IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: LUBUVA, J.A., MROSO, J.A., And MUNUO, J.A.)

CIVIL REFERENCE NO. 4 OF 2002

B E T W E E N

BANK OF TANZANIA. . . . . APPLICANT

A N D

DEVRAM P. VALAMBHIA. . . . . RESPONDENT

(Reference to the Full Court against the Ruling of the Single Judge of the Court of Appeal of Tanzania at Dar es Salaam)

(Ramadhani, J.A.)

dated the 27th day of March, 2002

in

Civil Application No. 15 of 2002

R U L I N G

LUBUVA, J.A.:

This reference arises from the decision of a Single Judge of this Court in Civil Reference No. 2 of 2000, dismissing the application for stay of execution by the applicant.

The background giving rise to the matter has been so ably set out by the learned Single Judge in the ruling that it is hardly necessary for us to make a repetition of it in this ruling. However, in order to facilitate an easy appreciation of the contentious, issues in this application, we think it is desirable to highlight the bare essentials of the background.

In High Court Civil Case No. 120 of 1989, Devram P. Valambhia, the respondent, obtained a decree against Transport Equipment Limited for the sum of U$ 55,099,171.66. On 4/5/2001, a Garnishee Order was issued by the High Court directing the Bank of Tanzania, the applicant, to pay this amount to the Registrar of the High Court

.../2

from the accounts of the Government of Tanzania. The applicant filed objection proceedings praying for among other orders, the setting aside of the Garnishee Order. The grounds for the objector proceedings were that the Garnishee Order was tainted with illegality because it was issued contrary to the law. Dismissing the application on 21.1.2002, the learned judge of the High Court, (Chipeta, J.) held that the Garnishee order was properly issued and served on the applicants. It was further held that the order should have been obeyed. The applicants were aggrieved, hence notice of appeal was filed on 21.1.2002. Pending the determination of the appeal, the applicant filed an application in this Court seeking stay of execution. As stated earlier, a single judge of the Court dismissed the application and also struck out the notice of appeal. From this decision, this reference has been preferred.

Before the learned single judge, a preliminary objection was raised on behalf of the respondent. It was contended that there was no proper notice of appeal upon which an order for stay of execution could be founded. The single judge was urged to strike out the notice of appeal. Briefly stated, the following was the essence of the argument in support of the preliminary objection: that section 5 (1) of the Appellate Jurisdiction Act, 1979 provides for appeals to the Court except where any other written law provides otherwise. It was contended that this matter before the High Court and the Single Judge falls within the provisions of Order 21 Rule 62 of the Civil Procedure Code, 1966 which is the law providing otherwise. In that case it was further submitted that the applicant had no right of appeal, instead, a suit should have been instituted. For that reason, as the notice of appeal was misconceived, the single judge was urged to strike out the notice of appeal.

.../3

On the other hand, on behalf of the applicant it was strongly argued that Rule 62 of Order 21 of the Civil Procedure Code, 1966, does not apply to the instant case which involves money by use of a garnishee order. It was submitted that the attachment of money falls under the provisions of Rule 45 of the Civil Procedure Code 1966 which is in pari materia with rule 46 of the Indian Code of Civil Procedure. It was further submitted that the law in Tanzania is similar to the law obtaining in England where there is a right of appeal. Therefore, it was urged that Order 21 Rule 62 does not provide otherwise and therefore the applicant had a right of appeal.

The learned single judge was satisfied that Order 21 Rule 62 of the Civil Procedure Code 1966, is the law envisaged under the provisions of section 5 (1) of the Appellate Jurisdiction Act, 1979 which provides otherwise. Consequently, he held that the applicant did not have a right of appeal to the Court and that the notice of appeal was misconceived, consequently, it was struck out.

In this reference, Mr. C. Tenga and Mr. Mbwambo, learned counsel appeared for the applicant. Mr. Tenga strenuously assailed the learned single judge in holding that the applicant had no right of appeal to this Court in garnishee proceedings. He maintained that Order 21 Rule 62 of the Civil Procedure Code, 1966 is not the law that provides otherwise in terms of section 5 (1) of the Appellate Jurisdiction Act, 1979. According to Mr. Tenga, rule 62 is not relevant to the instant case because in Tanzania there is no express provision in the Civil Procedure Code for a garnishee order or the garnishee. He further argued that since Order 21 Rule 62 did not apply to the case, it was proper for the Court to draw an inspiration from England or India whose provisions are in pari materia with Order 21 Rule 45 in Tanzania to enable the applicant to challenge on

.../4

appeal the decision in garnishee objector proceedings. Furthermore, Mr. Tenga contended that the fact that Rule 62 of Order 21 is couched with the words "subject to the result of such suit, if any, the order shall be conclusive" does not mean that the order shall not be appealable. Had the legislature intended that an order under rule 62 should not be appealable, it would have been stated so. As it is, he insisted that the applicant had a right of appeal and that the notice of appeal was proper. He said that had the single judge considered the matter in this light, he would have granted the application for stay of execution. On appeal, Mr. Tenga stressed, the legality of the garnishee order would be looked into.

Mr. Maira, learned counsel for the respondent, vigorously opposed the preliminary objection. Apparently, he had also represented the respondent in the High Court. It was his submission that the provisions of Order 21 Rule 62 which are unambiguously clear, is the law which provides otherwise in terms of section 5 (1) of the Appellate Jurisdiction Act, 1979. That being the position of the law in Tanzania, no appeal lies to this Court, Mr. Maira charged. He further submitted that in objector proceedings as was the case in this matter, the party against whom the order was made, may opt to institute a suit to establish its right over the property attached. He also stated that under the provisions of rule 62 subject to the result of the suit, the order shall be conclusive, which according to him means that the decision is not appealable. In support of his submission that the expression "shall be final or conclusive" means that the decision is not appealable,

.../5

Mr. Maira referred to the Indian cases of: Mohamed Ebrahim Moolla versus S.R. Jandass 1923 A.I.R. 94 and Phoman Singh V A.J. Wells A.I.R. 1923 Rangoon 195. He also referred to another Indian case of Maung Ba Han V S.M.A.R.M Firm AIR 1934, Rangoon 230 for the contention that where an application under rule 57 of Order 21 is dismissed, the proper remedy is the institution of a suit under rule 62 order 21.

We shall first deal with ground four in the application for reference. In this ground, the complaint is that the learned Single Judge erred in holding that the English practice and procedure does not apply in Tanzania in Garnishee proceedings. It is to be observed that the learned Single Judge arrived at this conclusion because in his view though the English law and practice was similar but was not the same, it did not apply in Tanzania where the law is clear and unambiguous. From the record it is apparent that the learned Single Judge closely examined the relevant provisions of the Civil Procedure Code, 1966 in Tanzania with regard to the attachment of money. These relate to Order 21 Rules 40 to 56 and 57 to 62 of the Tanzania Civil Procedure Code, 1966. From our reading of Mulla, The Code of Civil Procedure Act, 1908 Abridged Thirtieth Edition, these are in pari materia with Order 21 Rules 46 to 63 of the Indian Code. It is common knowledge that a number of legislations in Tanzania which were enacted before independence have close similarity with corresponding legislations in England and India. The reason is not far to seek, the English law was introduced in Tanzania through India. For instance, this Court alluded to the similarity in the law of banking and garnishee orders applicable in Tanzania and England in the case of Felix Rutazengelera v Co-operative and Rural Development Bank (1966) T.L.R. 382. With respect, we agree with the learned Single Judge that apart from pronouncing itself on the similarity

.../6

of the law in England and Tanzania in the law of banking the Court did not decide in that case that in matters pertaining to garnishee orders, the law of England has to be applied in Tanzania. Similarly, the learned single judge compared the provisions of rule 45 of the Civil Procedure Code, 1966 in Tanzania with Rule 46 Order 21 in India which, as observed earlier, are in pari materia. Finally the single judge came to the conclusion that once the investigation of the objection to attachment proceedings was completed in terms of rules 57 to 60 of the Civil Procedure Code, then rule 62 of Order 21 came into play. This, as already shown, was vehemently challenged by Mr. Tenga, for the applicant.

At this stage, we think it is desirable to consider whether in dealing with the garnishee order the learned Single Judge was correct in holding that the applicable law in Tanzania was rule 62 order 21. We agree with Mr. Tenga that in Tanzania, there is no express provision in the Civil Procedure Code for either the garnishee or garnishee order. However, this fact alone we think is not enough to justify Mr. Tenga's contention that the Court should draw an inspiration from India or England in dealing with the garnishee order. From our reading of the equivalent provisions of the Indian Code of Civil Procedure and in particular, rules 46 to 63 order 21, it is clear that they are similarly worded as the corresponding rules in the Tanzanian Code. It is to be observed that these provisions deal with both movable and immovable property including money decrees which can be satisfied by use of garnishee orders. Therefore, the mere absence of an express mention of garnishee or garnishee orders in the Civil Procedure Code of Tanzania is no ground for faulting the Single Judge in refusing to accept the invitation by

.../7

the applicant's counsel to draw an inspiration from India or England. For one thing, and as just stated, the Indian Code does not also have an express provision for a garnishee or garnishee order.

Therefore, we are in agreement with the Single Judge in his conclusion that the applicable law in Tanzania was rule 62 order 21 of the Civil Procedure Code 1966. First, it is common knowledge that the courts in Tanzania are not bound by decisions of the courts in England or India. Of course, there is no gainsaying that the decisions of the courts in England and India are of great persuasive authority. Depending on the circumstances of the case and the applicable law in the country, it is open for the courts in Tanzania to apply the principles of law or draw the inspiration from decisions of the courts in other jurisdictions including India or England. In this case the learned single judge having declined to apply the law and practice obtaining in India or England in preference to the law obtaining in Tanzania, namely Order 21 Rule 62 in objection proceedings, cannot, in our view be faulted.

From the scheme of the Civil Procedure Code 1966, it is apparent to us that once the investigation of objection to attachment proceedings in terms of rules 57 to 60 are completed, rule 62 Order 21 comes into play. In this case, after the attachment objector proceedings was disallowed in the High Court (Chipeta, J.) on 21.1.2002, the learned single judge held that the order was conclusive, unless subject to the result of a suit, if it is instituted. The learned single judge took the view that the use of the word "conclusive" in rule 62 means that there is no right of appeal against the order disallowing the objector attachment proceedings. As submitted by

.../8

Mr. Maira, we are in agreement with the learned Single Judge in the interpretation of rule 62 order 21 which reads:

> 62 - Where a claim or an objection is preferred, the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute but, subject to the result of such suit, if any, the order shall be conclusive. (underlining supplied).

Our reading of the rule extracted above, makes it abundantly clear that if no suit is instituted by the party against whom the order is made under this rule, and subject to the result of the suit, the order is conclusive. In our view, in the course of the suit the party against whom the order was made can among others, challenge the validity or otherwise of garnishee order as well as establishing its rights. The decision from such a suit would, we venture to think, be open to appeal. On the other hand, if no suit is preferred, like the Single Judge, we are of the view that the order remains intact and conclusive. That in our view is the import of rule 62 order 21.

Mr. Maira, had strenuously urged that the word "conclusive" has the same meaning as "final". On the other hand, Mr. Tenga, violently assailed this submission. According to Mr. Tenga, the wording "conclusive" in rule 62 order 21 does not preclude the right of appeal against the order. We agree with Mr. Tenga's submission that if the intention of the legislature was that the order shall not be appealable, it should have been stated so. However, it is to be observed that for a proper appreciation of the law, rule 62 order 21

has to be read in its wholistic context. In our view, rule 62 is worded such that, upon a proper construction, its rendering has the same effect as rule 7 order XLII of the Civil Procedure Code, 1966 in which it is expressly stated that there is no right of appeal. In this case, unlike rule 7 Order XLII, rule 62 provides an alternative of filing a suit which, subject to the result of the suit, the order is final and unappealable. So, as held by the learned Single Judge, if the option of filing a suit is not taken, the order is conclusive.

As shown earlier, the word "conclusive" was central in the submissions by counsel for both parties. While Mr. Maira strongly contended that it means final and not appealable Mr. Tenga was firmly of the view that it was not final and that it was open to appeal. In the Indian cases of Phoman Singh Versus A.J. Wells AIR 1923 Rangoon 195 and Maug Ba Ha Versus S.M.R.M. Firm A.I.R. 1934, Rangoon 230 availed to us, the Rangoon High Court in India had occasion to address the issue while exercising its revisional jurisdiction. Dealing with a similar situation based on an order made under Order 21 Rule 63 of the Indian Code of Civil Procedure, the equivalent of Order 21 Rule 62 in Tanzania; before the 1976 amendment in India, the Court stated inter alia:

> In my opinion where the order in question has, after proper investigation, been properly passed under Order 21, Rules 59 - 63, (the equivalent Order 21 Rules 57 - 62 in Tanzania) Civil Procedure Code, this Court should not, even though the order be erroneous, interfere on revision since there is a remedy by suit. (emphasis supplied)

.../10

> — Hence where an application under Order 21 Rule 58 is dismissed the proper remedy is not a revision application from order of dismissal but a suit under Order 21 Rule 63

From this, it is evident that even to the restricted limit of revision, the Court does interfere with the order made under Order 21 Rules 59 - 63 in India, the equivalent of Order 21 Rules 57 - 62 in Tanzania after the investigation is completed. In the instant case, the investigation was duly carried out and an order disallowing the application was passed. Consequently, the order made under Rule 62 would not be interfered with even on revision since another remedy by way of a suit is provided. This is the view that the learned Single Judge expressed with which we are respectfully in agreement.

In Phoman Singh, (supra) the Rangoon Court went further to address the interpretation of the word "conclusive". It was the view of the court that the word "conclusive" has the same meaning as "final" which also means unappealable. So, if the court was to draw an inspiration from India as urged by Mr. Tenga, that would be of no avail to him because the conclusion would be the same as that of the Single Judge. That is, the order made under Rule 62 Order 21 is conclusive subject only to the result of the suit if instituted.

In fine, we are satisfied that Rule 62 Order 21 of the Civil Procedure Code, 1966 is the law in Tanzania regarding objector proceedings. We agree with the learned Single Judge that as envisaged under section 5 (1) of the Appellate Jurisdiction Act, 1979, Rule 62 Order 21, provides otherwise with regard to appeals to this Court.

It is therefore apparent to us that even in India, the position of the law until the amendment was effected in 1976 was that the right of appeal from the decision of the court in objector proceedings upon investigation was curtailed. It was after the amendment of Rules 46A to 46I in 1976, that the Indian Code of Civil Procedure expressly provided under rule 46H for a right of appeal with regard to orders made against a garnishee disputing liability or does not pay forthwith into court. The position in Tanzania still remains as it stood in India prior to the 1976 amendment. We are therefore in agreement with the learned single judge that, in terms of the provisions of rule 62, the applicant does not have a right of appeal. Having taken this view of the matter, we do not think that it is necessary to deal with the other aspect touching on the notice of appeal. This is for the obvious reason that if there was no right of appeal as held by the learned single judge, the notice of appeal filed was not proper and hence of no legal effect. In the circumstances, we think with respect, that the striking out of the notice of appeal was consequential to the view taken on the right of appeal.

Finally, there is the issue of cost in which Mr. Tenga and Mr. Mbwambo were held by the learned single judge personally liable, jointly and severally for two counsel. Mr. Tenga's complaint was based on two grounds. First, that it was not shown before the learned single judge that the costs were properly incurred or that negligence was attributed to the counsel. Second, that the counsel were condemned to costs punitively without being given the opportunity of being heard. Mr. Maira, learned counsel for the respondent apparently conceded that there was no basis shown for

.../12

holding the advocates personally liable. From the ruling of the learned single judge, apart from the fact that the costs were asked for by counsel for both parties, the reasons are not apparent. We think, with respect, that had the learned single judge considered these factors, he would have come to a different conclusion with regard to the costs.

All in all therefore, the application for reference is dismissed. It is however ordered that the order for costs charged personally against the advocates, Mr. Tenga and Mr. Mbwambo is quashed and set aside.

Costs are granted to the respondent.

DATED at DAR-ES-SALAAM this 20th day of March, 2003.

D.Z. LUBUVA
JUSTICE OF APPEAL

J.A. MROSO
JUSTICE OF APPEAL

E.N. MUNUO
JUSTICE OF APPEAL

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

(A.G. MWARIJA)
SENIOR DEPUTY REGISTRAR