

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

CIVIL APPLICATION NO. 173 OF 2007

**JOHN GIMUNTA.....APPLICANT
VERSUS
JOSEPH OBETO.....RESPONDENT**

**(Application for stay of execution from the Judgment of
and Decree of the High Court of Tanzania,
Commercial Division at Dar es Salaam)**

(Massati, J.)

**dated the 29th day of October, 2007
in
Comm. Case No. 27 of 2005**

RULING

KALEGEYA, J.A.:

Responding to a Notice of Motion filed by the Applicant, the Respondent raised two preliminary objections but mid- way dropped one and remained with the following:

"That the application for stay of execution is incurably defective for want of the drawn order sought to be stayed".

The Applicant is represented by Mr. Maira, Learned Counsel, while Mr. Lutema, Learned Counsel, represented the Respondent.

Briefly, Mr. Lutema submitted, citing **(CAT) Civil Application No. 68 of 2003, Tanzania Zambia Railway Authority vs. Ayoub L. O. Ritti**, that failure to attach a drawn order makes the application incompetent attracting a sole consequence- striking it out.

On his part, Mr. Maira for the Applicant resisted by first conceding that indeed the drawn order was not attached but went on to justify failure thereof by adding that the High Court Registry delayed in availing him a copy thereof and that he had to act to beat limitation of time. Boldly, he urged that the Applicant cannot be blamed for the delay or inaction of the Registry and that he was now in possession of the order which should be duly received and acted upon. Mr. Maira did not end there for he also made a novel submission that according to him a Notice of Motion is made when it is argued and not when it is filed.

In rejoinder, Mr. Lutema submitted that a Notice of Motion is made at the time of filing and not when it is argued hence the provision of time limitations. On failure to get the drawn order from the Registry, Mr. Lutema submitted that mere allegations are not enough: that there ought to be affidavit evidence in support thereof.

I should start by observing on the obvious that though the Court Rules (Rule 9(2) (b), to be specific) do not specifically provide for the attachment of such drawn order/decreed to the Notice of Motion in an application for stay of execution, the Court has made it a mandatory requirement through case law – ***Dunhill Motors Ltd versus Tanzania Revenue Authority, Misc. Civil Application No. 12 of 2000; Consolidated Holding Corporation versus Rajani Industries Ltd, Civil Application No. 138 of 2002; Tanzania Zambia Railway Authority v. Ayoub (supra)***. In putting that requirement in place, the wisdom of the Court is not hard to see. Stay of execution is within the discretion of the Court. That discretion which should be exercised judiciously has to be backed up by sufficient reasons. Now, the Court cannot make analysis and arrive at a proper finding without being versed with that which is to be stayed or otherwise. That can only be found in a drawn order/decreed.

That settled, let me start with Mr. Maira's novel submission that a Notice of Motion is made when it is argued and not when it is filed!

I have branded it a novel idea because as the Counsel well knows, an application is made when the relevant document is lodged in the Registry upon payment of requisite fee. Arguing an application or an appeal for that

matter, is different from lodging it. I take his use of the word "made" to mean lodging in the Registry and not otherwise. The word "made" cannot be taken to mean hearing of the submissions in support thereof which process can take place, and as generally is the case, at a future date, different from the lodging or filing date. Thus, Mr. Maira's possession of the drawn order/decreed at the time of hearing do no cure the obvious defect of the Notice of Motion for lacking it at the time of filing.

As to the argument that the blame should lie with the Registry for failure to avail the same to him in time, while that has never been a cure of a defective motion or application where a document is supposed to be attached at the time of filing, as rightly pointed out by Mr. Lutema, this is just an assertion, a statement from the bar. Delay or failure by the Registry to supply a copy of an attachable document or related can be a good reason in an application for extension of time to take a step in the process and not otherwise. And, as the matter stands, even if the application was of the latter category the Applicant would have a steep hill to climb as he adduced no evidence to establish the alleged blame on the Registry.

In conclusion, as the drawn order/decreed was not attached to the Notice of Motion, the application is incompetent. It is struck out accordingly with costs.

DATED at DAR ES SALAAM this day of 2008.

JUSTICE OF APPEAL