

TANZANIA / JUDGMENT

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.THE COURT OF APPEAL OF TANZANIA AT DAR ES SALAAM . CIVIL APPLICATION NO. 110 OF 2003 c/f NO. 102 OF 2003 In the ~atter of Intended Appeal BETWEEN ENGEN PETROLEUM (T) LTD. ... APPLICANT AND KOBIL (T) LTD. RESPONDENT (Application to Strike Out the Notice of Appeal Against and Stay. Execution of the Decision of the High Court of Tanzania at Dar es Sal~am) (Kalegeya, J.) dated the 20 th day of October , 2003 1n Commercial Case No. 250 of 2002

RULING

RAMADHANI, J.A.: With the agreement of the parties, I have consolidated the two applications involving both of them: in Civil Application No. 102 of 2003, by Kobil (T) Ltd. seeks to stay the execution of the judgment of KALEGEYA, J. in Comm. Case No. 250 of 2002, while in Civil Application No. 110 of 2003, Engen (T) Ltd. is asking for the striking out of the notice of appeal filed by Kobil (T) Ltd. Civil Application No. r I 2 110 of 2003 is taken to be the application with Engen (T) Ltd. as the applicant and Kobil (T) Ltd. as the respondent with a 'cross- application' for stay of execution which will only be considered if the application for striking out the notice of appeal is dismissed. For clarity I am going to refer to the parties by their trade names and not their litigation labels. Engen (T) Ltd. was represented by Mr. Mujilizi, learned advocate, who submitted that the notice of appeal by Kobil (T) Ltd. refers_ to Comm. Case No. 250 of 2003 while the case was of 2002. Mr. Mujilizi argued that the notice of appeal contravenes Rule 76 (6) and should, therefore, be struck out with costs. Mr. Thadayo, learned counsel for Kobil (T) Ltd, conceded the discrepancy and submitted that it was a slip of pen which has not occasioned Engen (T) Ltd. any injustice. Mr. Thadayo argued that Engen (T) Ltd. knew what the notice of appeal was all about. He prayed that it should not be struck out but that he be allowed to make the necessary corrections. In *Atlantic Electric Ltd. v. Morogoro Region Cooperative Union* (1984). Ltd. [1993] T.L.R. 12 from page 17 to 19 I discussed at some length the provisions of Rule 76 (6) that a "notice of appeal shall be . substantially in the _Form 0- in the First Schedule" to the Rules. I 3 enumerated twelve requirements of Form D; one of them is the number of the case complained against. This is the complaint by Engen (T) Ltd.: No. 250 of 2003 instead of No. 250 of 2002. In *Atlantic Electric Ltd.* the respondent contravened three of the twelve matters I had outlined as required by Form D. One contravention was that the notice of appeal did not show that the appeal was before the Court of Appeal. However, I found that the contents of the notice of appeal clearly indicated that the appeal was before this Court, and I found that the defect was cured. I have the same feelings in this case: Admittedly, the case complained against is shown as

No. 250 of 2003, and NOT No. 250 of 2002, but the contents of the notice are laud and clear that the complaint is against: Comm. Case No. 250 between Engen (T) Ltd. and Kobil (T) Ltd. which was decided by KALEGEYA, J. on 20th October, 2003. Thus, there cannot be a confusion. I am of the decided opinion that the violation is not fatal and that it can be rectified and I hereby order that the case complained of to read, in the notice of appeal and all documents, as Comm. Case No. 250 of 2002. So, I refuse to strike out the notice of appeal. Kobil (T) Ltd., on the other hand, has come with two grounds praying for the stay of execution of the award of shs. 236,875,115/05 which 4 KALEGEYA, J. ordered to be reimbursed to Engen . (T) Ltd. immediately. Mr. Thadayo has argued that if the money is paid, Kobil . (T) Ltd. will suffer irreparable injury. He has, however, conceded that money is capable of being repaid but he has argued that the reputation of Kobil (T) Ltd. is going to be irreparably injured since ' the company has been implicated in a fraud to withdraw that amount of money from the account of Engen (T) Ltd .. Mr. Thadayo maintained that the execution of the judgment would confirm the implication in the fraud and that on occasion Kobil (T) Ltd. irreparable injury. Secondly, it was argued that the balance of convenience is in favour of Kobil (T) Ltd. He pointed out that the decretal amount is said to have been withdrawn since 2002 yet Engen (T) Ltd. is still in business. He argued that the same could not be said of Kobil (T) Ltd. if execution is not stayed. Mr. Mujulizi, responded by saying that stay of execution is aimed at the drawn decree which does not contain anything about fraud and reputation. As for the balance of convenience, the learned advocate contended that it has not been shown how that is in favour of Kobil (T) Ltd. This Court has held in a number of cases that irreparable loss or injury is a factor to reckon with when granting stay of execution. 5 . However, we have also said two things: One, if execution involves monetary payment then prima facie there is not substantial loss occasioning irreparable injury. The exception is if the amount is colossal and is payable to a judgment creditor who is a man on straw. Here Mr. Thadayo conceded that there is no problem with repayment. Secondly, the judgment debtor has to prove that there will be irreparable injury or loss. [See, for example, Kampuni ya Uchukuzi Tabora (Ltd.) v. Praxeda Paulo & Another, Civil Application No. 45 of 1999 (unreported); Tanzania Sewing Machine Co. Ltd. v. CRDB (1996) Ltd. & Another, Civil Application No. 9 of 1999 (unreported)]. In the present application, Mr. Thadayo has come up with a novel submission: that of reputation of the judgment debtor. I am afraid the results of almost all judgments would cause some ripples on the reputation of the judgment debtor. However, the remedy for that is not a stay of execution but a successful appeal. By irreparable loss or injury we normally mean that after execution is completed the judgment debtor cannot be put in the same position again. This is not the case here. So, I dismiss this ground. As for the balance of convenience, Mr. Thadayo was not sure as to the fate of the oil business of Kobil (T) Ltd. I cannot make a decision on suppositions. This Court has repeatedly said that stay of execution is an exception to the rule that the judgment creditor is to have the immediate benefit of the fruit of the judgment in his favour. Substantial reasons have to be presented to persuade this Court to deny the judgment creditor of its right. - So, I decline to grant stay of execution. Consequently, both applications are dismissed and I make no order as to costs. DATED at DAR ES SALAAM this 10th day of December, 2004. A. S. L. RAMADHANI JUSTICE OF APPEAL I certify that this is a true copy of the original. (S. M. RU~NYIKA,) DEPU EGISTRAR

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