

TANZANIA / JUDGMENT

nazareth amon vs new africa casino ltd 2014 tzhc 2065 24 july 2014

COURT
TZHCDECIDED
24 July 2014

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IN THE HIGH COURT OF TANZANIA AT DAR ES SALAAM CIVIL REVISION NO. 72 OF 2012
NAZARETH A M O NAPPLICANT V NEW AFRICA CASINO L T
D RESPONDENT Date of last Order 30/5/2014 Date of Judgment 24/7/2014

RULING

A. Shangwa, J In this application, the Applicant Decree holder is praying for revision of the proceedings and decision of Hon. Mashabara, Rm dated 19th October, 2012 in Civil case No 275 of 2007 on grounds of illegalities or irregularities and quash the same. The application is supported by affidavit of Nazareth Amon who is the Applicant. 2 In his affidavit, Nazareth Amon states as follows: - That on 9th October, 2007, he instituted civil case No 275 of 2007 and that on 7th August, 2012, judgment was given in his favour. That thereafter, he filed an application for execution of the decree and that on 26th September, 2012, the court appointed Unyangala Auction Mart and Court Brokers and issued a warrant of attachment and sale of the Respondent's immovable properties and that on 5th October, 2012 Unyangala Auction Mart issued a 14 days notice to the Respondent. That after being issued with the said notice, the Respondent filed in Court an application for stay of execution and for an order to lift the warrant of attachment. That hearing of the said application was fixed on 18th October, 2012. That contrary to the summons issued by the Court, hearing took place on 19th October, 2012 when he was in Zanzibar to collect the remains of his relative one Ibrahim Hakim Buto who was buried in Mbeya. That on his return from Mbeya, he was informed that Hon. Mashabara RM has issued an order for stay of execution dated 19th October, 2012. That hearing of the application for stay was conducted in his absence. Learned counsel for the parties argued this application by way of written submissions as ordered by this court on 18th November, 2013. In his written submissions, counsel for the Applicant adopted the contents of the affidavit in support of the application to be part of his submissions. He submitted that the Respondent's application for stay of execution was heard on 19th October, 2012 in the absence of the Applicant and that therefore the Applicant was denied a right to be heard. He contended that as the Applicant was not given opportunity to be heard on 19th October, 2012, the proceedings of the court and the order granting stay of execution is a nullity. In support of his contention, he cited the case of Edwin William Shetto V. Managing Director of Arusha International conference, Centre [1999] TLR 130 at page 139 in which the Court held that

the right to be heard is basic and breach of it renders the decision arising from the breach null and void. Learned counsel for the Respondent, MS Law. Associates do not oppose the fact that on 19th October, 2013, hearing of the Application for stay of execution was conducted in the absence of the Applicant but they do oppose the fact that the Applicant was condemned unheard. They submitted that counsel for the Applicant was duly notified that hearing of the application will take place on 19th October, 2013 but he chose not to appear. They contended that as counsel for the Applicant had knowledge that hearing of the application will take place on 19th October, 2013 and he chose not to appear, it cannot be held that he was condemned unheard. They further submitted that at any rate, there is a pending appeal in this Court which was filed by the Respondent i.e High Court Civil Appeal No 131 of 2012 against the decision of the Court of the Resident Magistrate at Kisumu made in civil case No 275 of 2007 of whose stay of execution was granted by the said Court in the absence of the Applicant. In this case, it is common knowledge that one of the cardinal principles of natural justice is that no man should be condemned unheard. It is common knowledge also that a violation of this principle renders the proceedings and decision null and void. The authorities to that effect are legion including the case of Edwin William Shetto V. Managing Director of Arusha International conference centre [1999] TLR 130 at page 139 which was cited by counsel for the Applicant. Now let me consider as to whether or not the Applicant in this matter was denied his right to be heard or condemned unheard by the trial Court on 19th October, 2012 when it heard the application for stay of execution of its decree in favour of the Applicant. It is not in dispute that on 19th October, 2013 when the hearing of the application for stay of execution took place and the order for stay granted by the trial Court neither the Applicant nor his counsel was present. It goes without saying therefore that the Applicant was denied his right to be heard. However, it cannot be said that he was condemned unheard as there was nothing for him to be condemned because the properties to be attached and sold in execution of the decree following the trial Court's order for stay of execution did not belong to him. They belonged to the Respondent. Also, despite the fact that the order for stay of execution was issued in the Applicant's absence, its issuance did not affect his substantial rights in Civil case NO 275 of 2007 in which he stands to be the winner. I think the Applicant is also aware that there is a pending appeal against the trial court's decision which is pending in this Court namely High Court Civil Appeal NO 131 of 2012. In my view, as the trial Court's order did not affect the Applicant's substantial rights, let him be patient until when High Court Civil Appeal NO 131 of 2012 is heard and determined. I would therefore strike out this application ~~but~~ no order as to Costs. A. Shangwa J u d g e ^**24/7/2014 Delivered in open Court this 24th day of July, 2014 in the presence of Mr. Edwin Webiro for the Respondent and the Applicant appearing in person.

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