

**IN THE COURT OF APPEAL OF TANZANIA**

**AT MWANZA**

**(CORAM: MWARIJA, J.A., KOROSSO, J.A., and KITUSI, J.A.)**

**CIVIL APPLICATION NO. 33 OF 2015**

**FARIDA ADAM (Administratrix of .....APPLICANT  
the Estate of the late Hamza Adam)**

**VERSUS**

**GEOFFREY KABAKA ..... RESPONDENT**

**(Application Arising from the Judgment and Decree of the High Court  
of Tanzania, at Mwanza)**

**(Sumari, J.)**

**Dated the 22<sup>nd</sup> day of January 2015  
in  
Land Appeal Case No. 29 of 2013**

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**RULING OF THE COURT**

22<sup>nd</sup> October & 7<sup>th</sup> November, 2019

**KOROSSO, J.A.:**

Before the Court is an application flagged with a certificate of urgency filed by way of notice of motion supported by an affidavit sworn by Farida Hamza Adam, the applicant who is the administratrix of the estate of the late Hamza Adam. The application which is pursuant to Rule 11(2)(c) and 48(1) of the Tanzania Court of Appeal Rules, 2009 (The Rules) seeks an order that execution of the decree dated 22<sup>nd</sup> January

2015, in Land Appeal No. 29 of 2015 (Sumari, J.), High Court of Mwanza be stayed, and that the costs and incidentals to this application abide by the results. The grounds to sustain the said prayers are expounded in the notice of motion as follows:-

- (a) The applicant had on 23<sup>rd</sup> January 2015 lodged her notice of appeal in the Court of Appeal of Tanzania*
- (b) The applicant has already filed an Application in the High Court of Tanzania at Mwanza for leave to Appeal in the Court of Appeal of Tanzania*
- (c) The Respondent has already published in Nipashe newspaper dated, 18<sup>th</sup> February, 2015 that houses on Plot 246 Block "U" Pamba Road, Plot No. 19 Block "BB", Mkuyuni and Plots No. 41 and 42 Block "BII", Mkuyuni would be auctioned in a public auction on 2<sup>nd</sup> March, 2015.*

The background to this application is that Hamza Adam, the applicant's husband on the 3<sup>rd</sup> of August, 2014 died intestate and thereafter, the applicant applied and was granted letters of administration for the deceased estate. Prior to his death, the deceased husband had an appeal pending at the High Court of Tanzania at Mwanza registered as

Land Appeal No. 2013 (Land Appeal), arising from a decision of the District Land and Housing Tribunal (DLHT) in Land Case No. 130 of 2008 which was in favour of the respondent. The said Land appeal, proceeded with hearing in the High Court after the death of Hamza Adam, because upon being made aware of the death by the deceased by his counsel, the High Court Judge (Sumari, J.) directed that there was an agreement with the parties prior to the death of the appellant for hearing of the appeal to proceed by way of written submissions. The High Court judge thus ordered for the hearing to proceed as scheduled. The High Court thereafter delivered its decision on the 22<sup>nd</sup> January, 2015.

In the said judgment which was in favour of the respondent, it was ordered that:-

- (i) The appellant (the deceased Hamza) shall pay to the respondent Tshs. 20,000/- daily loss from the date of closure till final payment instead of Tshs. 100,000/- awarded by the trial Tribunal.*
- (ii) The appellant shall pay to the respondent general damages of Tshs. of Tshs. 5,000,000/- and Tshs. 2,000,000/- as exemplary damages.*

*(iii) The appellant is ordered to return to the respondent all the properties confiscated from the business premises in good condition*

*(iv) Costs shall be borne by the appellant.*

It is the intended execution of the above orders that prompted the applicant to file the present application.

When the application came for hearing, Farida Hamza Adam the applicant appeared in person the same for Geoffrey Kabaka the respondent, both being unrepresented.

The applicant adopted the affidavit supporting the notice of motion and informed the Court that although the process of execution of the decree had been initiated, and led to the auctioning of the respective properties in dispute, the current application was filed prior to the execution proceedings being initiated, and that she had never been summoned to appear in court during the said execution proceedings which led to the auctioning of the disputed properties.

On the part of the respondent, he submitted that the application was a nullity because the decree whose execution is sought to be stayed was executed on the 9<sup>th</sup> May 2016. He also averred that the current application

has been overtaken by events. Submitting further, he alleged that the three houses were sold through an auction and the same are now in the hands of the purchasers. The respondent conceded that there is a Ruling by the High Court (Maige, J.) that set aside the order for execution. Therefore in effect saying that the application should be dismissed.

In rejoinder, the applicant contended that when the execution proceedings were conducted she was never informed and prayed for the Court to do justice.

Having heard the submissions from the parties, it came to our attention that prior to the hearing and determination of this application, a lot of developments had ensued with regard to the decision of the High Court in Land Appeal Case No. 29 of 2013, that relate to the execution of the challenged decree which may have relevance in determination of the current application.

There is the fact that the respondent had initiated a process of execution through Land Application No. 130C of 2008 where the Land Tribunal of Mwanza in its decision dated 17<sup>th</sup> February 2016 ordered for execution of the impugned decree, and after an appeal to the High Court was effected, that is, in Land Appeal No. 155 of 2016, the High Court

(Maige, J.) revised the proceedings and execution orders of the DLHT and set aside the said execution order finding that DLHT lacked jurisdiction to entertain the execution proceedings. Further to this, the respondent being aggrieved by the decision of the High Court (Maige, J.) appealed to this Court against the said decision in Civil Appeal No. 28 of 2019 which has yet to be determined.

We find it instructive to restate the legal position which was applicable at the time when the application was filed. Pursuant to Rule 11 (5) (a) (b) and (c) of the Rules, an order for stay of execution will not be granted unless the cumulative conditions enumerated thereunder exist.

The conditions are as follows:-

*(a) That substantial loss may result to a party applying for stay of execution unless the order is made;*

*(b) That the application has been made without delay; and*

*(c) That security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him.*

The current position under Rule 11(5) of the Rules is that condition (a) and (c) above must be fulfilled. It is obvious that the current application

has not fulfilled any of the obvious conditions, the main one being there has to be a decree to execute for the above stated conditions to have relevance. The applicant and the respondent conceded that in reality with the pending appeal (Civil Appeal No. 28 of 2019) and applications (the affidavit of the applicant has revealed that they have filed an application for extension of time to apply for leave to appeal against the decision in Land Appeal No. 29 of 2013), this application is without doubt premature.

It is obvious that the *status quo* obtaining differs from when this application was instituted. This being the situation, there is nothing at this juncture as it was when the application was filed to be restrained by the order of stay of execution if granted. The circumstances in respect of which stay of execution was sought have gone beyond the stage in which a stay order would meaningfully serve any purpose to restrain the respondent.

In a number of cases where it is shown that the application will no longer serve the purpose it was intended to or has been overtaken by events, the Court has dismissed such applications. See for instance, **Joachim Kalembe vs M. K. Mwamlima**, Civil Application No. 76 of 1998 and **Shell and BP Tanzania Limited vs The University of Dar es Salaam**, Civil Application No. 68 of 1999 (both unreported).

In the premises, for reasons revealed above, this application is superfluous and no longer relevant. The same is consequently dismissed and under the circumstances, we order for each party to bear own costs.

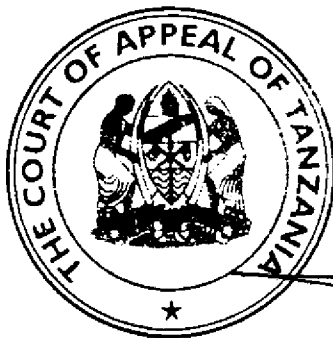
**DATED** at **MWANZA** this 6<sup>th</sup> day of November, 2019

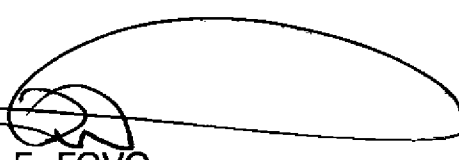
A. G. MWARIJA  
**JUSTICE OF APPEAL**

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

I. P. KITUSI  
**JUSTICE OF APPEAL**

The ruling delivered this 7<sup>th</sup> day of November, 2019 in the presence of Applicant Farida Hamza appeared in person and Respondent Geoffrey Kabaka also appeared in person is hereby certified as a true copy of the original.



  
J. E. FOVO  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**