**IN THE HIGH COURT OF TANZANIA**
**COMMERCIAL DIVISION**
**AT DARR ES SALAAM**

**COMMERCIAL CASE NO.32 OF 2010**

**AIR TANZANIA COMPANY LTD.....APPLICANT/J. DEBTOR**

**VERSUS**

**ULTIMATE SECURITY TANZANIA LTD.....RESPONDENT/D.HOLDER**

*Date of last order: 19/11/2012*
*Date of hearing: 19/11/2012*
*Date of Ruling: 28/11/2012*

**RULING**

**MAKARAMBA, J.:**

On the 31st day of October, 2012, **AIR TANZANIA COMPANY LTD** the Applicant lodged an application in this Court against, **ULTIMATE SECURITY TANZANIA LTD.**, the Respondent. The application which was brought under a Certificate of Urgency was preferred under section 38(1) and 95 of the Civil Procedure Code Act [Cap.33 R.E 2002. The Application is supported by the affidavit of Captain Milton L. Lazaro.

In the application, the Applicant is seeking for the following orders:

1. *That this Honourable Court be pleased to order the uplifting of the Garnishee Order Nisi issued by this Honourable Court on the 29th day of May, 2012 against the Applicant's/Judgment debtor's Bank Account.*

2. *That this Honourable Court be pleased to declare that the decretal sum supposed to be paid to the respondent/decree holder is Tzs.1,383,638,655/34 or USD 890,372/36 instead of USD 999,237.14 as stipulated in the Garnishee Order Nisi.*

3. *That this Honourable Court be pleased to order the sole shareholder of the applicant/judgment debtor i.e. the Government of the United Republic of Tanzania to pay the decretal sum (Tzs.1, 383,638,655/34 or USD 890,372/36) to the respondent/decree holder.*

4. *Costs of this application be provided for*

5. *Any other order(s) that this Honourable Court may deem just to grant.*

The Application by consent was disposed of orally by **Mr. BYARUSHENGO** learned Counsel for the Applicant/Judgment Debtor and **Mr. KESARIA** learned Counsel for the Respondent/Decree Holder.

I should point out here that save for the importance of some of the issues raised in the application, I would have struck it out with costs for the reason that this Court has not been properly moved to exercise its jurisdiction and grant the prayers sought by the Applicant. In his submissions Mr. Kesaria took issue with the law the Applicant has relied on in preferring the present application arguing that it was wrongly cited as it

does not correspond to the prayers in the application. Mr. Kesaria submitted further that, no law has been cited by the Applicant's Counsel empowering this Court to make orders as prayed in the Applicant's application. In response Mr. Byarushengo submitted that, the court cannot fail to interfere where there is obvious error in calculations and section 95 as cited by the Applicant empowers the Court to make any order in the interest of justice. Mr. Byarushengo submitted further that, the application has been made under section 38(1) and 95 of the Civil Procedure Code and therefore making it to be properly filed in this Court.

The Application has been preferred under section 38(1) of the Civil Procedure Code. As Mr. Kesaria rightly submitted, and having gone through the content of that section, I have found that it has nothing do with the lifting of a Garnishee Order nisi. Section 38(1) in my considered view is merely a direction to the court on how it should determine questions arising in the process of executing a decree. Furthermore, the Applicant has cited section 95 of the Civil Procedure Code as a preferring provision. Time and again the highest court in the land, the Court of Appeal of Tanzania has held that section 95 which preserve the inherent powers of the Court is applicable only where there are no specific provisions for such prayers in the Civil Procedure Code. In the present application, neither the Applicant nor Mr. Kesaria has told this Court the specific provision in the Civil Procedure which is applicable in lifting a Garnishee Order nisi. Such being the case then the Applicant was justified in relying on section 95 of the Civil Procedure Code to bring the application.

Much as the Applicant has dragged in the application the provisions of section 38(1) of the Civil Procedure Code which is inapplicable to the present application, in the absence of any specific provision in the Civil Procedure Code governing the lifting of a Garnishee Order nisi, the Applicant was justified in moving this Court under section 95 of the Civil Procedure Code.

Let me now turn to the arguments of Counsel for the parties, in support and rival. In his submissions in support of the Application Mr. Byarushengo for Applicant told this Court that the Applicant has discovered that the amount stipulated in the Garnishee Order Nisi, that is, **USD 999,237.14** or **TZS 1,552,845,516.67** was wrongly calculated by the Respondent/Decree Holder. According to the Applicant, the decretal sum stood at **TZS 1,383,638,655.34** or **USD 890,372.36** as per the J/Debtor's-ATCL-4, calculations made from 08/03/2011 to 31/10/2012. This amount has been arrived at after calculations based on **simple interest**. Mr. Byarushengo referred this Court to the case of **TANGANYIKA GARAGE LTD VERSUS MARCEL MAFURUKI [1975] L.R.T. 23** in which it was held that:

> *"Where the contract itself cannot assist as to the meaning of a word or term in it the ordinary rules of construing documents must be brought in to assist in interpreting the term of the contract between the parties."*

Mr. Byarushengo submitted further that even if the parties to the contract intended the interest on the administration charges to be made by compound interest, the same cannot amount to the excessive amount arrived at by the Respondent. Mr. Byarushengo referred this Court to the case of **JUMA HASSAN VERSUS HABIB SALUM [1975] L.R.T. 27** where it was held that:

> *"Where two parties to a contract agree for a rate of interest which is considered excessive the court has the discretion to award interest at a rate less than the contractual rate."*

Mr. Byarushengo submitted further that, after calculating on the principle sum and/or on interest on the principal sum at the rate of 12% per annum from 16/12/2009 to 08/03/2012, which is a period of 14 months, the principal sum plus interest resulted to **TZS 1, 213,367,300.60**. The calculation using a rate of 12% per annum, by the Respondent was not agreed upon by the parties and the decree is silent on the rates of interest, Mr. Byarushengo further submitted and added that therefore the Respondent in this application could use the rate of 7%, and not any rate above that rate. In support of his submissions on this point Mr. Byarushengo referred this Court to the decision of the Court of Appeal in the case of **NJORO FURNITURE MART LTD VERSUS TANZANIA ELECTRIC SUPPLY CO. LTD (TANESCO) [1995] T.L.R. 205**, in which it was held that:

*"If the parties to a suit did not agree to the rate of interest to be paid, the rate should not be above 7%."*

Mr. Byarushengo submitted further that, if the calculation could be made at the rate of 7% per annum, the principal sum plus interest could be TZS **1,347,848,843.08**.

Mr. Byarushengo submitted further that, the Applicant is likely to suffer irreparable loss because it is incapable of conducting its business efficiently because a sum of its money has been restrained by the Court Order. It is not the intention of the Applicant to deny or refuse to pay the debt; Mr. Byarushengo cautiously pointed out, and added informatively that the Government has agreed to pay all of the debts owed by the Applicant/Judgment Debtor, including the debt of the Decree Holder.

In his rebuttal, Mr. Kesaria argued that, the prayer for lifting of the Garnishee Order nisi cannot stand as it has been overtaken by events. The Garnishee Order nisi has ceased to exist following the issue of Garnishee Order absolute on the 6th day of November, 2012. Therefore the Applicant's prayer to lift something which is no longer in existence is not maintainable and cannot be granted.

Mr. Kesaria submitted further that, the reasons furnished by the Applicant cannot amount to good or sufficient reasons to enable this Court to grant the application. Mr. Kesaria referred this Court to the case of **UTEGI TECHNICAL ENTERPRISES AND ANOTHER VERSUS NBC [2004] Vol. II E.A. 344** in which Kalegeya, J. held that, *"an error in computing interest is rectifiable and did not go to the root of the order",*

and proceeded to grant the application to lift the garnishee order nisi on ground of incorrect calculations.

Mr. Kesaria further referred this Court to the Nigerian case of **MRS. PATTENCE OKON ETIM AKPAN VERSUS HON. COMMISSIONER FOR LANDS AND HOUSING AND ANOTHER** ( a copy of which he availed to this Court) where it was held at page 7-9 to the effect that:

> *"Once a garnishee order nisi is made, only the Garnishee has locus to make an application to set it aside and not the Judgment Debtor."*

Mr. Kesaria reasoned that a garnishee order is a proceeding between a Decree Holder and the Garnishee. The Judgment Debtor is not a party to the garnishee proceedings, Mr. Kesaria pointed out.

Mr. Kesaria submitted further that, the difference between the calculations by the Decree Holder and that by the Judgment debtor is on the modality of the calculation of administration charges and of interest. The Applicant has calculated the administration charges and interest on a simple interest basis, which according to Mr. Kesaria, it is incorrect. Paragraph 8 of the "*Standard Terms and Conditions of the Business*" between the parties as annexed to the Plaint requires the amount to be calculated on monthly compounded charges and as indeed it was agreed by the Judgment Debtor at the time of recording the decree. Therefore, all the calculation was arrived at by the Respondent on the basis of compound interest, Mr. Kesaria reiterated and referred this Court to the case of

**TANGANYIKA GARAGE LTD VERSUS MARCELL C. MAFURUKI [1975] L.R.T. 23**, in which it was held that:

> *"Where the contract itself cannot assist as to the meaning of a word or term in it the ordinary rules of construction of documents must be brought in to assist in interpreting the terms of the contract between the parties."*

Mr. Kesaria submitted further that, the decision of **JUMA HASSAN VERSUS HABIB SALUM [1975] LRT 27** as cited by the Applicant on excessive calculations is distinguishable since the Applicant in that case did not complain about it, and to the contrary the Applicant consented to the amount claimed including the administration charges on monthly compounded interest.

Mr. Kesaria submitted further that, the garnishee order nisi was made by this Court in May 2012, and therefore until November 2012, about six months have lapsed. Mr. Kesaria wanted this Court to note that this is the second application to set aside the Garnishee Order Nisi, the Applicant has brought in this Court, as previously an application of a similar nature was struck out on the 29th October, 2012 by Bukuku, J. on technicalities.

Furthermore, Mr. Kesaria avers that, this Court cannot make any order against the Government as suggested by the Applicant since the Decree Holder never sued the Government. In this suit the Government is not a party or the Judgment Debtor. The Government is merely a sole shareholder of the Judgment Debtor and cannot therefore be held liable on

behalf of the Judgment Debtor in terms of the famous English case of **SALOMON VERSUS SALMON & CO LTD [1897] AC 22** on liabilities of a company limited by shares, in that the company is a legal person with its own existence separate from its members or shareholders and capable of suing or being sued in its own corporate name.

In rejoinder Mr. Byarushengo submitted that, the argument by Mr. Kesaria that the Garnishee Order nisi has been taken by event has no substance since the application was filed on the 31st of October, 2012. Even if it has already ceased, still this Court has powers to lift it because the decree is yet to be executed, Mr. Byarushengo added.

Responding on the case of **UTEGI TECHNICAL ENTERPRISES AND ANOTHER VERSUS NBC [2004] Vol. II E.A 344** which Mr. Kesaria cited in his submissions, Mr. Byarushengo stated that, that case does not have anything useful to assist this Court in making its decision. In any case, according to Mr. Byarushengo since that decision is of the High Court, it does not bind this Court since according to the doctrine of precedent a decision of another Judge does not bind another Judge.

Mr. Byarushengo submitted further that, the Nigerian case of **MRS. PATTENCE OKON ETIM AKPAN VERSUS HON. COMMISSIONER FOR LANDS AND HOUSING AND ANOTHER,** also cited by Mr. Kesaria in his submissions cannot be a good law in Tanzania so as to support the Respondent's argument for the simple reason that Nigerian decisions are not binding on Tanzanian courts.

Mr. Byarushengo submitted further that, having had a look at paragraph 8 of the "Standard Terms and Conditions of Business," there is

nowhere in that paragraph even remotely suggesting that the chargeable interest should be compound interest.

Mr. Byarushengo surmised that, the case of **Salomon versus Salomon** (above) cited by Mr. Kesaria is distinguishable from the facts of the present case, but did not elaborate.

The parties in the present matter have locked horns on the lifting of the Garnishee Order Nisi issued by this Court. Garnishing proceeding is one of the means of realizing a judgment debt. It is a special procedure invoked to compel a third party who is in possession of the asset of the judgment debtor to forfeit the said asset to the Decree Holder to the amount of the debt in question. The Decree Holder initially gets an order nisi, which compels the third party to show cause why the order should not be made absolute. Where on the further consideration of the matter the garnishee does not dispute the debt due or claimed to be due and on the lapse of time, the Court may make an order absolute against the garnishee. I am alive however to the decision of this Court in **Miscellaneous Commercial Case No. 6 of 2010 between DB SHAPRIYA & COMPANY LTD VERSUS REGIONAL MANAGER (unreported)** where it was held at page 8 that, "*the procedure for garnishee nisi or absolute is a matter of practice. It is not a legal requirement.*" It is worth to note also that an order absolute may be enforced in the same manner as any other order for the payment of money. However, where on the further consideration of the matter the garnishee disputes liability to pay the debt due or claimed to be due from him to the judgment debtor or where the Court under section 59 of the

Civil Procedure Code is satisfied that such property when attached was not on the account of the Judgment Debtor or partly on account of other person, the Court shall make an order releasing the property or summarily determine the question at issue or order that any question necessary for determining the liability of the garnishee be tried in any manner in which any question or issue in an action may be tried.

Persuasively, the procedures on Garnishee Order was clearly stated by none other than Lord Denning as was quoted by the High Court of Uganda, the Commercial Division in **Miscellaneous Application No.402 of 2012 between UNIQUE HOLDINGS LTD VERSUS BUSINESS SKILLS TRUST LIMITED** (at Kampala from page 7 to 8) thus:

> *"Denning, MR considered the procedure of garnishee in **Choice Investments Ltd v Jeromnimon (Midland Bank Ltd, garnishee) [1981] 1 All ER 225** at page 227 where he said:*
>
> > *"The word 'garnishee' is derived from the Norman-French. It denotes one who is required to 'garnish', that is, **to furnish, a creditor with the money to pay off a debt.** A simple instance will suffice. A creditor is owed £100 by a debtor. The debtor does not pay. The creditor gets judgment against him for the £100. Still the debtor does not pay. The creditor then discovers that the debtor is a customer of a bank and has £150 at his bank. **The creditor can get a 'garnishee' order against the bank by which the bank is required to pay***

***into court or direct to the creditor, out of its customer's £150, the £100 which he owes to the creditor***.

*There are two steps in the process. The first is a* ***garnishee order nisi.*** *Nisi is Norman-French. It means 'unless'.* ***It is an order on the bank to pay the £100 to the judgment creditor or into court within a stated time unless there is some sufficient reason why the bank should not do so.*** *Such reason may exist if the bank disputes its indebtedness to the customer for one reason or other. Or if payment to this creditor might be unfair by preferring him to other creditors: see* ***Pritchard v Westminster Bank Ltd [1969] 1 All ER 999, [1969] 1 WLR 547 and Rainbow v Moorgate Properties Ltd [1975] 2 All ER 821, [1975] 1 WLR 788. If no sufficient reason appears, the garnishee order is made absolute, to pay to the judgment creditor, or into court, whichever is the more appropriate****. On making the payment, the bank gets a good discharge from its indebtedness to its own customer, just as if he himself directed the bank to pay it. If it is a deposit on seven days' notice,* ***the order nisi operates as the notice.***

***As soon as the garnishee order nisi is served on the bank, it operates as an injunction. It prevents the bank from paying the money to its customer until the garnishee order is made absolute, or is discharged, as***

***the case may be. It binds the debt in the hands of the garnishee, that is, creates a charge in favour of the judgment creditor****: see* ***Joachimson v Swiss Bank Corpn [1921] 3 KB 110 at 131, [1921] All ER Rep 92 at 102, per Atkin LJ. The money at the bank is then said to be 'attached',*** *again derived from Norman-French.* ***But the 'attachment' is not an order to pay. It only freezes the sum in the hands of the bank until the order is made absolute or is discharged. It is only when the order is made absolute that the bank is liable to pay."*** *(emphasis added).*

There is no better rendering of the garnishee procedure than that by Denning, MR in **Choice Investments Ltd v Jeromnimon (Midland Bank Ltd, garnishee) [1981] 1 All E.R. 225** at page 227 as quoted in the Ugandan case, **UNIQUE HOLDINGS LTD**, which is why I found it apt to reproduce the whole of it herein as it explains a lot about the garnishee procedure which is not expressly provided for in our Civil Procedure Code. In the present application the Judgment Debtor disputes on the amount of the debt as attached by the Garnishee Order nisi issued by this Court for what the Applicant claims to be "wrongly calculated and excessive." In my view the parties are at qualms over the basis for calculating interest on the Judgment debt, the Judgment Debtor insisting on calculations based on simple interest while the Decree Holder maintains that calculation on the

chargeable interest should be on compound interest basis. The parties therefore have failed to agree on the mode of calculating interest.

I have had a look at paragraph 8 of the "Standard Terms and Conditions of Business." There is nothing in that paragraph even remotely suggesting applicability of compound interest in calculating the interest chargeable on the administrative costs, as rightly submitted by Mr. Byarushengo. The contract is dead silent on the mode of interest to be employed in calculating the administrative costs. As matter of practice where the contract is silent, and as per the decision in ***Tanganyika Garage case*** (above) "*the ordinary rules of construction of documents must be brought in to assist in interpreting the terms of the contract between the parties*" such that simple interest should be what the parties intended to be imposed, unless otherwise the nature of the case itself compels the Court to make an order for compound interest to apply. The nature of this case is such that it does not compel this Court to make an order for compound interest to apply. Simple interest should therefore be imposed.

Mr. Kesaria further pointed out that, the Garnishee Order nisi does no longer exist following a Garnishee Order absolute issued by this Court on the 6th of November, 2012. I have had a thorough look at the Court record but I have not been able to unearth any such order making absolute the Garnishee Order Nisi as pointed out by Mr. Kesaria. I shall treat the submissions by Mr. Kesaria on this particular point merely as unsubstantiated allegation. I accordingly ignore it.

In the whole and for the reasons I have explained above, the application fails and stands dismissed with a qualification however, that the sum which should be garnished is **TZS 1,383,638,655/34** or **USD 890,372/36** instead of **USD 999,237.14** as stipulated in the Garnishee Order Nisi issued by this Court on the 6th of November, 2012.

The Respondent shall have its costs.

It is accordingly ordered.

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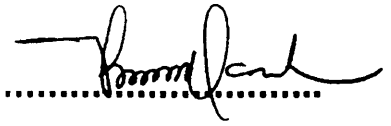
**R.V. MAKARAMBA**

**JUDGE**

**28/11/2012**

Ruling delivered this 28th day of November, 2012 in the presence of Mr. Byarushango, Advocate for the Applicant and Mr. Kesaria, Advocate for the Respondent



**R.V. MAKARAMBA**

**JUDGE**

**28/11/2012**

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