

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF  
TANZANIA  
(COMMERCIAL DIVISION)  
AT DAR-ES-SALAAM**

**MISC. COMMERCIAL APPLICATION NO.171 OF 2023  
BETWEEN  
EDENVILLE INTERNATIONAL (TANZANIA) LTD-----APPLICANT  
VERSUS  
UPENDO GROUP LIMITED-----RESPONDENT**

**RULING**

Date of Last Order: 15/11/2023  
Date of Ruling: 16/11/2023

**NANGELA, J:.,**

This is a ruling arises from an application which was filed in this court under a certificate of urgency by way of a chamber summons supported by an affidavit of one Kassim Mmbaga Nyangarika filed in court on the 13<sup>th</sup> day of November 2023. The Applicant brought it to the attention of this court under section 3A and 3B, 95 and Order XXI rule 24 (1), (2) and (3) and Order XLIII rule (2) of the Civil Procedure Code, Cap.33 R.E 2019, seeking for the following Orders:

**EX-PARTE**

1. The Applicant be dispensed with the mandatory requirement of issuing notice to the Respondent before

hearing the *ex-parte* interim application.

2. This honourable court be pleased to make *ex-parte* Order of stay execution of the Decree of this court in Commercial Case No.15 of 2020 by lifting the warrant of attachment issued by this court on the 6<sup>th</sup> of September 2022.

### **INTER-PARTES**

This honourable court be pleased to make an order of stay of execution by lifting the warrant of attachment issued by this court on the 06<sup>th</sup> day of September 2022.

On the 15<sup>th</sup> day of November 2023, the parties appear before me as this court saw it necessary that it proceeds with the inter-partes hearing rather than waste more time the matter having been brought under a certificate of urgency and all parties being available and able to attend the hearing. On the material date Mr. Kassim Mmbaga Nyangarika, learned Senior Counsel appeared for the Applicant while Mr. Tumaini

Shija and Ms Bertha Bihondo, learned counsel appeared for the Respondent.

When he rose to address the court, Mr. Nyangarika adopted his affidavit filed in this court as forming part of his submission and stated that, the Applicant preferred this application as she seeks to lift the warrant of attachment as per the reasons disclosed in the affidavit.

Regarding why this court should act on the prayer, Mr. Nyangarika pointed out firstly, that, currently there is,currently, an appeal pending in the Court of Appeal, which is Appeal No.412 of 2022. Secondly, there is also an order of the Court of Appeal for a Stay of Execution which was issued by the Court of Appeal though with a condition that the Applicant deposit a Bank Guarantee amounting to US\$ 117,028.28 **within 60 days** as security for costs.

Mr. Nyangarika submitted that, the respective Bank Guarantee was secured on 9/8/2023 from I & M Bank in the name of the Registrar of the Court of Appeal as ordered by the Court of Appeal but was a little bit delayed for about 5daysbeyond the 60 days. On that account, he submitted that the Applicant filed an application for extension of time within

which the Applicant will deposit the Bank Guarantee and the application is now pending before the Court of Appeal as Application No.622/ 16 of 2023 (annexed to the Affidavit as **Annexure E**).

He submitted further that, as the Applicant wait for the hearing of the application an order of this court which is in the form of warrant of attachment (**Annexure F**) was issued. He told the court that the same is now being acted upon on site and some of the Applicant's properties have been attached while the rest of the matters are still pending before the Court of Appeal. It is from that premise that the Applicant has approached this court arguing that, since the Court of Appeal has not rescinded its Orders, the matter at hand stands to be at odds given the Order of warrant of attachment issued by this court.

It was Mr. Nyangarika's submission that, the respective Bank Guarantee ordered by the Court of Appeal is there to satisfy the Decree incase the appeal is denied save that the pending application for extension of time to have it deposited as per the court order has not been heard and determined by the Court of Appeal and no order of that Court has set aside

its earlier orders. From such a premise, he urged this court to lift the warrant of attachment dated 16<sup>th</sup> day of September 2023 and order that all properties attached be restored until the Court of Appeal hear and determines the applications before it.

Responding to Mr. Nyangarika's submission, Mr. Tumaini Shija, the learned counsel for the Respondent told this court that, upon being served with the summons to appear the Respondent manages to hurriedly file a Counter Affidavit and if it pleases the court, the same be adopted as forming part of his submission.

Submitting in opposition to the application, Mr. Shija told this court that, while it is not disputed that the matter at hand involves same parties and same issues as those before the Court of Appeal in the name of Civil Appeal No.212 of 2022, there is also a Civil Appl. No.446/16 of 2021 and Civil Application No.622/16 of 2023 all being matters which should be brought to the attention of this court as they also involve same parties in dispute and same issues.

He told this court that, on the 6/6/2023, in Civil Application No.446/16 of 2021 the Court of Appeal of Tanzania

granted prayers for stay of execution pending hearing of an appeal preferred by the Applicant but on the condition that the Applicant deposits security for the performance of this court's decree emanating from Commercial Case No.15 of 2020.

Mr. Shija submitted that, the order had required the Applicant to deposit a bank guarantee of USD 117,008.28 and the same was to be deposited within 60 days from the date of the said Order, i.e., the 6<sup>th</sup> day of June 2023. Based on that account, he argued that this application is misconceived as there is a similar order made by the Court of Appeal on the same subject as evinced by **Annexure UGL-2** to the Counter Affidavit.

He argued that, the evidence on the ground shows, however, that, the Applicant did not comply with the Orders of the Court of Appeal and, for that matter, the orders sought here before this court cannot be granted having been granted or been made by the Court of Appeal in the Civil Application No.446/16 of 2021.

Secondly, Mr. Shija submitted that, there is also the pending Application before the Court of Appeal designated as Civil Application No.622/16 of 2023 in which the Applicant

herein is also applying for extension of time so that he is given an opportunity to comply with the Court of Appeal orders or rather correct the contempt of the Court orders. According to Mr. Shija, since that application still pending in the Court of Appeal, bringing this application before this court, is nothing but forum shopping and an abuse of the court's process/time.

He maintained that the application before this court having been substantively decided by the Court of Appeal, and there being a Stay Order of the Court of Appeal, and further, there being other applications before the Court of Appeal, it is only proper if this application was made before the Court of Appeal.

Thirdly, Mr. Shija submitted that, execution of the orders that the applicant seeks to suspend is already in motion as evinced by the Counter affidavit filed in this court. He was of the view that, since the orders are being executed in Rukwa region, and the same is under the supervision of the High Court Registry in Sumbawanga, Rukwa Region, and given that this application is brought to the attention of this Court under Order XXI RULE 24(1) of the CPC, the appropriate court before which this application should have been filed is the High Court,

Sumbawanga Registry. It is until such is done that the Applicant would move to this court and more so, that would have been proper also if there were no pending matters in the Court of Appeal as already argued.

Mr. Shija submitted further that, this application has been supported by an affidavit of one Kassim Mmbaga Nyangarika and a look at clause 7 of that affidavit reveals a perjury in relation to "**ANNEXURE D**" which, is part of the application for extension of time, i.e., Civil AppL.622/16 of 2023. He submit that there is a clear a misrepresentation aimed at misleading this court when one looks at **Annexure UGL-3** annexed to the Counter Affidavit of the Respondent since the said "**ANNEX.D**" of the Affidavit of Mr. Nyangarika sworn on behalf of the Applicant is not on the Bank's headed papers, it is unsigned, and even the names and titles of the Bank officials are different from the **Annexure UGL-3**.

He argued that, going through "Annexure D", one as well will find that it was not only taken after the 60 days, but it has also expired. For those reasons, he submitted that this application lacks merits, was filed in a wrong forum and should be dismissed with costs and the same costs be borne by the



counsel who presented this application unless evidence is brought to show that he was authorized to bring this application.

Mr. Shija prayed as well that the Applicant be asked to pay damages to the Respondent as may be assessed by the Court and if no evidence that the counsel was instructed then the counsel for the Respondent should bear the brunt of the damages. He thus urged this court to decline granting the orders sought in this application.

In a brief rejoinder, it was Mr. Nyangarika's submission that, the issue of perjury which was fronted by the Respondent's counsel on the account that the signatories on the document seem to be different from what annexure UGL-3 in the counter affidavit reveals is explainable. According to Mr. Nyangarika, there was a Bank Guarantee which was first issued but needed some corrections on the aspect of the number of the case, (Annex.C) as it was written Civil Case No.16 of 2020 instead of Commercial Case No. 15 of 2020.

He submitted that, on the same wave lengths, the document needed corrections as well regarding the number of the Civil Appeal case as it was written Civil Appeal No. 12 of

2020 instead of Civil Appeal No.412 of 2022. In view of that, he submitted that such matters were noted, and the Guarantee was sent back to be corrected by the Bank, thus accounting for the differences observed by the learned counsel when compared with the document attached to the Counter Affidavit. He added that, the same guarantee has not been submitted to the Court of Appeal given the pendency of the application filed by the Applicant.

Secondly, Mr. Nyangarika rejoined that, there is no dispute that the order of warrant of attachment was issued by this Division of the Court and not the High Court at Sumbawanga where it was sent for execution. For that matter, he argued that, this, therefore, is a proper forum from which the orders emanated. He submitted that; the Court of Appeal issued an order of stay of execution only with a condition of 60 days within which the be deposited a Bank Guarantee as security of performance. He admitted that it is true that there was a delay in the carrying out of the orders of the court and that is why there is a pending matter before the Court of Appeal.

It was a further submission by Mr. Nyangarika that, the application was not filed as an abuse of court process or a matter of engaging in forum shopping. He argued that, the order sought to be lifted was issued by this court and not the court of Appeal. Further that, it was issued when the Court of Appeal has not rescinded its orders. He submitted that, in any case, the Respondent should have gone first to the Court of Appeal to rescind the order before coming to this court for execution. Besides, the Court of Appeal has also not said anything regarding the application for enlargement of time. As regards whether he was duly instructed to file this application, Mr.Nyangarika was very categorical on that, stating that paragraph 2 of the affidavit is clear evidence to that effect. He urged that court to grant the prayers sought and lift its orders and direct that the properties attached be restored pending the further orders of the Court of Appeal.

I have gone through the application and its supporting documents, the affidavits and the annexures as well as considered the rival submissions as set out herein above. The issue for me to address is whether the application has any merit therein. In my humble view, the orders being sought to

be lifted were issued erroneously since, as rightly argued by Mr. Nyangarika, there is no order of the court of Appeal which has rescinded its earlier orders of stay of execution even if the condition set out therein has not been fulfilled.

Secondly, if the Respondent was to act in a decorated manner, then she would have approached the Court of Appeal and request that the Court of Appeal be pleased to rescind its orders of stay of execution before proceeding with seeking for an order of warrant of attachment which was sought and issued by this court.

Thirdly, since the order of warrant of attachment was issued by this court, the appropriate forum to have it lifted is not the Court of Appeal but this very court which issued it. The lifting of it, therefore, is an appropriate approach since currently there is before the Court of Appeal an application which seeks to extend the time within which to satisfy the requirements of the orders given by the Court of Appeal in respect of the deposit of Bank Guarantee of US\$ 117,008.28.

Concerning the restoration of the already attached properties, that is as well an appropriate approach and an order to that effect is warranted. In fact, it is worth reminding

ourselves of what was once stated by this court in the case of **Incar Tanzania Ltd and 60 others vs. Standard Chartered Bank of Tanzania Ltd**, Misc. Commercial Application No.25 of 2022. In that case this court stated as follows, and I quote:

“once disputed matters are laid before the Court of law, all other persons acting under their instructions are by all intent and purpose, restrained from laying their hands on them. This includes purported owners of properties or whoever else who may lay claims on the said properties which are a subject of court proceedings. All such interested persons are restrained from laying their hands on them until when the pending Court processes come to their finality.”

In my view, the same reasoning which resonated in the above quoted portion of the decision of this court will apply to the matters before me. The order of stay issued by the Court of Appeal has not been set aside and more so there is a pending application which is pending before the same Court of

Appeal and all parties herein concede to that fact. In such a circumstance, it would not be proper to proceed with attachment of the properties whose fate is still on the balances waiting for a definitive clearance by the Appex Court in this country. Laying hands on them is inappropriate if we all care for rule of law and respect for the court and its orders.

In the upshot of the above, I find merits in this application and this court proceeds to grant the application and settle for the following orders:

1. That, the Warrant of attachment issued by this court on the 6<sup>th</sup> of September 2022 is hereby lifted on the account of being erroneously issued at the time when there is a pending order of stay by the Court of Appeal of Tanzania and an Application by the same parties undetermined and pending before the same Court.
2. That, all properties attached by the Respondent be restored and the status quo ante the Warrant of Attachment Order be maintained

until the matters pending before the  
Court of Appeal comes to an end.

3. In the circumstances of this matter,  
each party shall bear its own costs.

**It is so ordered.**

DATED AT DAR-ES-SALAAM ON THIS 16<sup>TH</sup> DAY OF NOVEMBER  
2023



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**DEO JOHN NANGELA**  
JUDGE