IN THE HIGH COURT OF TANZANIA
COMMERCIAL DIVISION
AT DAR ES SALAAM

COMMERCIAL CASE NO.106 OF 2003

LALIBIBI PIRMOHAMED.....APPLICANT/OBJECTOR

VERSUS

TANZANIA POSTAL BANK.....1ST RESPONDENT
D.N. BAHRAM AND CO.LTD.....2ND RESPONDENT
DADRAHMAN NURMOHAMED BAHRAM.....3RD RESPONDENT
MERBIBI DADRAHMAN BAHARAM.....4TH RESPONDENT
MATHEW THOMAS MBATA.....5TH RESPONDENT
JOSEPH SIMBILINGUNGA MWACHULLAH.....6TH RESPONDENT

Date of last order: 17/05/2011
Date of final submissions: 28/06/2011
Date of ruling: 05/08/2011

RULING

MAKARAMBA, J.:

This is a ruling on application the Applicant filed in this Court on 18th day April, 2011, by way of Chamber Summons. The application has been preferred under section 95 and Order XXI Rule 27 of the Civil Procedure Code Act, [Cap.23 R.E 2002] and is supported by the sworn affidavit of MICHAEL M.J. LUGURU, advocate, and of M/s LALIBIB PIRMOHAMED, the Applicant/Objector all of which were sworn on the 18th day of April 2011 and filed in this Court on the same day the application was filed.

In the application the applicant is seeking for the following orders:

(a) *That this Honourable Court it be pleased to stay the execution of the decree made by this Court pending the hearing and determination of the restoration of the dismissed application.*

(b) *That this Honourable Court it be pleased to rescind its order it made on the 11th day of April 2011 dismissing the Applicant's objection proceedings and restore them.*

(c) *That this Honourable Court it be pleased to direct the objections proceedings so dismissed to be heard interparties.*

(d) *Costs of the application be provided for.*

(e) *Any other relief(s) this Honourable Court may deem fit and equitable to grant.*

The application by consent of learned Counsel for the parties was disposed of by way of written submissions, Mr. LUGURU, learned Counsel from the firm of MMJ LUGURU & CO. ADVOCATES for the Applicant and Mr. MALIMI, learned Counsel from the firm of K & M (ADVOCATES) for the 1st Respondent. The 5th and 6th Respondents appeared in person.

Briefly, the background to this application as could be gathered from the record on file is that on the 11th day of April 2011 at 1:30 pm, this matter was scheduled for hearing before Hon. Makaramba J. of an application filed in this Court on the 22nd day of October 2010 by LALIBIBI PIRMOHAMED, the Objector in this case. At the hearing of the application on the 11th day of April 2011, neither M/s LIBIBI PIRMOHAMED (the Objector/Applicant),

nor her advocate Mr. Luguru, appeared to prosecute the application. On the same day this matter was scheduled for hearing, Advocate Luguru wrote a letter to the Registrar of this Court dated 11th April 2011, which was duly filed in this Court informing it that Mr. Luguru was suffering from attack of flue and malaria bout and therefore he cannot attend court for the hearing of the application and prayed that the matter be fixed for hearing on another date. The letter by Mr. Luguru filed in this Court was not supported by any document to prove his sickness. In addition, M/s LALIBIBI PIRMOHAMED, the Objector herein, did not appear in Court and this without any excuse. On that date, Mr. Malima, learned Counsel for the 1st Respondent prayed before this Court that the application be dismissed with costs for want of prosecution. It was for this reason the Objector's application was dismissed and a drawn order dated 11th April 2011 for the same was issued by this Court. The Objector being aggrieved with the dismissal order filed in this Court the present application dated 18th day of April 2011 seeking for among others, an order of stay of execution of the decree and restoration of the dismissed application, and hence this ruling.

In his sworn affidavit dated 18th day of April 2011, Mr. Luguru, learned Counsel for the Applicant which was duly filed in this Court states that on the 11th day of April 2011 at midnight his body condition changed and was attacked by serious flue and malaria, which forced him to write a letter to this Court requesting for an adjournment of the hearing of the matter to another date or that the application be argued by way of written submissions. Mr. Luguru avers further in his sworn affidavit that after delivering the said letter to this Court, he proceeded to AL-JUMMA

CHARITABLE DISPENSARY for treatment for which he was given an excuse duty (ED) for three days due to the serious attack from malaria. Mr. Luguru avers further that he was unable to proceed with the case because the change in his body situation happened abruptly and beyond his control and that it was an Act of God.

According to the sworn affidavit LALIBIBI PIRMOHAMED (the Applicant/Objector), on the hearing date having been informed by a near relative one HAROON PIRMOHAMED that their beloved mother was sick having been involved in a car accident at Tunduma area, the Applicant was forced to travel to Mbeya on the 7th day of April 2011 to attend to their sick mother which happened at Tunduma and came back on the 11th day of April 2011 at 6.30 pm. the very day the matter was called for hearing and has attached copies of travel tickets to Mbeya and back as LPM-1 and LPM-2 respectively. The Applicant/Objector avers further that on the 12th day of April 2011, her advocate called her informing her that her application was dismissed on the 11th day of April 2011 for want of prosecution and further that her Advocate informed her that he had written a letter which was received by this Court on the 11th day of April 2011 requesting for another hearing date. The Applicant avers further that when she instructed her Counsel to act on her behalf, her Counsel assured her that the matter was capable of being proceeded with even in her absence because there was no evidence to be recorded from her part. The Applicant avers further that her non-appearance was not intentional because she notified her advocate who assured her that the matter was capable of being proceeded with

even in her absence because there was no evidence to be recorded from her part.

In his sworn counter–affidavit, MR. MALIMI, learned Counsel for the 1st Respondent in reply to the affidavit of LALIBIBI PIRMOHAMED avers that the Applicant is contradicting herself because under paragraph 3 of her sworn affidavit she states that she travelled to Mbeya on the 7th day of April 2011 while annexure LPM-1 to her affidavit shows that LALIBIBI PIRMOHAMED traveled to Mbeya on the 8th day of April 2011. Mr. Malimi avers further that if LALIBIBI PIRMOHAMED traveled to Mbeya on the 7th April 2011, she could have an opportunity to communicate with any other person to appear on the hearing date and inform this Court about her absence. Mr. Malimi avers further that a mere writing of a letter to court cannot be taken as authority to move this Court to grant orders for adjourning a matter. Mr. Malimi vehemently contested the averment in the affidavit of Mr. Luguru that the letter by the Applicant which was filed in this Court was not availed to the other parties in this matter and that the same is not an authority for adjournment of a case. Mr. Malimi avers further that even if the Applicant's Counsel had sufficient reasons for not attending Court, which is denied, the Applicant herself was to enter appearance in Court. Mr. Malimi avers further that if the Applicant's Counsel acted diligently, he could have informed the other parties to the matter and/or asking for someone to hold his brief or even by sending his Chamber Clerk or Legal Officer for that purpose. The applicant has all along being employing tactics to delay execution of the decree in the main case.

In the sworn joint counter-affidavit of the 5th and 6th Respondents in reply to the affidavit of Mr. Luguru, learned Counsel for the Applicant, aver that the Applicant's Counsel was misconceived by drawing wrong assumptions that his request for adjournment by the letter he wrote to this Court must be adhered to and/or accepted by this Court. Contesting the affidavit of M/s LALIBIBI PIRMOHAMED, the 5th and 6th Respondents jointly aver under paragraph 7 of their joint affidavit that the Applicant's mother could have been attended to by another family member so that the Applicant could wait for her case or return back as early as possible to appear in Court on the hearing date.

In the written submissions in support of the Application the Applicant's Counsel argues that the failure by the Applicant and the Applicant's Counsel to appear in Court on the date fixed for the hearing of the application was not intentional or due to negligence on the part of the Applicant's Counsel but it was due to the illness of the Applicant's Counsel and the fact that the Applicant herself had traveled to Mbeya attend to a sick relative believing that her advocate will represent her in Court.

Mr. Malimi, learned Counsel for the 1st Respondent replying submitted that this Court has not been properly moved. Mr. Malimi argues further that the Applicant has not cited any provision of the law for the restoration of the dismissed application. Mr. Malimi submits further that Order XXI Rule 27 of the Civil Procedure Code the Applicant's Counsel has cited for preferring this application cannot come into play as it deals with stay of execution where there is a pending suit while in this application there is no pending suit between the parties. Likewise, Mr. Malimi further argues,

section 95 of the Civil Procedure Code cited by the Applicant cannot come into play for restoration of suits since there is specific provision in the Civil Procedure Code for restoration of suit which has not been cited in the application. The Applicant ought to file an application for restoration under Order IX Rule 13 of the Civil Procedure Code, Mr. Malimi pointed out. Consequently, the Applicant's application is incompetent and should be struck out with costs, Mr. Malimi surmised and prayed. The consequences of non citation or wrong citations of provisions of the law is to render the whole application nullity, Mr. Malimi argues and buttresses this argument by citing the decision in **BAKARI KAJANGWA VERSUS THERESIA ATHUMANI Civil Application No. 7 of 2005 (Unreported)** where the Court of Appeal sitting at Tanga held that:

> *"First the application in the High Court was wrongly filed under Section 5(1) (c) of the Appellate Jurisdiction Act, 1979, second the relevant provision which deals with such applications is section 5(2)(c). Because of the foregoing reasons, the Application is incompetent. It is struck out..."*

Mr. Malimi also cites the case of **NAIBU KATIBU MKUU (CCM) AND MOHAMED IBRAHIM & SONS, ZNZ Application No.3 OF 2003 (Unreported)** where it was held that:

> *"It is important that the Court must be properly moved to hear and determine the Application. The Applicant has not cited the provisions from which the Court derives it's the power to enlarge time to appeal to this Court out of time....in this application the applicant has not cited which provision of the law is relied upon to move the Court to*

enlarge time. As the court is not properly moved, the application is undoubtedly incompetent it is accordingly struck out with costs."

Mr. Malimi submits further that the Applicant's application is fatally defective and bad in law for combining different prayers in that the Applicant is seeking for restoration of the dismissed application as well as praying for the stay of execution which brings confusion and therefore contrary to the law as declared in the case of **THE REGISTERED TRUSTEES MANYEMA MOSQUE V. HABESH SAID OMARY & MOHAMED SUDI, Civil Case No. 321 of 1988 (Unreported)** where Hon. Shangwa, J. restated the position that:

"It is absolutely true that the chamber summons filed by the Applicants on 12th March, 2002 is bad in law for lumping together several orders in the same applications. In my view, the applicants ought to have filed two applications one after the other".

Mr. Malimi having submitted on the preliminary points submits further that the Applicant's Counsel took it upon himself to assume that the Court will adjourn the matter as he had requested in his letter, citing the case of **ARBOGAST C. WARIOBA VERSUS NATIONAL INSURANCE & OTHERS, COMMERCIAL CASE NO. 86 OF 2003 (unreported)** where it was stated that:

"As regards Mr. Rutashoborwa appearance before Hon. Justice Rugazia, it cannot be accepted as sufficient cause to warrant the granting of this application because he did not communicate this information to the Court. He only chose to dictate his terms, Mr.

Mbamba that he should seek for an adjournment, the assumption being that it was going to be automatically granted. Mr. Rutashoborwa ought to have known that it is the Court which has the power and control of the proceedings....."

I shall first deal with the two preliminary points raised by Mr. Malimi in the course of his submissions that this Court has not been properly moved for ***non citation of any provision of the law for the restoration of the dismissed application*** and that ***the Applicant's application is fatally defective and bad in law for combining different prayers,*** namely, that for restoration of the dismissed application and for stay of execution. Initially the Applicant's Counsel had not rejoined. However, on the date this Court had set for delivering the ruling, which was the 29th day of July 2011, the Applicant's Counsel prayed for leave to file a rejoinder, which prayer having not been objected to by the Respondent's Counsel, this Court duly granted. The Applicant's Counsel duly filed his rejoinder in this Court on the 3rd day of August 2011 essentially contesting the manner in which Mr. Malimi, learned Counsel for the 1st Respondent raised the points of preliminary objection in his reply submissions to the submissions in chief by the Applicant's Counsel.

It is not disputed that the present application has combined two applications in one, namely, application for restoration of the dismissed application and application for stay of execution. Despite combining two applications in one, the Applicant has cited the provisions of Order XXI Rule 27 which deals with stay of execution but has not cited any provision for restoration of a dismissed matter. In the course of his reply submissions

Mr. Malimi, learned Counsel for the 1st Respondent raised an objection that the application is fatally defective and bad in law for combining different prayers, and cited the case of **THE REGISTERED TRUSTEES MANYEMA MOSQUE V. HABESH SAID OMARY & MOHAMED SUDI, Civil Case No. 321 of 1988 (Unreported),** a decision of the High Court of Tanzania

Mr. Luguru, learned Counsel for the Applicants contends that the practice of raising a preliminary objection in the course of submissions should be abhorred since it in the effect it denies the opposite party the natural right to be heard. Mr. Luguru submits further that the objection raised by Mr. Malimi learned Counsel for the 1st Respondent, that the application is fatally defective for combining more than one prayer in one application has no merits and cites the decision of the Court of Appeal of Tanzania in **Civil Appeal No.103 of 2004 between MIC TANZANIA LIMITED VS MINISTER FOR LABOUR AND YOUTH DEVELOPMENT AND ATTORNEY GENERAL** (unreported), whose copy he availed to this Court. Mr. Luguru distinguishes the case of **THE REGISTERED TRUSTEES MANYEMA MOSQUE V. HABESH SAID OMARY & MOHAMED SUDI, Civil Case No. 321 of 1988 (Unreported),** which is a decision of the High Court of Tanzania and therefore has no authoritative weight given the binding decision of the Court of Appeal of Tanzania in **MIC TANZANIA LIMITED VS MINISTER FOR LABOUR AND YOUTH DEVELOPMENT AND ATTORNEY GENERAL**, which has settled the legal position that combining more than one prayer in application is not fatal and does not render an application defective.

In **MIC TANZANIA LIMITED VS MINISTER FOR LABOUR AND YOUTH DEVELOPMENT AND ATTORNEY GENERAL** (supra) the Appellant therein had preferred an appeal to the Court of Appeal against the decision of the High Court in Misc. Civ. Cause No.91 of 2000, where the subject matter was an application combining three prayers in one, namely, prayer for extension of time within which to apply for leave to apply for orders of certiorari; prayer for an order of certiorari; and prayer for stay of execution. In the High Court, the competence of the Application had been challenged by the Respondents who were also the respondents in appeal by way of preliminary objection to that the orders being sought were misconceived and bad in law for "*mixing up an order for extension of time, order for leave and stay of execution in one chamber summons*"; and that the prayer for stay of execution was misconceived as there was no leave which had been granted by the court which would have formed the basis for the order to stay the extension of the two decisions. The High Court judge (Katiti, J. as he then was) who dealt with the application upheld the first point of preliminary objection. However, instead of striking out the application for being incompetent, proceeded to determine it on the merits. In the Court of Appeal, Mr. Mchome, learned Counsel making his submissions on one of the grounds of appeal that the High Court erred in law in essentially holding that the application was incompetent in so far as it combined three prayers in one Chamber Summons cited the decision of the High Court (Mapigano, J) (as he then was) in **TANZANIA KNITWEAR LTD VS SHAMSU ESMAIL (1989) TLR 48** where it was held that such combination is favoured by the Courts. In **TANZANIA KNITWEAR LTD**

VS SHAMSU ESMAIL (supra) the application had united two distinct applications, namely, one for setting aside a temporary injunction and another for issuance of a temporary injunction. **MIC TANZANIA LIMITED VS MINISTER FOR LABOUR AND YOUTH DEVELOPMENT AND ATTORNEY GENERAL** (supra) the Court of Appeal of Tanzania despite observing that the decision of Mapigano J. in **TANZANIA KNITWEAR LTD VS SHAMSU ESMAIL** (supra) was not binding on it, conceded that there was no direct decision of the Court of Appeal on the issue could not fault the ruling of Mapigano, J. on the issue and respectively agreed with him in the following words at page 9 of the typed judgment:

> *"It is also our settled view that the holding of Katiti, J. was predicated more upon fears than practicality and that is why he went on to determine the main application on merit. If the position he took is sustained on only those grounds it would lead to undesirable consequences. There will be a multiplicity of unnecessary applications. The parties will find themselves wasting more money and time on avoidable applications which would have been conveniently combined. The Courts' time will be equally wasted in dealing with such applications. Therefore, unless there is a specific law barring the combination of more than one prayer in one Chamber Summons, the Courts should encourage this procedure rather than thwart it for fanciful reasons. We wish to emphasize, all the same, that each case must be decided on the basis of its own peculiar facts."*

For the foregoing reasons and in view of the binding decision of the Court of Appeal of Tanzania in **MIC TANZANIA LIMITED VS MINISTER**

FOR LABOUR AND YOUTH DEVELOPMENT AND ATTORNEY GENERAL (supra), which has now settled the law on multiplicity of applications, I cannot, with due respect, agree with Mr. Malimi that combining more than one prayer in one application is fatal and renders the application incompetent. The decision **THE REGISTERED TRUSTEES MANYEMA MOSQUE V. HABESH SAID OMARY & MOHAMED SUDI, which Mr. Malimi cited in support of his submissions on this point** is no longer good law in view of the decision of the Court of Appeal of Tanzania in **MIC TANZANIA LIMITED VS MINISTER FOR LABOUR AND YOUTH DEVELOPMENT AND ATTORNEY GENERAL** (supra), agreeing with the ruling of Mapigano, J. in **TANZANIA KNITWEAR LTD VS SHAMSU ESMAIL** (supra). It is now settled law that combining two applications in one is not bad in law since courts of law abhor multiplicity of proceedings.

It is for the foregoing reasons that the preliminary objection raised by Mr. Malimi, learned Counsel for the 1st Respondent albeit in the course of his submissions that the application is fatally defective for combining more than one prayer in one application fails and accordingly I dismiss it.

The Applicant has also cited an omnibus provision, Order XXI Rule 27, which deals with stay of execution but has not cited any provision for restoration of a dismissed matter aside from citing section 95 of the Civil Procedure Code. This is what prompted Mr. Malimi to raise another preliminary objection in the course of his submissions that the Applicant has failed to cite the proper law for moving this Court and therefore the application should be struck out. Mr. Luguru in rejoinder submits that the

second point of preliminary objection lacks any merit in that the word "suit" includes any application pending in court. In support of his argument Mr. Luguru cites Black's Law Dictionary which defines the word "suit" to include an application.

In so far as the application for stay of execution is concerned, the Applicant has cited Order XX1 Rule 27 and section 95 of the Civil Procedure Code. Order XX1 Rule 27 of the Civil Procedure Code which deals specifically with stay of execution provides 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 decided**." (the emphasis is of this Court).*

In my view, the gist of Rule 27 of Order XXI of the Civil Procedure Code cited above is that stay of execution is issued against the holder of a decree in a **suit pending in any court** until such pending suit has been determined. As Mr. Malimi, learned Counsel for the 1st Respondent rightly submitted, for an order of stay of execution to be granted against any party to the suit, there has to be a suit pending between the Decree-Holder and the Judgment Debtor. There is no pending suit between the Decree Holder and the Judgment Debtor, Mr. Malimi further submits and that the Applicant is an objector and was not therefore a party to the main suit, which gave rise to the execution now she is seeking for its stay. There is therefore no pending suit between the Objector and the Respondents for

which the Applicant could seek the assistance of Rule 27 of Order XXI of the Civil Procedure Code. The Applicant's Application was dismissed with costs by this Court in it's entirely and a decree issued accordingly. As rightly submitted by Mr. Malimi, Order XXI Rule 27 of the Civil Procedure Code which the Applicant's Counsel has cited for preferring this application cannot therefore move this Court for the order for stay of execution sought by the Applicant. There is simply no pending suit between the Objector and the Respondents. Much as I agree with Mr. Luguru that the word "suit" would also include application this however, cannot assist the applicant. The purport of Rule 27 of Order XXI of the Civil Procedure Code in my view was intended to preserve the subject matter in a pending suit by enabling the person against whom the decree was passed to apply for stay execution of the decree until the pending suit has been decided.

The present application also contains a prayer for restoration of the dismissed application. Mr. Malimi submits that the most appropriate provision for moving this Court would have been Order IX Rule 13 of the Civil Procedure Code, which provides as follows:

> *"(1) In any case in which a **decree is passed ex parte against a defendant**, he may apply to the court by which the decree was passed **for an order to set it aside**; and if he satisfies the court that the summons was not duly served or that **he was prevented by any sufficient cause from appearing when the suit was called on for hearing,** the court shall make an order setting aside the decree as against him upon such terms as to costs, payment into court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit:*

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also." (the emphasis is of this Court).

In my view, and as rightly submitted by Mr. Malimi, the relevant provision for restoration of the decree passed exparte by this Court which the Applicant is seeking to restore would have been Order IX Rule 13 of the Civil Procedure of Code. Perhaps Mr. Luguru may rejoice over the fact that the word "suit" for purposes of Order IX Rule 13 of the Civil Procedure Code includes application so as to give meaning to the phrase "***he was prevented by any sufficient cause from appearing when the suit was called on for hearing."*** The Applicant being that person has not cited in the application the provisions of Order IX Rule 13 of the Civil Procedure of Code so as to move this Court to consider the reasons advanced both by her and her advocate for their absence in court on the date the application was called on for hearing and determine whether there is "***any sufficient cause from appearing when the suit was called on for hearing"*** and grant or otherwise the prayer for restoration of the dismissed application. In my considered view, the Applicant having combined two applications in one, which as I have held above that there is nothing in law about that, ought also to have cited the appropriate provisions for restoration of the dismissed application. Much as the provisions of Order XXI Rule 27 of the Civil Procedure Code Act, [Cap.23 R.E 2002], the Applicant cited in the application are appropriate for stay of execution, however, for the reasons I have explained above, this cannot

assist the Applicant in her prayer for stay of execution. In this regard there is therefore proper citation of the law in so far as application for stay of execution is concerned but not in respect of the order for restoration. This, in my view, most probably brings to the fore the peculiar situation the Court of Appeal of Tanzania had in mind in **MIC TANZANIA LIMITED VS MINISTER FOR LABOUR AND YOUTH DEVELOPMENT AND ATTORNEY GENERAL** (supra), when it observed that:

> *"...We wish to emphasize, all the same, that each case must be decided on the basis of its own peculiar facts."*

It cannot be said enough that the Applicant has completely failed to cite any provision for restoration of the dismissed application. The consequence of wrong citation and/or non-citation of the law is fairly clear – it is to strike out the application. This mundane legal position has been stated and restated many a times both by this Court and the highest court in the land. I can only cite the case Mr. Malimi cited in his submission, that of **BAKARI KAJANGWA VERSUS THERESIA ATHUMANI Civil Application No. 7 of 2005 (Unreported)** where the Court of Appeal struck out an application strike for having been wrongly filed under a wrong section of the law.

Accordingly, for the reasons explained above the application is incompetent and it is hereby struck out with costs. It is ordered accordingly.

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R.V. MAKARAMBA
JUDGE
05/08/2011

Ruling delivered in Chambers this 5th day of August, 2011 in the presence of Mr. Luguru, Advocate for the Applicant/Objector, Mr. Farzan, Advocate for the 1st Respondent and in the absence of 2nd, 3rd, 4th, 5th and 6th Respondents.

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R.V. MAKARAMBA
JUDGE
05/08/2011.

Words count: 4,705