IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MAKAME, J.A., RAMADHANI, J.A. And LUGAKINGIRA, J.A.)

CIVIL APPLICATION NO. 21 OF 2001
In the Matter of an Intended Appeal

BETWEEN

IGNAZIO MESSINA . . . . APPLICANT

AND

WILLOW INVESTMENTS SPRL . . . . .RESPONDENT

(Application for temporary injunction from the Judgment and Order of the High Court of Tanzania at Dar es Salaam)

(Kalegeya, J.)

dated the 19th day of November, 1998

in

Civil Case No. 4 of 1995

RULING

LUGAKINGIRA, J.A.:

In the course of arguing Civil Appeal No. 105 of 1998, learned counsel for the appellants Mr. Lameck Mfalila, made a passionate plea to the Court to halt the execution of the decree which is being challenged in the appeal on the ground that the exercise was fraught with considerable irregularities and spelt irreparable loss to the first appellant, now applicant herein. We found the plea rather unusual, coming as it did at that stage, and advised learned counsel to make a formal application and show the basis of the prayer. The application was duly filed by assisting counsel Ms Fatma Karume, and came on for hearing at the adjourned hearing of the appeal. Previously, however, counsel for the respondents, Mr. Rweikiza, had filed a notice of preliminary objections to the application which we heard and upheld. We reserved our reasons to a later occasion.

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The preliminary objections were four and stated thus:

1. That the application has been filed contrary to law and procedure which require that every application shall be heard by a single judge.

2. That the application is not brought in good faith and the applicant is not honest as can be seen in the supporting affidavit ...

3. That the supporting affidavit is incurably defective for containing extraneous matters by way of opinions, arguments, presumptions and contradictions ...

4. That the application is res judicata and the purported grounds and reasons therefor are not which can be said not to have been foreseeable during the earlier applications.

In respect of Objection 1, Mr. Rweikiza referred to Rule 55 of the Court Rules which requires that every application shall be heard by a single judge save that the judge may adjourn the application for determination by the Court. Ms Karume replied that Rule 55 provides for the manner of application and that the application was brought under Rule 3 (2) because there was no rule under which the application could have been made to a single judge.

We think the reply is interesting. Rule 55 does not provide for the manner of application but directs in no uncertain terms that "Every application shall be heard by a single judge ..." The manner of application is, of course, by notice of motion as provided under Rule 45. Moreover, this being an application for stay of execution, although ingeniously called an application for injunction, Rule 9 (2) (b) applies. In view of these express

provisions, it is not available to resort to Rule 3 (2) which can be resorted to only where no provision is made in the Rules. Once the application is made under the rules aforesaid, it has to be heard by a single judge and the Court has no jurisdiction in the matter unless the single judge sees it fit to adjourn the application for determination by the Court. The Court in this case directed for a formal application to be presented not because it considered itself as vested with jurisdiction to entertain the same but because it was taken aback by Mr. Mfalila's prayers and was keen to see the legal basis for same. As it turned out, no such basis was established.

Regarding Objection 2, Mr. Rweikiza pointed out that in paragraphs 13 and 14 of Captain Guiseppe Fedele's supporting affidavit to the application, it is denied that he, Fedele, gave instructions for cessation of operations in Dar es Salaam, apparently to frustrate the execution of the decree, but in paragraphs 29, 30 and 31 he admits stopping all operations in Tanzania. Ms Karume's reply to this was that the credibility of the deponent did not go to the competence of the application. We think, with respect, it does. An affidavit which is tainted with untruths is no affidavit at all and cannot be relied upon to support an application. False evidence cannot be acted upon to resolve any issue. The falsehood in this case goes to the root of the application because the applicant has already dishonestly frustrated the execution of the decree. The applicant cannot then turn around and ask the court to assist in staying or restraining execution. Hence even if the application were properly before us, but it was not, we could not have found our way to granting it.

Ms Karume did not in fact dispute Objections 3 and 4. In relation to the former she said arguments in Fedelela's affidavit can be expunged and in relation to the latter she insisted that this was not an application for stay but for an injunction, so it was not res judicata. We are not impressed. First, rules governing the form of affidavits cannot be deliberately flouted in the hope that the Court can always pick the seed from the chaff, but that would be abuse of the court process. The only assistance the Court can give in such a situation is to strike out the affidavit. Lastly, there is no dispute that an application for stay was previously made and refused by this Court in Civil Application No. 8 of 1998 and Civil Reference No. 8 of 1999, so the present application is res judicata. The basis of this application is that execution has been highly irregular and without transparency, but as we have informed Ms Karume at the hearing, matters to do with irregularities in execution should be dealt with in accordance with the provisions of Order 21, rule 76 of the Civil Procedure Code, 1966.

We upheld the objections for these reasons.

DATED at DAR ES SALAAM this 27th day of February, 2002.

L. M. MAKAME
JUSTICE OF APPEAL

A.S.L. RAMADHANI
JUSTICE OF APPEAL

K.S.K. LUGAKINGIRA
JUSTICE OF APPEAL

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

(F.L.K. WAMBALI)
DEPUTY REGISTRAR