

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

MISC. CIVIL APPLICATION NO. 79 OF 2018

**(Originating from Civil Appeal No. 25 of 2018 at the High Court of Tanzania,
Arusha District Registry)**

LEONARD SALVATORY MALLYA.....APPLICANT

VERSUS

YONA LOING'ON LAIZER.....RESPONDENT

RULING

14/9/ 2018, 16/1/2019

MWENEMPAZI, J.

This application is made under Order XXXIX Rule 5(1) (3) (a) and (4) and Order XLII Rule 2 and Section 95 of the Civil Procedure Code, Cap. 33 R.E.2002. It is an application for an order for stay execution of the decree passed in Civil Case no. 4 of 2018 pending determination of Appeal No. 25 of 2018 which is pending in this court. In the Chamber Summons, the applicant is also praying for cost and other

relief the Court may deem it fit and just to grant. His grounds of applications and reasons are set out in the affidavit attached to the chamber summons.

The applicant was the defendant in Civil Case No. 4 of 2018 in Kisongo Primary Court. The case was decided in favour of the Plaintiff. The decision in Civil Case No. 4 of 2018 in the Primary Court of Kisongo was delivered on the 16th March, 2018. The applicant was aggrieved and decided to appeal to the District Court. Since he was out of time, he applied for extension of time to file an appeal. The application was No. 10 of 2018 in the District Court of Monduli. The application was dismissed by the District Court Magistrate as the same was intended to defeat the ends of justice. He was again aggrieved by the decision of the District court of Monduli in application No. 10 of 2018 refusing to enlarge time for him to appeal. The applicant filed an appeal in the High Court of Tanzania, Civil Appeal No. 25 of 2018 which is pending before this Court.

On 28th August, 2018 the applicant was served with the notice of intention to execute from Kiranyi Ward Executive requiring him to pay the amount in dispute within two days or otherwise his property will be attached. He, however, has not been served with any application for execution or order which ordered his properties to be attached. He avers that the property which the Respondent intend to attach is a matrimonial house in which the applicant and his family of six children are living. They have no other house to stay. He further states that he believes his appeal has

an overwhelming chance of success and that if the application is not granted, he stands to suffer an irreparable loss.

The Respondent is strongly objecting to this application as deposed to in his counter affidavit. In paragraph 4 to 7 the respondent state that the applicant had admitted in Kisongo Primary Court that he owes the respondent. The basis of finding in the Primary Court decision is the admission the applicant made during hearing of the case. It was therefore an absurd move for him to appeal against the decision of the Primary Court in the District Court. Lack of merit led his attempt to appeal fail when his application for extension of time was dismissed. Further to that the respondent admits to have served the applicant with a letter from the Kiranyi Ward Executive officer. The rest of allegations that are in paragraph 4 of the affidavit are disputed.

In paragraph 4 of the affidavit the applicant avers that in the said letter it is stated that in case the applicant doesn't pay what he owes the respondent, his property will be attached. By the averment of the respondent, the content of paragraph 4 of the affidavit by the applicant is just a speculation. However, the averment by the respondent also seems to be out of place when in paragraph number 7 he deposes that the applicant has two options according to the execution order, either to pay the admitted claim of 6,260,000/= or the house stated in that order be attached. The allegations that the house is a matrimonial house cannot be considered

as substantial ground. His argument is that the notice is not just a letter from the Ward Executive officer. Rather it is an execution order issued by the trial court on the 18th June, 2018. At this point it is worthy to note that the respondent in his counter-affidavit has attached execution Order issued by the trial court as deposed.

The applicant's counsel Mr. Ombeni Kimaro, in the written submission, after narrating the facts of the case submitted that the reasons for the application of stay is that the respondent intends to attach the applicant's house which is worthy seventy-five million; and that only a two-day notice has been given to comply with execution demand or otherwise the property will be attached. The two-day notice is not sufficient and that compels a need for stay of execution otherwise the applicant stands to suffer a substantial loss and hardship to the family of 6 children. In order to re-enforce the point, he has cited the case of *Nicholas Nere Lekule vs. Independent Power(T) Ltd and Another* [1997] T.L.R. 58 where the Court of Appeal held that: -

“one of the essential conditions for granting a stay of execution pending the determination of an intended appeal was the loss or injury that an applicant would be subjected to. The loss had to be of an irreparable nature which could not be adequately compensated by way of damage”

For the reasons, the learned counsel believes the applicant has shown sufficiently that unless the order is made, he and his family shall suffer the irreparable loss. His point is that the respondent has given insufficient notice in order for the applicant to fail to comply with it so that they can attach a matrimonial house.

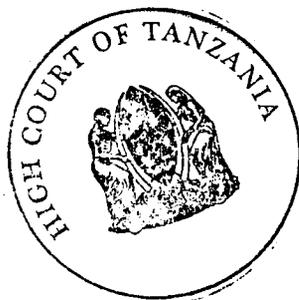
I have gone through the record of the application and also, I took trouble to look for the record of Civil Appeal No. 25 of 2018. I read the same. My apprehension of the content shows that the application at hand is misplaced. The applicant has filed an appeal against a dismissal order issued against the application to enlarge time to appeal against the decision of the Primary court. In the Primary Court, a decision was made against the applicant (defendant then) who had admitted to owe the respondent some money. That order of the Primary Court is the one subject of execution and an order for stay may rightly be issued against it. But not by this court as it is in this application.

In my view, a dismissal order is merely declaratory. That decision is incapable of execution and in respect of which no stay order could be issued. The reason is that, with the dismissal order by the District Court, the status quo reverted to was the decision of the Primary Court which was capable of execution. In respect of that decision a stay order could be issued. In this case, the status quo is the position created by the decision of the Primary court. The applicant has been ordered to pay the decretal sum he owes the Respondent and upon application by the Respondent

the Primary Court being an executing court has ordered an attached the property belonging to the applicant. Under the circumstances therefore, the application for the order of stay of execution ought to have been filed in the court to which the applicant can appeal against the decree; that is the District Court or the executing court which is the Primary Court itself under the relevant law, that is '*The Magistrates' Courts (Civil Procedure in Primary Courts) Rules, G.Ns. Nos.310 of 1964*'

Earlier on the 31st August, 2018, I issued an order temporarily restraining the Ward Executive Officer from attaching the applicant's property until the ruling in this application is delivered. As I am delivering this ruling today, that order comes to an end. For the reasons stated above, the applicant is enjoined to comply with the proper procedure in the proper forum if he thinks he has rights to protect; this application is therefore dismissed with cost.

It is ordered accordingly




T. M. MWENEMPAZI

JUDGE

16/01/2019