IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

CIVIL APPLICATION NO. 175 OF 2005

SELCOM GAMING LIMITED ..... APPLICANT

VERSUS

1. GAMING MANAGEMENT (T) LIMITED]
2. GAMING BOARD OF TANZANIA] ..... RESPONDENTS

(Application for the suspension and stay of the interim order of the High Court of Tanzania – Commercial Division at Dar es Salaam)

(Dr. Bwana)

dated the 19th day of October, 2005
in
Commercial Case No. 92 of 2005

R U L I N G

NSEKELA, J.A.:

The applicant, Selcom Gaming Limited, filed a notice of motion under a certificate of urgency, in terms of Rule 3 (2) (a) and (b) read together with Rule 9 (2) (b) of the Court Rules, 1979 moving the Court essentially for an order that the execution of the High Court's decision in Commercial Case No. 92 of 2005 dated the 19.10.2005 (Dr. Bwana, J.) be stayed pending the hearing and determination of the application for revision. When the application was called for hearing Dr. Mapunda, learned advocate for the first respondent, Gaming Management (T) Limited, raised a preliminary objection based on four grounds. However, in the course of hearing, the learned advocate abandoned the

fourth ground of complaint. Before I consider the merits or otherwise the grounds of preliminary objection raised by Dr. Mapunda, let me briefly explain the nature of a preliminary objection. Law, J.A. in **Mukisa Biscuit Manufacturing Co. Ltd. v. West End Distributors Ltd.** (1969) EA 696 stated as follows at page 700 –

> "So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arise by clear implication out of the pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the suit to arbitration."

And Newbold, P. stated thus at page 701 –

> "A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts

> pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or what is sought is the exercise of judicial discretion."

A preliminary objection must first, raise a point of law based on ascertained facts and not on evidence. Secondly, if the objection is sustained, that should dispose of the matter. (see: (CAT) Civil Application No. 40 of 2000, **COTTWU (T) OTTU Union & Another and Hon. Iddi Simba Minister of Industries and Trade and Others** (unreported). A preliminary objection is in the nature of a legal objection not based on the merits or facts of the case, but on stated legal, procedural or technical grounds. Any alleged irregularity, defect or default must be apparent on the face of the application.

Dr. Mapunda, learned advocate for the first respondent, Gaming Management (T) Limited, in his preliminary objection, raised the following grounds, namely that –

> "1. The application for suspension and stay is not maintainable for the reason that it is based on an application for intended revision which revision is not itself maintainable in terms of the

provisions of section 5 (2) (d) of the Appellate Jurisdiction Act (Cap 141 ER 2002) read together with the Written Laws (Miscellaneous Amendments) Act No. 25 of 2002.

2. In the alternative, there is nothing to be suspended or stayed as the interim order sought suspended or stayed have already been implemented by the applicant and the second respondent as admitted by the applicant in paragraphs 15 and 18 of the affidavit of Sameer Hirji filed in support of the application for stay or suspension of the said order.

3. To the extent the order sought to be revised did not bar the applicant from bringing up intervention proceedings, this application is premature and the applicant is not an aggrieved party."

As regards the first ground of complaint, Dr. Mapunda

submitted that the intended application for revision by the applicant was incompetent since it contravened section 5 (2) (d) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2002. The learned advocate was of the view that since any interlocutory application for revision is prohibited, there was no valid application for revision before the Court. He added that Rule 9 (2) (b) of the Court Rules, 1979 presupposes a valid appeal or a valid revision. On the second ground, Dr. Mapunda submitted that since the applicant has complied with the interim order, there is nothing to stay. This, he contended, was evident from paragraphs 15 and 18 of the affidavit in support by Mr. Sameer Hirji. Lastly, the learned advocate submitted that since the applicant was not a party to the proceedings in the court below, the applicant should file what he called intervenor proceedings in the High Court and pursue his remedies in that court. He added that it was premature for the applicant to come to this Court.

On his part, Mr. D. Kesaria, learned advocate for the applicant, strongly resisted the preliminary objection. He submitted to the effect that the application now before the Court was for stay of execution only and not an application for revision. He added that whether or not the application for revision was competent was not a matter before a single judge at this point in time. Secondly, the learned advocate submitted that the preliminary objection is not in law a

preliminary objection since it is based on unascertained matters. For instance, Mr. Kesaria submitted that it is not possible for the Court to determine the remedies to be pursued without looking at the proceedings in the court below. Also the veracity of paragraphs 15 and 18 of Mr. Sameer Hirji's affidavit cannot be disposed of as a preliminary objection.

Mr. Kisusi, learned advocate, entered appearance on behalf of the second respondent, Gaming Board of Tanzania. The learned advocate generally associated himself with Mr. Kesaria, learned advocate for the first respondent.

Needless to say, a preliminary objection is one that challenges the competence of a court to hear and determine a particular cause before it. I have no doubt that Dr. Mapunda is fully aware of the fact that there is no application for revision, intended or otherwise, before me. The first ground of complaint is challenging the competence of this Court to exercise its revisional powers allegedly because it is prohibited under section 5 (2) (d) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2002. That may well be so, but what is currently before me is not an application for revision. As I understand it, the application before me is seeking for an order of stay of execution under Rules 3 (2) (a) and 9 (2) (b) of the Court Rules, 1979. This ground of complaint is

certainly misconceived.

The second ground of complaint revolves around paragraphs 15 and 18 of Mr. Sameer Hirji's affidavit in support of the notice of motion. The contention here by Dr. Mapunda, is that the applicant has admitted that the interim order has been implemented and therefore there is nothing to stay. As explained before, the objection must raise a point of law based on ascertained facts. Dr. Mapunda relies on the purported compliance by the applicant in paragraphs 15 and 18 of Mr. Sameer Hirji's affidavit in support. Any alleged irregularity, defect or default must be apparent on the face of the notice of motion. The learned advocate for the first respondent should not refer to the affidavit accompanying the notice of motion to support his preliminary objection. The Court should not be invited to refer to extraneous matters such as affidavits to establish its truthfulness. It then ceases to be a pure point of law based on ascertained facts.

The third ground of complaint is equally misconceived. The application before the Court is for stay of execution. It is not concerned with the Court's powers of revision; the joinder or misjoinder of parties to the suit or with remedies that are available to the applicant. In a nutshell, the tests enunciated in **Mukisa's** case above, have not been met.

In the result, the preliminary objection fails in its entirety. However, for what it is worth, I would like to associate myself with the remarks made by Lord Templeman in **Ashmore v. Corp. of Lloyds** (1992) 2 All ER 486 (HL) at page 493 that –

> "It is the duty of counsel to assist the judge by simplification and concentration and not to advance a multitude of ingenious arguments in the hope that out of ten bad points the judge will be capable of fashioning a winner."

The preliminary objection is incompetent and is accordingly overruled with costs. The application is to proceed to hearing.

DATED at DAR ES SALAAM this 4th day of January, 2006.

H.R. NSEKELA
JUSTICE OF APPEAL

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

(S.M. RUMANYIKA)

DEPUTY REGISTRAR