

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(COMMERCIAL DIVISION)**

AT DAR ES SALAAM

MISC. COMMERCIAL APPLICATION NO. 6559 OF 2024

(Originating from Commercial Case No. 113 of 2022)

ISAYA AGROVET GENERAL SUPPLIES.....1ST APPLICANT

ISAYA SIMON BUKAKIYE.....2ND APPLICANT

VERSUS

STANBIC BANK TANZANIA LIMITED.....1ST RESPONDENT

MR. BAGENI ATHANAS MASUBO t/a MASUBO

AUCTION MART & GENERAL BROKERS LIMITED.....2ND RESPONDENT

RULING

Date of Last Order: 03/04/2024

Date of Ruling: 04/04/2024

GONZI, J.

The Applicants lodged the present application under certificate of urgency praying for Orders that:

EXPARTE

- 1. That this Honourable Court be pleased to issue an
order staying the execution by way of attachment
and sale of the two landed property namely
Landed property under Certificate of Title
No.35418 LR Mwanza, Plot No.4 Block "A"**

**Medium Density Mhungula Kahama Urban area;
as well as Landed property under Certificate of
Title No.22177 LR Mwanza, Plot No.102,Block "U"
High Density, Kahama Urban Area, as issued by
this Honourable Court on 13th day of March 2024
pending hearing of the application inter parties.**

INTERPARTES

- 2. That this Honourable Court be pleased to issue an
order staying the execution by way of attachment
and sale of the two landed property namely
Landed property under Certificate of Title
No.35418 LR Mwanza, Plot No.4 Block "A"
Medium Density Mhungula Kahama Urban area;
as well as Landed property under Certificate of
Title No.22177 LR Mwanza, Plot No.102,Block "U"
High Density, Kahama Urban Area, as issued by
this Honourable Court on 13th day of March 2024
pending hearing of Misc. Application**

**No.5376/2024 and final determination of the
appeal process to the Court of Appeal of Tanzania.**

**3. Any other Order as this Honourable Court deems it
fit and just to grant and issue.**

The application was brought under the provisions of Order XXI Rule 21 (1) and (2), section 68(e) and 95 of the Civil Procedure Code Cap 33 of the Laws of Tanzania (R.E 2019). It is supported with an affidavit sworn by Isaya Bukakiye Simon, the Principal Officer of the 1st Applicant Company and the second Applicant herein.

In his affidavit, the 2nd Applicant stated that the 1st Respondent instituted in this Court Commercial Case No.113/2022 against the 1st and 2nd Applicants herein as well as against one Stella Raphael Gwiyago and that the Judgment thereof was delivered on the 27th October 2020 in favour of the 1st Respondent after exparte hearing. He stated that under the Judgment and decree, the 1st and 2nd Applicants were ordered to pay the 1st Respondent Tshs. 227,196,433.81 as general damages. That upon delivery of the Judgment, the Applicants found themselves out of time to lodge notice of appeal to the Court of Appeal of Tanzania hence they lodged Misc. Civil

Application No. 5376 of 2024 in this court seeking an extension of time to file the Notice of Appeal whereby the application for extension of time is scheduled for hearing on 22nd April 2024. He stated further that in the meanwhile, the 1st Respondent embarked upon execution process whereby on 13th March 2024, as part of execution of the decree against them, the Applicants were served with a Prohibitory Order of this Court restraining them from transferring the mentioned landed properties. Also, that the second respondent issued the applicants with a Notice of Attachment of the said properties in execution of the court's decree thereby affording the applicants 15 days' time within which to settle the decretal sum or risk the said properties to be sold by public auction in execution of the decree.

On 27th March 2024 the Applicants filed the application at hand under certificate of urgency seeking exparte order of stay of execution. Upon admission and assignment, on 28th March 2024 I directed that the Respondents be served so that they could be given an opportunity to be heard. I further directed that the parties should appear in court on 2nd April 2024 for necessary Orders. On 2nd April 2024, the second applicant appeared in person and stated that his advocate one Mr. Dennis was attending to his sick child and that he had requested the case be scheduled for necessary

orders the next day that is 3rd April 2024. The second Applicant also stated that the documents evidencing proof of service to the respondents were with his advocate. On 3rd April 2024 when the matter was called for orders, the 2nd Applicant again appeared in person and said that his advocate was not available still and that due to the urgency of the matter, he was ready to fend for himself. The 2nd Applicant produced in Court proof of service of the application to the Respondents bearing the official stamp of the 1st Respondent which shows that they were served with the application on 28th March 2028. Being satisfied that the Respondents were duly served but had defaulted to appear in Court nor to file a counter affidavit, and taking into account that the application was brought under certificate of urgency, I ordered the hearing to proceed exparte the respondents and I granted podium to the 2nd Applicant to address the court.

The sum total submissions by the 2nd Applicant who was also speaking for the 1st Applicant as the Principal officer thereof was as follows:

I pray for an order of staying the execution of the decision of this court delivered on 27th October, 2020 by Hon. Judge Matuma. I have already lodged an application for extension of time to appeal. It is Commercial Application No. 5376/ 2024 and has

been assigned to Honourable Judge Morris. Hearing thereof is fixed for 22nd April 2024. But there is an auction set to take place on 8th April 2024. So, I pray for stay of execution. The Court Broker wants to execute and sell my houses which are valued more than 8-times the amount of the debt I owe them. I have brought the application under certificate of Urgency. As there is a pending appeal process, I pray that stay of execution be granted pending the determination of the application for extension of time to appeal. That is all my Lord.

At the outset I asked myself whether I am vested with jurisdiction to determine the application at hand. The application was brought under the provisions of Order XXI Rule 21 (1) and (2), sections 68(e) and 95 of the Civil Procedure Code Cap 33 of the Laws of Tanzania (R.E 2019). In my settled view, Order XXI Rule 21 (1) and (2) does not apply in applications for stay of execution like the present one. The Order XXI rule (1) and (2) provides that:

21.-(1) Where the person to whom notice is issued under rule 20 does not appear or does not show cause to the satisfaction of the court

why the decree should not be executed, the court shall order the decree to be executed.

(2) Where such person offers any objection to the execution of the decree, the court shall consider such objection and make such order as it thinks fit.

In my view, that provision clearly states that it applies in respect of applications for execution made under circumstances falling under the provision of Order XXI Rule 20 of the Civil Procedure Code. That is to say it applies in a situation where an application for execution is made more than one year after the date of the decree; or where the application for execution is made against the legal representative of a party to the decree. Where in such circumstances a person is issued with the Notice to show cause against execution under Order XXI Rule 20, that person can resort to the provisions of Order XXI Rule 21(1) and (2) and show cause why the decree should not be executed against him. I have looked at the contents of the Affidavit of the 2nd Applicant in support of the application and I have not seen any factual allegations befitting the invocation of the provision of Order XXI Rule 21(1) and (2) of the Civil Procedure Code.

The present application for stay of execution also does not fit under the provisions of Order XXXIX Rule 5 of the Civil Procedure Code as there is no pending appeal in this court pending which the stay is sought. Equally Order XXI Rule 24 of the Civil Procedure Code cannot avail the Applicant in the circumstances of the present case because this is not a court to which a decree has been transferred for execution. In that regard, as there is no other legal provision supporting the applicant's application for stay of execution pending determination of his application for extension of time, the only avenue for the applicant appears to be section 95 of the Civil Procedure Code which confers the court with inherent jurisdiction to ensure that ends of justice are not defeated. I find support to my position from the decision by the Court of Appeal of Tanzania in the case of **Tanzania Electric Supply Company Limited Versus Dowans Holdings SA (Costa Rica) and Dowans Tanzania Limited (Tanzania)** (Civil Application No.142 of 2012) where the Court held that:

We have, indeed, found the above reasoning of the learned High Court Judge to be a correct exposition of the law on the issue and we subscribe wholly to it. The inclusion of the words relied on by Mr. Rweyongeza in Rule 11 (2) (b), was not meant to

change the prevailing law, in our considered view. Although unnecessary, it was only a recognition of the prevailing view of law that the High Court and/or Tribunals had actually their inherent jurisdiction to grant orders of stay of execution pending appeal saved under section 95 of the Civil Procedure Code, Cap. 33. This, however, has always been subject to one condition that no proceedings in the matter have been commenced in this Court. For the order of the High Court or Tribunal, in our respectful firm opinion, to be valid, it should be or should have been made before a notice of appeal is lodged. (underlining supplied)

Therefore, I am satisfied that in the present case I am vested with the requisite jurisdiction to determine an application for stay of execution of the decree of this court pending determination of the application for extension of time to appeal to the court of Appeal of Tanzania. In the application at hand, it has been disclosed that there is no notice of appeal lodged to the court of appeal and that is why the applicants have a pending Commercial Application No.5376/ 2024 before this court wherein they are seeking for an extension of time to lodge the Notice of Appeal to the Court of Appeal of Tanzania. The Applicants have disclosed in the affidavit that execution

process has commenced and to that extent there is a Prohibitory Order issued against landed properties owned by the 2nd Applicant as described in the chamber summons. It should also be noted that the execution process has not yet ended as the decree holder is yet to realize the relief ordered by the Court hence there remains a portion of the execution process which can be stayed by the Court. In those circumstances, this court can properly exercise its powers to determine the application for stay of execution of the decree of the court.

Having found that the court possesses the requisite jurisdiction and that the circumstances prevailing in the present case warrant the exercise of the court's powers of stay of execution of the decree, I now proceed to determine the application before me on merits. The Respondents were served but they did not file a counter affidavit nor did they appear in court twice. Therefore, the determination of this application for the stay of execution is done on the assumption that the averments contained in the applicants' affidavit are not disputed by the other side. Although the application is being entertained ex parte, it is still the duty of the court to consider the application on hand in line with the laid down principles of law regulating applications for stay of execution.

A stay of execution simply prevents the judgment creditor from carrying out the legal processes of execution; it has no bearing on rights earned outside the stayed process. In Civil Litigation, a stay of execution is like a pause button used by the applicant to restrain the execution of the court decree from being carried out by the opposing party. Fundamentally, for an application for a stay to succeed, the applicant must show special circumstances to justify the grant of a stay. The special circumstances which an applicant for stay of execution must show and substantiate in the affidavit in support of the application, are well settled and there is litany of judicial precedents in that regard. For example, in the case of **Tanzania Electric Supply Company (TANESCO) v. Independent Power Tanzania Limited and Two Others [2000] TLR 324**, it was stated that in Tanzania it is now settled law that the principal factors which a court or tribunal should consider whether or not to grant a stay of execution are:

- (a) Whether there is a pending appeal between the respective parties.
- (b) Whether the refusal of the application is likely to cause substantial and irreparable injury to the applicant; and

(c) Balance of convenience.

On existence of an appeal and its chances of success, the modern trend now taken by the courts is that:

The chances of success of an intended appeal, though a relevant factor in certain situations, could only meaningfully be assessed later on appeal after hearing arguments from both sides. This was a general principle which was not without exception.

The above position was taken in the case of **Tanzania Posts & Telecommunications Corporation V M/S B S Henrita Supplies (1997)** TLR 141 decided by the Court of Appeal of Tanzania.

In the present application there is no pending appeal but there is pending an application for extension of time to file an appeal. In my view, it is part and parcel of the appeal process without which the applicant cannot lodge a competent appeal in the court of appeal. As I am exercising the inherent powers of the Court under section 95 of the Civil Procedure Code, which does not prescribe requirements for granting a stay of execution under it, I find it prudent not to consider the chances of success of the pending application for extension of time to appeal or chances of success of the intended appeal. This is in line with the stance taken by the Court of Appeal

of Tanzania in Tanzania Posts & Telecommunications Corporation V M/S B S Henrita Supplies (supra).

On substantial and irreparable injury to the Applicant, in the case of **Nicholas Nere Lekule vs Independent Power (T) Ltd and Another (1997) TLR 58** the Court of Appeal of Tanzania 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 damages.

However, the stance of the courts on irreparable loss has been progressively becoming a bit relaxed. In **Tropical Commodities Supplies Ltd and Others Versus International Credit Limited (In Liquidation) [2004]2 E.A. 331**, the words "Substantial Loss" were defined to mean:

"... Substantial loss does not represent any particular amount or size. It cannot be qualified by any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real

***worth or value, as distinguished from a loss
without value or loss that is merely nominal.”***

In the application at hand, the substantial irreparable loss has been substantiated by the Applicants stating in the affidavit that unless stay of execution is granted, the said properties namely Landed property under Certificate of Title No.35418 LR Mwanza, Plot No.4 Block “A” Medium Density Mhungula Kahama Urban area; as well as Landed property under Certificate of Title No.22177 LR Mwanza, Plot No.102,Block “U” High Density, Kahama Urban Area, would be sold by public auction in execution of the decree. Obviously, this entails that the applicants suffering irreparable loss by losing ownership of the landed properties even if later on an extension of time to appeal is granted and the ultimate appeal succeeds. I find that the applicants have substantiated this legal requirement.

On balance of convenience, the rule was stated in the case of **China Henan International Cooperation Group Limited vs Salvand K.A. Rwegasira**, Civil Application No. 71 of 2005 (unreported) where at page 10 it was held that:

A balance of convenience is struck when this Court gives an order that would not put either party in jeopardy.

Admittedly, in the affidavit of the 2nd applicant, the aspect of balance of inconvenience is scantily espoused by the fact that the applicants have been granted 15 days' time within which to settle the decretal sum or the said properties would be sold by public auction. In his submissions, the 2nd Applicant accentuated the inconvenience alongside the irreparable loss by stating that the Court Broker wants to execute and sell his houses which are valued more than 8-times the amount of the debt. If the applicants are to be believed on this - and there is no counter affidavit to refute the allegations, then it will be greater inconvenience and greater loss to them if they lose their properties worth more than 8 the value of the decretal sum sought to be executed.. Should they ultimately win the intended appeal, chances of recovering the net value of their landed properties would be slim.

In fine, I find merit in the application at hand. I grant the application. I order that execution of the decree of this Honourable Court in Commercial Case No. 113 of 2022 delivered by Hon. Matuma, J., on 27th October 2020 be stayed pending determination of Miscellaneous Civil Application No. 5376 of 2024 which is pending in this court. I make no order as to costs. It is so ordered.



A handwritten signature in black ink, appearing to read "A. H. Gonzi".

A. H. GONZI
JUDGE
05/04/2024

Ruling is delivered in court this 5th day of April, 2024 before Hon. Kelvin Ndomba Ag. Deputy Registrar and in the presence of Applicant in person and Ester Poyo Advocate for the 1st Respondent.



A handwritten signature in black ink, appearing to read "K. Ndomba".

K. NDOMBA
AG. DEPUTY REGISTRAR
05/04/2024