

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN THE DISTRICT REGISTRY OF ARUSHA**

**AT ARUSHA**

**CIVIL REVISION No. 06 OF 2021**

*(C/F Civil Case No. 114 of 2016 before the Resident Magistrate Court of Arusha at Arusha)*

**YOHANA JOHN KAVISHE..... APPELLANT**

**VERSUS**

**THE REGISTERED TRUSTEES OF**

**E.L.C.T NORTH CENTRAL DIOCESE.....RESPONDENT**

**RULING**

02<sup>nd</sup> June & 15<sup>th</sup> July 2022

**TIGANGA, J**

In this revision, Yohana John Kavishe hereinafter referred to as the applicant applies for the revision of the ruling of the Court of Resident Magistrate of Arusha sitting at Arusha in Civil Case No. 114 of 2016 delivered on the 23<sup>rd</sup> March 2021. The impugned ruling ordered for stay of execution in that particular case, that is, Civil Case No. 114 of 2016.

The application was filed via a chamber summons filed under section 79(1)(b) and (c) of the Civil Procedure Code [Cap 33 R.E 2019] and was supported by affidavit of Gwakisa Sambo the Counsel for the applicant. The

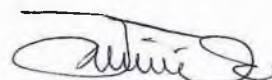


chamber summons prays for revision of the ruling of the Court of Resident Magistrate on the following grounds:

- i. That, the Honourable court be pleased to order for the continuation of the execution of the Civil Case No. 114 of 2016 before the Court of Resident Magistrate of Arusha at Arusha
- ii. Costs of this application be borne by the Respondent
- iii. Any other relief(s) this Honourable court may deem fit to grant.

The affidavit filed in support of the application gave a historical background of the matter and the reasons for the application. For purposes of brevity I will not reproduce herein but I will refer them in the course of my decision making.

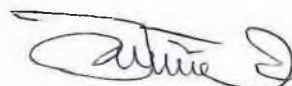
To appreciate what brought about the application at hand, I find it apposite to point out albeit briefly, the historical background of matter. Way back in 2016, the applicant filed a Civil Case No. 114 of 2016 before the Court of resident Magistrate of Arusha. He came victorious, the decision which aggrieved the respondent, thereafter he appealed to this court vide Civil Appeal No. 33 of 2017 in which he also lost. Following the decision of this Court in appeal, the applicant went back before the Court of Resident

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Magistrates for execution while the respondent seemingly commenced the appeal process to appeal to the Court of Appeal. When the execution application was filed and served to the respondent, he appeared and contested it by way of preliminary objection on the ground that as there was already an appeal process to the Court of Appeal, the execution had to wait up to when the appeal to the Court of Appeal would be finalized. The preliminary objection was sustained on the ground that, once an appeal has been filed or the process to appeal has been commenced then the execution had to await.

That decision also aggrieved the applicant, who filed this application for revision as indicated herein above. The application was contested by the respondent who filed the counter affidavit sworn and filed by Jeff George Sospiter, the Counsel for respondent. his counter affidavit will be referred in the course of this ruling.

Parties argued this matter by way of written submissions which they filed timely. In the submission in chief filed by the Counsel for the applicant submitted in support of the application that an appeal is not a bar to the execution of the court's decree, he emphasized on his argument by citing rule 11(2) of the Court of Appeal Rules, GN No. 344 of 2019 as well as a Civil

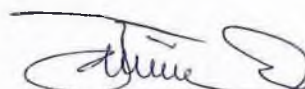
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Procedure Code Cap 33 R.E 2019 as a whole without citing any specific section, that an appeal cannot act as a bar to execution. The Counsel also cited the case of **D.B. Shapriya and Co. Ltd vs Gulf Concrete and Cement Product Co. Ltd, commercial case No. 23/2015(unreported)**, the High court of Tanzania had this to say;

*"As a matter of fact, the court can only stop an application for execution of decree on two grounds, **one**, the decree has been satisfied, **two**, if there is an order for the stay of execution from the court with competent jurisdiction."*

The Counsel for the respondent also submitted in reply to the applicant's submissions in chief that, the Court of Resident Magistrate should not proceed with the execution of the Civil Case No. 114 of 2016. Since the matter is on the appellate stage before the Court of appeal of Tanzania as evidenced by the Notice of appeal filed before it to challenge the decision of the first appellate Court before his Lordship Mwenempazi, J dated 06<sup>th</sup> December 2019.

He further stated that, the Judgment debtor applied for copies of the proceedings and other necessary documents including letter requesting for appeal documents which were lodged in the High court of Tanzania at the

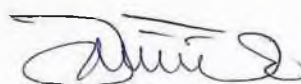
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District registry of Arusha on the 27<sup>th</sup> December 2019 and served to the Counsel for the Decree Holder on the 31<sup>st</sup> December 2019 but to date their request for the said copies went in vain.

He further submitted that, since the notice of appeal before the Court of Appeal of Tanzania has been filed, that marks the commencement of such appeal as it was held in the case of **Kaserkand Construction and Transport Company Ltd vs Sebastian Mathias Sabal** (Misc. Labour Application No. 11 of 2021)[2021] TZHC 4000 (05 July 2021] in which the court cited the case of **Tanzania Electric Supply Company Limited vs. Dowans Holdings S.A. ( Costa Rica) and Dowans Tanzania Limited ( Tanzania)**, Civil Application No. 142 of 2012 which emphasized that,

*"we are equally convinced that it has long been established law that once a notice of appeal has been duly lodged, the High court ceases to have jurisdiction over the matter."*

He further submitted that, following the filing of an appeal before the Court of Appeal of Tanzania, the lower courts should give the Court of Appeal room to determine the appeal, not otherwise. According to him, this technically means that, the lower courts lack jurisdiction on the matter. He further submitted that, the cited cases by the Applicant's Counsel are

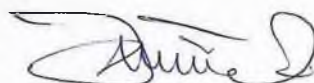


distinguishable in the circumstance and thus cannot help the court to reach fair and equitable justice.

In his view, the Honourable executing Magistrate acted in the confines of the law by ordering for the stay of execution pending the appeal to the court of appeal. He further stated that, the fact that the judgment sought to be executed vide Civil Case No. 114 of 2016 is enormous as the attachment of motor vehicle will jeopardize the activities of the Hospital, as the Hospital serves the society. Hence, they insist on the dismissal of the revision.

The Counsel for the respondent further submitted that, the grant of execution by the court as prayed by the Decree Holder will pre-empt and render the intended appeal nugatory. He proceeded to submit that, it is for the interest of justice the execution should not proceed against the judgment debtor so as to wait for the determination of the appeal filed before the Court of Appeal. He ended up praying for dismissal of the revision application.

In rejoinder submissions, the Counsel for the applicant submitted that; *firstly*, filing the notice of appeal by itself does not act as a bar to execution. He also submitted that, following the filing of notice of appeal there could be stay of execution only if it has been ordered by the Court of Appeal as it

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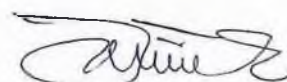
is the one with mandate to give such an order. *Secondly*, that, the cited cases by the Counsel for the respondent are distinguishable since they were not dealing with execution proceedings, *thirdly*, that, when the notice of appeal is filed to the Court of Appeal, the High Court and subordinate court do not cease their jurisdiction to all the proceedings, there are proceedings which the High Court and the subordinate court retains their jurisdiction, this includes execution proceedings as per rule 11(2) of the Court of appeal rules, G.N No. 344 of 2019 as submitted earlier in submission in chief. *Fourthly*, the respondent's allegation that the appeal will be rendered nugatory is of no merits because the respondent soon after being served with the summons for execution had the right to file for the stay of execution before the Court of Appeal as per rule 11(**supra**). *Fifthly*, that, the fact that the motor vehicles save the hospital should not be a bar for the Decree holder/applicant to enjoy the fruits of the court decree. He finalized his rejoinder submissions that, the revision be allowed with all its prayers.

From the record, the application, counter affidavit as well as the submission filed by the parties in support and against the application, one main issue for determination that is whether the Applicant's revision is meritorious?

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In dealing with the above issue, I should appreciate the very resourceful submissions made by the counsel for parties. I appreciate for the arguments backed up by the authorities of this court and the Court of Appeal. In so doing I take cognizance of the fact that the decision of the Court of Appeal in the case of **Ahmed Mbaraka v Mwananchi Engineering Co. Ltd**, Civil Application No. 229/2014, which was relied upon by the executing court in staying the execution was at the time when it was delivered, good law, and still it is. However, there are some development as of now following other subsequent decisions of the same court as I am going to expound herein bellow. In the case of **CRDB Bank Plc vs Finn.W. Petersen and 3 Others**, Civil Application No.367/17 of 2017 at page 12 in which the Court of Appeal held *inter alia* that;

*"I, therefore find myself constrained to agree with Mr. Shayo that, upon reading that decision in the case of **Ahmed Mbaraka v Mwananchi Engineering Co. Ltd**, Civil Application No. 229/2014 that the impression one gets is that where appeal process is initiated the execution proceedings should not be commenced. That decision had a binding nature until when the Court made it clear in the case of **Tanzania Bureau of Standard v Anita Kivera Maro**, Civil Application No. 244/2017, that the above*

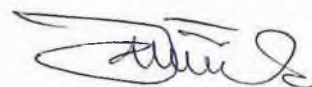




*statement was a mere orbiter dictum and that the legal position remained to be that unless stay of execution is sought and granted by the Court, execution at the High Court will proceed.”*

In line with the above position, it is my considered view that the position relied upon by the Counsel for the Respondent is an old position established in the case of **Ahmed Mbaraka v Mwananchi Engineering Co. Ltd (supra)**. He did not search for the development in the jurisprudence of this jurisdiction. Had the both the learned executing magistrate bothered herself to make further research, she could have not allowed herself to be bound by the position presented to him. She would have discovered that an appeal does not automatically bar an execution unless there is an application for the stay of execution filed and granted as it was held in the case of **Tanzania Bureau of Standard v Anita Kivera Maro, (supra)** and the case of **CRDB Bank Plc vs Finn.W. Petersen and 3 Others, (supra)** which changed the position in **Mbaraka’s** case.

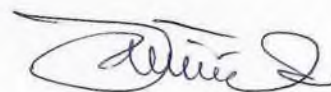
Further cementing on the position that filing an appeal does not stay the execution, the Court of Appeal in the case of **Jonas Bethwel Temba vs Paulo Kisamo and Another**, Civil Application No. 17 of 2014, held inter alia that;



*"The institution of an appeal shall not operate to suspend any sentence or to stay execution, but the Court may upon good cause shown, order stay of execution of such decree or order."*

In furtherance of the argument I entirely agree with the argument by Mr. Gwakisa Sambo, learned Counsel for the applicant that, when the notice of appeal is filed to the Court of Appeal, the High Court and subordinate court do not cease their jurisdiction to all matters, there are some matters which the High Court and the subordinate court retains their jurisdiction to handle, this includes execution proceedings as per rule 11(2) of the Court of appeal rules, G.N No. 344 of 2019.

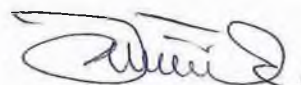
This is further observed in the case of **National Microfinance Bank and Another vs Stephen Nkaina Marwa and Another**, (Land Revision No. 11 of 2020), [2021] TZHC 2197 (19 February 2021) this Court, Mwanza Registry, relied in the case of **Norman Mahboub t/a Norman Al Mahboub General Trading Corporation vs Milcafe Limited**, Commercial Case No. 41 of 2003 which quoted the case of **Matsushita Electric Co. Ltd vs Charles George t/a G.G Traders**, Civil Appeal No. 71 of 2001 in which it was held *inter alia* that;



*"Once a notice of appeal is filed under rule 76, then this court is seized with the matter in exclusion of the High Court, **except for application specifically provided for such as leave to appeal, provision of a certificate on point of law, or execution where there is no order of stay of execution from this court.**"* [Emphasis added]

As earlier on pointed out, it is very unfortunate that the court of Resident Magistrate granted the order for stay of execution by relying upon the old position of **Mbaraka's** case (**supra**) which was later on changed by the position made in **TBS's** case (**supra**), as evidenced by part of the finding of the executing court at page 3 and 4 of the decision which I find it prudent to reproduce in part as follows;

*"The issue of whether the appeal pending at the Court of Appeal can stay this matter, this court passed through the submissions of both Parties whereby the Counsel for the judgment debtor argued that this matter be pending until the determination of an appeal at the Court of Appeal of Tanzania and the Counsel for the decree holder objected it. Since there is an appeal before the Court of Appeal which involved the same Parties, I find it in the interest of justice that this matter be stayed to await the outcome of pending appeal before the Court of Appeal. I am in this*



*instance guided by the Court of Appeal of Tanzania decision in the case of **Ahmed Mbaraka vs Mwananchi Engineering Company Ltd** which requires court officers issuing execution orders to do so cautiously when there is an appeal pending as is the case in this matter.”*

That said, it goes without saying that, the Court of Resident Magistrate was not legally justified to stay the execution on the basis of the pendency of an appeal before the Court of Appeal. That said so, the trial court’s decision is hereby revised, quashed and set aside, the execution of the trial Court’s decree should proceed. Each Party should bear its own costs.

It is so ordered.

**DATED** at **ARUSHA**, this 15<sup>th</sup> July, 2022.



  
**J.C. TIGANGA,**

**JUDGE.**