

TANZANIA / JUDGMENT

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IN THE HIGH COURT OF TANZANIA AT DODOMA CIVIL CASE NO. 5 OF 1998 ABUTWALIB
MUSSA MSUYA &. OTHERS APPELLANTS/PLAINTIFFS (APPLICANTS/DECREE
HOLDERS) versus

1. CAPITAL BREWERIES LIMITED 2.GIRISH T. CHANDE RESPONDENTS/ 3.CHARLES R.B.
RWECHUNGURA DEFENDANTS (JUDGEMENT DEBTORS) ./~ 27/04/2010 & 11/06/2010 f,

RULING

HON. MADAM, SHANGALI, J. This is an application for the execution of the exparte decision . , ..
J (Kyando, J). in Civil Case No. 5 of 1998. The relevant execution proceedings were filed and
marked as Miscellaneous Civil Application No. 21 of 2001. The same was stayed by this court
(Kaijage, J) on 2/12/2001 pending the hearing of an ~pplication to set aside 'the exparte
judgement. For avoidance of confusion let me narrate, albeit briefly the history of the matter.
Back in April, 1998 the plaintiffs/applicants 1 ... -2· filed their Civil Case No. 5 of· 1998 in this court
suing - the • respondents/defendants claiming for their terminal benefits and other . . ancillary
reliefs. The respondents/d~fendants failed to respond to file their written statement of Defence
·and in the result on 18/10/2000 the exparte judgement was · pronounced in favour of plaintiffs/
applicants. The plaintiffs/applicants filed an application for the execution of the exparte decree
by arresting and detaining the second respondent as a civil prisoner. That is Miscellaneous Civil
Application No. 21 of

2001. On the other hand the respondents/defendants filed an application praying for extensio~ of
time to file an application for setting· aside. an exparte judgement dated 18/10/2000 and
stay of -'; execution proceedings pending the hearing of the application to set ~ . aside the
ex-parte judgement. On 2/12/2003 the court granted the respondents/defendant
applicatio"n and stayed execution proceedings in Miscellaneous Civil Application No. 21 of
2001. Unfortunate to the respondents/defendants all their efforts to set aside the ex-parte
judgement ended in vain. Their application for extension of -time to file ·-an application ·
to set aside exparte judgement was dismissed by this court (Masanche, J) in his decision
dated 20/03/2007. In that decision the court soundly and correctly castigated the
respondents/defendants and their advocates for their dilatory litigations aimed to defeat
the purpose of the judicial process. At page 6 of that decision the court observed that; 3
"I am·. of the settled opinion that there is a deliberate dilly dallying by the applicant in .

order to frustrate the respondents who got Judgement from Kyando, J procedurally. For me, these antics by the applicants are, vexatious. Bullen Leak and Jacobs say this, of frivolous or vexatious proceedings: They say: - - - pleading or an action is frivolous when it is without substance or groundless or fanciful and it is vexatious when it lacks bona fides and is hopeless or oppressive and tends to cause the opposite party unnecessary anxiety, trouble and expense. Thus a proceeding may be said to be frivolous when a party is trifling with the court - - - "1Zh Ed. P. 145. Precedents of Pleadings)." Consequent to that decision the plaintiffs/applicants attempted to proceed with their execution proceedings. The respondent/defendants managed to convince this court that they have already filed a notice of appeal to the Court of Appeal against the decision of this court (Masanche J.) together with a notice of motion in the Court of Appeal praying for stay of execution of the same decision. Their application was granted by this Court (Musa, J) and the matter was referred to the Court of Appeal. On 3/02/2009 the matter was finalized before the Court of Appeal when the respondent/defendants decided to withdraw the matter before the Court of Appeal. The case file was accordingly returned to this court to proceed with the pending execution proceedings in the miscellaneous Civil Application No. 21 of 2001. That is the matter before me to determine. On 11/03/2010, I allowed the parties to argue the application by way of written submission. The applicants, decree holders were not represented, they appeared in person. While Mr. Passi, learned Advocate appeared for the respondents, judgement debtors., In their submission the applicants/Decree Holders narrated the long and sad story of their case and stated that they are simply praying for an order allowing the arrest and imprisonment of the person of the second respondent/judgement debtor as a civil prisoner. The reason behind is that since the pronouncement of the ex parte judgement on 18/10/2000 against him, the second judgement debtor has deliberately refused to honour it and instead he has disposed of all the properties that belonged to the first respondent/judgement debtor where he was the principal officer and then disappeared for good. , 5. The applicants/decree holders avers that section 44 (1) of the Civil Procedure Code, Cap 33 read together with Order XXI, rule 28 of the same law is applicable in this application being one of the modes of execution for decree for payment of money. The applicants/Decree Holders further submitted that so far as GIRISH T. CHANDE is one of the defendants in Civil Case No. 5 of 1998, the decree of which is sought to be executed, the application against him is just and proper because he has failed or refused to pay decretal amount plus interest or part of it. They prayed for order for him to be committed to prison as a civil prisoner; In his long written submission, Mr. Passi learned advocate object the application and introduced some matters which goes beyond the essence of the application. In fact a good part of his submission is nothing but attempts to make this court to review what has already been determined or and to hear the defence which was thwarted for non-compliance with procedural laws. In short Mr. Passi claimed that executing the decree against the second judgement debtor would amount to violation of the cardinal principle that Directors are not liable for acts of their companies. He stated that the applicants are attempting to benefit from their failure to prove their debt against the receiver/manager, the third judgement debtor- and that the decree sought to be

executed is defective. Nonetheless, Mr. Passi admitted the existence of an ex-parte decree against his client and he further conceded that the decree holder may execute his decree against anyone named in the decree. Having gone through the parties submissions and rejoinder, I am of the opinion that no wrong was committed by the decree holders seeking to execute the ex-parte decree against the second judgement debtor because he is one of the defendants condemned in the ex-parte judgement of which he failed to appear and defend himself. It must be noted that status of the parties in the suit and issues of maintainability of a claim are supposed to be raised in the pleadings as per Order VIII Rule 2 of the Civil Procedure Code. What is before this court at this stage is the execution process against the judgement debtors and not who was supposed or who was not supposed to be sued. I entirely agree with the applicants/Decree holder's submission in their rejoinder that arguing on the legality of the decree holders suing the second judgement debtor in person amounts to swaying this court and pushing it to go back to determine matters ought to be discussed in the preliminary objections. On the second ground, I am convinced that since the case was proved ex-parte and now we are at the stage of execution there is no basis to claim that the Decree Holders failed to prove their debt against the third judgement debtor. The debt has already been proved in the ex-parte decision against all three judgement debtors. The Companies (Winding-up) rules 1929 provide that unless proof by affidavit of the debt against the receiver manager is done, there cannot be a cause of action against him by claimants in a suit. That means lack of cause of action is one of the issues to be discussed before a case goes for trial, and indeed such are issues raised in preliminary objections. Therefore, the proper forum for such legal issues would have been during trial of the suit and not in execution proceedings. The second ground is therefore misconceived and the cited cases to support it are irrelevant to this matter. On the last ground, I am of the view that in law the decree is not defective. Order XLIII, rule 1 (d) read together with order XX, rule 7 of the Civil Procedure Code, (Cap 33 R.E. 2002) empowers the Registrar to sign such decrees. To be precise, order XLIII, rule 1 (d) provides; "1. Subject to any general or special direction of the Chief Justice, the following powers may be exercised by the Registrar or any Deputy or District Registrar or the High Court in any proceeding before the high Court - (a) (b) (c) (d) (e) (f) (g) (h) (i) (j) (k) (l) (m) (n) (o) (p) (q) (r) (s) (t) (u) (v) (w) (x) (y) (z) (aa) (ab) (ac) (ad) (ae) (af) (ag) (ah) (ai) (aj) (ak) (al) (am) (an) (ao) (ap) (aq) (ar) (as) (at) (au) (av) (aw) (ax) (ay) (az) (ba) (bb) (bc) (bd) (be) (bf) (bg) (bh) (bi) (bj) (bk) (bl) (bm) (bn) (bo) (bp) (bq) (br) (bs) (bt) (bu) (bv) (bw) (bx) (by) (bz) (ca) (cb) (cc) (cd) (ce) (cf) (cg) (ch) (ci) (cj) (ck) (cl) (cm) (cn) (co) (cp) (cq) (cr) (cs) (ct) (cu) (cv) (cw) (cx) (cy) (cz) (da) (db) (dc) (dd) (de) (df) (dg) (dh) (di) (dj) (dk) (dl) (dm) (dn) (do) (dp) (dq) (dr) (ds) (dt) (du) (dv) (dw) (dx) (dy) (dz) (ea) (eb) (ec) (ed) (ee) (ef) (eg) (eh) (ei) (ej) (ek) (el) (em) (en) (eo) (ep) (eq) (er) (es) (et) (eu) (ev) (ew) (ex) (ey) (ez) (fa) (fb) (fc) (fd) (fe) (ff) 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