IN THE COURT OF APPEAL OF TANZANIA

AT DAR-ES-SALAAM

CIVIL APPLICATION NO. 68 OF 1999
In the Matter of an Intended Appeal

BETWEEN

SHELL AND BP TANZANIA LTD. ..... APPLICANT

AND

THE UNIVERSITY OF DAR-ES-SALAAM ..... RESPONDENT

(Application for Stay of Execution from the Judgment of the High Court of Tanzania at Dar-es-Salaam)

(Chipeta, J.)

dated the 9th day of August, 1999

in

Civil Case No. 326 of 1997

R U L I N G

LUGAKINGIRA, J.A.:

This application seeks to stay execution of the decision of the High Court (Chipeta, J.) in Civil Case No. 326 of 1997. The subject matter of the application is a filling station, known as Mlimani Service Station, the property of the respondent and over which the applicant held a lease for a term of 25 years. At the expiration of that term, the lease was not renewed but the applicant refused or failed to relinquish the premises. That prompted the respondent to institute Civil Case No. 326 of 1997 praying for recovery of possession, damages and incidental reliefs. The action was allowed in full, the High Court dismissing a counter-claim by the applicant, and the respondent was awarded possession, general damages of 50m/=, plus interest and costs. The applicant lodged a notice of appeal against the decision, and then brought this application to stay its execution pending determination of the appeal.

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The application is supported by the affidavit of Mr. Beatus Kinemo, a manager of the applicant company, in which he depones that if stay is not granted the appeal will be frustrated by the disposition of the filling station on lease. He also states that the applicant is prepared to pay any damages suffered by the respondent should the intended appeal fail, and to execute a security bond to that end. In a counter-affidavit by Mr. Jonathan Rwijage on behalf of the respondent, it is revealed that the respondent is already in possession of the suit premises and that the applicant has already paid the damages adjudged. It is further revealed that the applicant is a specified corporation in receivership under the Parastatal Sector Reform Commission, and so it is averred that the applicant is incompetent to execute any bond binding on its properties.

At the hearing of the application the parties were represented by learned counsel, Mr. H. J. Mkatte for the applicant and Mr. J.K. Kalolo for the respondent. Mr. Mkatte had earlier filed a reply to Mr. Rwijage's counter-affidavit conceding that the respondent was already in possession of the suit premises; he states, however, that the respondent entered into possession without any execution order and in contempt of an injunction in Civil Case No. 311 of 1999 in which both parties to this application are sued by M/S Mwenge Gas and Lube Oils Ltd. (hereinafter "Mwenge Gas"). Mr. Mkatte also conceded at the hearing that the applicant has already paid the damages. His argument in support of the application rests on two major grounds: First, that if stay is not granted the subject-matter of the appeal will be frustrated and would lead to irreparable loss to the applicant; second, that there is a question of jurisdiction to be raised in the appeal, viz. that the suit was commenced without leave of the court as required by s. 9 of the Bankruptcy Ordinance (Cap. 25). He was saying, in other words, that the intended appeal was likely to succeed and cited

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Ignazio Messina & Anor. v. Willow Investment & Anor. Civil Reference No. 8 of 1999 (unreported), for the proposition that the Court would grant stay where the intended appeal is against a decision reached without jurisdiction. On the other hand, Mr. Kalolo submitted that there was nothing to be stayed since the decree was already satisfied, the respondent having entered into possession. He urged, in the premises, that the respondent was entitled to the benefit of the judgment, citing Joackim Kalembwe v. M. N. Mwamlima, Civil Application No. 76 of 1998 (unreported) for that position. Mr. Kalolo also stated that the injunction in Civil Case No. 311 of 1999 was issued after the decree was satisfied and therefore served no purpose. Generally, he emphasised the applicant's legal disabilities consequent upon its being specified under the Public Corporations Act, 1992, as amended by Act Nos. 16 of 1993 and 17 of 1999. He concluded by contending that the intended appeal was filed out of time, pointing out that a notice of preliminary objection had already been filed.

I think I should start from the end. Mr. Kalolo contends that the appeal was filed out of time. Although he did not elaborate, I take this as one with para 11 of Mr. Rwojage's counter-affidavit to the effect that the appeal was not likely to succeed for being filed out of time. In other words, I am invited to rule that since the appeal is not likely to succeed, it would be futile to grant stay. I do not understand the argument to be that the application is otherwise incompetent. Mr. Mkatte gave an explanation for filing the appeal when he did by making reference to the Registrar's certificate under Rule 83 (1). Undoubtedly, I am not in this application called upon or expected to decide whether or not the appeal was filed out of time, but having regard to Mr. Mkatte's explanation, it seems to me that the contention is a debatable one.

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It cannot be said with certainty at this stage that the appeal was filed out of time, but the contention remains to be demonstrated. In my view, however, stay of execution cannot be refused where it is merely feared that the appeal was filed out of time, but where it is in fact out of time, and no step has been taken to remedy the situation, thus rendering the appeal manifestly inadmissible. Analogous examples of the latter situation may be found in Willow Investment v. Mbombo Ntumba, /1997/ T.L.R. 156, where a similar application was dismissed on the same grounds. The case before me does not present a similar outlook so as to seal the fate of the application. I therefore propose to consider the application in the light of other factors revealed in the pleadings and submissions.

It is apparent, first of all, that the application relates to part only of the decision of the High Court. It is directed at the order for possession, but not payment of damages; indeed the damages were paid two weeks after the application was filed. It is axiomatic, however, that an application to stay and an order staying execution presuppose that the decree has not been satisfied. Rule 9 (2)(b) does not envisage an order being made unless there is something to stay. Where a decree has been satisfied and no other step remains to make the satisfaction effectual, an order cannot possibly issue to stay execution of the decree. The question, therefore, is whether, in this case, there is anything to stay in relation to the order for possession.

As indicated already, it is common ground that the respondent is already in possession of the suit premises. Ironically, possession was taken on 18 August, 1999, the very day that this application was lodged. But Mr. Mkatte averred in his affidavit-in-reply that the respondent took possession without an execution order and in contempt

of an injunction in Civil Case No. 311 of 1999 between Mwenge Gas and the parties hereto. Mr. Mkatte seems to say that the possession was in the circumstances not execution within the meaning of the law, and at worst illegal. Is that correct? I will examine, first, whether the injunction vitiated possession, then, if not, whether possession without an execution order was not effective execution.

I have experienced difficulties with the injunction. In the first place, the injunction order was not available to me, so I do not know its terms. In his affidavit-in-reply Mr. Mkatte stated that the order was being typed and promised to produce it at the hearing as Annex HJM'1', but it is neither contained in his supplementary affidavit where HJM'1' is annexed nor did he make reference thereto in his submissions. It is apparent that he abandoned the injunction altogether and this view is founded on two factors. One, according to Mr. Kalolo, the injunction was issued after the respondent had taken possession of the suit premises, therefore it served no purpose. I would have wished better to show the supposed connection between the injunction and this application but the information available is rather limited. Some linkage may be gleaned from the following second factor. I have had the opportunity of perusing the lease agreement between the respondent and Mwenge Gas annexed to Mr. Mkatte's affidavit-in-reply and note that the lease relates to "Mlimani Shop", and this is described as 'situated adjacent to the University Filling Station'. Mwenge Gas was also the applicant's agent in operating the filling station. Despite those links it is nevertheless evident that the subject-matter of the injunction, namely, the shop, is a distinct entity from the subject-matter of this application, which is the filling station. This distinction of the two facilities is similarly made in the judgment of the High Court.

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While discussing the first issue in the suit, that is, whether the respondent was entitled to possession, Chipeta, J. said:

> The question of the Mlimani shop appears to me to be almost a side issue. It was not fully disclosed as to how or to what extent the "shop" affected any of the parties ... Be that as it may, it is said that the question of the tenancy of the shop has since been determined by a competent tribunal.

It is clear from this that the possession decreed by the learned judge did not include the shop to which Civil Case No. 311 of 1999 and the and the injunction therein relate. Indeed in his concluding remarks, Mr. Mkatte said: "Civil Case No. 311 of 1999 arose from an independent lease unassociated with the applicant's cause." On the totality of these factors, I am satisfied that the injunction related to a different subject-matter and could not vitiate the respondent's possession of the filling station.

The second leg leads to a consideration of the meaning of "execution" in the context of judgments and orders. Mr. Mkatte is of the view that in the absence of an order in execution, the respondent's possession of the suit premises was ineffective. I do not accept that view. Expressed modestly, I would say that execution in the context aforesaid is the realisation of the award made in a judgment or order. This definition, I believe, combines both the process, where any process is necessary, and the completion of execution, and I think many definitions reflect this formulation. According to Lord Denning M.R., In re Overseas Aviation Engineering (G.B.) Ltd., [1963] I Ch. 24, 39,

> "Execution" means, quite simply, the process for enforcing or giving effect to the judgment of the court: and it is completed when

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> the judgment creditor gets the money or other thing awarded to him by the judgment.

He illustrates his meaning with a passage from Rastill Termes de la Ley, "that valuable old book", where it is stated:

> Execution is, where judgment is given in any action, that the plaintiff shall recover the land, debt, or damages, as the case is; and when any writ is awarded to put him in possession or to do any other thing whereby the plaintiff should the better be satisfied his debt or damages, that is called a writ of execution; and when he hath the possession of the land, or is paid the debt or damages, or hath the body of the defendant awarded to prison, then he hath execution.

Assuming these statements to be cumulative, this passage points to a three-tier process: the judgment, the writ of possession, and the actual possession. There is no suggestion, however, that this is an invariable process in every instance of execution. The passage sets out a generalised process without excluding variations in particular cases. There are cases where it would not be necessary to return to court for an order in execution, but where execution can proceed on the basis of the decree alone. In the Canadian case of Thakar Singh v. Iram Singh, [1942] 1 W.W.R. 737, cited in Roland Barrows' WORDS AND PHRASES JUDICIALLY DEFINED, (1943) Vol. 2, p. 240 [650], O'Halloran, J.A. said:

> Execution is the enforcement of a judgment. In Coke Upon Littleton, 17th ed., vol. 1, p. 154a, it is said: 'Execution signifieth in law the obtaining of actual possession of anything acquired by judgment of law, or by a fine executory levied, whether it

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> be by the sherife or by the entry of the party,' ... Execution is aptly described as 'putting the sentence of the law into force'. The means of putting the sentence in force must necessarily vary with the nature of the subject-matter.

According to this decision, therefore, execution is the final act, that is, the satisfaction of the judgment, and this can be with the aid of an agent of the court or, in the case of possession of land, by the entry of the plaintiff. The nature of the subject-matter would dictate the mode of execution.

The Civil Procedure Code, 1966, provides for various modes of execution. Although O.21, r.9 provides for application to the court where it is desired to execute a decree, there are other provisions which evidently excluse the assistance of the court. Take O.21, r.1 (1)(b). Under this provision money payable under a decree, may be paid out of court to the decree-holder. It is not required to move the court in order for the judgment debtor to pay the decree-holder. The decree-holder will resort to an application to the court only where the judgment debtor does not comply with the decree. In fact a money decree is by its terms an imperative command to the judgment debtor to pay the sum adjudged to the decree-holder as evidenced by Form No. 2, Appendix D to the Indian Code of Civil Procedure, 1908. This form and other forms in the appendices to the Indian Code continue to be part of our Code by virtue of the provisions of s. 101 (3) thereof; the Chief Justice has not approved different forms under sub-sec. (1). Given this scenario, it would be incorrect to say that an execution order is necessary for the realisation of a money decree. Significantly, the applicant paid the damages without being moved by an execution order, yet it is not suggested that the payment was ineffective.

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The position is not different with regard to possession of land. First, according to O. 21, r.33 (1), where a decree is for delivery of immovable property, possession is to be delivered to the decree-holder. The provision does not say that the court has necessarily to be involved in order to bring about the delivery. In discussing O. 21, r.35 of the Indian Code, the counterpart of our O. 21, r. 33, MULLA (14th ed., vol. 2, p. 808) says that the decree-holder "need not invoke the assistance of the court if he can get possession peaceably". In other words, even with possession of land, the decree-holder does not have to resort to O. 21, r. 9 unless peaceful delivery is not forthcoming. Moreover, a decree for recovery of land is equally a command to the judgment debtor to put the decree-holder in possession as per Form No. 23 in Appendix D aforesaid. In the light of all this, I similarly say that it is incorrect to suppose that an order in execution would be necessary for effective possession of land.

In sum, execution of a judgment need not require an order of the court but this would depend on the nature of the subject-matter and the disposition of the judgment debtor. In the instant case, the respondent has entered the suit premises and I note that there was correspondence between the parties regarding the date of that event. As stated earlier, it is rather ironical that this application was brought at all. There is no suggestion, either, that the respondent is not in physical control of the land and visibly so. In fact it is understood that the land is already leased to some other party which is undertaking constructions thereon. I am satisfied in the final analysis that the High Court's decision has been executed. As stated earlier, stay may be granted where there is something to stay. There is nothing to stay in this case. The case of Joackim Kalembwe (supra) cited by Mr. Kalolo actually decided that stay

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cannot issue where execution has already taken place. And so it ought to be in the instant case and the application must fail.

Having come to that conclusion, it becomes irrelevant to consider the chances of the intended appeal. I dismiss the application with costs.

DATED at DAR-ES-SALAAM this 5th day of October, 2000.

K.S.K. LUGAKINGIRA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

(A.G. MWARIJA)
DEPUTY REGISTRAR