

TANZANIA / JUDGMENT

20030918 TZCA Dar es Salaam

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IN THE COURT OF APPEAL OF TANZANIA AT DAR ES SALAAM CIVIL APPLICATION NO. 35 OF 2003 In the Matter of an Intended Appeal BETWEEN · EAST AFRICAN DEVELOPMENT BANK..... APPLICANT AND BLUELINE ENTERPRISES LIMITED RESPONDENT (Application for Stay of Execution from the Decision of the High Court of Tanzania at Dar es Salaam) (Ihema, J.) dated the 7 th day of May, 2003 in Misc. Civil Case No. 135 of 1995

RULING

LUBUVA, J.A.: There is before me an application for stay of execution. By notice of motion, the applicant, East African Development Bank, is moving the Court for an order that the execution of the order of the High Court (Ihema, J.) dated ih May, 2003, in Misc. Civil Case No. 135 ·of 1995, be stayed pending the determination of the intended appeal in this Court. The application is supported by the affidavit sworn by Dr. Alex Thomas Nguluma, learned advocate, for the applicant. 2 From the affidavital deposition, the historical background giving rise to the application may briefly be stated. In High Court Misc. Civil . . Cause No. 135 of 1995, judgment and decree was given in favour of the respondent. The respondent, the decree ·holder, filed a bill of costs in the High Court which was taxed at shillings 114,720,120/=. The applicant, the judgment debtor, was dissatisfied with the decision of the Taxing Master. An application was filed in the High Court objecting the Taxing Officer's decision. On 7.5.2003, the High Court confirmed the Taxing Officer's decision resulting in the dismissal of the application. The High Court order of dismissal which is ought to be stayed is dated 7.5.2003. When the application for stay of execution was called on. for hearing on 16.5.2003, it was adjourned to a date to be fixed by the Registrar. Among other reasons for the adjournment, the applicant was given opportunity to rectify irregularities in the application, namely the non-attachment of the order sought to be stayed to the application and the introduction of a supplementary affidavit without leave of the Court. 3 · On· 21.5.2003, Mr. Mwezi Mhango, learned advocate for the respondent, filed .notice ~of - preliminary objection based on the following two grounds. First, that the application was incompetent because no order which was intended to· be stayed is· att9ched to the application. Second, that execution having taken place by a garnishee order, there is nothing to be stayed. · On 9.9.2003, when the matter came on for hearing, Dr. Nguluma, learned counsel, appeared for the applicant. On the other · hand, Mr. Mwezi Mhango, together with Mr. Bwahama, learned counsel, represented the respondent. Upon enquiry by the Court whether the position in the matter had been regularized as ordered on 16.5.2003, when the matter was adjourned, Dr.

Nguluma confirmed that the position still remained the same. The reason, he said was that he could not obtain the order of the High Court of 7.5.2003. In the circumstances, I was satisfied that the applicant had not taken the opportunity given on 16.5.2003 to regularize the position in the application. 4 For this reason, . Mr. Mwezi Mhango~ learned counsel was allowed to argue the preliminary objection raised. He argued in support of the preliminary objection that even after the adjournment~ the amended notice of motion filed did not have the ruling or order attached. As the position had not changed, he further stated that the application is incompetent, it should be struck out. Mr. Mhango also said that the fact that the applicant could not obtain the order or ~ruling which is sought to be stayed, does not in anyway cure. the irregularity in the application~ What is more, Mr. Mhango pointed out that there is nothing to be stayed because substantially the decree has been executed by a garnishee order. Dr. Nguluma, learned counsel for the applicant, said he had made concerted effort in obtaining the order from the High Court for attachment to the application unsuccessfully. The reason was that according to information received from the High Court Registry the Court record had been submitted to the Court of Appeal. In that situation, the applicant was in a dilemma, he lamented. Furthermore, Dr. Nguluma also submitted that as there was no rule 5 '\. requiring the attachment of the order to the application, he prayed to be given another opportunity to regularize the position. Alternatively, he urged the Court not to strike out the application on account of technical procedural rules particularly having regard to the peculiar ' circumstances of the cas~. With regard to the alleged execution of t,he decree, Dr. Nguluma submitted that the amount of shillings 116 Million debited from the respondent's bank account has been paid into court, the High Court and not to the respondent. This is part payment out of the total sum of 155/= Million shillings. In that case, execution is not complete, Dr. Nguluma charged. He referred to the views expressed by this Court in Consolidated Holdings Corporation V Rajani Industries Limited, Civil Application No. 138 of 2002. There is no denying the fact that the application for .stay of execution in this matter was not accompanied with the order which is sought to be stayed by this Court. It hardly needs to be emphasized that both logic and common sense demand that the Court should be seized with the decision by way of judgment, ruling or order which is the subject matter for stay of execution. This is so, in order to enable the Court to see and satisfy itself of the application before it. 6 It would not make any sense at all for the_ Court to order stay of execution of a judgment, ruling or order which the Cou_r_t has not seen. In this case, I have pationately considered the difficult position facing the applicant as lucidly set out by Dr. Nguluma, learned counsel for the applicant. He could not obtain the order, understandably because the court record had been submitted to this Court. However, sympathy apart, the fact of the matter still remains that the irregularity in the application was not rectified. In view of the peculiar circumstances facing the applicant, opportunity was given for the applicant to regularize the position on 16.5.2003 when hearing of the application was adjourned. In somewhat similar situation, the Court invoked its indulgence in Permanent Secretary, Ministry of Works and Attorney General V Ebeneza Masawe, Civil Application No. 113 of 2001 by granting an adjournment in order to enable the applicant the opportunity to rectify the irregularity. In this case, where, after the adjournment, no change in the application was effected, I do not think that this Court should overstretch its indulgence to grant another adjournment as urged by Dr.

Nguluma. In my view, any further adjournment in the matter 7 I I \ would not serve any useful purpose because the outcome would be the same. That is, the order for the attachment would still not be forthcoming because the record is in this Court. In these circumstances, the crucial issue is the fate of the application which is not accompanied with the order. As correctly contended by Dr. Nguluma, I accept that there is no specific rule which requires the attachment of the order to the application. However, as observed earlier, 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. See for instance, Blue Star Service Station V Jackson Museti, (1997) TLR 310 and Dunhill Motors Ltd. V Tanzania Revenue, Civil Application No. 12 of 2000 (unreported). This alone, I think is sufficient to dispose of the application. It is therefore unnecessary at this stage to deal with the second ground that the decree had substantially been executed. 8 (In the event, and for the foregoing reasons, I agree with. Mr. Mwezi Mhango and Mr. Bwahama, learned counsel for the respondent, that the application before me is incompetent. It is accordingly struck out with costs. DATED at DAR ES SALAAM this 18th day of September, 2003. D.Z. LUBUVA JUSTICE OF APPEAL I certify that this is a true copy of the original. n=tc... (F.L.K. WAMBALI) DEPUTY REGISTRAR

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