IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MBAROUK, J.A., MASSATI ,J.A., And JUMA,J.A.)

CIVIL APPLICATION NO. 72 OF 2015

ATTORNEY GENERAL.....APPLICANT

VERSUS

THE BOARD OF TRUSTEES OF THE CASHWNUT INDUSTRY DEVELOPMENT TRUST FUND.....1st RESPONDENT

HAMMERS INCORPORATION CO. LTD. .....2nd RESPONDENT

(Application for stay of execution of the decree of the High Court of Tanzania (Commercial Division) at Dar es Salaam)

(Nyangarika, J)

Dated 31th day of July, 2014

in

Commercial Case No. 108 of 2013

.....

RULING OF THE COURT

23rd April & 13th May, 2015

MASSATI, J.A:

The Attorney General ("the Applicant") has filed a Notice of Motion in this Court under Rules 4(2) (b) and (c), 11(2)(d)(i) and (e) of the Tanzania Court of Appeal Rules 2009 ("the Rules") and sections 17(1) (a) and (2), (6) and 8(1)(f) of the Office of the Attorney General (Discharge of Duties) Act No. 4 of 2005 to move this Court to grant two orders; namely; one; Stay of execution of the judgment and decree of the High Court Honourable Nyangarika, J dated 31st July, 2013, pending hearing and determination of an application for extension of time and application for extension of time

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and application for revision; and two; immediate restoration of the attached government monies totaling Tshs 953,142,797.05 from account number 05150237061700 in the name of the **CASHEWNUT INDUSTRY DEVELOPMENT TRUST FUND** which has been deposited with the Registrar, Commercial Division of the High Court Tanzania.

The application is supported by the affidavit of GABRIEL PASCAL MALATA, Principal State Attorney who also appeared for the Applicant at the hearing of the application.

The application is against two Respondents, namely, the **BOARD OF TRUSTEES OF THE CASHEWNUT INDUSTRY DEVELOPMENT TRUST FUND** (the 1st Respondent) and **HAMMERS INCORPORATION CO. LTD** (the 2nd Respondent).

At the hearing, the 1st Respondent was represented by Mr. Peter Kibatala, learned counsel, while the 2nd Respondent was represented by Mr. Ndurumah Majembe, and Mr. John Mhozya, learned counsel.

However, before the application was called on for hearing, Mr. Majembe rose to argue a set of preliminary objections, notice of

which he had earlier on filed. In total, there were 12 of them, but before the commencement of the hearing, he abandoned grounds 2,3, and 6. In the course of hearing he also abandoned grounds number 5,9,10 and 11, and so ended up arguing only 5 points of objections, which in his notice appear as numbers 1,4,7,8, and 12. Those objections are reproduced below for ease of reference:-

"1". *The Application is incompetent before the Court for failure to attach a copy of the Decree sought to be stayed contrary to Rule 11(2) (c) of the Tanzania Court of Appeal Rules, 2009.*

"4" *The Applicant not being a party in the Original proceedings In the High Court (Commercial Division) at Dar es Salaam in Commercial Case No. 108 of 2013 has no lucus standi to make this Application.*

This honourable Court does not have jurisdiction to grant the orders prayed in item (b) of the Notice of Motion for reasons that:

a. *That the money in question is still the subject of a valid and subsisting order of this Court which ordered the said monies to be retained as*

security for an order of stay of execution in Civil Application number 156 of 2014.

b. *The Court has not been properly moved to issue the order prayed for as the Applicant has not cited the enabling provision empowering the Court to make such an order.*

c. *There are no facts on record which may vitiate the execution process to which the said monies are attached. If there were any such complaints/vitiating factors, which are disputed, the said process should be within the powers of the executing Court and not this honourable Court.*

"8". There is no Appeal or Application before this honorable Court against which the stay of execution prayed for can legally be pegged.

"12". The Applicant's intervention is irregular and a diversion of the course of justice because the

orders sought herein can be sought and obtained by the 1st Respondent who is party to the proceedings and ably represented in this Court".

which in this ruling shall be referred to as the first, second, Third, fourth and fifth objections respectively.

Arguing on the first objection, Mr. Majembe submitted that the application for stay was defective, because it did not attach a decree sought to be stayed contrary to Rule 11(2)(c) of the Rules. He referred us to the decision of the Court in **HAMMERS INCORPORATION CO LTD v BOARD OF TRUSTEES OF CASHEWNUT INDUSTRY DEVELOPMENT TRUST FUND,** Civil Application No. 213 of 2014 (unreported) as authority.

Mr. Kibatala, and Mr. Malata took turns to oppose this objection. They jointly submitted that although it was true that the decree was not attached, the original ruling and both the garnishee orders nisi and absolute were attached. This was sufficient for the purposes of an application under Rules 4(2)(b) and (2)(c) of the Rules. In addition, Mr. Malata submitted that the requirement to attach a decree is predicated upon the wording of Rule 11(2)(c) of

the Rules, which essentially applies to parties to an appeal. The applicant in this case was not a party to an appeal. So strictly speaking, Rule 11(2)(c) of the Rules did not apply, he argued.

In reply, Mr. Majembe submitted that a garnishee order was not a decree anticipated in Rule 11(2)(c) of the Rules and so his arguments still held.

On the second objection, Mr. Majembe submitted that the applicant had no *locus standi* to institute the application as he did not notify and satisfy the Court of his interests in the matter, in terms of section 17(2) of Act No.4 of 2005.

Mr. Malata and Mr. Kibatala jointly submitted that, in terms of section 17(2) (b) of the Act and paragraphs 2,5,7,9 30, and 31 of the affidavit, the applicant had shown the necessary interest to institute this application. Mr. Malata went on to argue that, since the applicant was not a party to the proceedings in the Court below and as the government interests were at stake, he had the right to apply for revision to this Court and pending an application for extension to file such application for revision, the applicant could file an application for stay of execution.

In reply, Mr. Majembe, countered the above argument by insisting that in order to establish *locus standi*, the applicant had to satisfy the Court that the matter had a public interest; and that the applicant has failed to do so.

On the third ground, Mr. Majembe submitted that, this Court did not have jurisdiction to grant the order sought in that:

(a) *The money in question was still the subject of a valid and subsisting order of this Court.*

(b) *The applicant has not cited the enabling provision empowering the Court to make such an order*

(c) *There are no facts on record which may vitiate the execution process to which the said monies are attached.*

Mr. Kibatala, submitted that the first leg of this preliminary objection is purely factual and requires to be determined in the hearing of the application itself. Alternatively, since the application also seeks for the restoration of the monies in addition to stay, and since the moneys were not deposited as security, this Court had jurisdiction to make the order sought.

On the second leg of the objection, the learned counsel submitted that so long as Rule 4(2) of the Rules was cited, the Court was properly moved to make the orders sought. With regard to the third leg of the objection, Mr. Kibatala submitted again that this was purely factual and not a pure point of law. Mr. Malata concurred with Mr. Kibatala's submission on this objection and had nothing useful to add.

However, in his reply submission, Mr. Majembe reiterated his earlier argument that the garnishee order was not deposited as security and that unless vacated, this Court cannot go into it again. He went on to submit that what the applicant is seeking to do is to undo what has already been done, which was an abuse of process.

Regarding the fourth objection, Mr. Majembe submitted that as there was no pending substantive appeal or application in this Court, the application for stay of execution was untenable.

Both Mr. Malata and Mr. Kibatala, submitted that so long as there is pending in this Court, an application for extension of time to apply for revision, the Court, has powers to make an order of stay of execution. Mr. Malata informed the Court that the application for

extension of time has in fact already been heard by Mussa JA, and the 2nd Respondent was aware of it.

In reply, Mr. Majembe submitted that he was of the strong view that, to justify an application for stay of execution there must be, pending, a substantive, not a preliminary application such as an application for extension of time.

On the fifth objection, Mr. Majembe loudly lamented in effect, that, this application was irregular and an abuse of process, because the applicant's intervention was unnecessary as the 1st Respondent could effectively defend the alleged interests. But Mr. Kibatala, supported all the way by Mr. Malata, submitted that this objection was also basically factual, and required further judicial investigation before determining it. In his rejoinder submission, Mr. Majembe insisted that this merited to be decided as a preliminary objection, because it raised a point of law touching on the propriety of the applicant's application.

With those submissions Mr. Majembe prayed for the striking out of the application on the grounds of incompetency; while Mr. Malata and Mr. Kibatala, prayed that the objections be overruled, and the application be set for hearing on merit.

We shall begin by a brief resume on the law relating to preliminary objections. As we understand it, a preliminary objection should raise a pure point of law based on ascertained facts from the pleadings or by necessary implication, not on facts which have not been ascertained; and even if ascertained if argued, a preliminary objection should be capable of disposing of the case. A preliminary objection cannot also be raised if what is sought is the exercise of judicial disrection.(**See MUKISA BISCUITS MANUFACTURING CO Vs WEST END DISTRIBUTORS LTD** (1969) EA.701, followed in **COTWU (T) OTTU UNION AND ANOTHER Vs HON IDDI SIMBA MINISTER OF INDUSTRIES AND TRADE AND OTHERS** (2002) TLR. 88), among others.

It appears to us therefore that a preliminary objection rests on five assumptions:

(i) It must be a pure point of law;

(ii) It must be based on ascertained facts;

(iii) It must arise from the parties' pleadings or necessary inference thereto;

(iv) It must not touch on the Court's exercise of judicial discretion; and lastly;

(v) *If the objection is argued, it must be able to dispose of the matter before the Court completely.*

With the above parameters, we think that, based on the learned counsel's arguments, there are matters of fact which need to be ascertained, in handling, **the second objection, points (a) and (c) of the third objection,** and the **fifth objection.** We shall demonstrate.

In the **second objection,** the argument has been whether or not the applicant has *locus standi in* the matter. Section 17(2) of the Office of the Attorney General (Discharge of Duties) Act No. 4 of 2005 is at the epicenter of the controversy. This provision requires the Attorney General, firstly, to notify the court or tribunal, of his intention to join in the suit or proceeding, and secondly, to satisfy the court or tribunal of the public interest or public property involved. Mr. Majembe has submitted that the applicant has failed to satisfy the Court that there is public interest involved. Mr. Malata, has claimed that the money in question is government property, thus there is public interest.

Now in our view whether or not the money in question is government money, is a question of fact that will have to be ascertained by adduction of evidence. It cannot be resolved in a preliminary objection. The fifth objection is also linked to this objection. Only after determining whether or not, the applicant has *locus standi*, can it properly be determined whether the process is irregular or an abuse of process. Mere arguments from the bar on a preliminary objection cannot dispose of the issue. In part (a) of the third objection, counsel have locked horns on whether the money was deposited as security for an order of stay, or just garnisheed in execution. With these lingering doubts, it cannot be said that those facts have been ascertained. The Court will have to go into evidence and mature consideration to arrive at a proper decision. Besides, we do not think that the resolution to this issue would finally dispose of the matter before us. As such, it too, does not qualify as a preliminary objection. Similarly, part (c) of the third preliminary objection, invites us to see if there are or there are no "facts on record that may vitiate the execution process". The objection is self-defeating when it says that if there were any vitiating factors, the

same are disputed. As demonstrated above, once there is a dispute over any facts, it ceases to be a preliminary objection.

From the above analysis, we are really left with the **first, part (b) of the third** and the, **the fourth objections,** on which we now proceed to rule.

In the first objection, the contention is that there is no decree attached to the application for stay as required under Rule 11(2)(c) of the Rules. Mr. Malata, and Mr. Kibatala, admit so. We also agree that no decree is attached to the application at hand. We are also aware of the legal proposition that an application for stay of execution under Rule 11(2)(c) of the Rules, in which a copy of the decree is not attached, would be incompetent. (**See NATIONAL HOUSING CORPORATION Vs ETTIENES HOTEL,** Civil Application No. 175 of 2004, and **EAST AFRICAN DEVELOPMENT BANK Vs BLUELINE ENTERPRISES LIMITED** Civil Application No. 35 of 2003 (both unreported). But in those cases, the applications were for stay of execution pending appeals. In such cases Rule 11(2)(c) of the Rules was applicable.

However in the present case, Rule 11(2) (c) was not cited to support the application for stay, nor is the application preferred pending on appeal. Instead, the applicant has sought to move the Court under Rules 4(2)(b) and (c), and 11(2)(d)(i) and (e) of the Rules, among others. None of those rules require an applicant to attach a decree. This analysis is sufficient to dispose of the first preliminary objection which we find deficient and so proceed to overrule it.

We find it convenient to dispose part (b) of the third objection together with the fourth one, because they are related. Whereas part (b) of the third objection, criticizes the application for not citing an enabling provision, the fourth objection complaints that the application was incompetent in the absence of a substantive appeal or application pending in the Court.

It is trite law that where a party moves the Court, he must cite the specific provision of the law under which he seeks to do so for the Court to exercise its jurisdiction. This rule of practice from case law has now been crystallized into a statutory rule. It is Rule 48(1) of the Rules, which provides as follows:

"48(1) Subject to the provisions of sub rule (3) and to any other rule allowing informal application, every application to the Court shall be by notice of motion supported by affidavit. It shall cite a specific rule under which it is brought and state the ground for the relief sought."

There is, it is true, a thick string of case law, to the effect that failure to cite the enabling provision, renders an application incompetent. (**See NATIONAL BANK OF COMMERCE Vs SADRIDIN MEGHJI,** (1998) TLR. 503

In his submission, Mr. Majembe used his arguments in the first objection to support part (b) of the third objection, to the effect that the applicant should have cited Rule 11(2) (c) of the Rules, in support of his application and that if that was the case, there ought to have been pending in Court, an appeal or application. Since there was no such appeal or application, the application for stay was incompetent. he argued.

In our considered view, Rule 11(b) and (c) of the Rules, strictly apply to applications for stay of execution pending appeals to the Court. We also agree that there is no pending appeal in this case preferred by the applicant. But does that deprive the Court of jurisdiction to entertain an application for stay, where there is no appeal?

The above question was answered by this Court in **SELCOM GAMING LIMITED Vs GAMING MANAGEMENT (T) LTD AND GAMING BOARD OF TANZANIA** (2006) TLR- 200 in which the Court held that, where, there was no provision governing an application for stay of execution pending an application for revision, the Court could invoke Rule 3(2)(a) and (b) of the Court of Appeal Rules, 1979 to entertain such an application. Rule 3(2) (a) and (b) of the 1979 Rules is similarly worded as Rule 4(2)(a) and (b) of the Rules.

In the present application, the applicant has cited Rule 4(2)(b) and (c) of the Rules among others, to support the application at hand. So, as it is, we agree with Mr. Malata and Mr. Kibatala that the application is properly before the Court.

With regard to whether there ought to be a substantive, not a preliminary application before an application for stay is entertained, we think that, the wording of Rule 4(1) and (2)(a) and (b) of the Rules, is wide enough to give discretion to this Court to go into any matter or give any order, if it is of the opinion that it is required in the interests of justice. So, whether or not to entertain such application is really in the discretion of the Court, and once judicial discretion is involved, it cannot be disposed of in a preliminary objection. With these remarks, we also overrule those preliminary objections.

In fine, we find that all the preliminary objections are devoid of substance. They are accordingly overruled with costs.

DATED at **DAR ES SALAAM** this 4th day of May,2015.

M. S. MBAROUK
JUSTICE OF APPEAL

S.A.MASSATI
JUSTICE OF APPEAL

I. H. JUMA
JUSTICE OF APPEAL

I certify that this is a true copy of the original

E. Y. Mkwizu
DEPUTY REGISTRAR
COURT OF APPEAL