

**IN THE COURT OF APPEAL OF TANZANIA**  
**AT DAR ES SALAAM**  
**(CORAM: MWARIJA, J.A., KOROSSO, J.A, and KEREFU, J.A.)**

**CIVIL APPLICATION NO. 188 OF 2016**

**OK PLAST LIMITED..... APPLICANT**

**VERSUS**

**EDHA AWADHI & COMPANY LIMITED ..... RESPONDENT**

**(Application for stay of execution of the judgment and decree of the High Court of Tanzania (Land Division), at Dar es Salaam**

**(Mjemmas, J.)**

**dated the 28<sup>th</sup> day of April, 2016**

**in**

**Land Case No. 125 of 2011**

.....

**RULING OF THE COURT**

16<sup>th</sup> August, & 20<sup>th</sup> September, 2019

**KOROSSO, J.A.:**

The application before us filed by way of notice of motion supported by an affidavit deposed by Ahmad Ghaddar, a principal officer of the applicant is made pursuant to Rules 11(2) (d)(i),(ii),(iii) and 48(1) and (2) of the Tanzania Court of Appeal Rules 2009 G.N. No. 368 of 2009 (the Rules) and seeks an order for stay of execution of the judgment and decree of the High Court of Tanzania Land Division dated 28<sup>th</sup> June, 2016 in Land Case No. 125 of 2011, pending determination of the intended

appeal filed in this Court. The affidavit supporting the notice of motion is accompanied by the following documents; a copy of the Government Gazette, No. 849 of 9<sup>th</sup> October, 2015; a copy of a newspaper advertisement titled "*Wizara ya Ardhi, Nyumba na Maendeleo ya Makazi, Tangazo la Ubatilisho wa Miliki za Ardhi*"; Judgment and Decree of Land Case No. 125 of 2011 dated 28<sup>th</sup> April, 2016; a Notice of Appeal to this Court lodged on 11<sup>th</sup> May 2016; an application for official search on Title No. 97014 dated 11<sup>th</sup> March 2016; and also an application for official search for Title No. 29166 dated 9<sup>th</sup> June, 2016.

Reasons advanced for this application are that:

- (1) *Substantial loss will result to the applicant unless the Order for stay of execution is made.*
- (2) *There exist serious errors and illegalities in the judgment and decree of the High Court of Tanzania sought to be challenged in that the High Court declared the respondent lawful owner of the property whose title deed has been revoked, as such the said decision should be examined by this Hon. Court in the intended appeal to this Court.*
- (3) *The applicant is willing and able to furnish such security as may be ordered by the Court for the due performance of the decree sought to be stayed.*

The respondent filed an affidavit in reply affirmed by Faisal Edha Awadh which contests most of the averments in the affidavit supporting the notice of motion.

Before we delve into the substance of the rival submissions and affidavital evidence before the Court, for better understanding of the present application, it is pertinent to provide a brief background. The applicant was a plaintiff in Land Case No. 125 of 2011, whereas the respondent was the defendant, and the trial court delivered judgment on the 28<sup>th</sup> April, 2015 (Mjemmas, J.) in favour of the respondent. The respondent was declared the rightful owner of the suit property that is, Plots No. 91 and 92 located at Vingunguti Light Industrial area, Ilala Municipality within Dar es Salaam City (disputed property). The applicant was aggrieved by the decision of the High Court and therefore lodged a Notice of Appeal and also sought leave of the High Court to appeal to this Court vide Land Application No. 351 of 2016. The applicant also filed an application for stay of execution under Rule 11(2)(d) of the Rules that is, the current application.

On the day the application came for hearing, Mr. Dilip Kesaria, learned Advocate represented the applicant while Mr. Thobias Laizer

learned Advocate, entered appearance for the respondent. The counsel for the applicant prayed that the Court adopt the notice of motion, affidavit supporting the notice of motion and the filed written submissions to form part of the applicant's overall submissions. On the respondent's side his counsel also implored the Court to adopt the reply to affidavit and the written submissions in reply so as to be part of the respondent overall submissions.

The applicant's main contention as exposed by his counsel is that the Court determine whether or not he is entitled to stay the execution pending the intended appeal against the impugned judgment and decree of the High Court. The applicant's counsel asserted that this application fulfills all the conditions stated in Rule 11(2)(d) of the Rules, which are, **first**, that the substantial loss may result to the party applying for stay of execution unless the order is made; **second**, that the application has been made without unreasonable delay; and **third**, that security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him. Mr. Dilip Kesaria submitted further that the affidavit supporting the notice of motion and annexures thereto which are part of the affidavit have established that all the conditions have been

fulfilled, particularizing paragraph 4 and 8 with respect to the first condition and also arguing that evidence shows that the disputed property's Title deed was revoked and there was a change in title to Title No. 97014 with L.O No. 199380 from Title No. 29166 with L.O No. 73856. Arguing further that if execution of the impugned decree is left to proceed, it will lead to further complexities and endless litigations and render it difficult for the applicant to recover the property if the intended appeal succeeds and may lead the applicant to suffer irreparable loss.

With regard to the second condition, the applicant's counsel argued that there was no undue delay in filing the application, since the impugned judgment and decree are dated the 28<sup>th</sup> April, 2016, and this application was filed on the 28<sup>th</sup> of June 2016 after having requested the trial court for necessary documents to initiate an appeal, and thus within the period prescribed by law to file an application for stay of execution as averred in paragraph 9 of the affidavit supporting the notice of motion. Counsel for the applicant argued that they took all the necessary steps to ensure that the application is timely and without undue delay. On the issue of providing security for due performance of such decree which is the third condition, the applicant counsel contended that this is revealed in paragraph 10 of

the affidavit supporting the notice of motion, where the applicant undertook to furnish security for due performance of the orders as may be binding upon them. To cement his contention the counsel for the applicant also cited **Mantrac Tanzania Ltd vs Raymond Costa**, Civil Application No. 11 of 2012 (unreported) which in effect held that an applicant must give security for the due performance of the decree as one of the condition in an application for stay of execution.

The applicant counsel also alluded to efforts made by the applicant to get the name of the title holder of the disputed property and submitted that they have also demonstrated that the title deed in dispute has been revoked as discerned from the Government Notices such as the one dated 9<sup>th</sup> October 2015, Government Notice No. 850 (annexure OK-1) accompanied by a copy of an advertisement in a newspaper titled "*Tangazo la Ubatilisho wa Milki za Ardhi*" (Notice of revocation of Land Titles) by "*Wizara ya Ardhi, Nyumba na Maendeleo ya Makazi*" (Ministry of Land, Housing and Human Settlement) and also applications for official search dated 9/06/2016 and 11/03/2016 (annexure OK-4). That the search on 11/03/2016 revealed that the disputed property owner is E. Awadhi Company Limited with respect to Title No. 97014, L.O No. 199380 Plot No.

91 and 92 Vingunguti Industrial and area of 2.78 Hectares and the official search on 9/06/2016 revealed the same owner, and the plot description being LO. NO. 73856 Plot No. 91 and 92, Vingunguti Industrial Area, with an area of 2.780 hectares. From this, the counsel argued that, it shows there was some anomalies, because there is a difference in the description of the plot and the area while all the search referred to the same plot, the disputed property. Thus, the applicant's counsel alleged that there has been dubious dealings in the property at the Registrar of Titles office and that they have demonstrated this in paragraphs 4 and 8 of the affidavit supporting the notice of motion, the matter which will be dealt with in the intended appeal.

In reply, Mr. Tobias Laizer counsel for the respondent argued that the applicants have failed to fulfill the conditions precedent to warrant the Court to issue the stay of execution orders as prayed. The counsel argued that with regard to the first condition on whether substantial loss may result to the applicant, with the current situation on the disputed property as also averred in paragraph 4 of the affidavit supporting the notice of motion, the Title of the disputed property was now vested with the President and which implies that the applicant no longer has interest to the

property. That if what is alleged is the case then the proper person to lodge the application should be the Government and not the applicant. Thus, from this analogy the counsel for the respondent argued that under the circumstances, the applicant cannot express or show any likelihood of suffering substantial loss with regard to the disputed property as required.

The Counsel for respondent argued further that the applicant failed to demonstrate his interest and/or Title in the disputed property. The decision in **Stanbic Bank Tanzania Limited vs Plexius Cotton Limited**, Civil Cause No. 111 of 2006 (unreported) was referred, which held that the applicant has to give details and particulars for loss which is likely to be incurred if the application is not granted and that it is expected that details and particulars will be given in line with the Court's decision. Another case cited was **Seni Silanga and the Unit Manager, OLAM (T) Ltd**. Civil Application No. 1 of 2001 (unreported), stating that the applicant should go beyond mere assertions that he would suffer substantial loss if stay is not granted. The counsel for the respondent also contended that there is nothing to stay as prayed by the applicant since the disputed property belongs to the respondent.



When tackling whether or not the applicant satisfied the requirements of the second condition to be granted an order for stay of execution, the counsel for the respondent stated that there is no specific time specified within which an application for stay of execution can be filed and thus contended that the applicant's submissions are misconceived since no one can determine whether the application was filed within time or not.

Moving to whether or not the applicant fulfilled the third condition on furnishing security, the respondent counsel submitted that having regard to the circumstances pertaining to the application as exposed herein, there being nothing to stay since the suit property is owned by the respondent as revealed by the land searches conducted by the applicant and other documents such as the Rent Assessment, Demand Notice and Title Deed forming part of the affidavit in reply, the issue of security does not arise. That in any case no security has been given and even if given, it would be superfluous and not required for the matter on hand. Thus the respondent prayed that the application be dismissed with costs.

The counsel for the applicant brief rejoinder was mainly a reiteration of the arguments already submitted. The Court invited the parties to

- address it on whether or not the impugned decree can be executed, that is
- whether the decree is enforceable. The applicant's counsel expounded on what he considered to be the applicant's interest in the disputed property. He argued that the applicant interest is self-evident since it is clear from the impugned judgment that the applicant was granted letters of offer to the disputed property. That with regard to who is the rightful owner of the disputed property, the intended appeal should be left to determine that issue. The counsel further stated that without doubt the applicant has an interest in the disputed property hence the current application. The respondent counsel on the other hand submitted that the decree was not executable, because the evidence reveal that the applicant had no interest in the disputed property because the same is owned by the respondent company.

This being the position we propose to first dispose of the issue raised by the Court that is, whether the impugned decree is executable, which we find important to determine in view of the fact that the competence of the current application is surely dependent on whether or not the impugned decree can be executed. We find it important to determine the issue first before we consider whether or not the applicant has cumulatively fulfilled

the conditions for the grant of the application for stay of execution set under the law, that is; Rule 11(2) (d)(3)(4)(5)(a)(b) of the Rules as amended by GN No. 344 of 2019 and also expounded in numerous decisions of this Court such as; **Mantrac Tanzania Limited vs Raymond Costa** (supra), **Joseph Antony Soares @Goha vs Hussein Omary**, Civil Application No. 6 of 2012 (unreported) and **Mohamed Masoud Abdallah and 16 Others vs Tanzania Haulage** (1980) Ltd, Civil Application No. 58/17 of 2016 (unreported).

In considering the issue under scrutiny leads us to ponder on the meaning of "execution" in the context of judgment and orders. In the case of **Stanbic Bank Tanzania Ltd vs Plexus Cotton** (supra), the Court adopted the definition of Lord Denning M.R., In re Overseas Aviation Engineering (G.B) Ltd [1967] 1 Ch. 24, 39 stating:

*"Execution means, quite simply, the process for enforcing or giving effect to the judgment of the court: and it is completed when the judgment creditor gets the money or other thing awarded to him by the judgment".*

What the above passage reveal according to the holding of this Court in **Stanbic Bank Tanzania Ltd vs Plexus Cotton Ltd** (supra) is that;

*“execution is the final act, that is the satisfaction of the judgment and this can be with the aid of an agent of the court or, in case of possession of land, but the entry of the plaintiff, The nature of the subject matter would dictate the mode of execution”.*

The Court also stated that;

*“stay may be granted where there is something to stay.”*

There is also the decision of **Dimon Tanzania Ltd vs The Commissioner General TRA and 2 Others**, Civil Application No. 89 of 2005 (unreported), stating that;

*“There is no doubt that for an order to be stayed it must be capable of being executed”.*

A similar position has been stated in **The Bank of Tanzania vs Said A. Marinda and 30 Others**, Civil Application No. 108 of 2005 (unreported) and **East African Development Bank vs Blue Line**

**Enterprises**, Civil Application No 57 of 2004 (unreported). This being the case, for ease of reference we propose to reproduce the impugned decree dated 28<sup>th</sup> April 2016 which reads:

- "1. The defendant company is declared the lawful owner of the suit plots.*
- 2. The plaintiff's case fails and it is dismissed with costs."*

Whilst this Court is aware that there is an intended appeal against the impugned judgment and decree which will determine the merit, competence and rights of the parties in the appeal, it is important to understand that in this application we are confined to consider and determine only the prayers before this Court.

In consideration of the issue under scrutiny, there is evidence as revealed in paragraph 4 of the affidavit supporting the notice of motion and the supporting documents, that the disputed property title deed was revoked by the Commissioner for Lands vide Government Notice No 853 of 9<sup>th</sup> October 2015 and the title vested to the President of the United Republic of Tanzania. There is also the fact that two official searches by the applicant related to Title deeds concerning the disputed property reveal

that the owner of the disputed property is E. Awadhi Company Limited, the respondent. It is also clear that at this interval, the facts expounded above with regard to the title deed being in the name of the respondent, and the impugned order giving that same right to the respondent, in effect means that the execution of the impugned decree is not feasible. Even if this was not the case, the evidence provided in Court that there is revocation of the titles to the disputed property, renders the High Court order impossible to execute. At this juncture the Court finds that there is nothing which the respondent can execute from the impugned decree.

The applicant's counsel submissions on this issue concentrated more on alluding on the interest the applicant believes to have in the disputed property and asserting that the current application is so as to ensure that there is no process undertaken by the respondent to implement the orders found in the impugned judgment and decree, although at the same time he acknowledged that such orders may only be executed by the officials of the Ministry of Land, Housing and Human Settlement and not the respondent and implored the Court to stay execution as prayed believing such an order will stay any process to change title. An argument we find peculiar since the evidence and submissions before us clearly revealed that

the title to the disputed property from the search was still in the name of the respondent, so why then should one expect the respondent to process for change of title?

On the part of the respondent's counsel he submitted that there is nothing to execute since the title to the disputed property was held by the respondent company and argued that the application was an abuse of the court process, since he argued the application has no substance.

Having carefully considered the contents of the decree, on our part we find that without doubt the impugned decree orders are merely a declaration that the respondent is the lawful owner of the suit plots and there is nothing that the respondent can do himself to execute this, this not being one of his designated functions. The order is solely declaratory, since it emphasizes a position, a situation and a right and by any standard which is not executable.

In the premises, in consideration of what we have stated hereinabove, we are of the view that the application before the Court for stay of execution is incompetent by reason that there is no executable decree. Consequently, the application is struck out. Under the

circumstances the issue of competency of the application being raised by the Court *suo motu*, each party to bear its own costs. Order Accordingly.

**DATED** at **DAR ES SALAAM** this 9<sup>th</sup> day of September, 2019.

A. G. MWARIJA  
**JUSTICE OF APPEAL**

W. B. KOROSSO  
**JUSTICE OF APPEAL**

R. J. KEREFU  
**JUSTICE OF APPEAL**

The ruling delivered this 20<sup>th</sup> day September 2019 in the presence of Mr. Zacharia Daudi, Counsel for the Applicant and Ms. Oliva Mark, Counsel for the Respondent is hereby certified as a true copy of the original.



S. J. KAINDA  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**