THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

AT MBEYA

MISC. LAND APPLICATION NO. 39 OF 2020.

(Originating from Land Application No. 179 of 2016, in the District Land and Housing Tribunal for Mbeya, at Mbeya, and Misc. Land Application No. 34 of 202, in the High Court of Tanzania,

at Mbeya).

MARAN-ATHA ENGINEERING
AND TRADING CO. LTD.....APPLICANT

VERSUS

TANZANIA POSTAL BANK

(MBEYA BRANCH).....RESPONDENT

RULING

22 & 22. 05. 2020.

UTAMWA, J:

In this application, the applicant MARAN-ATHA ENGINEERING AND TRADING CO. LTD applies for stay of execution of a decree pending appeal. The application is made under Order XXXIX rule 5 (1) and (4) of the Civil Procedure Code, Cap. 33 R. E. 2002 (Now Cap. 2019). It is supported by an affidavit sworn by one Mr. Ambonisye Mbilike Mwandembo, the Managing Director of the applicant. The application was

resisted by the respondent, the TANZANIA POSTAL BANK (MBEYA BRANCH) through a counter affidavit sworn by one John Nzila.

According to the affidavit, the applicant had filed a suit (Land Application No. 179 of 2016) against the respondent in the District Land and Housing Tribunal for Mbeya, at Mbeya (the DLHT). She lost the case and appealed to this court against that decision. The appeal was struck out by this court (Dr. Mongella, J.). The applicant then filed an application for extension of time to appeal to this court out of time (Land Application No. 34 of 2020). The application is still pending.

When the application at hand (for stay of execution) was called upon for hearing, the court sniffed an irregularity in it. It thus, raised a legal issue *suo motu*. The issue was whether or not the application for stay of execution was filed under proper provisions of the law (Order XXXIX rule 5 (1) and (4) of Cap. 33) though there is no any pending appeal. The issue had to be determined before the hearing of the application on merits took off.

At the hearing regarding the court's issue, the application was represented by Ms. Juliana Malunda, learned counsel while the respondent was advocated for by Mr. Emmanuel Mwakyembe, learned counsel.

In arguing the issue, the learned counsel for the applicant essentially maintained that, the applicant was competent for the reasons that, though there is no any appeal before this court, there is a pending application for extension of time to file the appeal out of time. She further contended that, under the principle of Overriding Objective, wrong or improper citation is

not fatal for purposes of promoting justice. She supported the contention by a decision of this court in **Aliance One Tobacco Tanzania Ltd and another v. Mwajuma Hamisi and another, Misc. Civil Application No. 803 of 2018, High Court of Tanzania, at Dar es Salaam** (unreported). She also cited a decision of the Court of Appeal of Tanzania (CAT) in **Samson Ngw'arida v. The Commissioner General, Tanzania Revenue Authority, Civil Appeal No. 86 of 2008, CAT, at Dar es Salaam** (unreported) to cement the argument.

On his part, the respondent's learned counsel did not concede to the position adopted by the applicant's counsel. He thus, argued that, the provisions of law under which the application was made apply only when there is a pending appeal before this court. They cannot apply in this present matter where there is essentially no any pending appeal upon the applicant's appeal being struck out. The proper provisions under which the applicant could bring the application are those of Regulation 25 (1) of the Land Disputes Courts (District Land and Housing Tribunal) Regulations, 2002 (GN. No. 174 2003), hereinafter called the GN. These provisions permit a judgment debtor of a decree issued by the DLHT to apply for stay of execution when there is no any pending appeal before this court.

The respondent's counsel further contended that, in law, one of the conditions for staying execution of a decree is whether the appeal has, *prima facie*, a likelihood of success. He cited a decision by the CAT in **Tanzania Electric Supply Company (TANESCO) v. Independent Power Tanzania Ltd (IPTL) and Two Others [2000] TLR. 324** to cement the stance. He thus, argued that, this court cannot, properly

entertain the application on merits for want of the pending appeal, hence the application at hand is incompetent.

Moreover, the respondent's counsel submitted that, the application is overtaken by event since the suit premises has already been auctioned, there is thus, nothing to stay.

In her rejoinder submissions, the applicant's counsel reiterated the contents of her submissions in chief. She similarly contended that, the applicant is not sure that the respondent has auctioned the disputed premises. If she did so, that was against the procedure since the applicant was not informed of the auction. She further submitted that, the applicant could not apply for staying execution before the DLHT since its record had been forwarded to this court for appeal purposes.

I have considered the arguments by the parties, the record and the law. In fact, the parties do not dispute that currently there is no any pending appeal before this court between the parties regarding the matter that was before the DLHT mentioned above. What is pending before this court, is only the application for extension of time to file the intended appeal out of time. Indeed, I agree with the consensus of the parties since the position of the law is that, once a matter is struck out, nothing remains in court. The status of the parties reverts back to the previous position as if nothing had been filed in court. The major issue before me is, thus, as shown above, i. e *whether or not this application is competent*.

In my settled view, the circumstances of the matter at hand do not attract answering the major issue affirmatively. This follows the following

reasons: in the first place, the provisions under which the application was based do not give this court any jurisdiction to stay the execution in the case at hand. These provisions, as rightly contended by the respondent's counsel, apply only when there is a pending appeal before this court. Actually, the learned counsel for the applicant is erroneously reading the provisions of law under discussions in isolation of other legal aspects and provisions of the law. The heading of Order XXXIX of Cap. 33 for example, is titled "APPEALS FROM ORIGINAL DECREES." Headings of parts of written laws are part of the written law as per section 26 (1) of the Interpretation of Laws Act, Cap. 1 R. E. 2019. Such headings must therefore, take a guide on the construction of statutory provisions under them. Otherwise, there would be no need for the draftsman to divide statutes into various parts, divisions, subdivisions and headings.

The stance underscored above on headings of parts of statutes is supported by other legal principles. It has been legally underscored for instance that, the legislature inserts every part of statutory provisions for a purpose and the legislative intention is that, every part of the statute should have effect; see the observation by the CAT in **Republic v. Dodoli Kapufi and another, Criminal Revision No. 1 of 2008 (C/F No. 2 of 2008), Court of Appeal of Tanzania at Mbeya** (unreported). This was a criminal matter yes, but the principle it propounded apply *mutatis mutandis* in construing statutory provisions related to civil matters like the one under consideration.

Furthermore, the usefulness of headings of parts in statutes has been underscored by scholars. **Dworkin, G.,** in the book of "**Odgers'**

Construction of Deeds and Statutes, 5th Edition, Universal Law Publishing Co. Pvt. Ltd, Delhi, 1967, p. 311-312," underscored that, a heading is a prefix to a set of sections of statutes and is regarded as a preamble to them. The sections under a heading must be read in connection to it and interpreted by the light to it. A heading is considered as giving the key to construction of the section under it, unless the wording is inconsistent with such construction.

The respect to headings of parts in statutes in construing statutory provisions was also sufficiently demonstrated by the CAT in the case of **Fredric Kamikola and another vs. Deocres Rugalama, Civil Revision No. 9 of 2010, CAT, at Mwanza** (unreported). In that case, the CAT heavily relied upon the headings of parts III and IV of the Magistrates Court Act, Cap. 11 R. E. 2002 (now Cap. 11 R. E. 2019) in deciding the issue of whether or not a Resident Magistrate with Extended Jurisdiction had jurisdiction to entertain appeals originating in primary courts. Through that course, the CAT held that, the magistrate lacked that jurisdiction (by that time before the law was amended). The CAT thus, validated the significance of headings of parts in written laws in construing statutory provisions under the heading.

It follows thus, that, according to the heading of Order XXXIX of Cap. 33 quoted above, one must conclude that, this part of the statute relates to appeals only and not to applications for extension of time to file intended appeals out of time. The heading must thus, be considered in construing the provisions of law at issue. Other provisions of order XXXIX, which carter for appeals, must also be considered together.

In fact, the applicant's counsel could not also ignore the provisions of Regulation 25 (1) of the GN cited by the respondent's counsel (supra). These provisions must be read together with regulation 24 of the same GN. According to these provisions, a party who is aggrieved by a decision of a DLHT has to appeal to this court. However, he may apply for stay of execution of the decree or order before the same DLHT at any time before the same is executed. Regulations 25 (1), (2) and (3) of the GN set the procedure to be followed before the DLHT upon an application for stay of execution is made before it. Ultimately, Regulation 25 (4) of the same GN gives powers to the Chairman of the DLHT to stay execution, i. e. when the execution is not effected yet. Now, since the applicant categorically stated in the affidavit and through the submissions by his counsel, that the execution has not been effected yet, she cannot avoid the legal requirement to file the application for stay before the DLHT, as long as it is not disputed that there is no any pending appeal before this court.

The argument by the learned counsel for the applicant that the applicant could not apply for stay of execution before the DLHT because its record was forwarded to this court is not tenable since it is not supported by any law. Besides, the process of forwarding the record of the DLHT to this court and back to the DLHT is mainly administrative. The record can thus, easily be returned to the DLHT as the proper court for purposes of entertaining the application for execution.

The position that this court has powers to stay execution only where there is an appeal is also supported by the **TANESCO v. IPTL case** (supra) relied upon by the respondent's counsel. In fact, since one of the

conditions to be considered in an application for staying execution is the chances of success for the appeal, makes it obligatory that an application for staying the execution of an original decree of this nature, must be made only where there is a pending appeal. Otherwise, it will be difficult for the court to determine that application. In my view, there is a great difference between a pending appeal before this court on one hand and a pending mere application for extension of time to file the intended appeal out of time. That application for extension of time implies only an intention to appeal, but not the actual appeal. The application may be granted or dismissed as correctly contended by the learned counsel for the respondent. It is for this reason, I believe, the law cited above requires the existence of an appeal before an application for staying execution is sought.

I have also considered the precedents cited by the learned counsel for the applicant. Nonetheless, I distinguish both of them on the following grounds: As to the **Aliance One case** (supra) I am of the view that, this court did not decide that wrong or non-citation of each and every enabling provisions can be ignored. Its decision was to the effect that, where the wrong or non-citation of enabling provisions exists, but the court has the requisite jurisdiction to grant the prayers sought by the applicant, then the error is negligible and can be rectified on and there by inserting the correct enabling provisions. However, this is not the situation is the matter at hand. This is because, as I demonstrated earlier, since the execution of the decree has not been effected, and since there is no any pending appeal before this court, the law vests the jurisdiction to stay the execution of the

decree in the DLHT and not in this court. This court thus, lacks the jurisdiction at all.

Regarding the **Samson Ngw'arida case** (supra) I am settled in mind that, the CAT in that case did not consider the non-citation of an enabling law in an application. It only considered the non-citation of relevant provisions of the law in a notice of preliminary objection. It then observed that, such non-citation could not deter the delivery of substantive justice. In the case at hand, the non-citation is on the enabling provisions in the application and not in the notice of preliminary objection, hence the distinction of the precedent.

Furthermore, the applicant's counsel tried to hide face under the principle of Overriding Objective. Nevertheless, she did not elaborate the principle and explain as to how it can rescue the application. Certainly, the principle of Overriding Objective has been recently underlined in our law vide see section 6 of the Written Laws (Miscellaneous Amendments Act) (No. 3) Act, No. 8 of 2018 (Act No. 8 of 2018). These provisions amended Cap. 33. The amendments added new sections 3A and 3B to the statute. They essentially require courts to deal with cases justly, speedily and to have regard to substantive justice as opposed to procedural technicalities which are also known as legalism. The principle was also underscored by the CAT in the case of **Yakobo Magoiga Kichere v. Peninah Yusuph, Civil Appeal No. 55 of 2017, CAT at Mwanza** (unreported).

However, the principle of Overriding Objective, in my concerted view, did not come to absorb the parties' violations of each and every rule of procedure. It is not thus, a broad-spectrum antidote for every procedural

error. That principle cannot, in fact, be applied mechanically to suppress or bulldoze other significant legal principles or rules the purposes of which are also to promote justice and fair trials. This is the envisaging that was recently articulated by the CAT in the case of **Mondorosi Village Council and 2 others v. Tanzania Breweries Limited and 4 others, Civil Appeal No. 66 of 2017, CAT at Arusha** (unreported). In that case, the CAT declined to apply the principle of Overriding Objective amid a breach of an important rule of procedure. In my settled opinion, the irregularities discussed above, cannot be cured by resorting to the principle of Overriding Objective.

Owing to the reasons show above, I answer the issue posed above negatively to the effect that, the application is incompetent. I accordingly strike it out with. It is so ordered.

THE HIGH COURT OF TANZANIA

J.H.K. Utamwa

JUDGE

26/2/2020

22/05/2020.
CORAM; Hon. JHK. Utamwa, J.
Applicant: present Mr. Ambonisye (Director) and Ms. Juliana Malunda, advocate.
Respondent; Mr. Emmanuel Mwakyembe, advocate.
BC; Mr. Patric Nundwe, RMA.

Court: Judgment delivered in the presence of the Director of Applicant, Ms. Juliana Malunda, advocated for the applicant and Mr. Emmanuel Mwakyembe, advocated for the respondent, in court, this 22nd May, 2020.

JHK. UTAMWA.

JUDGE

22/05/2020.