in Miscellaneous Commercial Application no. 185 of 2021 following an order of stay of execution by the Court of Appeal pending determination of an application interparty.

In the light of the distinction made in respect of the two applications, I concur with learned advocate for the applicant that the two applications are different and the argument by the learned advocate for the respondent based on position in the case of **Tanzania Electric Supply Company Limited** and that of **Mohamed Enterprises Tanzania Limited (Supra)**, cannot apply to the scenario in present application as observed above.

Coming to the issue on whether this Court can stay proceedings of this application pending determination of the application mentioned before the Court of Appeal. Based on the two arguments raised by the both learned advocates, To answer this issue, this Court paused the question on what will be the effects of the two applications. As clarified by the learned advocate for the applicant, the application to

uplift the garnishee order nisi is to show the cause why the attached money should be not be released and transfer to the respondents account while, the latter is to stay the execution pending the hearing of stay of execution interparty.

Looking on the effect of the two applications, the first one is to uplift garnishee order nisi which is a part of execution process which will relieve the burden of the Bank from restriction to transfer or remit any money from the applicant's account but will not stayed the execution.

On the other hand, the pending application of stay of execution at the Court of Appeal will stay the total execution process of the decree in Civil Case No. 140 of 2018 pending determination of the intended appeal.

Going by the aforesaid analysis, the finding is that, the present application is part of the execution process of the decree which its execution has been stayed by the order of the Court of Appeal. Meaning to proceed with this application will be an abuse of court processes while there is a pending of an application at the Court of Appeal.

In that circumstance, since the Court of Appeal has already issued an order of stay pending the hearing interparty as per section 11 (2) (b) of the Court of Appeal Rules which provides that;"

" In any civil proceedings, where a notice of appeal has been lodged in accordance with Rule 83, an appeal, shall not operate as a stay of execution of the decree or order appealed from except so fa as the High court or tribunal may order..."

The existing order of stay issued on 17th February 2022 is automatically stayed any matter relating to the Civil Case No. 140 of 2018 pending the determination of Civil Application No. 605/16 of 2021 before the Court of Appeal.

In result, since the Miscellaneous Commercial Application No. 185 of 2021 is concerning with the garnishee order nisi which is relating with a degree in Civil Case No. 140 of 2018. At this stage, this Court cannot proceed with any further proceedings in the present application.

In the result I stayed proceedings in Misc. Commercial Application No. 185 of 2021 pending determination of the Civil Application No. 605/16 of 2021.

It is so ordered.



Z.A Maruma, J

21/3/2022

Court:

Ruling delivered in the presence of Mr. Abeid Buzohera, Advocate hold brief for Ms. Neema Makunga, Advocate and in the absence of the respondent.



Z.A.Maruma, J

18/03/2022