

**IN THE HIGH COURT OF TANZANIA  
(COMMERCIAL DIVISION)  
AT DAR-ES-SALAAM.**

**COMMERCIAL CASE NO. 103 OF 2012**

**JAWINGA CO. LTD..... PLAINTIFF:**

**VERSUS**

**ARISTEPRO INVESTMENT CO. LTD ..... DEFENDANT:**

**RULING**

**Mruma, J.**

The decree holder **Jawinga Co. Ltd** obtained a decree against the judgment debtor **Aristepro Investment Co. Ltd** for payment of Tshs. 107,935,322.00 plus interest at the rate of 7% per annum from the date of Judgment till full and final payment. The decree was passed on 16<sup>th</sup> April, 2014, and on 23<sup>rd</sup> April 2014 the Judgment debtor lodged a notice of Appeal to the Court of Appeal.

On 16<sup>th</sup> July 2015, the decree – holder filed in this court an application for execution of the decree by attachment and sale of the Judgment debtor's property described as **Royal Lodge** which is located at

Tabata Kisukuru area opposite "**Club ya Wazee**" in Ilala District Dar es Salaam.

The Judgment debtor has strongly opposed the issuance of execution order. He based his objection mainly on two grounds firstly that the property sought to be attached does not belong to the Judgment debtor and secondly that there is an appeal pending in the Court of Appeal. There is another ground advanced by the Judgment debtor against execution but which is not very much disputed by the applicant which is to the effect that some amount (i.e. Tshs. 10,397,000/=) which is included in the decree sought to be executed was actually set aside by this court (Mwambegele, J), in its ruling in **Miscellaneous Application No. 173 of 2015** dated 20<sup>th</sup> November, 2015.

Mr. Willson Ogunde, counsel for the Judgment debtor who argued this application has submitted that because there is a pending appeal in the Court of Appeal (i.e. Civil Appeal No. 80 of 2015), execution in this matter should not be endorsed because if it is endorsed it will make the pending appeal meaningless. To support his argument the learned counsel cited the decision of the Court of Appeal in the case of **Ahamed Mbaraka vs Mwananchi Engineering contracting Company Ltd Civil Application No. 229 of 2014**, where it was observed that:

*"The officer signing the order authorizing execution to be carried out must comply with the provisions of the law. He/She must ensure that before signing the documents authorizing execution to be carried out, there is either no appeal pending*

*or none of the parties has imitated the appeal process was initiated, there is negligence by the party in making a following"*

On the strength of that decision of the Court of Appeal in Ahmed **Mbaraka's case** [supra], Mr. Ogunde has impressed upon this court to refrain from issuing an execution order.

In reply to Mr. Ogunde's submissions, Mr. Peter Shapa counsel for the decree holder has submitted that in terms of **Rule 24 (1) of Order XXI of the CPC** the mere fact that there is an appeal pending in the appellate court does not constitute an automatic stay of execution of a decree. The learned counsel contended that an execution order should be issued as prayed because the Judgment debtor has failed to show sufficient cause against its issuance. These are rivalry arguments which this court is called to consider and make its own deliberations.

Let me start with the position of the law as it stands. Under **Rule 11 (2) (b) of the Court of Appeal Rules 2009** (and not **Order XXI Rule 24 (1) of the Civil Procedure Code** as submitted by Mr. Peter Shapa), a notice of appeal or an appeal shall not operate as a stay of execution.

The said rule provides

*11- (2) (b) – "In any Civil Proceedings, where a notice of appeal has been lodged in accordance with Rule 83, an appeal shall not operate as a stay of execution of the decree or order appealed from except so far as the High Court or tribunal may*

*order, nor shall execution of a decree be stayed by reason of an appeal having been preferred from the decree or order... but the court may upon good cause shown, order stay of execution of such decree or order”.*

Clearly, from the above quoted provision of the law, in law the pendency of a notice of appeal or of an appeal does not constitute a stay of execution of a decree in the trial court. Under the same Rule, is **Rule 11(2) (b) of the Court of Appeal Rules**, the court (which means the Court of Appeal) may, upon good cause shown order stay of execution of the decree or order. It is only where there is an order for stay of execution that a trial court is estopped from issuing an execution order.

In the case at hand, admittedly there is no stay of execution order either by this court or by the Court of Appeal and there is no pending application seeking for that order. Mr. Ogunde has submitted that because there is an appeal pending in the Court of Appeal (i.e. Civil Appeal No. 80 of 2015) and in view of the decision of the Court of Appeal in the case of **Ahmed Mbaraka (Supra)**, this court should desist from issuing execution order until appeal No. 80 of 2015 is determined by the Court of Appeal. This argument is tantamount to saying that the decision of **Ahmed Mbaraka’s** case has the effect of making an appeal or a notice of appeal an automatic stay of execution of decree and this brings me face to face with the decision of the Court of Appeal in Ahmed Mbaraka’s case (supra).

I have carefully read the decision of the Court of Appeal in that case and with due respect to Mr. Ogunde I think that the case of Ahmed Mbaraka is

distinguishable . In the first place the issue before the Court of Appeal was whether or not the original case file for which an appeal is preferred should be called by the Appellate court (and in that case it was the Court of Appeal itself) when an application for stay of execution is filed. The Court of Appeal agreed with the view expressed by Dr. Lamwai, learned advocate that court should issue direction to the registry not to call for original case files for purpose of hearing of application for stay of execution. The *ratio decidendi* for this decision of the Court of Appeal was that if the record remains in the trial court while the application for stay of execution is pending determination in the appellate court the intending appellant can easily be availed with documents which are necessary for pursuing the appeal. This will expedite the appeal processes, but if it is called by the Appellate court then the whole process of preparing records of appeal will have be halted to await determination of an application for stay of execution and the net result will be delay in determining the appeal which is constitutional right.

On how to control unscrupulous move in the execution process during the pendency of an application for stay, the court made an orbiter dictum that:

*"The officer signing the **order authorizing the execution to be carried out** must comply with the provision of the law. He/She must ensure that before signing documents authorizing execution to be carried out, there is either no appeal pending, or none of the parties has initiated the appeal process or where the process was initiated, there is negligence by the party in making a following"*

From the above quoted observations of the highest court of the land, it can be deduced that the execution process has two stages. The first stage is the issuance of an execution order and the second stage is the enforcement of that order which is normally done in the registry by the registrar or other designed officer in the registry.

In practice an order for execution is a judicial order and it is issued/made by a Judge and in most registries by the Judge in charge. It is after that order had been issued or granted by a Judge that it can be enforced or carried out. The carrying out of the execution order is normally done by the registrar and/or other officers in the registry. This will normally entails appointment of a court brokers and signing of various forms to enable the appointed court broker to carry out the execution process. This stage is essentially administrative. It is at this stage that the Court of Appeal in **Mohamed Mbaraka's case (supra)** emphasized good supervision by the court and compliance with the law by the "officers" concerned. The court of Appeal directed that before the officer concerned can sign the order and documents authorizing the execution process to be carried out he/she must satisfy himself or herself that there is no pending appeal or appeal process before the appellate court. It is my considered view that that halting the process at this stage does not amount to a stay of execution because it is rather administrative than judicial action.

A careful perusal of the decision of the Court of Appeal in **Mohamed Mbaraka's case (supra)** would further suggest that in making its obiter

dictum, the Court of Appeal presupposed the existence of an execution order and cautioned the "officers" signing it to comply with the law. If the court was of the view that whenever a notice of appeal or an appeal is preferred an execution order should not be issued or that an execution should automatically be stayed then it would not have directed that the officer signing it (i.e. execution order) must comply with the law. This is so because the order would have not been there in the first place.

That said, and taking into consideration the fact that there is no order for stay of execution, it is my considered view that his court can make an order for execution to issue despite the pendency of Appeal No. 80 of 2015.

Regarding the allegation that the property sought to be attached does not belong to the judgment debtor the law is very clear under **Rule 57 (1) and (2) of Order XXI of the Civil Procedure Code** that the claimant (and here the claimant must be a person who claims to have interest in the attached property), has to bring objection proceedings so as allow the court to investigate the matter. An investigation cannot be done by using a statement from the bar.

In the event, I find that the Judgment debtor has failed to show cause why an execution order should not be granted. Accordingly I order and direct that:

**Order:**

1. Execution order to issue as prayed.

2. As there is an appeal pending in the Court of Appeal (Civil Appeal No. 80 of 2015), the enforcement of this order (i.e. attachment and sale of the Judgment debtor's property) may await the result of the pending appeal.
3. In the event the appeal is successful this order will not be continued to be enforced.
4. In case the appeal is unsuccessful the order shall be carried out from the stage where it is stopped (by appointing a court broker to execute it etc).

*Mr. A. R. Mruma*  
**A. R. Mruma**

**JUDG**

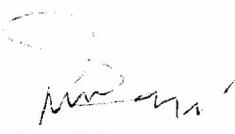
**6/5/2016**

**Date: 6/5/2016**

Coram : Hon. A.R. Mruma, J  
For the D/Holder : Mr. Peter Shapa for  
For the J/Debtor : Mr. Wilson Ogunde for  
CC : Cosmas

**Court:**

Ruling delivered this 6<sup>th</sup> day of May, 2016

  
**A. R. Mruma**

**JUDG**

**6/5/2016**