

**IN THE UNITED REPUBLIC OF TANZANIA
IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM**

MISC. CIVIL APPLICATION NO. 775 OF 2016

NATIONAL RANCHING COMPANY LTDAPPLICANT

VERSUS

INTERLAND SURVEYORS.....RESPONDENT

RULING

Date of the last Order: 12th December 2017

Date of the Ruling: 16th February 2018

SAMEJI, R. K. J

The applicant herein, seeks orders of this Court for stay of execution of Judgement and Decree of the Resident Magistrate Court of Dar es Salaam at Kisutu issued by Hon. D. Kisoka, RM on 15th August 2014 in respect of Civil Case No. 168 of 2007, pending hearing and determination of *Misc. Civil Application No. 634 of 2016*. The Application has been brought under Order XXXIX Rule 5(1) and Section 95 of the Civil Procedure Code, Cap. 33 [R.E.2002]. The Application is supported by an Affidavit deponed by Mafuru Mafuru, the learned Counsel for the applicant.

On the other side the respondent has filed a Counter Affidavit opposing the Application that the applicant has not advanced

sufficient reasons to warrant granting of the orders sought in the Chamber Summons.

At the hearing of this Application, the applicant was represented by Ms. Proscovia Nihongataile, the learned Counsel who was holding brief for Mr. Mafuru Mafuru, the learned Counsel for the applicant, while Mr. Thadei Agathon Hyera, the learned Counsel represented the respondent.

Ms. Nihongataile submitted that, this Application is for the stay of execution of the decree and Judgement of the Kisumu Resident Magistrate Court issued on 15th August 2014 in respect of the *Civil Case No. 168 of 2007* pending the determination of the Application for an order of extension to restore *Civil Appeal No. 5 of 2015*.

She said, they have appealed before this Court, but the said Appeal was dismissed for want of prosecution. Subsequent thereafter, they have filed a *Misc. Civil Application No. 634 of 2016* which is still pending before Hon. Mkasimongwa, J. Ms. Nihongataile argued that, while the said Application is still pending, the applicant has received a letter from the respondent indicating his interest to execute the decree with a colossal amount of Tshs. 138,429,014/= out of the principle sum of Tshs. 46,684,000/= which was decreed by the

Kisumu Resident Magistrate Court, hence the intervention by the Court is necessary.

To buttress her position Ms. Nihongataile referred to the case of **Theodore Valentine and Rose Valentine Vs Dr. Jan Jasper**, Civil Application No. 85 of 2009 CAT (Unreported) at page 4-5 and submitted that, there are three conditions to be met by the applicant to enable the Court to grant a prayer for stay of execution, namely:-

- (a) *Whether there is a prima facie case with a likelihood of success;*
- (b) *Whether the refusal is likely to cause substantial and irreparable injury to the applicant; and*
- (c) *Balance of convenience.*

She then elaborated on the above points and prayed the Court to be guided by the same and note that the applicant has submitted sufficient reasons for the Court to grant the prayers sought in the Chamber Summons.

She referred to paragraph 2 of the Affidavit and argued that, the appeal has overwhelming chances of success, because there are

contentious issues to be determined. That, the applicant had already paid Tshs. 12,000,000/= inclusively, but the trial Magistrate ignored that fact and held to the contrary.

She also argued that if the prayer will not be granted the applicant will suffer irreparable loss which the respondent will not be in a financial position to cover, as currently the applicant is not aware with the respondent's financial capacity to meet the same. As to the balance of convenience, Ms. Nihongataile argued that, it is the applicant who will suffer the most than the respondent, because the respondent had already indicated his interest to execute the decree by attaching the applicant's Ruvu Ranch, among others. She finally referred to Article 13(6) of the Constitution of the United Republic of Tanzania and prayed the Court to grant the prayer sought in the Chamber Summons.

In response Mr. Hyera referred to Order XXXV of the Civil Procedure Code and contended that, for the Court to grant stay of execution there must be a pending appeal. He said, the applicant was once accorded her right by the Court to be heard, but never utilized it, hence the case was dismissed for want of prosecution. Mr. Hyera referred to **Theodore Valentine's case**, the same case cited by Ms.

Nihongataile and argued that, a winning party is as well entitled to enjoy fruits of the decree and that the applicant's Application is only a delaying tactics to deny and delaying the respondent to enjoy the fruits of the decree.

Mr. Hyera contended further that, even if the said Ruvu Ranch is attached, it is not the only ranch belonged to the applicant. He said the applicant has other ranches all over the country. He also said that the claimed amount is not colossal it involves the principle amount and the interest therein. He thus prayed the Application to be dismissed with costs.

In rejoinder submission, Ms. Nihongataile insisted that, the issue that the applicant has failed to pursue the appeal is not true, there are sufficient reasons which hindered the same and that is why the pending Application before this Court. She as well insisted that the amount claimed is colossal and there is need for the Court intervention.

I have perused the record of the Application, the submission of the parties and the main issue to be considered is *whether the Application is meritorious.*

It is on record that the applicant is applying for stay of execution of the Judgement and decree issued on 15th August 2014 in respect of the Civil Case No. 168 of 2007. The applicant after being aggrieved by that decision appealed to the High Court through a Civil Appeal No. 5 of 2016 which was then dismissed for want of prosecution on 19th July 2016. Then on 20th September 2016, the applicant had since filed a Misc. Civil Application No. 634 of 2016 praying to restore the dismissed Appeal and the said Application is currently pending before Hon. Mkasimwongwa, J.

While the said Application is still pending, the respondent through his Counsel and via a letter dated 24th October 2016 with Ref. No. TA/IS/NARCO/1/16 expressed his interest to execute the decree within seven (7) days with a colossal amount at the tune of Tshs. 138,429,014/= the thing which forced the applicant to file this Application.

Given the circumstance, I have considered the principle enunciated by the Court of Appeal in the case of **Ahmed Mubaraka V Mwananchi Engineering & Contracting Co. Ltd**, Civil Application No. 229 of 2014, where the Court of Appeal observed that, "*once there is a move by the party in pursuing the appeal, the trial court*

should reasonably suspend the proceedings with regard to execution”.

It is a fact that, the applicant had since filed an Appeal and the same through dismissed the applicant is in the process of restoring the same and the matter is still pending before this Court. Since we are yet to know the determination and the outcome of the said Application which is still pending before this Court, I find that it is reasonable to stay the execution pending the outcome of the same.

While I do appreciate the submission of Mr. Hyera that, a winning party is entitled to enjoy fruits of the decree and that the applicant's Application is only a delaying tactics to delay the respondent from enjoying the fruits of the decree, but I cannot ignore the fact that there is a pending matter before this Court which is as well related with the Appeal which was once filed by the applicant.

In the result, I use my judicial discretion and order stay of execution of the Judgement and Decree issued in respect of the Civil Case No. 168 of 2007 pending the determination of the Misc. Civil Application No. 634 of 2016 which will give out the way forward of the dismissed Appeal No. 5 of 2015. For the interest of justice and taking into

account that there are pending matters, the Court finds it desirable for the moment, to order each party to bear his or her own costs.

DATED at DAR ES SALAAM this 02nd day of February 2018.



R. K. Sameji.
JUDGE
02/02/2018

COURT- Ruling to be read and delivered by the Deputy Registrar on 16th February 2018.



R. K. Sameji
JUDGE
02/02/2018