

TANZANIA / JUDGMENT

christopher ritte vs shivacom t ltd 2012 tzhccomd 36 31 july 2012

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31 July 2012

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IN THE HIGH COURT OF TANZANIA COMMERCIAL DIVISION AT DAR ES SALAAM
COMMERCIAL CASE NO.27 OF 2010 CHRISTOPHER RITTE..... APPLICANT/
J.DEBTOR SHIVACOM TANZANIA LIMITED.RESPONDENT/DECREE HOLDER Date of last order:
12/06/2012 Date of final submissions: 17/07/2012 Date of Ruling: 31/07/2012

RULING

MAKARAMBA, J.: On the 11th day of April 2012, the applicant/judgment debtor, Christopher Ritte t/a DGS Agency lodged an application in this Court asking it to grant order for stay of the judgment and decree of this Court in Commercial Case No.27 of 2010 dated 20th March 2012 issued against the Applicant/judgment debtor pending finalization and determination of the intended appeal to the Court of Appeal of Tanzania. The application has been preferred under Order XXI Rules 24(1) and 27 and section 95 of the Civil Procedure Code, Cap.33 R.E. 2002 and is supported by the affidavit of the Applicant/judgment Debtor. The application by consent of Counsel for the parties was disposed of by way of written submissions. The firm of lawyers TJM Law Offices represented the Applicant/Judgment Debtor and D. Kesaria Advocate for Page 1 of 14 the Respondent/Decree Holder. However, before I traverse the submissions of Counsel, both in support of the application and rival, a brief background to the application is apposite. The application has been resisted by the Respondent/Decree Holder on two grounds. The first ground is that the application is bad in law for having been made under the wrong provisions of the law. The second ground is that there being a Notice of intention to appeal to the Court of Appeal, the Applicant was required to make his application for stay of execution in the Court of Appeal of Tanzania and not in this Court. I shall revert to these two points in due course, but first a brief background to the application. Immediately after this Court delivered its judgment on the 20th March 2012, the Applicant/Judgment Debtor on the 26th March 2012 lodged a Notice of intention to appeal to the Court of Appeal of Tanzania and applied for certified copies of the proceedings, judgment and decree of the court, which copies were also served on the Respondent/Decree Holder. However, prior to the Applicant/Judgment Debtor lodging its Notice of intention to appeal, on the 21st March 2012, the Respondent /Decree Holder filed in this Court a bill of costs, whose determination is pending before the then Deputy Registrar, Hon. Revocati awaiting the outcome of this application. In resisting the application on behalf of the Respondent/Decree

Holder, Mr. Kesaria, learned Counsel, argues that the provisions of Order XXI Rules 24(1) and 27 and section 95 of the Civil Procedure Code, Cap.33 Page 2 of 14 R.E. 2002 under which the application has been made are wrong provisions of the law. Mr. Kesaria fronts a three-limbed argument as reasons for his position on the wrong provisions under which the application has been made. The first argument of Mr. Kesaria is that Order XXI Rule 24(1) of the Civil Procedure Code applies to the Court where a Decree has been sent for execution, which is not the case in the present instance, since the Decree whose execution is sought to be stayed is of this Honourable Court. In support of his argument, Mr. Kesaria relies on Mulla's Commentary on Order XXI Rule 26 of the Indian Civil Procedure Code, (which is *pari materia* to our Order XXI Rule 24(1)), which is to the effect that: "Rule 26 applies to the Court to which a Decree has been transferred for execution and not the Court which passed the Decree." The second argument of Mr. Kesaria is that likewise, Order XXI Rule 27 of the Civil Procedure Code is inapplicable for the simple reasons that there is no second suit in existence in this Honourable Court commenced by the Judgment Debtor against the Decree Holder. Mr. Kesaria relies also on Mulla's Commentary on Order XXI Rule 29 of the Indian Civil Procedure Code, (which is *pari materia* to our Order XXI Rule 27) in support of his contention. Mulla's Commentary, whose copy Mr. Kesaria availed to this Court is to the effect that: "...there should be two proceedings in existence in one Court, i.e. the execution proceedings at the instance of the Judgment Debtor against the Decree Holder." Page 3 of 14 Mr. Kesaria surmises that an application made under the wrong or inapplicable provision(s) of the law is fatally incompetent and should be struck out, a trite principle enunciated in a number of decisions of the Court of Appeal of Tanzania including Civil Application No.64 of 2003; CITIBANK TANZANIA LIMITED V TANZANIA TELECOMMUNICATIONS COMPANY LIMITED AND OTHERS and CHAMA CHA WALIMU TANZANIA V THE ATTORNEY GENERAL

[2008] EA 57, copies of which Mr. Kesaria availed to this Court for easy of reference. Mr. Kesaria prays that the application is incompetent for citing wrong provision of the law and should therefore be struck out. In his rejoinder submissions, the learned Counsel for the Applicant/Judgment Debtor insists that the decree to be executed was issued by the High Court of Tanzania Commercial Division and the executing court ought to be the same High Court of Tanzania and not the Court of Appeal of Tanzania and therefore he has failed to see the purpose of filing the application for stay of execution in the appellate court instead of the original court which passed the decree. The learned Counsel for the Applicant/Judgment Debtor submits further that the learned Counsel for Respondent/Decree Holder has misinterpreted the provisions of Order XXI Rule 27 that "there should be two proceedings in one court" of which the said rule clearly provides that "had already where a suit is pending in any court against the holder of a decree" meaning that the Applicant initiated the appeal process to the Court of Appeal of Tanzania by way of notice of intention to appeal. Page 4 of 14 The third argument of Mr. Kesaria is that the invocation of section 95 of the Civil Procedure Code is equally inapplicable. According to Mr. Kesaria, section 95 of the Civil Procedure Code can only be invoked where the law has made no provision governing a particular matter at hand. Mr. Kesaria cites decision of the Court of Appeal of Tanzania in AERO HELICOPTER (T) LIMITED V. F.N. JENSEN [1990]

TLR 142 in support of his contention and concludes that section 95 of the Civil Procedure Code cannot be invoked and it is therefore likewise inapplicable to the present application. There are provisions in our law governing application for stay of execution where a judgment debtor has filed and served a Notice of his intention to appeal to the Court of Appeal of Tanzania against the judgment and Decree of this Honourable Court, Mr. Kesaria points out. The correct applicable provisions are Rules 11(2)(b) and

- (c) of the Tanzania Court of Appeal Rules, 2009, Mr. Kesaria suggests. Under the said rules, once a Notice of Appeal has been lodged, the Court (which is defined in rule 3 as the Court of Appeal of Tanzania) has the power to make an Order for stay of execution of the Decree, Mr. Kesaria reiterates. In his rejoinder as was for his submissions in chief, the learned Counsel for the Applicant/Judgment Debtor insists that there was no specific provision in the Civil Procedure Code allowing the Applicant apply for stay of execution of the decree, and the proper provision could therefore be section 95 of the CPC given that all proceedings in this matter are still in this Court, and since the decree had not been signed it could not Page 5 of 14 therefore be proper to lodge the application for stay of execution in the Court of Appeal. The present application has brought to the fore the competing legal principles in so far as lodgment of Notice of intention to appeal and stay of execution pending such lodgment is concerned. The general principle as correctly submitted by the learned Counsel for the Applicant/judgment Debtor is that the mere intention or even lodgment of an appeal to the Court cannot operate as an automatic bar to the execution of the decree unless there is a court order specifically for stay of execution. The other principle is that both this Court and the Court of Appeal have concurrent jurisdiction in so far as application for stay of execution is concerned, which seems to plunged the applicant into a legal dilemma. All the proceedings in this matter, as the learned Counsel for the Applicant/Judgment Debtor correctly noted are still in this Court. This Court is the one which passed the now impugned decree. It is in this very court where the applications for execution and for stay of execution have been preferred. The noose of limitation period for application for stay of execution is dangling against the applicant/judgment debtor if the applicant/judgment debtor does not seek for remedy by way of stay of execution while pursuing the process of appealing to the highest court of the land. Unless the applicant/judgment debtor obtains a stay, there is nothing in the law to prevent the respondent/decreed holder from executing the decree, whose process the respondent/decreed holder has already put in place. Clearly, in the event the applicant/judgment debtor succeeds on its appeal, which he believes has overwhelming chances of success there will Page 6 of 14 be nothing to execute as the properties the subject matter of the intended appeal might have already been sold in execution of the decree and probably transferred to another person, the learned Counsel for the Applicant/judgment Debtor strongly argues in his submissions. In other words what the applicant/judgment debtor is saying is that if stay of execution is not granted the intended appeal will be rendered nugatory. The issue for determination in the present application is whether where a Notice of intention to appeal has been lodged, the application for stay of execution is to be made to this Court or to the Court of Appeal. This Court and the Court of Appeal both are

vested with concurrent jurisdiction in exercising their discretionary powers to grant or refuse stay of execution where there is notice of intention to appeal to the Court of Appeal. This comes out very clearly under Rule 11(2) of the Court of Appeal of Tanzania, 2009, (the Rules) [GN No.368 published on 6th November, 2009 and came into force on 1st February, 2010 vide GN No.36 published on 29/01/2010]. Rule 11(2) of the Rules stipulates as follows: "11.(2) Subject to the provisions of sub-rule (1), the institution of an appeal, shall not operate to suspend any sentence or to stay execution, but the Court may-

- (b) in any civil proceedings, where a notice of appeal has been lodged in accordance with Rule 83, an appeal, shall not operate as a stay of execution of the decree or order appealed from except so far as the High court or tribunal may order, nor shall execution of a decree be stayed by reason only Page 7 of 14 of an appeal having been preferred from the decree or order; but the Court, may upon good cause shown order stay of execution of such decree or order." The relevant parts of Rule 83 of the Rules stipulates as follows: "83(1) Any person who desires to appeal to the Court shall lodge a written notice in duplicate with the Registrar of the High Court.
- (2) Every notice shall, subject to the provisions of Rule 91 and 93, be so lodged within thirty days of the date of the decision against which it is desired to appeal.
- (5) Where it is intended to appeal against a judgment or decision of the High Court, it shall not be necessary for a copy of the judgment or decision to accompany the notice of appeal. " (the emphasis is of this Court) It is crystal clear from the foregoing provisions of Rule 83 of the Rules that a notice of appeal is lodged in the High Court. Furthermore such notice does not require to be accompanied with a copy of the judgment or decision if the intended appeal is against a judgment or decision of the High Court. This is only logical since at this stage the record is still with the High Court. The provisions of Rule 11(2)(b) of the Rules which according to Mr. Kesaria is the relevant provision for preferring application for stay of Page 8 of 14 execution in my view carries a double edged jurisdiction, which has been a source of the confusion. Rule 11(2)(b) of the Rules confers jurisdiction to order for stay of execution on both the High Court and the Court of Appeal but under two different situations. The first circumstance is where a notice of appeal has been lodged with the Registrar of the High Court in terms of Rule 83 of the Rules. The Rule provides clearly that: " ... where a notice of appeal has been lodged in accordance with Rule 83, an appeal, shall not operate as a stay of execution of the decree or order appealed from except so far as the High court or tribunal may order,..." The High Court therefore is vested with discretionary powers to order for stay of execution where a notice of appeal has been lodged with the High Court under Rule 83 of the Rules. The second circumstance under Rule 11(2)(b) of the Rules is that the Court of Appeal is also vested with jurisdiction to order stay of execution where an appeal has been preferred upon showing of good cause. Rule 11(2)(b) stipulates as follows: "...nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree or order; but the Court, may upon good cause shown order stay of execution of such decree or order." It is very clear from Rule 11(2)(b) of the Rules that the

Court of Appeal is seized with jurisdiction to order for stay of execution only where Page 9 of 14 an appeal has been preferred. In the instance matter there is no appeal which has been preferred but only a notice of intention to appeal. The High Court is therefore in terms of Rule 11(2)(b) of the Rules still vested with jurisdiction to order for stay of execution. I should point out here that the grounds for applying for stay of execution in the High Court are still very wide. However the grounds for stay of execution in the Court of Appeal have been strictly circumscribed to only three in terms of Rule 11(2)(d) of the Rules. This provision has received judicial interpretation by Hon. Kalegeya J.A as he then was in ruling of the Court of Appeal in Civil Application No. 149 of 2009 between PETER P. TEMBA t/a MAHENGGE TIMBER & ENTERPRISE VS DSM CITY COUNCIL & HASSAN IBRAHIM SOBO (unreported). Let me now having cleared the confusion as to the jurisdiction of the High Court in dealing with application for stay of execution, consider whether the provisions of Order XXI Rule 24(1) of the Civil Procedure Code are relevant. The argument of Mr. Kesaria is that Order XXI Rule 24(1) applies to the Court where a Decree has been sent for execution and not in the Court which issued the decree whose execution is sought to be stayed. Order XXI Rule 24(1) of the Civil Procedure Code provides that: "24(1) The Court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time, to enable the judgment debtor to apply to the court by which the decree was passed or to any other court having appellate jurisdiction in respect of the decree or the execution thereof, for Page 10 of 14 an order of stay of execution or for any other order relating to the decree or execution which might have been made by such court of first instance or appellate court if execution had been issued thereby or if application for execution had been made thereto. The purpose of Rule 24(1) of Order XXI of the Civil Procedure Code cited above in my view is among others to enable the judgment debtor to apply to the court by which the decree was passed or to any other court having appellate jurisdiction in respect of the decree. As Mr. Kesaria rightly submitted Rule 24(1) of Order XXI of the Civil Procedure Code can only be invoked in the Court to which a decree has been sent for execution, which is not the case presently. It is therefore a wrong provision of the law for moving this Court for stay of execution where a notice of intention to appeal has been lodged in terms of Rule 83 of the Court of Appeal Rules. The other controversy surrounds citing of Order XXI Rule 24(7) of the Civil Procedure Code in the application, which Mr. Kesaria argues that is similarly inapplicable for the reason that there is no second suit in existence in this Honourable Court commenced by the Judgment Debtor against the Decree Holder. Rule 24(7) of Order XXI of the Civil Procedure Code states as follows: "Where a suit is pending in any court against the holder of a decree of such court, on the part of the person against whom the decree was passed the court may, on such terms as to security or otherwise as it thinks fit, stay execution of the decree until the pending suit has been determined." Page 11 of 14 The gist of Rule 27 of Order XXI in my view is that there has to be "a suit is pending in any court against the holder of a decree of such court" for the provisions of Rule 27 of Order XXI to come into play. In the instance case there is no such pending suit in any court against the decree holder. With due respect to the learned Counsel for the Applicant/Judgment Debtor an appeal cannot be equated with a suit for purposes of

Rule 27 of Order XXI of the Civil Procedure Code. As such and as rightly submitted by Mr. Kesaria, the provisions of Rule 27 of Order XXI of the Civil Procedure Code cannot be invoked to move this Court for order of stay of execution. This brings me to the final argument by Mr. Kesaria section 95 of the Civil Procedure Code is equally inapplicable as it can only be invoked where the law has made no provision governing a particular matter at hand. As I have indicated above there are relevant provisions in the Court of Appeal Rules, Rule 11(2)(b) which vests discretionary powers on the High Court to consider application for stay of execution where a notice of appeal has been lodged with the Registrar of the High Court in terms of Rule 83 of the Court of Appeal Rules. It is for this reason that I am at one with the submissions of Mr. Kesaria and on the binding authority in AERO HELICOPTER (T) LIMITED V. F.N. JENSEN [1990] TLR 142, that section 95 of the Civil Procedure Code has also wrongly been invoked. As I intimated to earlier where a Notice of Appeal has been lodged with the Registrar of the High Court of Tanzania in terms of Rule 83 of the Court of Appeal Rules, 2009, the High Court is seized with jurisdiction to consider application for stay of execution and upon good cause the High Court may Page 12 of 14 grant such stay. However, where an appeal has been preferred to the Court of Appeal, it is only that Court which has jurisdiction to deal with application for stay of execution. The question that the Applicant/Judgment Debtor should have made his application for stay of execution in the Court of Appeal of Tanzania and not in this Court as Mr. Kesaria argues is a misconstruction of Rule 11(2)(b) of the Court of Appeal in so far as where a notice of appeal has been lodged in the High Court. The Court of Appeal is only seized with jurisdiction to consider application for stay of execution where an appeal has been preferred which means that by then it will have been seized of the case record. In the whole and for the foregoing reasons, the application for stay of execution is incompetent for citing wrong provisions of the law and accordingly it is hereby struck out vyith cost[^]. Order accordingly. R.V. MAKARAMBA JUDGE 31/07/2012 Page 13 of 14 Ruling delivered this 31st day of July, 2012 in the presence of Mr. Kesaria, Advocate for Mr. Massawe, Advocate for the Applicant/Judgment Debtor and in the presence of Mr. Kesaria, D., Advocate for the Respondent/Decree Holder. R.V. MA KARAM BA JUDGE 31/07/2012. Words count: 3,419 Page 14 of 14

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