

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF
TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM
MISC.COMMERCIAL APPLICATION NO. 226 OF
2022**

WANG SHENGJU1ST APPLICANT
WANG WENQIAN.....2ND APPLICANT
VERSUS
MOHAMED SAID KILUWA (SUIING IN
THE NAME OF KILUWA STEEL GROUP
COMPANY LTD) RESPONDENT

RULING

Last order: 27TH JANUARY 2023
RULING: 03RD MARCH 2023

NANGELA, J.,

The Applicants herein has, by way of a chamber summons filed under a certificate of urgency, applied for the orders of this Court as follows:

A: Ex-parte

1. That, this honourable Court be pleased to issue an interim order lifting the prohibitory order in Commercial Case No. 23 of 2022 issued on 13th December 2022, and an order for status quo ante pending hearing of this application inter-partes.

B. Inter partes

1. That, this honorable Court be pleased to lift the prohibitory order in Commercial Case No.23 of 2022, issued on the 13th December 2022, pending the determination of an application for stay of execution known as Civil Application No. 758/16 of 2022 and the intended appeal against the Judgment and Decree in Commercial Case No.23 of 2022, delivered on 21st October 2022, both pending before the Court of Appeal.
2. That, this honorable Court be pleased to lift a conditional order for sale of Applicants' shares in Commercial case No.23 of 2022, upon receipt of a report that the order for attachment has been complied with, pending the determination of an application for stay of execution known as Civil Application No. 758/16 of 2022 and the intended appeal against the Judgment and Decree in Commercial Case No.23 of 2022,

delivered on 21st October 2022,
both pending before the Court of
Appeal.

3. Any other relief.

The Respondent's counsel opposed the application by preferring a counter affidavit and raised a preliminary objection. On the other hand, when the Applicants filed their reply affidavit, they as well raised and filed a preliminary objection in this Court.

At the day when the parties appeared before me, I directed them to file their respective submissions and, that, I will start by disposing the earlier objection filed by the Respondent and if it carries the day, that will be the end of this matter. If not, then I will consider the Applicant's objection.

The parties' respective submissions, therefore, were filed simultaneously. In their notice of preliminary objection, the Respondent's learned counsels, Mr. Alex Balomi and Mr. Imam Daffa, stated that, this Court has not been moved properly by the Applicants to warrant the granting of the orders sought in the chamber summons.

Submitting in support of the objection, the counsels for the Respondent contended that, according to the chamber summons, the application is filed under section 38 (1), 95 and Order XXI Rules 10 (2) (d) and 15 (1) and (4) of the *Civil Procedure Code*, Cap.33 R.E 2019, Rule 2(2) of the *High Court (Commercial Division) Procedure*, 2012 and any other enabling provisions. The learned counsels for the Respondent contended

that, the nature of the current application is to stay execution in Commercial case No.23 of 2022 pending determination of the application for stay of execution in the Court of Appeal of Tanzania, Misc. Civil Appl. No.759/16 of 2022.

It was their submission, in the first place, that, the order which this Court is being asked to lift, dated 13th December 2022, is non-existent. They contended that, the application is, therefore, seeking to challenge a non-existent order.

The learned counsels submitted that, on 12th December 2022, this Court, upon application for execution of decree in Commercial case No.23 of 2022 by the Respondent herein, issued the following orders:

1. An order is hereby made prohibiting the Judgement Debtors from transferring 8,800 and 98,600 fully paid ordinary shares or receiving any dividend thereon.
2. An Order for sale of the said shares in view of realizing the decretal sum of TZS 36,131,696,5348 will be issued upon receipt of a report that an order for attachment has been complied with.
3. The Registrar of Companies and Judgement Debtors be served with the attachment order.

The Respondent counsels submitted that, such were orders issued in execution proceedings, meaning that, the process of execution of the decree is already in progress and can only be stopped when there is a stay order, either from the executing Court or the Court of Appeal upon the granting by that Court of an application for such a stay properly filed before that Court. They contended that, there is no such order and, for that matter, the Applicants cannot move this Court to grant the orders sought.

Relying on the decision of this Court in the cases of **UAP Insurance Tanzania Ltd vs. Akiba Commercial Bank Plc**, Misc. Commercial Case No.48 of 2022 (unreported) and that of the Court of Appeal in the case of **Tanzania Motors Services Ltd vs. Tantrack Agencies Ltd**, Civil Application No.86 of 2004 (CAT) DSM, (Unreported), it was contended that, raising attachment and stay of execution have the same end results of staying the execution of a decree.

The learned counsels for the Respondent argued that, since there is an application for stay of execution at the Court of Appeal, this Court cannot be moved to stay execution of the matter as well since that will constitute an abuse. It was contended that, an application under section 38(1) of the CPC, Cap.33 R.E 2019, can only be entertained by this Court if the same is for implementation of an Order of the Court of Appeal for stay as it was in the **UAP Insurance's case** (supra).

The learned counsels for the Respondent submitted, therefore, that, this Court has not been moved to grant the orders sought since there are no orders for stay of execution by the Court of Appeal which should thus be enforced by an application premised under section 38(1) of the CPC, Cap.33 R.E 2019. It was contended further that, none of the provision cited in the chamber summons empowers this Court to stay execution of a decree arising from orders of attachment of the judgement debtor's shares and conditional sale of such attached shares.

Responding to the submissions filed by the learned counsels for the Respondent, it was the submission by Mr. Roman Masumbuko, the learned counsel for the Applicant that, having read the submission, he does not see any where that the Respondent's counsels have addressed the objection raised in their notice. He contended that, what they seem to do is to submit on merit. He contended further that, the Court has not been moved to stay execution but to lift the attachment and conditional orders for sale issued on the 13th December 2022.

As regards the contention that, no order was issued on the 13th December 2022, Mr Masumbuko submitted, that, the Court order was signed under seal on the 13th day December 2022 and, in any case, that cannot be a matter of preliminary objection as it does not pass the test in the case of **Mukisa Biscuits Manufacturing Co. Ltd vs. West End Distributors Ltd** (1969) EA 696.

Mr. Masumbuko submitted further that, in the ***UAP Case*** (supra), this Court did not agree that a stay order is semantically similar to lifting of an attachment order. He contended, however, that, what the Court stated was that, when a stay order is issued, the trial court's judgment cannot be executed or implemented and the execution process remains suspended. He noted, however, that, the executing Court remains with jurisdiction of entertaining all matters having effect of implementing the stay order and that, vacation of previous orders by the executing court for purposes of implementing the appellate Court's stay Order is permissible.

In his submission, Mr. Masumbuko was of the view that, such a position as stated in the **UAP's case** (supra) supports the present application, regardless of the fact that, there are no stay order from the Court of Appeal.

He contended that, the executing Court will have jurisdiction to entertain any application seeking to lift the attachment. As such, he referred to this Court section 38 (1) and 95 of the CPC, Cap.33 R.E 2019 as provisions which can support the present application. He also relied on the case of **National Bank of Commerce vs. Silas Lucas Isangi & Others**, Commercial Reference No.3 of 2019 (unreported). He lastly urged this Court to dismiss the objection with costs arguing that, there is no requirement that an application to lift up an

attachment order can only be made when there is a stay order of the Court of Appeal.

In their rejoinder submission, the learned advocates for the Respondent have rejoined that, this Court could only be properly moved if there was an order of the Court of Appeal to stay execution. They rejoined that, there being no such order, the applicant cannot move the Court in the manner he tries to do. Further, it was their rejoinder submission that, there being an application pending in the Court of Appeal seeking for a stay of execution, the Applicant cannot move this Court to grant the orders which have the effect as well of staying the execution.

Concerning the applicability of the **UAP's case** (supra) in this case, the Respondent's counsels rejoined that, its facts are very clear, that is to say, in that case, the application was filed under section 38 (1) and 95 of the CPC upon the Applicant obtaining an *ex-parte* order for stay of execution from the Court of Appeal.

I have had an opportunity of examining the rival submissions and the cases cited therein. The issue to be addressed here is whether the objection raised by the Respondent has any merit or not. Certainly, as it will be noted, the current application was brought under section 38 (1), section 95 and Order XXI Rules 10 (2) (d) and 15 (1) and (4) of the *Civil Procedure Code*, Cap.33 R.E 2019, Rule 2(2) of the *High Court*

(Commercial Division) Procedure, 2012 and any other enabling provisions.

Section 38 (1) of the CPC, which forms the bedrock of this application covers situations or matters arising from the execution of a decree of a Court or in relation to the discharge or satisfaction of the decree. It reads as follows: -

"(1) All questions arising between the parties to the suit in which the decree was passed, or their representative, **and relating to the execution; discharge or satisfaction of the decree,** shall be determined by the court executing the decree and not by a separate suit."

In my view, since there is such a specific provision, I find that there was no need to cite section 95 of the CPC and that provision becomes inapplicable to the application. In principle, section 95 of the CPC is to be used parsimoniously. In the case of **Aero Helicopter (T) Ltd vs. F. N Jansen** [1990] TLR 142 at 145, it was stated that: -

"It is to be remembered that the inherent power of the High Court under section 95 of the Code is exercisable where (sic) the law has made no provision governing the particular matter at hand. "

That fact aside, what then are the merits or otherwise of the objection raised by the Respondent's counsels? I have certainly looked at the decisions referred herein by the parties along side their submissions. What the Applicant is seeking is Orders of this Court to lift the prohibitory order in Commercial Case No.23 of 2022, issued on the 13th December 2022, pending the determination of an application for stay of execution known as Civil Application No. 758/16 of 2022 as well as lifting the order of attachment and conditional order for sale of Applicants' shares in Commercial case No.23 of 2022.

What the Respondent counsels have raised is that this Court cannot be moved to issue the orders sought. In other words, what they have raised is a jurisdictional matter in terms of the inability of this Court to exercise its jurisdiction at the moment. They have placed reliance on the case of **UAP Insurance Tanzania** (supra). I have looked at that decision. In that case this Court (Mkeha, J) did take note, and correctly so, that, it is an obtaining legal position in our jurisdiction, that:

“When a notice of appeal is filed at the Court of Appeal, the trial Court is barred from entertaining any other matter relating to the decision appealed against.”

But this Court was quick to note and state as well, that:

“applications for execution of Court decrees fall within the

exception to the rule hereinabove. That is why the Judgment Debtor had to move the Court of Appeal for an order of stay of execution which she obtained on 2nd March 2022.... While I agree ...that staying execution is not semantically similar to lifting an attachment order, **I do not agree with him further, that, the two have different effects. As it was held by the Court of Appeal in *Tanzania Motors Services Ltd vs. Tantrack Agencies Ltd (supra)*, whether the attachment order is raised or execution is stayed, the end result is the same, that is, the execution of the decree is stayed.** That being the position, when a stay order is issued, the trial court's judgement cannot be executed or implemented...." (Emphasis added).

In their submissions, the Respondent counsels have argued that, the process of execution of the decree has been on-going and can only be stopped if there is a stay order, either from the executing Court or the Court of Appeal. They contended

that, there is no such order and, for that matter, the Applicants cannot move this Court to grant the orders sought. I think I need not respond to that submission because that befits a response if I were to deal with the merits of the matter but not at this preliminary stage.

On the other hand, the learned counsels for the Respondent have also argued that, based on the **UAP's case** (supra), the lifting of an attachment order has the same effect as stay of execution. As such, they contended that, since there is an application for stay of execution at the Court of Appeal, this Court cannot be moved to issue an order with same effects as well since that will constitute an abuse. They contended that, the Applicant's application under section 38(1) of the CPC, Cap.33 R.E 2019, could only be entertained by this Court if the same is for implementation of an Order of the Court of Appeal for stay as it was in the **UAP Insurance's case** (supra).

Indeed, I am inclined to agree with the submission offered by the learned counsel for the Respondent on that aspect. As this Court stated in the **UAP Insurance Tanzania Company Ltd** (supra) the lifting of an attachment order has the same effect just as the effect which an order to stay execution has. The end result, therefore, is the same; that is, the execution of the decree is stayed.

In the present scenario, there is before the Court of appeal an application for stay of execution already filed by the Applicant

which, if and when granted it will have a similar effect. This application cannot and should not pre-empt that which is before the Court of Appeal. What the Applicants should have done is to wait and pursue the already matters they had initiated at the Court of Appeal.

In view of the above, I am in agreement with the learned counsels for the Respondent that, had there been an order of stay as the case was in the **UAP Insurance Tanzania Company Ltd** (supra), this Court could have been moved to grant the orders sought. The contrary being the case, this application cannot be allowed to stand but should be struck out as the Respondent's counsels contends.

Being in agreement with the submissions by the Respondent's counsel on that aspect, I hereby, without further ado, uphold the objection and struck out the application with costs.

It is so ordered.

**DATED AT DAR-ES-SALAAM ON THIS 03rd DAY OF
MARCH 2023**



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DEO JOHN NANGELA
JUDGE