IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWANGESI, J.A., NDIKA, J.A., And KITUSI, J.A.)

CIVIL APPLICATION NO. 243 OF 2016

NATIONAL HOUSING CORPORATION ..... APPLICANT

VERSUS

1. **PETER KASSIDI**
2. **HAMISI LUSWAGA**
3. **CHRISTOPHER SEME**
4. **MSOLOPA INVESTMENT CO. LIMITED**
5. **ESTHER BERNARD KOMBA**

..... RESPONDENT

(Application for Temporary Injunction from the Decision of the High Court of Tanzania at Dar es Salaam)
(Wambura, J.)

dated the 23rd day of February, 2016
in
Miscellaneous Land Appeal No. 155 of 2014
.....

RULING OF THE COURT

15th May & __ June, 2019

NDIKA, J.A.:

The main issue which this ruling seeks to answer is whether the Court can invoke its inherent powers under Rule 4 (2) (a) and (b) of the Tanzania Court of Appeal Rules, 2009 (the Rules) to issue an order restraining the first, second and third respondents from executing a decree of an inferior tribunal.

The facts which are germane to this long-drawn-out dispute are as follows: the protagonists herein have been tussling over ownership and possession of landed property now described as Farm No. 1854 measuring

3.776 hectares situate at Boko area in Kinondoni District in the City of Dar es Salaam (the disputed property). The applicant claims that it bought the said property from a certain Mr. Joseph David Hayila on 29th September, 2004 and that its title to that property is now comprised in a Letter of Offer of Right of Occupancy No. LD/164666/28 of 10th February, 2005 issued for a term of 99 years commencing 1st January, 2005. Having developed a portion of the property into a housing estate, the applicant sold twenty-four housing units to individual owners including the fifth respondent and has retained ownership and possession of the residual land.

Unbeknown to the applicant, the first, second and third respondents had successfully sued the said Mr. Hayila for ownership and possession of the disputed property in the Ward Tribunal of Bunju vide Land Complaint No. 94 of 2004. The applicant was not a party to that action, which proceeded *ex parte* and the judgment was rendered on 28th August, 2004. In October, 2005, the applicant learnt from a newspaper advert that, at the instance of the three respondents named above, the District Land and Housing Tribunal of Kinondoni District (the DLHT), pursuant to its powers under section 16 (3) of the Land Disputes Courts Act, Cap. 216 RE 2002 for enforcement of Ward Tribunals' decrees, had issued an eviction order against the said Mr. Hayila to vacate the disputed property in execution of the aforesaid decree of the Ward

Tribunal. In effect, the eviction order was against Mr. Hayila's successors in title who are the fifth respondent and twenty-three other owners of the individual housing units as well as the applicant as the owner of the residual land.

To fend off the said eviction, the applicant instituted Land Case No. 210 of 2005 in the High Court, Land Division at Dar es Salaam against the first, second and third respondents herein seeking a declaration that it was the lawful owner of the disputed property. That case ended at the pre-trial stage as it was struck out by the High Court (Rugazia, J.) for being *res judicata* on reason that the matter had been litigated finally and conclusively by the Ward Tribunal of Bunju vide Land Complaint No. 94 of 2004.

Aggrieved, the applicant appealed to this Court vide Civil Appeal No. 84 of 2008. Meanwhile, the fifth respondent along with the aforesaid twenty-three other owners of housing units filed Land Revision No. 94 of 2008 in the DLHT against the first, second and third respondents herein along with an instructed broker named Adili Auction Mart seeking revision of the decision of the Ward Tribunal of Bunju in Land Complaint No. 94 of 2004. By its ruling dated 26th October, 2011, the DLHT nullified the impugned Ward Tribunal's decision. In due course, the appeal before this Court (Civil Appeal No. 84 of

2008) was surpassed by events. Hence, it was duly marked withdrawn on 30th April, 2013.

A new turn of events unfolded from 21st July, 2016 after the applicant was summoned to appear on 27th July, 2016 before Hon. Mlyambina, Chairperson of the DLHT (as he then was) in respect of Land Application No. 251 of 2016. Upon appearance, the applicant was ordered to vacate the disputed property within fourteen days or, in the alternative, agree to pay compensation to the first, second and third respondents. It was at that time that the applicant learnt the following: **first**, that following the withdrawal by the applicant of its appeal in this Court alluded to earlier, the first, second and third respondents re-approached the DLHT and resuscitated their bid for execution of the Ward Tribunal's decree in Land Complaint No. 94 of 2008 deceptively claiming that it was still in force while, in actual fact, it had been nullified by the DLHT. **Secondly**, that the fifth respondent along with the aforesaid twenty-three other owners of housing units objected to the execution by lodging Miscellaneous Land Application No. 278 of 2014 in the DLHT against the three respondents, Mr. Hayila and a Tribunal-appointed broker called Rhino Investment Co. Limited on the ground that the decree sought to be executed was non-existent following its nullification by the DLHT

vide Land Revision No. 94 of 2008. The DLHT sustained the objection and terminated the execution proceedings.

Being unhappy with the aforesaid decision of the DLHT in Miscellaneous Land Application No. 278 of 2014, the first, second and third respondents herein successfully appealed to the High Court, Land Division in Miscellaneous Land Appeal No. 155 of 2014. By its decision dated 23rd February, 2016, which is the subject of the intended application for revision in this Court, the High Court, in effect, restored the execution proceedings in Land Application No. 251 of 2016 in the DLHT in favour of the first, second and third respondents. As hinted earlier, the applicant was, then, issued with an eviction order by which it was commanded to vacate the disputed property within fourteen days or, in the alternative, agree to pay compensation to the first, second and third respondents.

The said threat of eviction prompted the applicant to seek extension of time from this Court within which to apply for revision of the High Court, Land Division in Miscellaneous Land Appeal No. 155 of 2014. In tandem with that application, the applicant has lodged the instant application by a notice of motion taken out on 15th August, 2016 under Rule 4 (2) (a) and (b) of the Rules for:

> *"an order that the respondents be restrained from executing the Eviction Order issued by the District Land and Housing Tribunal of Kinondoni District (at Mwananyamala) vide Miscellaneous Application No. 251 of 2016 on 27th August, 2016 … pending determination of the intended revision …."*

In support of the application, Mr. Martin Mdoe, the applicant's Corporation Secretary, deposed an affidavit. It is noteworthy that none of the respondents lodged any affidavit in reply, denoting that all the averments in the supporting affidavit are essentially uncontested.

Mr. Mpaya Kamara, learned counsel, appeared for the applicant at the hearing of the application. Having adopted the grounds in the notice of motion, the accompanying affidavit and the list of authorities he had duly lodged as part of his oral argument, Mr. Kamara updated the Court that in the aftermath of the filing of this matter, the applicant duly filed the intended application for revision (Civil Application No. 294/16/2017) after being granted by the Court a requisite extension of time to do so vide an earlier application.

In justifying the instant application, Mr. Kamara argued that the Court is being moved to invoke its inherent jurisdiction in terms of Rule 4 (2) (a) and (b) of the Rules to grant a temporary injunction to restrain the ordered eviction of the applicant from the disputed property pending the hearing of

the revision already instituted in the Court. He clarified that the applicant could not apply for a stay of execution of the decree under Rule 11 of the Rules because the said provisions contemplate issuance of a stay pending determination of an intended appeal where the applicant has already lodged a notice of appeal as was held by the Court in **National Housing Corporation v. Etiennes Hotel**, Civil Application No. 175 of 2004 (unreported) but in this case no such notice could be filed.

When probed by the Court whether a temporary injunction was the appropriate and justiciable relief in the instant case, Mr. Kamara relied on the decision of a single Justice of the Court (Kileo, J.A.) in **National Housing Corporation v. Hamisi Luswaga & 3 Others**, Civil Application No. 82 of 2008 (unreported) for the proposition that the Court has inherent powers under the enabling provisions cited for this matter to give an order restraining a party from executing a decree of a subordinate court or inferior tribunal to which the applicant was not a party. In the above case, the Court restrained the respondent from executing an eviction order issued by the DLHT for Kinondoni District pending the hearing and determination of an intended appeal.

Dr. Masumbuko Lamwai, learned counsel for the first, second, third and fourth respondents, on the other hand, disagreed. While initially conceding

that the applicant had, indeed, lodged in this Court the intended application for revision as submitted by his learned friend, he submitted so ardently that the Court cannot legally injunct the respondents from executing the decree under consideration. In elaboration, he argued that as a matter of practice, an order of injunction is issued, in appropriate circumstances, by a court of first instance, not a final appellate court. However, he did not cite any authority to back up his position.

The learned counsel, then, disputed the applicability of the case of **National Housing Corporation v. Hamisi Luswaga & 3 Others** (supra) to the instant matter as he contended that it concerned an application for a stay of execution of a decree of an inferior tribunal.

It was Dr. Lamwai's further submission that even though there was a lacuna in the Rules in respect of the Court's power to stay an execution of a decree of a subordinate court or inferior tribunal pending the determination of an application for revision, the Court has inherent powers under the enabling provisions cited for this application to grant such a relief, but not an order of injunction suggested by Mr. Kamara. Counsel based this proposition on analogy from Rule 11 of the Rules providing the Court's jurisdiction to consider and grant stay of execution of a decree pending the determination of an appeal.

For the fifth respondent, Mr. Elisa Msuya, learned advocate, associated himself with Mr. Kamara's submissions as he indicated that his client did not oppose the application. However, he suggested that the prayer sought in this matter was, in essence, a stay of execution, not an injunctive relief.

Rejoining, Mr. Kamara maintained that the Court has, in practice, been issuing preservatory orders pending appeals and urged against this power being constrained. He contended that the decision in **National Housing Corporation v. Hamisi Luswaga & 3 Others** (supra) is one such case where the Court granted an injunctive relief to preserve the substance of a pending appeal, notwithstanding the citation in the ruling of the Court that it concerned a motion for a stay of execution. In any event, he added, an injunction of an execution process and a stay of execution were one and the same thing, as they both result in a temporary stoppage of the happening of execution of a decree.

We have carefully considered the grounds in the notice of motion and accompanying affidavit in the light of the learned contending submissions and taken account of the authorities cited. We think the whole matter brings to our attention three issues: the first issue is, admittedly, a direct and clear-cut question whether the instant application is, in essence, a motion for an order of injunction against an execution process or one for a stay of execution. The

second issue is the main issue but also the most intricate – whether the Court has inherent powers under Rule 4 (2) (a) and (b) of the Rules to issue an order restraining the respondents from executing the decree of the Ward Tribunal. The final question, which would only arise if the second issue is answered in the affirmative, is whether there is good cause for the Court to grant the order prayed for.

Our answer to the first issue, as formulated above, is clearly unmistakable on both the notice of motion and the accompanying affidavit. As indicated earlier, the notice of motion explicitly states that the applicant herein prays for an order that the respondents be restrained from executing the eviction order issued by the DLHT vide Miscellaneous Land Application No. 251 of 2016 on 27th August, 2016 pending determination of the intended revision. By the same token, the accompanying affidavit seeks, quite unequivocally, to justify an order of restraint particularly in Paragraph 20 as it avers that:

> *"… the balance of convenience weighs in favour of granting the injunction because whereas the refusal of the injunction will result in the deprivation of the applicant's property before it has been heard, the grant of the injunction will not cause any new hardship on the 1st, 2nd and 3rd respondents because the said*

respondents have never before been in occupation of the premises at any given time."

In view of the foregoing, we hold that this matter unquestionably concerns, in its tenour and spirit, a prayer for injunctive relief against the execution process that was going on in the DLHT.

We now turn to the second issue whether the Court has inherent powers under Rule 4 (2) (a) and (b) of the Rules to issue an order restraining the respondents from executing the decree of the Ward Tribunal issued in their favour.

To begin with, it is common ground that the Rules do not specifically provide for the procedure for seeking an order for preserving the substance of an intended application for revision. It is, therefore, understandable that the applicant herein resorted to the Court's inherent powers as spelt out under Rule 4 (2) (a) and (b) of the Rules thus:

"(2) Where it is necessary to make an order for the purposes of-

(a) dealing with any matter for which no provision is made by these Rules or any other written law;

(b) better meeting the ends of justice; or

(c) [Omitted]

the Court may, on application or on its own motion, give directions as to the procedure to be adopted or make any other order which it considers necessary."

What is the subject of contest herein is whether a temporary order of restraint against an execution process can be made by the Court pursuant to the above inherent powers. As hinted earlier, Mr. Kamara's answer to that question is in the affirmative, based upon the decision of the single Justice of the Court in **National Housing Corporation v. Hamisi Luswaga & 3 Others** (supra) as his trump card. Dr. Lamwai took a different view, submitting that the said decision was inapplicable in the instant matter on the ground that it concerned an application for stay of execution pending appeal. Having read that decision, we agree with Mr. Kamara that the said decision, indeed, concerned the question whether the Court had jurisdiction to restrain the respondents from executing an eviction order issued by the DLHT pursuant to a decision of a Ward Tribunal. The application was pegged on Rule 3 (2) (a) and (b) of the Tanzania Court of Appeal Rules, 1979, which is *in pari materia* with the enabling provisions cited for this matter. The single Justice of the Court determined that question in the affirmative as she held that:

"... where the interests of justice demand, as in the present situation, ***the Court of Appeal has***

> ***inherent powers under Rule 3 (2) (a) and (b) to give an order restraining a party from executing the decree of a subordinate court where the applicant was not a party****. The Ward Tribunal is one of the subordinate courts in the hierarchy of land courts and it may be equated to a Primary Court. The applicant, as already pointed out, has no locus in the Ward Tribunal, nor did he have locus in the DLHT which is the executing court."* [Emphasis added]

Admittedly, the above position is different from the stance that had been taken three years earlier, also by a single Justice of the Court (Lubuva, J.A.), in **Gazelle Tracker Limited v. Tanzania Petroleum Development Corporation**, Civil Application No. 15 of 2006 (unreported). In that case, the applicant sought an order of temporary injunction to restrain the respondent from carrying out an intended eviction of the applicant from the suit premises. In dismissing the application, the single Justice was essentially of the view that:

> *"It is common knowledge that the Civil Procedure Code, 1966 does not apply in this Court. In view of the fact that no provision is made in the Court Rules, 1979, for injunctive reliefs, I am persuaded by Mr. Kilindu's submission that* ***applications for***

> ***injunctive reliefs such as this, are more appropriately suited for the court exercising original jurisdiction and not the Court of Appeal****. The logic is not far to seek. As provided for under Rule 1, Order 37 of the Civil Procedure Code, 1966, temporary injunction may be granted where in any suit, the property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit. It is therefore clear that* ***injunctive reliefs are, according to the law as set out above, generally invoked at the stage where the trial of a suit is in progress or pending****."*
> [Emphasis added]

It seems to us that besides the authority of **National Housing Corporation v. Hamisi Luswaga** (supra) relied upon by the applicant, this matter was essentially stirred by the applicant's understanding that an injunction of an execution process and a stay of execution are one and the same thing, as they both result in a temporary stoppage of the happening of execution of a decree. While we would agree that there is a grain of truth in that observation, we think it is not wholly correct.

It bears reflecting that a temporary injunction is an equitable relief for maintaining the *status quo* between the parties pending hearing and determination of an action in court. This remedy is in the nature of a

prohibitory order granted at the discretion of the court against a party. On the other hand, while an order of stay of execution is also in the nature of prohibitory order, it is addressed to the court carrying out the execution to suspend or delay the enforcement of the decree concerned pending hearing and determination of a proceeding, most certainly an appeal. What a stay of execution does, therefore, is to prohibit the Court from proceeding with the execution further. Apart from the two orders being different in terms of their respective object, the learned authors V.S. Sohoni and S.V. Sohoni in **Sohoni's Law of Injunctions**, 4th Edition, Premier Publishing Company, Allahabad, India 2013, at page 21, emphasise that the:

> *"... difference between an order of injunction and an order of stay arising out of the fact that an injunction is usually passed against* ***a party while a stay order is addressed to the Court****."* [Emphasis added]

Taking into account the difference between the two orders in terms of their respective object as well as the party against whom each one may be made, we are firm that they constitute two distinct and exclusive judicial processes which cannot be invoked interchangeably or in the alternative.

The above aside, we are persuaded by a commentary by the learned authors of **Sohoni's Law of Injunctions** (supra) at pp. 737 to 738 to the

effect that generally no injunction can be granted to stop a judicial process such as execution of a decree even with the aid of inherent powers of the Court under section 151 of the Indian Code of Civil Procedure barring very exceptional circumstances. We feel obliged to excerpt the relevant passage from page 738 disclosing the logic in that commentary:

> *"The principle is also well-settled that before an order [of injunction] in exercise of inherent powers is passed, the Court must be satisfied (1) that the applicant has a prima facie case in his favour, (2) that irreparable injury would be caused to the applicant if the order sought by him is not granted during the pendency of the legal proceedings, or (3) that the balance of convenience lies in favour of the applicant. But it appears from the perusal of the decision in* ***Surinder Singh v. Lal Sheoraj [AIR 1975 MP 85], that since a party in whose favour a decree or order has been passed holds his prima facie title to the property or the right which was the subject-matter of the decree or order, very strong evidence would be necessary to rebut the presumption of prima facie title in favour of the decree-holder****."* [Emphasis added]

To cement their observation, the learned authors went on to extract a holding in the case of **Surinder Singh v. Lal Sheoraj** (supra) that they cited thus:

> *"Decree-holder should not ordinarily be restrained from enjoying the fruits of the decree obtained by him after a successful litigation. Merely because a party chooses to file* ***a suit*** *challenging the decree or order on certain grounds, would not suffice to destroy the presumption in his favour and a very heavy burden would lie on the applicant to produce strong and cogent prima facie evidence to satisfy the Court that the grounds on which the decree or order is challenged are fairly strong and that here is a reasonable possibility of the success of* ***such suit****."*
> [Emphasis added]

We are alert that the above holding explicates the slim chance of issuance of an injunctive order to restrain execution of a decree pending **determination of a suit**. Nonetheless, by dint of logic and the practice of the Court it would seem to us that the chance for issuing such an order for restraining execution of a decree pending determination of an appeal (or revision) would be even more trifling because, unlike where such an order is sought in relation to a pending suit, there exists in the procedure a special

judicial process for halting execution of a decree by a stay order in the pendency of an appeal.

Perhaps, at this point, we should put matters in a proper perspective. In the instant application, the first, second and third respondents duly instituted execution proceedings in the DLHT which resulted in the issuance of the eviction order, the subject-matter of this application. The fourth respondent was, then, duly appointed by the DLHT to carry out the eviction. Although the applicant now moves the Court that **the respondents** *"be restrained from executing the Eviction Order issued by the District Land and Housing Tribunal of Kinondoni District (at Mwananyamala),"* in essence we are being urged to issue an order of temporary injunction against the aforesaid eviction order. Put differently, the Court is being moved to issue that order to injunct a judicial process of enforcement of a decree. To us, this course amounts to a misapplication or misuse of an injunctive relief, more so because we think that an order of stay of execution would have been not only proper but also more efficacious.

In view of the foregoing, we find logic in Dr. Lamwai's submission, drawing inspiration from Rule 11 of the Rules, that given the lacuna in the Rules on the Court's power to stay an execution of a decree of a subordinate court or inferior tribunal pending the determination of an application for

revision, the Court would have inherent powers to issue such an order, but not one of injunction. Conceivably, it may be questioned whether a decree of a subordinate court or inferior tribunal can be a subject of a stay order issued by the Court. A single Justice of the Court (Ramadhani, J.A. as he then was) settled that question in **Sudi Kipetio & 3 Others v. Bakari Ally Mwera**, Civil Application No. 94 of 2004 (unreported), also cited by Mr. Kamara, as he held that:

> *"It is my considered opinion that as long as there is a notice of appeal before this Court and the order to be stayed, though given by a subordinate court, was nevertheless given in respect of a matter subject of the pending appeal, this Court has jurisdiction to entertain an application for stay of execution. Consequently, I have jurisdiction to deal with this application for staying the execution of an order given by the Primary Court."*

Based on the foregoing analysis, we would, therefore, answer the second issue in the negative.

Given our determination on the second issue, the third issue, which was dependent upon the second issue being answered in the affirmative, does not arise.

In fine, we are of the firm mind that this application is misconceived. In consequence, we are constrained to dismiss it, as we hereby do. The respondents shall have their costs in this matter.

DATED at **DAR ES SALAAM** this …… day of June, 2019

S. S. MWANGESI
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL