

IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM SUB - REGISTRY)

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 543 OF 2023

(Arising from Land Execution No. 71/2023 delivered by the High Court of Tanzania before Hon. Fimbo, the deputy Registrar dated 23rd September 2023 which originates from Land Case No. 05/2013 of High Court of Tanzania, at Dar es Salaam dated 30th June 2015)

LEKAM INVESTMENT CO. LTDAPPLICANT

Versus

THE REGISTERED TRUSTEE OF AL-JUMAA

MOSQUE.....1ST RESPONDENT

THE ADMINISTRATOR GENERAL2NDRESPONDENT

CLEMENT KAHABUKA3RD RESPONDENT

ABDALLAH ILAMULIRA4TH RESPONDENT

HILLARY SANDE LIGATE t/a

NOEL ESTATE COMPANY5TH RESPONDENT

RULING

29th November, 2023 & 6th February 2024

MWANGA, J.

The present application for a stay of execution is made under Order XXI Rule 24(1) and Rule 27 of the Civil Procedure Code, Cap. 33 R.E 2022. The applicant seeks a stay of the execution of the judgment and decree of the High Court of Tanzania in Land Case No. 05 of 2013 at Dar es Salaam High Court Registry dated 30th June 2015.

The chamber summon contains the prayers for a stay of execution in respect of the eviction of the applicant or her tenants from the property described as Plot No. 28 Block A, House No. 8 Uhuru Street Kariakoo, Ilala Dar es salaam comprised Certificate of Title No. 79520 pending finalization of intended appeal and determination of Misc Civil Application No. 417 of 2023 before this court. The applicant also prays for the costs of this application.

The chamber summons is supported by the affidavit of the applicant's advocate, Mr. Augustine Mathern Kusalika. The counsel pleads in his affidavit under paragraph 4 that on 1st August 2023, the applicant applied in this court for an extension of time to file both notice of intention to appeal to the Court of Appeal and leave to appeal to the Court of Appeal and the same was admitted as Misc. Civil Application No. 417 of 2023.

He further explained that the application for an extension of time was necessitated after Civil Appeal No. 510 of 2020 lodged by the applicant was struck out on 12th July 2023 for failure to obtain leave of this court. Hence caused the delay in applying for leave in this court.

The counsel pleaded under paragraph 6 of the affidavit further that the applicant is the legal owner of the property in Plot No. 28 Block A, Kariakoo comprised of Certificate of Title No. 79520 dated 4th April 2008 and in Land Case No. 5 of 2013 but was not accorded an opportunity to defend her case in respect of the allegation made by the 1st respondent to the applicant. He also averred in paragraph 8 of the affidavit that, during the hearing of Execution Proceedings No. 71 of 2023 the applicant was not served with a summons so that could be accorded the right to be heard, hence the court proceeded to appoint 5th respondent to carry out eviction against the applicant and her tenants.

Based on the stated facts in the affidavit, the applicant sought it imperative to file the present application in line with the stated prayers above.

In reply, the 1st respondent upon being served with the application, through Mr. Daimu, learned counsel promptly filed a notice of preliminary objection and counter affidavit. The counsel for the 1st respondent raised two contentions. **One**, is that this court does not have jurisdiction to grant a stay of execution under Order XXI Rules 24 and 27 of the Civil Procedure Code, Cap 33 [R. E 2019]. **Two**, the application is incompetent as the verification clause supporting the affidavit is not dated and does not disclose the name of the source of information.

When the matter was scheduled for hearing, both parties agreed on the points of preliminary objections, and the main application to be heard by way of written submission simultaneously. Both parties complied with the scheduling order.

However, on careful perusal and examination of the respective submissions, I noted that the counsels for the 1st respondent Mr. Daimu and Abdulfatah silently abandoned the submissions regarding the points of preliminary objections as he did not argue and expound on the same.

This was also noted in the applicant's counsel rejoinder, where he proceeded to address the court on the merits of the application less the substance of the preliminary objections.

For that matter, therefore, I consider that the 1st respondent had failed to prosecute the points of preliminary objections he had earlier raised, and no reasons were adduced. Consequently, the respective points of preliminary objections are hereby dismissed for want of prosecution.

Now, given the current main application at hand, it is brought under Order XXI of CPC rules 24(1) and 27. Order XXI deals generally with the execution of decrees and orders. Order XXI rule 24(1) deals with the powers and duties of the court to which the decree has been sent for execution. Proceeded to, the court can stay the execution of the decree transferred to it for execution for a reasonable time to enable the judgment debtor to apply to the court by which the decree was passed on to any court having appellate jurisdiction over the former for an order to stay execution or for any other order relating to the decree or execution which might have been made by the court of first instance or the appellate court.

In part, Rule 27 deals with a different situation. It entails the existence of simultaneously two proceedings in one court. That is the proceedings in execution at the instance of the decree-holder against the judgment debtor and the other the suit at the instance of the judgment debtor against the decree-holder. That is the condition under which the court in which the suit is pending may stay the execution before it. For ease of reference, the said Rule 27, Orde XXI provides as follows;

"Where a suit is pending in any court against the holder of a decree of such court, on the part of the person against whom the decree was passed the court may, on such terms as to security or otherwise as it thinks fit, stay execution of the decree until the pending suit has been decided".

Relying on the above provision, it is my view that, for a stay of execution to be granted under Order XX1, rule 27 of the CPC there are conditions to be fulfilled. **One** there should be a proceeding pending in court that is a suit, **Two**, if the stay is not granted, the applicant stands a chance to suffer a substantial loss. **Three** the application has been made without undue delay, and **four**, the applicant has undertaken or promised to furnish security.

Starting with the first condition on the pending suit. Mr. Butawantemi submitted that the applicant has lodged a Misc Application No. 417 of 2023 which is pending before this court for an extension of time, seeking the leave to appeal against the impugned verdict of Misc. No. 95 of 2018 to the Court of Appeal. He cited the case of **Mekefason Mandali and 8 Others vs The Registered Trustee of Arch Diocese of Dar es Salaam**, Civil Application No. 491 of 2019 (unreported), and the Case of **Tanzania Portland Cement Company Ltd vs Khadija Kuziwa**, Civil Application No. 85401 of 2023 (CAT -unreported).

In the reply thereto, Counsels for the 1st Respondent agrees that there should be two proceedings in one court; that is, execution proceedings and a suit of a Judgment Debtor and Decree Holder. However, he stated that the applicant has satisfied only one condition which is the pending execution but there are no pending suits required under order XXI Rule 27, and thus application for an extension of time within which to file a Notice of Appeal as far as Misc. Application No. 417 is concerned is not a suit. He cited the case of **Aloyce Kisenga Mchili vs Zebedayo Mkodya**, Misc. Application No. 128 of 2022 (unreported) Mr. Butawantemi rejoined

that even if an application is a suit, therefore the court should consider his application.

I have considered the rival submissions of the learned counsels. It is true from the affidavit of the applicant that there are pending proceedings and that is Execution No. 71 of 2023 before Fimbo DR and Misc. Application No. 417 of 2023 which are yet to be determined before this court. I do not agree with the counsels for the 1st Respondent that an application for an extension of time to file a notice of appeal is not a suit. His view is contrary to the decision of this court in the case of **Hashim Jongo and 41 Others Vs. Attorney General and TRA**, Miscellaneous Civil Appeal No. 41 of 2004 (Unreported) whereby Mlay J. had this to say when defining the word suit, I quote;

"Applying the above definition of the word "suit" to the present proceedings, I have no doubt in any mind that the application being a "court proceeding", it is a "suit" for the purpose of Order 1 Rule 8" (emphasis is mine).

Having navigated to the above decision, it is undisputed that the application is a court proceeding and thus, a suit. Therefore, in the present case, paragraph 4 of the applicant's affidavit established that there is an

application for an extension of time to file a notice of appeal and leave to appeal Misc. Application No. 417 of 2023, though, presently, leave to appeal to the court of appeal is no longer a good law. See the cases **Petro Robert Myavilwa Vs Zena Myavilwa & Erica Myavilwa**, Civil Application No. 117/06 of 2022 (CAT-Unreported) and **Delta Africa Limited Vs CRDB Bank PLC**, Misc. Civil Application No.455 of 2023 (HCT Unreported).

Additionally, the view regarding one of the grounds for granting a stay of execution was stated in the case of **Tanzania Port Land Cement Company Ltd vs Khadija Kuziwa**, Civil Application No. 854 of 01 of 2023 (CAT- unreported) where Issa JA had this to say and I quote

"Therefore, by analogy, the order staying execution of a decree may be issued pending the determination of an application for an extension of time to lodge a notice of appeal. This answer leads to the second question on whether this power under Rule 4(2)(a) and (b) can also be exercised by a single justice"(emphasis is mine)

Based on the above, the application for an extension of time to file notice is one of the conditional precedents for granting a stay of execution. Hence this condition succeeded.

The second condition is about the applicant having a chance to suffer substantial loss. In his submission, Mr. Butyantemi argued that the applicant stands to suffer loss against the 1st Respondent as he is the grantee of the certificate of title and has initiated investment by raising a commercial rental building in which he secured a loan from the financial institution as of today he stands debts of 400,000,000/= to the banks. And if he isn't granted his prayer, the applicant will suffer financial implications.

Per contra, counsels for the 1st respondent strongly denied such assertions. They argued that, upon perusal of the affidavit no financial loss was stated therein, hence bringing such an assertion in the submission of the learned advocate an afterthought and statement from the bar.

He further stated that it is the 1st Respondent who will suffer loss than the applicant since the applicant has refused to give the respondent vacant possession of the land and for over 9 years has been collecting rent

from the tenants on the land depriving the applicant of the same as reflected under Paragraph 6 and 8 of the counter affidavit.

The counsel cited the Indian case of **Tropical Commodities Supplies Ltd and Others vs International Credit Bank Ltd(In Liquidation) [2004] 2 EA 331** and **the case of Bansidhar vs Pribhu Dayal AIR1954Raj 1**. In his rejoinder counsel for the applicant submitted that it is not true that he hasn't stated it in the affidavit. He further stated that he has demonstrated the same in paragraph 8.

Having considered the submissions of both parties and upon perusal of the affidavit of the applicant, this court finds that the applicant has not stated the substantial loss to be suffered if the prayer is not granted. Paragraph 8 as enunciated by the applicant in his submission only states how the applicant was deprived of his right to be heard in the execution proceedings and the location of the disputed property. In my readings, the same has nothing to do with the loss to be suffered by the applicant. For ease of reference Paragraph 8 of the applicant's advocate affidavit states and I quote;

" that on 18th September 2022 this Honourable Court through Honourable Fimbo DR has issued an eviction against

the Applicant while The Applicant during the hearing of Execution No. 71 of 2023 was not served with the summons so that could be accorded right to be heard and thereafter this Honourable Court proceeded to appoint the 5th Respondent to carry out eviction against the Applicant and her tenants who are residing and doing business to the aforestated property which is situated at Plot No. 28 Block A House No. 8 Uhuru street Kariakoo Ilala Dar es Salaam Tanzania comprised Certificate of title No. 79520."

About the above, failure to state in the affidavit anything about the loss to be suffered by the applicant if the stay is not granted is fatal. The same cannot be cured in the submission of the learned counsel. This is because it is a trite law that submissions are not evidence. This was stated in the case of **Bruno Wenceslaus Nyalifa Vs Permanent Secretary, Ministry of Home Affairs and the Attorney General**, Civil Appeal No. 82 of 2017 where it was held that:

"...Submissions are not evidence. Submissions are generally meant to reflect the general features of a party's case. They are elaborations on evidence already tendered. They are expected to contain arguments and the applicable law. They are not intended to be a substitute for evidence".

Above all, to accept the submission of the counsel at this stage would be unfair to the respondents who do not have the opportunity to counter the allegations of the applicant in the counter affidavit. Having said that, I am confident that the applicant failed to meet this condition.

Thirdly, the application has been made without undue delay. Counsel for the Applicant submitted that the applicant was not informed of any application pending in court until when he was served with 14 days' notice to vacate the premises on 21st September 2023. Hence this application. And prayed the application to be granted. Counsel for the 1st Respondent did not dispute the fact that the application was made without undue delay. However, he stated that the application is not made in good faith as it is made to hold the 1st Respondent down onto the land while the applicant continues to collect rent.

Having considered the submission of both parties, I joined hands with the counsels that the applicant applied without undue delay. The Application was preferred as soon as practicable after the knowledge of the applicant of the execution.

Lastly is whether the Applicant has given Security. It is the Counsel for the Applicant's submission that, the decree to be executed is not monetary in nature therefore cash deposit does not apply and it can be in bond as long as to maintains the status quo of the premises. He cited the case of **Asha Juma Mansour and others vs John Ashley Mbogoni**, Civil Application no. 122/03 of 2020 CAT Dodoma (unreported), and the case of **Mohamed Masoud Abdallah and Others vs Tanzania Road Haulage (1980) Ltd**, Civil Application No. 58/17 of 2016.

In reply, counsel for the 1st Respondent submitted that no security was stated in the affidavit of the applicant.

Having considered the submission by both parties it is a trite law established in the case of **Tanzania Petroleum Development Corporation vs Mussa Yusuph Namwao & 37 Others**, civil application no. 603/07 of 2018 page 9 when referring to the case of **Mantrac Tanzania Ltd. v. Raymond Costa, Civil Application No. 11 of 2010** the court had this to say

"One other condition is that the applicant for a stay order must give security for the due performance of the decree against him. To meet this condition/ the law does not strictly

demand that the said security must be given before the grant of the stay order. To us/ a firm undertaking by the applicant to provide security might prove sufficient to move the Court; all things being equal to grant a stay order, provided the Court sets a reasonable time limit within which the applicant should give the same”.

It is undisputed that, in the affidavit, the applicant has not made a firm undertaking to furnish security for the due performance of the decree against him as the court may deem necessary. Instead, he narrated the same in the submission. As I have stated earlier in referring to the case **Bruno Wenceslaus Nyalifa V. Permanent Secretary, Ministry of Home Affairs and the Attorney General, (supra)** submission is not evidence, hence it accords no weight.

Further to the above, in the case of **Tanzania Petroleum Development Corporation vs Mussa Yusuph Namkwao & 37 others (Supra)**, CAT stated that,

“As is the case, these conditions had to be complied with cumulatively, which necessarily meant that where one of them could have not been satisfied, the Court would decline to grant the order sought”

Looking at the spirit of the law above, it is obvious that, since the applicant has not made any firm undertaking to provide security which might prove sufficient to move the Court; and also has not proved that the applicant is in a chance to suffer a substantial loss, is against the well established cardinal principles above. As stated in the case of **Tanzania Petroleum Development Corporation vs Mussa Yusuph Namkwao & and 37 others (Supra)**, the consequence is to decline the grant of a stay of execution. It is as good as there are not sufficient reasons to grant the same. The conditions outlined must be cumulatively and complied with. See the case of **Felix Emmanuel Mkongwa Vs Andrew Kimwaga**, Civil Application No. 249 of 2016 CAT (Unreported).

In the upshot, the application fails in its entirety and is hereby dismissed. Each party bears its costs.

Order accordingly.



A handwritten signature in blue ink, appearing to read 'H. R. Mwangi', enclosed in a light blue rectangular box.

H. R. MWANGA

JUDGE

06/02/2024