

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MJASIRI, J.A., KAIJAGE, J.A., AND MUSSA, J.A.)

CIVIL APPLICATION NO. 162 OF 2015

**1. INTEGRATED PROPERTY
INVESTMENTS (T) LIMITED**

2. OMARY ABDI ALI

..... APPLICANTS

3. SULEIMAN DUALEH

VERSUS

THE COMPANY FOR HABITAT AND

HOUSING IN AFRICA SHELTERAFRIQUE RESPONDENT

**(Application for stay of execution of the judgment and decree of
the High Court of Tanzania
at Dar es Salaam)**

(Mansoor, J.)

dated the 6th day of July, 2015

in

Commercial Case No. 53 of 2015

.....

RULING OF THE COURT

4th November, 2015 & 5th February, 2016

MJASIRI, J.A.:

This is an application for stay of execution of the judgment and decree of the High Court of Tanzania (Mansoor, J.). The applicant is represented by Dr. Masumbuko Lamwai, and Mr. Andronicus Byamungu, learned advocates and the respondent had the services of Mr. Gasper Nyika, learned advocate.

When the application was called on for hearing, Mr. Nyika rose to argue a preliminary objection, a notice of which was lodged under the Tanzania Court of Appeal Rules 2009 (the Court Rules).

The preliminary objection is on the following points of law:-

- (a) The application is incompetent for non-citation of the enabling provisions of the law, namely Rule 11 (2)(d)(i), (ii) and (iii) of the Tanzania Court of appeal Rules 2009, and*
- (b) The application is incompetent as the applicants have failed to comply with Rule 11(2)(d)(iii) of the Tanzania Court of Appeal Rules 2009.*
- (c) The application is incompetent for failure to attach a proper decree sought to be stayed.*

In relation to ground No. 1, Mr. Nyika argued that the notice of motion only makes reference to Rule 11(2)(b) (c). According to Rule 60(2)(b) the applicant has omitted to cite Rule 11(2)(d)(i), (ii), & (iii). These Rules have

to be read together. According to Mr. Nyika, non citation of the relevant rules renders the application incompetent.

With regard to the second ground Mr. Nyika submitted that Rule 11(2)(d)(iii) has not been complied with. There is no indication that security for costs has been provided. This is a requirement under the law.

On the third ground of objection Mr. Nyika contended that the decree is defective. He submitted that it is a requirement under Order 20 Rule 6 that a decree should agree with the judgment. The Court entered a summary judgment for failure by the defendant/applicant to obtain leave to defend. The decree is titled a **default decree**, it is therefore defective. Since there is no decree to support the application for stay of execution, the application is incompetent. He relied on **Mantrack (T) Limited v Raymond Costa**, Civil Appeal No. 74 of 2014 and **BP Tanzania Limited v Riakdit Barnabas**, civil Application no. 75 of 2012 CAT (unreported) He prayed that the application be struck out.

In relation to the first ground of objection Dr. Lamwai argued that Rule 48(1) of the Court Rules requires the applicant to cite enabling provisions of

the law, that is the jurisdictional provisions and not the ones which impose conditions on the grant of the application.

Dr. Lamwai submitted that Rule 11(2)(d)(i)-(iii) imposes mandatory conditions under which applications for stay of execution can be granted. It is not an enabling provision for moving the Court.

With regard to the second ground of objection, Dr. Lamwai submitted that it is not a preliminary objection. Compliance with Rule 11(2)(d)(iii) comes after the order. That is the order for stay is granted subject to the condition of furnishing security for costs.

He submitted that as the case concerned a money decree. He was prepared to pay for the security for costs. However he reiterated that it is not a condition precedent for an applicant to show his readiness for security.

According to Dr. Lamwai, since the provisions relating to security for costs is a mandatory condition it is subject to the order of the Court. He made reference to the case of **Indian Ocean Hotels Ltd t/a Golden Tulip Dar es Salaam v Nitesh Suchak t/a Smart Dry Cleaners**, Civil

Application No. 82 "A" of 2010, CAT (unreported). He stated that security for costs was ordered by the Court and was not a condition precedent. He also cited the case **of BP Tanzania Limited** case (supra) he contended that the circumstances in the BP case does not support Mr. Nyika's argument.

On the third ground of objection Dr. Lamwai contended that there is no basis for this objection. He submitted that the decree comes at the conclusion of the case. In this case it was a summary judgment for failure to apply for leave to defend. Whether it is a **default decree** or **summary decree**, it reflected what was contained in the judgment.

In relation to the first ground of objection, we would like to make the following observations:- Rule 11 (2)(d) provides as follows:-

No order for stay of execution shall be made under this rule unless the Court is satisfied that:-

- (i) *That substantial loss may result to the party applying for stay of execution unless the order is made;*

(ii) *That the application has been made without unreasonable delay; and*

(iii) *That security has been given by the applicant for due performance of such decree or order as may ultimately be binding upon him.*

A close scrutiny of Rule 11(2) d(i) & (iii) provides the criteria to be followed by the Court when granting an application for stay. In other words the determinant factors to be decided upon by the Court. This is not a provision to move the Court to grant an order for stay. We therefore agree with Dr. Lamwai that this ground of objection has no basis.

In relation the second ground of objection on the requirement for furnishing security for costs the law is settled. In **Mantrac Tanzania Limited v Raymond Costa** (supra) the Court stated thus:-

"One other condition is that the applicant for a stay order must give security for the due performance of the decree against him. To meet this condition, the law does not strictly demand that the said security must be given prior to the grant of the stay order.

To us, a firm undertaking by the applicant to provide security might prove sufficient to move the Court, all things being equal, to grant a stay order provided the Court sets a reasonable time limit within which the applicant should give the same."

See also **Indian Ocean Hotels Ltd** (supra).

With regard to the third ground of objection, we would commence by looking at the definition of decree as provided under section 3 of the Civil Procedure Code 1966 (the CPC). It is provided thus:-

"3. "decree" means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final and it shall be deemed to include rejection of a plaint and the determination of any question within section 38 or section 89 but shall not include:-

- (a) *An adjudication from which an appeal lies as an appeal from an order; or*
- (b) *Any order of dismissal for default.*

In the case of **Robert John Mugo v. Adam Mollel**, Civil Appeal No. 2 of 1990, CAT (unreported) this Court observed as follows:-

*"It is apparent from the plain language of the relevant definition under section 3 that what determines a decree **is the nature of determination which a decree is meant to express formally in suit. The adjudication or determination must "conclusively determine the right of the matters in controversy in the suit."***

[Emphasis provided]

(See also: **Permanent Secretary, Ministry of Tourism (ii) Hon. Attorney General v Hotel Travertine Limited** CAT (unreported); **The Collector V Kassin Shivji Bhimji and Two Others** (1959) EA 1063. **South British Insce Co. Ltd v Mohamedali Taibji** (1973) EA 210.

Order 20 Rule 6 of the CPC provides as follows:

"6(1) The decree shall agree with the judgment; it shall contain the number of the suit, the names and descriptions of the parties and particulars of the claim and shall specify clearly the relief granted or other determination of the suit.

(2) The decree shall also state the amount of costs incurred in the suit and by whom or out of what property and in what proportions such costs are to be paid.

(3) The Court may direct that the costs payable to one party by the other shall be set off against any sum which is admitted or found to be due from the former to the later.

Order 20 Rule 7 provides as follows:-

"7. The decree shall bear the date of the day on which the judgment was pronounced and, when the Judge or Magistrate has satisfied himself that the decree had been

drawn up in accordance with the judgment he shall sign the decree."

The judgment forms the concluding part of the civil suit and it determines the rights and liabilities of parties. Basically the judgment is followed by a decree which is its operating part and has to be in harmony with the judgment. The question we have to determine is whether or not the decree being complained of agree with the judgment in terms of Order 20 Rule 6(1) of the CPC? We are of the considered view that what is important is the substance of the judgment. If the decree complies with the substance of the judgment, that will suffice even though the decree is titled **default decree**.

In **Mohadev Parshad v Mst Mungi d/o Pandit Sheo Baksh** AIR 1959 PH 565 it was stated thus:-

"It is desirable that a decree should be drawn up in the form prescribed in the code of Civil Procedure, but a failure on the part of the Court to follow strictly the language of the form is not necessarily fatally defective. The validity of a decree depends upon the authority by which it is issued and the mandate it

contains and not upon the extent to which the language prescribed by the code had been reproduced. We should look rather to the substantial effect intended by the decree than to the precise form of words which the Court has used"

There has been no complaint from the respondent that the decree substantially defers from the judgment. The only anomaly is the word **default decree**. As the requirement under Order 20 Rule 6 and Order 20 Rule 7 of the CPC have been met, there is no basis for this ground of objection.

In the instant case the decree clearly indicate on what the judgment is based, for and against whom it is issue and the amount and date issued. The decree is in other words executable without having any formal defect. The terms of the decree are clearly ascertainable. We are convinced that the inclusion of the word **default** in the decree was unnecessary and uncalled for, but innocuous.

For the foregoing reasons, we find all the three grounds of objection without merit. The preliminary objection is hereby dismissed with costs to

the applicant. We order that the application proceed for hearing on a date to be fixed by the Registrar.

Order accordingly.

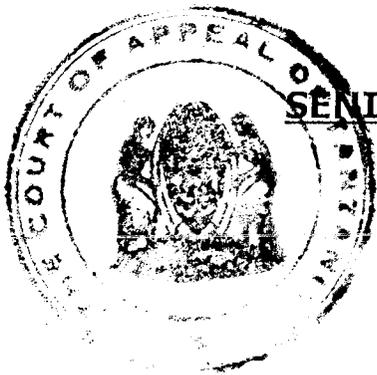
DATED at DAR ES SALAAM this 1st day of February, 2016.

S. MJASIRI
JUSTICE OF APPEAL

S.S. KAIJAGE
JUSTICE OF APPEAL

K.M. MUSSA
JUSTICE OF APPEAL

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




P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL