**IN THE COURT OF APPEAL OF TANZANIA**
**AT DAR ES SALAAM**

**(CORAM: KILEO, J.A., MMILLA, J.A., And JUMA, J.A.)**

**CIVIL APPLICATION NO. 210 OF 2015**

**TANZANIA ELECTRIC SUPPLY CO. LTD ..... APPLICANT**

**VERSUS**

**MUFUNGO LEONARD MAJURA AND 14 OTHERS ..... RESPONDENTS**

**(Application for lifted garnishee order nisi from the decision of the High Court of Tanzania at Dar es Salaam)**

**(Sheikh, J.)**

**dated the13th day of October, 2005**

**in**

**Civil Case No. 14 of 1999**

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# RULING OF THE COURT

8th & 23rd December, 2015

## MMILLA, J.A.:

The applicant, Tanzania Electric Supply Co. Ltd lodged Civil Application No. 210 of 2015 in this Court seeking its indulgence to lift the garnishee order ***nisi*** issued on 5.10.2015 by the High Court of Tanzania Land Division at Dar Es Salaam, against the applicant's Account No. 0100235072 with CITI BANK in execution of a decree in Land Case No. 55 of 2008. The application is brought by way of notice of motion and purports to be based on Rule 4 (a, b, and c) of the Tanzania Court of

Appeal Rules, 2009 (the Rules). The notice of motion has raised a lone ground that the decree which is the subject of execution is problematic because the awarded sum of T. shs 945,266, 520/= is based on speculations contrary to the law governing compensations of landed properties. It is supported by an affidavit sworn by Stella Modest Rwekiza, who is an advocate.

Upon being served with the necessary documents in this regard, Mr. Audax Vedasto, learned advocate who represented the respondents, Mufungo Leonard Mtatura and 14 others, raised preliminary objections based on four grounds; **one** that, the application has been filed hopelessly out of time; **two** that, the Court has not been properly moved; **three** that, the decree whose execution is intended to be stayed has not been attached to the application; and **four** that, the affidavit in support of the application contains extraneous matters and/or is defectively verified. He supported these grounds with brief crucial facts and authorities.

Mr. Vedasto's submission in respect of the first ground is that since the notice of appeal to challenge the decision that resulted into the decree, and subsequently the garnishee order sought to be lifted was filed on 23.2.2015, and because this application was filed on 20.10.2015, that

means there is an interval of 8 months. He contended that because of that fact, the application is time barred because it ought to have been filed within a period of two (2) months. He relied on the case of **Tanzania Electric Supply Company Ltd. v. Dowans Holding SA (Costa Rica) and Another**, Civil Application No. 142 of 2012, CAT (unreported). In view thereof, Mr. Vedasto pressed the Court to dismiss this application.

As regards the second ground, Mr. Vedasto has submitted that the present application seeking to lift the garnishee order ***nisi*** is in essence an application for stay of execution, therefore that an application such as the present ought to have been anchored on Rule 11 (2) of the Rules. He elaborated that the said order was made under Order XXI Rule 45 (1) (c) of the Civil Procedure Code Cap. 33 of the Revised Edition, 2002 (the CPC), hence that it was part of the process of execution. Mr. Vedasto cited also the cases of **Bernard Masaga and Others v. NAFCO and 3 others,** Civil Application No. 177 of 2006, CAT (unreported) and **Standard Charted Bank Ltd v. Interbest Investment Co. Ltd**, Civil Application No. 130 of 2015. He submitted that in **Bernard Masaga and Others v. NAFCO and 3 others,** the Court stated that any attempt to affect enforcement of a decision of the High Court was a process of stay of

execution, and thus Rule 9 (2) (b) of the Court of Appeal Rules, 1979 (the old Rules) (now Rule 11 (2) of the Rules) must be cited to move the Court to remedy the applicant. On the basis of that, Mr. Vedasto challenged that since the present application purports to be based on Rule 4 (a) (b) and (c) of the Rules, ***ipso facto*** the Court is not properly moved. He urged us to strike out this application.

On the third ground, Mr. Vedasto has submitted that although the judgment from which stemmed the decree whose execution led into the garnishee order ***nisi*** which is the subject of this application was annexed, the decree itself has not been annexed. He submitted that to have not annexed the decree makes the application incompetent. He supported his argument with the case of **TAZARA v. Ayub Ritti**, Civil Application No. 68 of 2003, CAT (unreported) in which the Court underscored that failure to annex a decree in an application for stay of execution renders the application incompetent, and that attachment of a judgment is not enough. He persuaded the Court to strike out the application,

Finally is Mr. Vedasto's submission in respect of the fourth ground. He submitted that the affidavit in support of the application contains extraneous matters and/or is defectively verified. He targeted paragraphs

3, 12, 13, 15, 16 and 17 of that affidavit. He asked the Court to hold the said affidavit fundamentally defective and strike out the application. He relied on the cases of **Uganda v. Commissioner of Prisons, Ex Parte Matovu** [1966] E. A. 514, **Phantom Modern Transport v. D. T. Dobie**, Civil References Nos. 15 of 2001 and 3 of 2002 and **Juma Busiah v. The Zonal Manager (South), Tanzania Posts Corporation**, Civil Application No. 8 of 2004, CAT (both unreported). On the basis of this, he prayed the Court to strike out the application.

When he was asked by the Court whether there was Rule 4 (a, b, and c) in the Rules cited, Mr. Vedasto hastened to say that that Rule does not exist, a fact which he said, strengthens his argument that the Court is not properly moved.

In responce to the submission of his learned brother, Mr. Msefya chose to discuss the first two grounds together. He prefaced his submission by conceding that Rule 4 (a, b, and c) on which his application is anchored is nonexistent, but he quickly added that it was a slip of the pen as he had in mind Rule 4 (2) (a) (b) and (c) of the Rules as he later on reflected on page 3 of his written submission.

Regarding the first two grounds, Mr. Msefya submitted that the application before the Court is for lifting the garnishee order ***nisi*** which in his submission is different from an application for stay of execution, therefore that it has properly been anchored on Rule 4 (2) (a) (b) and (c) of the Rules. He similarly said that on the basis of the same reasoning, it is incorrect to say that the application is time barred because it is not an application for stay of execution falling under Rule 11 (2) of the Rules as submitted by his learned friend. On being tasked by the Court to explain whether or not a garnishee order is part of the execution process, he readily conceded that it was.

On the third ground, he conceded that the decree was not attached, but that it was not necessary because the present matter is not an application for stay of execution.

As regards the last ground, Mr. Msefya refuted the allegation by his learned friend that the accompanying affidavit contains extraneous matters. He prayed the Court to dismiss all the grounds of the preliminary objection raised by the respondents.

After carefully going through the rival submissions of the learned advocates for the parties, we have decided to begin with the second

ground on whether or not the Court has been properly moved because in our view if upheld, it is sufficient to dispose of the entire application.

As already pointed out, Mr. Msefya has submitted in respect of the first and second grounds that the application before the Court is for lifting the garnishee order ***nisi*** which is different from an application for stay of execution, therefore that it has properly been anchored on Rule 4 (2) (a) (b) and (c) of the Rules. We hasten to say that we do not agree with him on the basis of the submission of his learned friend, Mr. Vedasto.

We begin by appreciating that the garnishee order ***nisi*** which necessitated the lodging of this application was made under Order XX1 Rule 45 (1) (c) of the CPC which covers execution of court decrees in certain instances by attachment of debt, share and other property not in possession of judgment debtor. That provision stipulates that in such cases, the attachment shall be made by a written order prohibiting:-

(i) in the case of the debt, the creditor from recovering the debt and the debtor from making payment thereof until the further order of the court;

(ii) in the case of the share, the person in whose name the share may be standing from transferring the same or receiving any dividend thereon;

(iii) **in the case of the other movable property except as aforesaid, the person in possession of the same from giving it over to the judgment debtor**. [Emphasis provided].

Certainly, in the light of the above provision, there is no gainsaying that a garnishee order ***nisi*** is part of the process of execution of a decree. The position we have taken is strengthened by what this Court had occasion to state in **Bernard Masaga and Others v. NAFCO and 3 others** (supra), a case referred to us by Mr. Vedasto.

In that case the applicants had applied before the High Court for temporary injunction in order to restrain the respondents from opening up and awarding of the bids in respect of the intended sale of the houses of their former employer in which they were staying. That application was founded under Rule 3 (2) (a) and (b) of the Court of Appeal Rules, 1979, instead of Rules Rule 9 (2) (b) of those Rules, a specific provision for stay of execution. According to the trial judge, Rule 9 (2) (b) of those Rules

could not be invoked because that was not an application for stay of execution. This Court held that:-

> ". . . in a sense this is an application for stay of execution in which the court is essentially being moved to stop a process which has a bearing on the decision of [the court]. If so, ideally, Rule 9 (2) (b) ought to have been cited notwithstanding the suggestion that the . . . decision is not capable of a stay of execution."

The Court went further and stated that:-

> "Since, as already observed . . . the objective here is to seek a stay of execution of the process which has bearing on the decision by Mr. Mihayo, J. it was improper to invoke the provisions of Rule 3 (2) (b) in filing the application in a situation where there is a specific provision in the Rules providing for a stay of execution."

The position in the present matter is similar to that which pertained in the above cited case. The request by the applicant to lift a garnishee order ***nisi*** is part of the process of execution because in essence it entails moving the Court to stop the process of execution. Thus, the Court is improperly moved firstly because Rule 4 (2) (a) (b) and (c) of the Rules is non - existent, and secondly that because we have said lifting of the

garnishee order ***nisi*** is a process of execution, therefore is tantamount to stay of execution, the Court ought to have been moved under Rule 11 (2) (b) (c) and (d) of the Rules which is the specific provision in applications of the kind.

On the basis of the many authorities of this Court, it is now settled that the non- citation or wrong citation of an enabling provision of the law has the effect of rendering a matter incompetent. See the cases of **Edward Bachwa & 3 Others v. Attorney General & Another** Civil Application No. 128 of 2008 and **Chama Cha Walimu Tanzania v. The Attorney General,** Civil Application No. 151 of 2008 (both unreported).

In **Chama Cha Walimu Tanzania vs. Attorney General** (supra), the arguments were that the Labour Court was wrongly moved under Rule 94 (1) (f) (ii) of the Employment and Labour Relations Act No. 6 of 2004 as the main enabling provision of law in granting the prayer for injunction. The Court was satisfied that such wrong citation of the law rendered the application before it incompetent. In justifying its holding, the Court quoted with approval the case of **China Henan International Co-operation Group v. Salvada K. A. Rwegasira,** Civil Application No. 22 of 2005 (unreported) where it was stated that:-

*"Here the omission in citing the proper provision of the rule relating to a reference and worse still the error in citing a wrong and inapplicable rule in support of the application is not in our view, a technicality falling within the scope and purview of Article 107A (2) (e) of the Constitution.* ***It is a matter which goes to the very root of the matter."*** [Emphasis provided].

For reasons we have aptly assigned, we find that the second ground of preliminary objection has merit, therefore that the application is incompetent. Consequently, it is struck out with costs.

**DATED** at **DAR ES SALAAM** this 14th day of December, 2015.

E. A. KILEO
**JUSTICE OF APPEAL**

B. M. MMILLA
**JUSTICE OF APPEAL**

I. H. JUMA
**JUSTICE OF APPEAL**

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

P. W. BAMPIKYA
**SENIOR DEPUTY REGISTRAR**
**COURT OF APPEAL**