

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISC.COMMERCIAL APPLICATION NO. 255 OF 2014

(Originating from Commercial Case No. 137 of 2012)

FESTO MKUTA MBUNZU

.....

APPLICANT

Versus

FARM EQUIP COMPANY LIMITED

.....

RESPONDENT

RULING

Date of the Last Order: 07/12/2017

Date of the Ruling 15/02/2018

SEHEL, J.

The present application for extension of time within which to publish the decree issued by this Court was stayed by Hon. Mwarija, J (as he then was). He stayed the application.

Following such an order for stay, the present application has been called on several occasions to ascertain the status of the case reached at the Court of Appeal of Tanzania.

When the matter was called today, i.e on 7th day of December, 2017 Counsel Luteja notified this Court that on 27th day of October, 2017 the Court of Appeal of Tanzania dismissed the respondent's application for stay of execution. Thus, he prayed for the application to be granted since there is no order for stay.

Counsel Webiro agreed that the application for stay was dismissed but objected to the prayer with the reason that the Court has already pronounced itself that it has no jurisdiction to entertain the application as there is notice of appeal. He thus prayed for the application to be stayed till the appeal is determined.

It was re-joined that an appeal does not bar execution unless there is an order for stay which is not present in the present application. Therefore, the counsel reiterated his prayer to be granted as prayed in the chamber summons.

The crucial issue to be determined in the present application is whether the present application should be granted after the application for stay of execution was dismissed by the Court of Appeal. Counsel for applicant impressed upon the court that the application should be granted because there is no order for stay and an appeal is not an automatic stay. Counsel for the respondent on the other hand said this Court has already pronounced itself that it has no jurisdiction as there is a pending appeal at the Court of appeal.

It is the law that a notice of appeal or an appeal shall not operate as a stay of execution. **Rule 11 (2)(b) of the Court of Appeal Rules 2009** provides:

"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 only 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".

It follows then that the position of the law is as stated by Counsel Luteja, of which I totally agree with him, is that an existence of a notice of appeal or an appeal does not constitute a stay of execution. Nevertheless, Counsel Webiro cautioned this Court that the Court has already pronounced itself on the status of the present application. In order to appreciate the submission made by counsel Webiro it is worthwhile to reproduce what has been stated by this Court on 1st April, 2016 when the present application was stayed. At page 3 of the typed ruling Mwarija, J (as he then was) stated:

"It is trite law that once a notice of appeal has been filed in the Court of Appeal against a decision of this Court, the effect of it is to remove the proceedings from this Court to the Court of Appeal....."

Further at page 5 he said:

[Handwritten signature]

"I have already found that the notice of appeal filed by the respondent had the effect of removing the proceedings of this case to the Court of Appeal. I have found also that the proceedings in this application are not execution proceedings. The Court therefore lacks jurisdiction to hear and determine the application."

At page 6 he held:

"In conclusion, I find that this Court lacks jurisdiction because of existence of a notice of appeal filed by the respondent, the effect of which was to remove the proceedings from this Court to the Court of Appeal. In the event, hearing of this application is hereby stayed pending determination of the intended appeal."

It is thus clear that this Court has already pronounced itself that it has no jurisdiction in entertaining the present application because there is notice of appeal and the present proceedings are not execution proceedings. In that respect, at this stage I cannot entertain the applicant's request. Therefore, the matter shall remain

stayed pending the finalization of appeal at the Court of Appeal of Tanzania. It is so ordered.

Dated at Dar es Salaam this 15th day of February, 2018.



B.M.A Sehel

JUDGE

15th day of February, 2018

