IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MWARIJA, J.A., KOROSSO, J.A. And LEVIRA, J.A.)

CIVIL APPLICATION NO. 526/17 OF 2016

Hamisi Mohamed (as the Administrator of the Estate of Risasi Ngawe, deceased) ..... APPLICANT

VERSUS

Mtumwa Moshi (as the Administrator of the Estate of Moshi Abdallah, deceased) ..... RESPONDENT

(Application for stay of execution from the decision of the High Court of Tanzania at Dar es Salaam)

(Mgetta, J.)

dated the 24th day of December, 2016
in
Land Case No. 301 of 2009
.....

RULING OF THE COURT

24th June & 21st August, 2019

MWARIJA, J. A.:

In this application, the applicant Hamisi Mohamed who was the administrator of the estate of the late Risasi Ngawe, is seeking an order staying execution of the decree of the High Court of Tanzania, Land Division (Mgetta, J.) dated 24/11/2016 in Land Case No. 301 of 2009 (the suit).

The application which was brought under Rule 11 (2) (b), (c) and (d) of the Tanzania Court of Appeal Rules, GN No. 368 of 2009 (the Rules) is

supported by an affidavit affirmed by the said Hamisi Mohamed. It is based on the following grounds:

> *"(a) The substantial loss may result to the applicant unless the order is made.*
>
> *(b) The application has been made without unreasonable delay."*

At the hearing of the application, the applicant did not appear. He had however, filed written submission in support of the application in compliance with rules 106 (1) of the Rules. On her part, the respondent, who was sued in the High Court in her capacity as an administratrix of the estate of the late Moshi Abdallah, was represented by Mr. Yahya Njama, learned counsel.

Since the applicant had filed his written submission, in terms of Rule 112 (4) of the Rules as amended by GN No. 344 of 2009, he was deemed to have appeared. The provision states as follows:

> "112 – (1)....
>
> (2) ....
>
> (3) ....
>
> (4) For the purpose of this rule, a party who has lodged written submissions under the provisions of Rule 106 shall be deemed to have appeared."

On his part, the respondent did not file any reply submission. Notwithstanding that omission, under Rules 106 (10) (b) and (11) of the Rules, she was not precluded from making oral submission in response to the applicant's written submission. In the circumstances, we proceeded to hear the application on the basis of the arguments made by the applicant in his written submission and the oral arguments made by respondent's counsel in reply thereto.

In his written submission, the applicant prefaced his arguments by stating the background facts giving rise to the decision which is the subject matter of his application for stay of execution. He stated that, as a result of a dispute over ownership of a property, House No. 2 situated on Plot No. 60 Block J along Kibambwe Street, Kariakoo area within Ilala Municipality between the estates of the deceased persons Risasi Ngawe and Moshi Abdallah, he filed the suit against the respondent in the High Court, Land Division.

He went on to state that on 24/11/2016, the learned trial judge dismissed the claim by the applicant that the property belonged to the estate of the late Risasi Ngawe. According to the trial court's judgment, the ownership dispute had since been dealt with by the Buguruni Primary Court in Probate and Administration Cause No. 340 of 2003. That court decided

that the property was part of the estate of the late Moshi Abdallah. The applicant was aggrieved by the decision of the High Court and thus on 28/11/2016, he instituted a notice of appeal intending to challenge that decision. Making reference to paragraphs 9 and 10 of his affidavit, he submitted that the application meets the requisite conditions for grant of the sought order. He states as follows in those paragraphs of his affidavit:

> *"9. I am willing and ready to provide security for costs as to be determined by this honourable Court.*
>
> *10. The heirs of the deceased will suffer irreperably if the judgment and decree of the trial court will be executed because there is danger of that property being alienated by the respondent and apart from that the appeal has merit."*

In his oral submission, Mr. Njama argued briefly that the applicant has failed to meet the conditions precedent for grant of an order of stay of execution. In particular, the learned counsel argued that the applicant has failed to provide security for the due performance of the decree. He argued that, both in his affidavit and written submission, the applicant undertook to provide security for **costs**, not security for the due performance of the decree.

When he was probed by the Court on whether or not there was any decree which is capable of being stayed, the learned counsel was quick to state that in effect, the decision of the High Court did not give rise to a decree. He contended that what should have been extracted from that decision was not a decree but a drawn order which, from the nature of the decision, is itself not executable.

We have considered the applicant's written submission and the oral arguments of the respondent's counsel. For the reasons which will be apparent herein, we think that we need not dwell on the merits or otherwise of the application. According to the record, the reliefs claimed by the applicant in the plaint were, among others, a declaration that the property belonged to the estate of the late Risasi Ngawe and an order requiring the respondent to give vacant possession of the property. On her part, the respondent raised a counterclaim seeking declaration that the property belonged to the estate of the late Moshi Abdallah. Having found that the dispute over ownership of the property was dealt with by the Primary Court of Buguruni in Probate and Administration Cause No. 340 of 2003, the learned trial judge decided that it was improper for the applicant to file a suit in the High Court on the same matter. He states as follows at page 18 of his judgment:

"...it should be clear that the decision of the Primary Court of Buguruni cannot be challenged by instituting this suit. It ought to be challenged in the same proceedings either in appeal or revision. Unfortunately, the plaintiff lodged his application for revision before Ilala District Court, which application, on appeal, the High Court at Dar es Salaam Registry found to have been lodged out of time, and hence it was incompetent before Ilala District Court which ought to have struck it out.... ***Hence, the suits*** *(sic)* ***as well the counter claim are not meritorious and are according dismissed."***

[Emphasis added].

Since the claim in both the plaint and the counter claim were dismissed, we agree with Mr. Njama that in principle there can be no decree or order which is capable of being executed. That is for obvious reason that the decision of the High Court did not give any right to any of the parties. In the case of **Athanas Albert and 4 Others v. Tumaini University College, Iringa** [2001] TLR 63, the Court stated as follows on that principle:

"A stay of execution can properly be asked for where there is a Court order granting a right to the respondent or commanding or directing him to do something that affects the applicant."

See also the case of **Dimon Tanzania Limited v. the Commissioner General Tanzania Revenue Authority and 2 Others,** Civil application No. 89 of 2005 (unreported). In that case, the applicant had applied for leave to file an application for prerogative orders of certiorari, mandamus and prohibition (prerogative orders). The application was dismissed by the High Court. The applicant was aggrieved by that decision and therefore lodged a notice of appeal and subsequently filed an application seeking *inter alia*, an order staying execution of the order of the High Court which dismissed the application for leave to file an application for prerogative orders. Having considered the nature of the decision of the High Court, this Court was of the view that the order was not executable and thus incapable of being stayed. The learned single Justice observed as follows:

> *"In my view, it is not executable because it does not give any right to any party capable of being executed."*

He then went on to hold that:

> *"Since the order dismissing the application for leave to apply for orders of certiorari, mandamus and prohibition is not capable of being executed, it goes without saying that it is not capable of being stayed."*

In our considered view, although in the cited cases the orders sought to be stayed arose from applications, not suits, the principle is that an order which

does not grant a right to any of the parties is not capable of being executed and as such, is similarly not capable of being stayed. As pointed out above, in the present case none of the parties was granted any right as both the applicant's and the respondent's claims in the plaint and the counterclaim respectively, were dismissed.

On the basis of the above stated reasons, we find that the application is incompetent. In the event, we hereby strike it out with an order that each party shall bear its own costs.

DATED at DAR ES SALAAM this 19th day of August, 2019.

A.G. MWARIJA
JUSTICE OF APPEAL

W.B. KOROSSO
JUSTICE OF APPEAL

M.C. LEVIRA
JUSTICE OF APPEAL

The ruling delivered this 21st day of August, 2019 in the presence of Hamisi Mohamed present in person and Mr. Yahaya Njama, counsel for the respondent is hereby certified as a true copy of the original.

E.Y. MKWIZU
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL