

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(COMMERCIAL DIVISION)**

AT DAR ES SALAAM

MISC. COMMERCIAL APPLICATION NO. 3344 OF 2024

(Arising from Commercial Case No. 16 of 2018)

GODWILL CERAMICS TANZANIA LIMITED APPLICANT

VERSUS

MANTRACK TANZANIA LIMITED.....RESPONDENT

RULING

Date of last order: 27/02/2024

Date of ruling: 29/02/2024

AGATHO, J.:

This ruling is in respect of the oral application of the applicant that the Garnishee Order Nisi issued by this court on 14/02/2024 be lifted following the ruling of the Court of Appeal of Tanzania (CAT) issued on 26/02/2024 ordering the stay of execution. The application has been resisted by the Respondent.

The court is therefore invited to rule whether the garnishee order nisi should be lifted. It is on record that the Applicant is represented by Mr Erick Rweyemamu, Advocate while Mr Roman Masumbuko, advocate appeared for the Respondent.

The matter was coming for hearing of the Preliminary Objections (POs) raised by the Respondent when Mr Rweyemamu told the court that the POs

should not be heard due to the fact that there is an ex parte order of stay of execution issued by the Court of Appeal on 26/02/2024 in Civil Application No. 69/16 of 2024 between Godwill Ceramics Tanzania Limited v MANTRACT Tanzania Limited. The applicant's counsel submitted that according to that ex parte order the CAT stayed the whole execution in Commercial Case No. 16 of 2018. Due to that order, the Applicant besought the court to uplift garnishee order nisi which the court issued ex parte on 14/02/2024.

Mr Rweyemamu submitted that this court has jurisdiction under Section 95 and 38 of Civil Procedure Code [Cap 33 R.E. 2019] to uplift the garnishee order nisi in compliance with the ex parte order issued by the CAT. To buttress his submission he referred the case of **Serengeti Breweries Limited v Sikem Real Estate Developers Limited, Misc. Application No. 162 of 2022 HCCD** where this court exercised its power and lifted the garnishee order nisi following the Court of Appeal's issuance of an order staying the execution. Mr Rweyemamu went on submitting that considering the cited holding this court has jurisdiction to uplift the garnishee order nisi.

Furthermore, Mr Rweyemamu argued if the garnishee order nisi is not uplifted the Applicant stand to suffer because the bank account against which the garnishee order nisi was issued is the account used for payment of salaries to more than 3000 employees and it used by the Applicant to pay government tax and revenues. Therefore, he was of view that by not lifting the garnishee order nisi it will bring chaos and penalties to the Applicant's employees and to the government respectively. He concluded his submission by praying that the prayer to lift garnishee order nisi be granted.

On the adversary side stood Mr Masumbuko for the Respondent. He began his reply submission by attacking the argument about the irrepealable loss. He cautioned that the same should not be entertained because it goes to the merit of application. He observed that the Respondent has not even filed her counter affidavit and the POs have not been determined. He suggested that the prayer to lift garnishee order nisi cannot be entertained because the POs are yet to be determined. It was his view that the lifting of garnishee order nisi cannot be done before hearing of the POs and determination of application on merit.

Mr Masumbuko went on with his response that the gist of the Applicant's prayer is that the CAT has issued an ex parte order staying execution proceedings. However, he noted that the Applicant's counsel has used the word (sic) "all execution proceedings." Mr Masumbuko opined that Mr Rweyemamu probably got that phrase from page 3 of the CAT ruling where the word used is putting the execution in abeyance. That means to stop any proceedings. That is to put it in standstill. Mr Masumbuko argued that that means CAT has assumed jurisdiction over the proceedings and it has ordered the proceedings in this court to stay where they are. He continued to submit that the CAT has not ordered any undoing of any act done. It did not set aside any order or proceedings done by this court. He submitted further that they understand that even lifting the garnishee order nisi or determining the POs raised are part of execution proceedings. It means they have now been put in abeyance. According Masumbuko the court has two options: either, it can strike out the application because it has been over taken by events as the ex parte order for staying of execution

proceedings came subsequent to the present application, or it can stay the present application which is part of the execution proceedings as ordered by the Court of Appeal until determination of the application of stay of execution proceedings inter partes.

Mr Masumbuko went on submitting that the order of stay of execution given by the CAT was aware of the garnishee order nisi. But it did not make any adverse order against the garnishee order nisi including lifting it. He added in his submission that the CAT refrained from lifting the garnishee order nisi. Contrary to what the Applicant's counsel submitted this court has no power to lift the garnishee order nisi under (Sections 95 and 38 of CPC). Mr Masumbuko observed that this is something which the CAT itself has refrained from doing. He thereafter suggested that if the Applicant want she can go to CAT and ask it to vary the order on stay of execution and seek the court to lift the garnishee order nisi.

Mr Masumbuko warned that if the court allow the lifting of garnishee order nisi that will be tantamount to changing the status of what was done in the CAT including the affidavit that was filed in the CAT to support application for stay of execution.

Regarding the applicant's counsel citation of the **Serengeti Breweries case**, Mr Masumbuko submitted that, firstly, that case is not binding upon this court. Secondly, in that case the prayer for lifting of garnishee order nisi faced no resistance from the respondent. It was consensual. Further, there was not ex parte stay of execution. He argued that maybe it was the ruling by the full court of CAT. He poised that the court does not have full facts of that case. He submitted that any order

including this will be erroneous if it seeks to change the status like this one after the order for stay of execution has been granted by the CAT. He closed his submission by praying that the prayer to lift the garnishee order nisi be dismissed. In the alternative he invited the court that since there is CAT order of stay of execution, the court can exercise the above suggested options.

In his rejoinder Mr Rweyemamu reiterated his submission in chief. And added that the argument that the POs have not been heard is without merit as he submitted earlier that these POs have been overtaken by the order of stay of execution given by the CAT. Concerning the argument that the CAT did not lift the garnishee order, Mr Rweyemamu said that is not true. The CAT at page 4 of its ruling last paragraph it covers the whole execution from when it was filed up to this moment. He submitted that that is what the CAT meant by "the intended execution." Mr Rweyemamu stressed that this court has jurisdiction to determine the Applicant's prayer as provided for under Sections 38 and 95 of the CPC.

On the case of **Serengeti Breweries** (supra), Mr Rweyemamu submitted that the said case resembles the application hand. And this court lifted the garnishee order nisi after the CAT gave an order staying the execution. He protested the argument that the respondent did not resist in **Serengeti Breweries case** (supra). Moreover, Rweyemamu faulted the suggestion that there was consent. He opined that the respondent did not resist because she knew that when there is the order of stay of execution then this court has power to uplift the garnishee order nisi.

I have keenly listened to the submissions by learned advocates. Along with that I have dispassionately considered these submissions, in my firm view the application to lift the garnishee order nisi cannot be granted. One among the reasons is that lifting of garnishee order nisi is part of execution proceedings which the CAT has ordered to be stayed. In case of **Tanzania Electric Supply Co. Ltd v Mufungo Leonard Majura and Others, Civil Application No. 210 of 2015 CAT** at page 9 held that:

"The request by the applicant to lift garnishee Order nisi is part of the process of execution because in essence it entails moving the court to stop the process of execution."

The above decision of the CAT is enough to dispose the application at hand. Lifting of garnishee order nisi is part of execution proceeding which the CAT has ordered to be stayed. This court therefore declines to grant the applicants prayer. Besides that, it suffices to point out that the **Serengeti Breweries' case** (supra) is distinguished from this case, and short of that the same is disjointed from the CAT holding in **Tanzania Electric Supply Co. Ltd's case** (supra). Moreover, and as rightly submitted by Mr Masumbuko the lifting of garnishee order nisi in **Serengeti Breweries' case** might have been consensual and not due to the CAT order for stay of execution.

Furthermore, if lifting of garnishee order nisi is done then it will imply violating the CAT order to stay the execution. In other perspective it may mean that the order of the CAT is operating retrospectively. I am of the view that the order of stay by CAT does not have effect on the orders given by this court prior to that order of staying the execution.

I have noted that the CAT in **Tanzania Electric Supply Co. Ltd's case** (supra) held that lifting of garnishee order nisi is tantamount to stay of execution. I concur with that standing. However, in the context of the case at hand the order of stay has been issued by the CAT which bars this court from lifting the garnishee order nisi.

Again, unlike the situation in the **CRDB Insurance Brokers Limited v Yuko Enterprises (EA) Limited and 2 others, Civil Application No. 548/16 of 2022**, where the CAT stayed the execution and went on lifting the garnishee order nisi, in the case at hand the CAT ordered stay of execution and did not order lifting of the garnishee order nisi which would have made this application redundant. It is important to stress that the CAT has now taken over the matter as there is a pending inter parte hearing of the application for stay of execution. This court has no mandate to proceed with execution including lifting the garnishee order nisi.

I fully subscribe to the views of Mtembwa J in **Phoenix of Tanzania Insurance Company Limited v Jilala Julius**

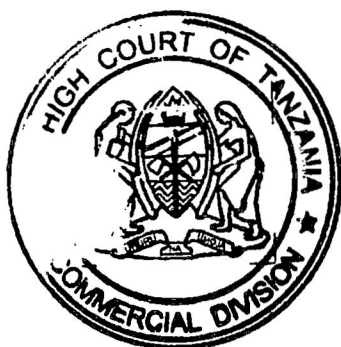
Kakenyeli and Another, Misc. Civil Application No. 28537 of 2023 HCT Dar es salaam Sub-registry (ruling delivered on 14 February 2024) at page 15 holding that:


"...If the Court of Appeal intended that its order of stay execution be implemented or enhanced by the High Court, it could have specifically stated so to avoid ambiguities. The Garnishee Order Nisi cannot be lifted on the pretext that this Court is implementing or enhancing the Court of Appeal's stay of execution order in the circumstance of this Case."

In lieu of the foregoing, this application stand dismissed for want of merit. As to the issue of costs, understandably, the parties are battling at the CAT, and in this court, there is an impending application as well as POs that are yet to be determined, it is fair that each party bears its costs.

Order accordingly.

DATED at DAR ES SALAAM this 29th Day of February 2024.




U. J. AGATHO
JUDGE
29/02/2024

Date: 29/02/2024

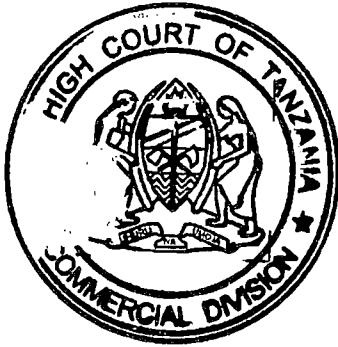
Coram: Hon. U. J. Agatho, J

For the Applicant/judgment debtor: Erick Rweyemamu, Advocate

For the Respondent/decreed holder: Roman Masumbuko, Advocate

B/C: E. Mkwizu

Court: Ruling delivered today, this 29th February 2024 in the presence of Erick Rweyemamu, counsel for the Applicant, and Mr Roman Masumbuko, the Respondent's Counsel.



U. J. AGATHO

JUDGE

29/02/2024