

IN THE HIGH COURT OF TANZANIA

COMMERCIAL DIVISION

AT DARESSALAAM

MISCELLANEOUS COMMERCIAL CAUSE NO 384 OF 2017

KMJ TELECOMMUNICATIONS LIMITED.....DECREE HOLDER

Versus

AIRTEL TANZANIA LIMITED..... JUDGMENT DEBTOR

Last Order: 14th July, 2021

Date of Ruling: 28th July, 2021

RULING

MKEHA, J.

The genesis of this ruling is an application for execution filed by the decree holders under order XXI Rule 10 (2) of the Civil Procedure Code which was struck out by my predecessor in office for reasons of being pegged on a case which has never existed between the parties. The operative portion of this court`s ruling dated the 24th day of October, 2019 reads as hereunder:

For the foregoing, I hereby proceed to grant the application and order lifting of the garnishee orders *nisi* made and proceed to strike out the application for execution predicated on commercial case No. 384 of 2017 which never existed between the parties.

Subsequent to issuance of the order hereinabove, the decree holders wrote several letters to the Deputy Registrar in view of reviving execution proceedings which had been struck out. In their letter dated 13/11/2019 the decree holders clarified that, in fact, they had filed a correct application for execution on 19th day of June, 2019 for Miscellaneous Civil Cause No. 384/2017 and not Commercial Case No. 384/2017. Seemingly, the decree holders were trying to challenge this court`s order striking out their former application for execution. Without vacation of this court`s order striking out the former application, without reversal of the said order and without refiling of fresh application for execution, proceedings aimed at giving effect to the decree holders` award resumed.

In view of showing cause as to why execution order should not be issued, the judgment debtors filed an affidavit. When Mr. Gaspar Nyika learned advocate for the judgment debtors appeared for hearing, he submitted that, in terms of paragraph 6 of the affidavit of one Mr. David Lema, the application for execution sought to be determined was struck out by an order of this court dated 24/10/2019 on the ground that it was predicated on a case which has never existed between the parties. The learned advocate was of the considered view that. In the absence of fresh application, it would be improper to proceed with execution proceedings. The learned advocate added that, neither could an amendment revive an application that had been struck out by an order of this court.

Mr. Shehazada Walhi learned advocate submitted in reply, for the decree holder, that, the judgment debtor had not sought and obtained an order for stay of execution hence, it was in the interests of justice that execution

proceedings be allowed to proceed so that the decree holder can benefit from the final order issued. The learned advocate did not controvert Mr. Nyika`s submissions that, the decree holder`s application for execution had been struck out on 24/10/2019.

The only issue for determination is **whether an order for execution of a decree can be issued in the absence of a formal valid application for execution**. It is important to observe that, the decree sought to be executed was passed on 07/ 12/ 2018. Although the decree is for payment of money, the decree holder did not orally apply for immediate execution thereof by the arrest of the judgment debtor as per order XXI rule 10 (1) of the Civil Procedure Code. It was after some months after the passing of the decree, when the application for execution was made. As such, the application falls under order XXI rule 10 (2) of the Civil Procedure Code. Under the said provision of the law, every application for the execution of a decree should be in writing, signed and verified by the applicant or some other person proved to the satisfaction of the court to be acquainted with the facts of the case and should contain in a tabular form particulars listed under paragraphs (a) to (j) of the said provision, i.e. order XXI rule 10 (2) of the Civil Procedure Code.

There is no denial that the applicant`s application for execution was struck out on 24/10/ 2019 and that, no fresh application has so far been filed. Neither was there any legal attempt aimed at challenging this court`s order which struck out the applicant`s former application. In the case of **John Mwansasu Vs. Republic, Criminal Review Case No. 8 of 2000**, it was held that:

*A court order is lawful unless it is invalidated by another superior order and therefore, **it must be obeyed**. Contrary view will have the undesired effect of creating an impasse in the conduct of trials.*

Therefore, while I agree that the decree holder is entitled to enjoy fruits of her decree, however, rules are in place not for embroidery but for use. See: **SGS Societe Generale de Surveillance SA & Another v VIP Engineering & Another, Civil Appeal No. 124 of 2017.**

Therefore, the applicant`s application having been struck out, there being no fresh application, there is nothing remaining in court for purposes of moving the court to issue the execution orders sought. The decree holders be accordingly advised.


C.P. MKEHA

JUDGE

28/07/2021

Court: Ruling delivered in the presence of the parties` advocates.




C.P. MKEHA

JUDGE

28/07/2021