

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR-ES-SALAAM.

COMMERCIAL CASE NO. 64 OF 2011

JOHAN HARALD CHRISTER ABRAHAMSSON.....APPLICANT

VERSUS

EXIM BANK (TANZANIA) LTD RESPONDENT

RULING

Mruma, J.

The Decree Holders Exim Bank (Tanzania) Limited obtained a decree against the judgment debtor Johan Herald Christer Abrahamson in Commercial Case No.64 of 2011. The decree was passed on 10th December, 2015.

Apparently the Judgment Debtor was aggrieved and on 14th December, 2015 he lodged a notice of appeal to the Court of Appeal. He also applied for copies of proceedings and judgment for purposes of appealing to that court. Together with the notice of appeal, the judgment debtor filed an application for stay of execution of the decree in the Court of Appeal. The application is pending ruling in that court.

While the application for stay of execution was pending before the Court of Appeal, the decree holder came back to this court and lodged an

application for execution of the decree. The mode in which the assistance of the court is sought is by way of attachment and sale of the second Judgment Debtor's property described as a property located on Plot No.16 Jangwani Beach Dar es Salaam with Title No.43835.

Incidentally a notice to show cause why the decree should not be executed was issued to the judgment debtor who filed an affidavit to show cause why he was resisting execution to be granted. He ^{was} ~~was~~ advanced a number of reasons but the most important is that he has already initiated appeal processes in the Court of Appeal, therefore execution should await the result thereof.

Mr. Dilip Kesaria, learned counsel who represented the Decree Holder has opposed the approach taken by the judgment debtor to show cause by way of affidavit. The learned counsel submitted that the notice served on the judgment debtor required his personal appearance before this court therefore it was wrong for the judgment debtor to file an affidavit in lieu of personal appearance.

Responding to Mr. Kesaria's submissions, Dr. Nshalla, counsel for the judgment debtor submitted that the notice to show cause does not necessarily require personal appearance of the Judgment Debtor. The learned counsel is of the view that the requirements in the notice can be fulfilled if the Judgment Debtor swears an affidavit and is represented by an advocate duly authorized. The learned counsel said that in the present matter the judgment debtor has chosen to file an affidavit and he is duly represented by an advocate which is quite proper.

Regarding the application for execution the learned counsel contended that the Judgment Debtor is opposing the application mainly for two reasons. The first reason is that there is a notice of appeal before the Court of Appeal and the second reason is that the Judgment Debtor has already filed an application for stay of execution which is awaiting ruling in the Court of Appeal.

I will start with Mr. Kesaria's argument regarding the requirements of a notice to show cause served on the Judgment Debtor. Sub-rule (1) (a) of Rule 20 of Order XXI under which the notice was issued provides that.

"Where an application for execution is made – more than one year after the date of the decree, the court executing the decree shall issue a notice to a person against whom execution is applied for requiring him to show cause on the date to be fixed why the decree shouldn't be executed against him".

Procedure after issuing of notice to show cause is provided for under **Order XXI Rule 21 (1) of the Civil Procedure Code. Sub-rule (1) of the Rule 21** of that Order provides;

"Where the person to whom notice is issued under Rule 20 doesn't appear or does not show cause to the satisfaction of the court why the decree should not be executed, the court shall order the decree to be executed".

From the wording of **sub-rule (1) of rule 21 of Order XXI**, it is clear that upon being served with notice to show cause the person to

whom notice is issued is required either to appear or to show cause. The term appearance is used particularly to signify or designate the overt act by which one against whom suit has been instituted submits himself to the court's jurisdiction. An appearance may be expressly made by formal written or oral declaration. It is a procedure of coming into court as a party or interested person or as a Lawyer on behalf of a party or interested person [see **Black's Law Dictionary 7th Edition by Bryan A. Garner at page 94**].

On the other hand a show cause order is an order directing a party or person to appear in court and explain why the party took (or failed to take) some action or why the court should or should not grant some relief. Thus since in practice appearance can be made either personally and or through an Advocate, I find that in the present case it was proper for the judgment debtor to appear through his advocate duly authorized and it was also proper to show cause (explain why execution should not issued), by way of affidavit which is a voluntary declaration of facts written down and sworn to by the declarant before an officer authorized to administer oaths. The Applicant (ie Decree holder) may require the person's attendance of the declarant for purposes of cross examining him/her on facts affirmed only.

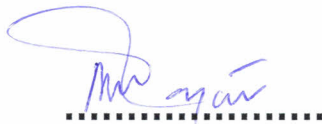
on whether execution can be issued where appeal process has been initiated, the answer is Yes! **Sub-rule (2) (b) of Rule 11 of the Tanzania Court of Appeal Rules 2009** states clearly that a notice of appeal or an appeal shall not operate as stay of execution of a decree or order appealed from. The case of **Ahmed Mbaraka (Supra)** cited by Dr. Nshalla does not apply in the circumstances of this case for the following

reasons; firstly the issue before the Court of Appealⁱⁿ Mbaraka's case was not whether an execution order can be issued after the initiation of appeal process but whether the record of the lower court (i.e. case file etc) should be called for purposes of hearing of an application for stay of execution or not. The Court of Appeal found that in order to expedite the appeal processes the record should not be called to the appellate court. Leaving the record with the trial court will expedite preparation of the records of appeal etc. However, by way of obiter, the Court of Appeal cautioned the officers signing the documents authorizing execution to be carried out to comply with the law and exercise their discretion prudently and particularly so where appeal processes have been initiated. The Court of Appeal talked of "***the officer signing execution order to be carried out.....***" which means that there was an execution order in place.

In Commercial Court practice and it is also the practice in most of the other registries of the High Court, the execution order is issued or granted by a Judge and in most cases the Judge In Charge and it is carried out by the Deputy Registrar who signs documents appointing a Court Broker, signs prohibitory order and proclamation of sale etc...to authorize the carrying out of the execution processes. It is this stage of "***signing the documents authorizing execution order to be carried out***" that the Court of Appeal issued a warning.

In the event therefore I find that the Judgment Debtor has not been able to show cause why execution order should not issue. Accordingly I order as follows:

- i) Execution order to issue.
- ii) As there is an application for stay of execution which is pending before the Court of Appeal the carrying out of this execution order may await the result of the pending application and the result of intended appeal.
- iii) In case the execution is not stayed by the Court of Appeal, and the intended appeal is unsuccessful, execution processes shall proceed from where it ended and the Decree holder will not be required to bring a fresh application unless there are reasons to do so.
- iv) In the event stay is granted and the intended appeal is successful, this execution order will die a natural death.



A. R. Mruma

JUDGE

24/5/2016