

**IN THE COURT OF APPEAL OF TANZANIA  
AT DAR ES SALAAM**

**CIVIL APPLICATION NO. 120 OF 2003**

**In the Matter of an Intended Appeal**

**BETWEEN**

**CONSOLIDATED HOLDING CORPORATION.....  
APPLICANT**

**AND**

**1. JIT FINANCE LIMITED..... 1<sup>ST</sup>  
RESPONDENT**

**2. THE REGISTERED TRUSTEES OF  
TANGANYIKA NATIONAL PARKS..... 2<sup>ND</sup>  
RESPONDENT**

**3. JOSEPH LAIZER..... 3<sup>RD</sup>  
RESPONDENT**

**(Application for Stay of Execution from the decision  
of the High Court of Tanzania - Commercial Division  
at Dar es Salaam)**

**(Kimaro, J.)**

**dated the 10<sup>th</sup> day of December, 2003  
in  
Commercial Case No. 48 of 2003**

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R U L I N G**

**MROSO, J.A.:**

Before me is a Notice of Motion for an application for stay of execution of a decree of the High Court pending an appeal to this Court. However, Mr. Deogratias W. Ringia, learned advocate for the first respondent, has taken a preliminary objection to the application because the decree sought to be stayed was not annexed to the Notice of

Motion.

In arguing the preliminary objection Mr. Ringia said that in an application for stay of execution of a decree it was necessary that the Court should see the decree that is being sought to be stayed and where such decree is missing from the application, the application is incompetent and it should be dismissed, as he put it. He submitted that in the application before me no copy of the decree was annexed and the affidavit in support of the Notice of Motion gave no reasons for the failure by the applicant to annex the decree. For that reason, he called upon the Court to dismiss the application with costs. In support of the proposition that the Notice of Motion was incompetent, he cited the decision of this Court in **Blue Star Service Station v. Jackson Musseti** [1997] TLR 310

Mr. Mpuya, learned advocate, who appeared for the second respondent did not wish to be heard on the preliminary objection. The third respondent was absent and unrepresented in the proceedings.

Mr. Rweyongeza, learned advocate, appeared for the applicant. He readily conceded that, indeed, the Notice of Motion was not accompanied by the decree sought to be stayed. He argued however, that it was not necessary to annex to the Notice of Motion a copy of the decree. He said

that Rule 9 (2) (b) of the Court Rules, 1979 which is the relevant provision in an application for stay of execution, makes no requirement for attachment to the application any documents, including the decree or order sought to be stayed. This Court, however, developed the law and required certain documents to be annexed to the application for stay of execution. He also cited the **Blue Star Service Station** case (supra) but said that the decision in that case did not specifically require that a decree or order be annexed to the application for stay of execution. Further development of the law in applications for stay of execution, according to Mr. Rweyongeza, is seen in the case of **Permanent Secretary, Ministry of Works v. Ebeneza Massawe and Another**, Civil Application No. 113 of 2001 (unreported) in which the applicant was allowed by the Court to remedy the absence of a decree in an application for stay of execution by filing a supplementary record which would contain a copy of the decree.

Mr. Rweyongeza explained that in the application now before the Court, the applicant was not in possession of the extracted decree at the time of filing the Notice of Motion. Although the decree was in fact issued before the date of filing the Notice of Motion, he had not been notified that it was available for collection, and that had he waited until he was notified that the decree was available, he would have

been time barred to make the application. He argued that should the Court consider that a copy of the decree is necessary, he should be allowed under Rule 52 (2) (3) of the Court Rules to file a supplementary affidavit. In the meantime he prayed that the preliminary objection be dismissed for being misconceived.

In his final address to the Court Mr. Ringia said from the bar that he had evidence (which he did not show) that a copy of the decree was available by 15/12/2003, some 16 days before the application for stay of execution was filed on 31/12/2003. The applicant could have obtained a copy of the decree before filing the application, had it bothered to check with the court registry.

Mr. Rweyongeza is right to say that the Court Rules do not require that a copy of the decree or order sought to be stayed should be annexed to a Notice of Motion in an application for stay of execution. He is also correct to say that over the years this Court has developed the law on an application for stay of a decree under Rule 9 (2) (b) of the Court Rules. It had become apparent that the Court could not be expected to order the stay of a decree or order the particulars of which were not before it. In **East African Development Bank v. Blueline Enterprises Ltd.**, Civil Appeal No. 35 of 2003 (unreported) this Court said -

... both logic and common sense demand that the Court cannot order stay of execution of an order which it has not seen, furthermore, by precedent, the practice of the Court in such a situation is that an application for stay of execution which is not accompanied with the order sought to be stayed is held to be incompetent.

The court struck out the application. In **Dunhill Motors Ltd. v. Tanzania Revenue Authority**, Civil Application No. 12 of 2000 (unreported), it was similarly held that an application for stay of execution which was not accompanied by the order (read decree where relevant) sought to be stayed was incompetent and it was struck out. Even in the decision of this Court in the **Permanent Secretary, Ministry of Works and Another v. Ebeneza Massawe**, Civil Application No. 113 of 2001 the same position was maintained, that a copy of the decree was necessary.

In certain circumstances however, this Court has shown willingness to dispense with the need for a copy of the decree or order where a copy of the decision and the terms of such decision are contained in the affidavit in support of

the application. This Court made that observation in the **Blue Star Service Station** case. In that case the application for stay of execution not only lacked a copy of the decree, it did not even have a copy of the decision and the terms of the decision in an affidavit. The Court struck out the application as incompetent.

The application before me has a copy of the judgment against which it is intended to appeal annexed to the Notice of Motion. But until at the time of hearing the preliminary objection there was no indication whatever why a copy of the decree was not annexed to the Notice of Motion. During the hearing of the Preliminary Objection it became apparent, even from the words of Mr. Rweyongeza himself, that the decree had been issued before the date the Notice of Motion was filed. The excuse which was given for not annexing a copy of the decree which was ready for collection from the High Court was that the learned advocate had not been notified that it was available.

With due respect to Mr. Rweyongeza, there was a lack of diligence on his part. If he knew that the Court requires that in such an application copy of decree ought to be annexed to the Notice of Motion, he could have easily obtained one from the High Court Registry, had he bothered to make enquiry. It is apparent however, that he believed

that a copy of the decree was not necessary. These, therefore, are not circumstances in which the Court could exercise its discretion to accept a copy of the decision in lieu of the copy of decree. Furthermore, the circumstances in this application are not such as would persuade the Court to allow the applicant to file a supplementary record or affidavit which would include a copy of the decree. The Court made that concession in the **Ebeneza Massawe** case because the applicant had earlier applied in vain to the Registrar of the High Court for, among other documents, an extracted order. I also do not see the relevancy of Rule 52 (2) or (3) of the Court Rules.

For the above reasons, the preliminary objection must be sustained. The application which was not accompanied by the extracted decree is incompetent and is accordingly struck out with costs.

DATED at DAR ES SALAAM this 14<sup>th</sup> day of  
December, 2004.

J.A. MROSO  
**JUSTICE OF APPEAL**

I certify that this is a true copy of the original.

( S.M. RUMANYIKA )  
**DEPUTY REGISTRAR**