

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)**

AT DAR ES SALAAM

MISC. LAND CASE APPLICATION NO. 632 OF 2020

**DOROTHY KANSOLELE).....APPLICANT
t/a DORKA CATERING SERVICES)**

VERSUS

EILEEN JOSEPHINE PETIT MSHANA.....1st APPLICANT

PETER LOUIS PETIT.....2nd APPLICANT

**JESCA W. MASSAWE).....3rd APPLICANT
t/a Mm AUCTIONEERS)
AND DEBT COLLECTORS)**

RULING

30/11/2020 & 29/12/2020

MASOUD, J.

The applicant moved this court under a certificate of urgency. He invited the court to grant an order for stay execution of an ex-parte decree dated 15/08/2019 pending determination of this application and determination of application for extension of time to file application for setting aside ex-parte judgment arising from Land Case No. 316 of 2016.

The application was hinged on the allegation that was stated in the certificate of urgency that the applicant would suffer irreparable loss if

the respondents and any one working under her was not restrained from continuing with the execution process involving the applicant's bank account (A/C No. 3004211165806 in the name of Dorka Catering Services) against which a garnishee order nisi has been issued and attachment of eight (8) movable properties of the applicant.

The application was supported by an affidavit of the applicant who, among other things, narrated facts giving rise to the present application; the pending application for extension of time to file application for setting aside the ex-parte judgment; and the complaint that she was not served with any summons relating to the suit which was determined ex-parte against her including summons to appear on the day of delivery of the ex-parte judgment.

In addition to the above the applicant's affidavit also set out facts as to how warrant of attachment against the properties of the applicant as well as the garnishee order nisi were issued. The affidavit went further to list the said properties which consisted of eight (8) motor vehicles. As the application for execution was set for mention on 16/11/2020 following the granting of the order for attachment and garnishee order, the applicant was afraid the respondents would act on attaching and

selling the properties and freezing the applicant's bank account. As to the irreparable loss that the applicant would suffer if the order staying the execution is not granted, the following was the only averment in the applicant's affidavit I would say:

8. That I pray for the stay of execution and that if the order of stay is not granted the pending application to apply to set aside ex-parte judgment No. 607 of 2020 before His Lordship Masoud, Judge, will be rendered nugatory and I will suffer irreparable loss.

The respondent's counter affidavit in which the applicant's opposed the application was detailed and elaborate as to how service was, in relation to the suit which was eventually determined ex-parte against the applicant, effected to the applicant in vain and hence substituted service through publication in one of widely circulating newspaper; how the applicant failed to appear notwithstanding the substituted service; how the court as a result ordered the matter to proceed ex-parte against the applicant; how the ex-parte judgment was delivered on 15/09/2019; and the period of about ten (10) months that elapsed without any steps being taken by the applicant whilst the applicant was aware of the ex-parte judgment against her.

In the hearing of the application, the counsel for the applicant adopted the applicant's affidavit as part of his submission. He expounded on some of the averments in the affidavit. He nonetheless introduced matters which were not part of the affidavit.

Of significance was the complaint that the orders as to the execution (Execution No. 25 of 2020) were excessive having involved the applicant's properties (8 motor vehicles) and bank account whilst the properties would have sufficed to discharge the outstanding sum of Tshs 62,040,867.93. Equally important to note as to matters which were not in the affidavit was in relation to the applicant's account. It was stated that the account was crucial as it was being used by the applicant for various purposes including paying up her children's school fees and her workers' salaries.

He relied on the case of **Ignazio Massina & National Shipping Agency vs Willow Investment and Costa Shinyanga** Civil Reference No. 8 of 1999 re-stating the conditions which must be considered in determining whether or not to grant an application for stay of execution like the present.

In reply, the first respondent's counsel, Mr Tumaini Mgonja and Mr Ernestila Bahati, brought to the attention of the court that granting or not granting stay is a matter of court's discretion. He relied on **MIC Tanzania Ltd vs CXC Africa Ltd** Civil Application No. 172/01 of 2019. It was also brought to the attention of the court to the span of time lapse between the institution of the suit (i.e Land Case No. 316 of 2016) and commencement of the Execution No. 25 of 2020. And the fact that within that period there was nothing from the applicant.

It was also pointed out that the affidavit supporting the application did not show how the continuing of the execution would result in irreparable loss on the part of the applicant. The averments were general and vague I would say. Reliance was made on **Cotton Marketing Board vs Cagecot Cotton** [1997] TLR 63. Further, the case of **Hydrox Industrial Services Ltd and Another vs CRDB (1996) Ltd and Others** Civil Application No. 87 of 2015 was cited in relation to the principle that the applicant for an order of stay of execution must cumulatively satisfy the conditions necessary for granting of the said order, namely, substantial loss, the application has been made without unreasonable delay, and that security has been given by the applicant.

I have painstakingly considered the rival submissions in relation to the alleged pending application for extension of time within which to file application for setting aside ex-parte judgment delivered against the applicant on 15/08/2019 and whose decree's execution commenced pursuant to Execution No. 25 of 2020.

There is no dispute on the conditions which the court has to consider in determining whether or not to grant an order for stay of execution. The question is whether the present application has satisfied the conditions which must be commutatively satisfied. I had to only look at the affidavit of the applicant and the counter affidavit of the respondents as my yardstick in considering and determining relevance of the submissions in chief made on behalf of the applicant and determining whether the conditions were averred and established. As earlier stated, there were matters which were not in the affidavit which I am accordingly bound to ignore and not consider at all.

Thus, the only relevant matter which was averred in the affidavit was in relation to irreparable loss which the applicant would suffer if the sought order is not granted. Looking at the relevant paragraph, it is clear to me that there was not sufficient material in relation to the allegation of

irreparable loss to enable the court to exercise its discretion in this regard.

Apart from the relevant paragraph being in a form of a prayer, there was nothing in the said paragraph and the entire affidavit as to lack of assurance for easy and quick recovery from the respondents in case the stay is not granted. It should in this respect be recalled that the respondents controverted the allegation and the respective averment in the affidavit by their counter affidavit. The failure to satisfy the court on this point suffices to dispose of the matter against the applicant as I can not see how the cumulative satisfaction of the conditions could be attained.

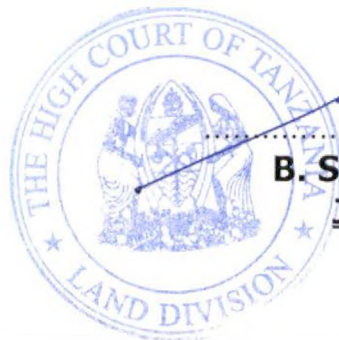
I should perhaps mention that while the ex-parte judgment was delivered on 15/08/2019, the applications for execution and for stay of execution were respectively sometime in May 2020 and on 06/11/2020 if I go by the record before me. As per the applicant's affidavit, the application for execution was heard on 07/10/2020. Yet, there was nothing showing why the present application was filed after a month. I can in the circumstances not rule out the obvious finding that the application was in the circumstances filed unreasonably late.

In all, the cumulative effect of the above leaves me with no doubt that the applicant's affidavit and submissions in support of the application have not disclosed to the court sufficient materials on the basis of which the court could have exercised its discretion in the favour of the applicant. I am thus inclined to find the present application against the applicant.

In the upshot, and for the above reasons, the application is dismissed with costs.

It is so ordered.

DATED and DELIVERED at Dar es salaam this 29th day of December 2020.




.....
B. S. Masoud
Judge

COURT

Delivered this 29th day of December 2020 in the presence of Mr Simon Mkwizu, Advocate, assisted by Ms Theresia Mjengwa, Advocate, for the Applicant and Ms Doreen Athanas, Advocate, for the first and second respondents, and in the absence of the third applicant.




.....
B. S. Masoud
Judge