

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

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

CIVIL APPLICATION NO. 42 OF 2016

CATHERINE HONORATIAPPLICANT

VERSUS

1. CRDB BANK PLC
2. METHOD KAUNGA MORIS**RESPONDENTS**
3. HONORATI BIASHARA JOHN LYOMBE

**(Application for stay of execution of Judgment and Decree of the High Court
of Tanzania at Moshi)**

(Mwingwa, J.)

dated the 16th day of December, 2015

in

Land Case No. 15 of 2011

RULING OF THE COURT

19th Oct & 16th Nov, 2020

MWANGESI J.A.:

The applicant herein who is the wife of the third respondent, was the plaintiff in Land Case No. 15 of 2011 wherein, she sued the respondents in the High Court of Tanzania at Moshi, claiming against them jointly and severally for reliefs that: -

- (a) The Court declares her to have right over the disputed property because it was a matrimonial house;*
- (b) The loan transaction which was entered between the respondents was null and void for want of spousal consent;*
- (c) The applicant be paid TZS 10,000,000/= for pain and anguish which she suffered;*
- (d) The applicant be paid general damages, and costs of the suit.*

In the judgment which was delivered by the Court (Mwingwa, J.) on the 16th day of December, 2015 all the reliefs sought by the applicant, were dismissed for want of merit. In its own words the concluding part of the judgment read *verbatim* that: -

"In the final disposal the suit is devoid of any merit and I hereby dismiss it, no order as to costs".

Being aggrieved by the judgment and decree of the trial High court, on the 28th December, 2015 the applicant through the services of Dr. Rugemeleza A. K. Nshala, learned counsel, lodged a notice of appeal to challenge the said judgment and decree.

Meanwhile, on the 18th February, 2016 Dr. Nshala lodged a notice of motion under the provisions of rule 11 (2) (b), (c), (d) (i - iii), and (e) of the Tanzania Court of Appeal Rules, 2009 (**the Rules**), moving the Court for orders that the execution of the judgment and decree in Land Case No. 15 of 2011 of the High court of Tanzania, Land Division at Moshi, be stayed pending the outcome of an intended appeal to be lodged in this Court. The notice of motion was supported by an affidavit which was sworn by the applicant, stating the reasons as to why the Court had to issue a stay order to the execution of the decree.

On the other hand, the first respondent through the services of Mr. Mgisha Kasano Mboneko, learned counsel, raised a preliminary objection on a point of law to the notice of motion lodged by the applicant in terms of rule 107 (1) of **the Rules**, arguing that the application was untenable for the reason that the decree of the High court sought to be stayed, was not capable of being executed. The Court was therefore, urged by the first respondent to strike it with costs.

On the date when the application was called on for hearing before us, Dr. Rugemeleza Nshala, learned counsel, entered appearance to represent the applicant, whereas, the first respondent had the services of

Mr. Mgisha Kasano Mboneko, also learned counsel. There was no appearance on the part of the second and third respondents, who however, had been duly served through substituted service by publication in the Nipashe Newspaper of the 12th October, 2020.

In view of the unexplained absence of the second and third respondents in Court for the hearing of the application despite being duly served, Dr. Nshala presented a prayer which was granted by the Court, to proceed with the hearing of the application in their absence pursuant to the provisions of rule 63 (1) of **the Rules**. The same paved way for the determination of the preliminary objection which was raised by the first respondent. In that regard, Mr. Mboneko was invited by the Court to address it on the said preliminary objection.

Upon taking the floor, Mr. Mboneko, amplified the preliminary objection by submitting that the decree in Land Case No. 15 of 2011 of the High Court of Tanzania (Land Division) at Moshi, whereby, the suit was dismissed for want of merit, was not capable of being executed. This was from the fact that the dismissal of the suit lodged by the applicant, conferred no right to either party which could be executed or enforced. In the circumstances, Mr. Mboneko was of the firm view that there was

nothing executable, which necessarily implied that the instant application by the applicant intending to stay such a decree, was misconceived. To fortify his argument, the learned counsel placed reliance on the holding in **Patel Trading Company (1961) Limited and Another Vs Bakari Omary Wema t/a Sisi Kwa Sisi Panel Beating Enterprises Limited**, Civil Application No. 19 of 2014 (unreported), where it was held that the fact that a dismissal order was incapable of being executed, it could not be stayed.

Mr. Mboneko, submitted further that in line with the spirit contained in the holding of the case cited above, amendment was made to **the Rules** vide Government Notice No. 362 of 2017 which came into force on the 22nd September, 2017 in which, sub-rule 7 (d) was added to rule 11 of **the Rules**, by naming '**a notice of the intended execution**' as among the necessary documents which have to accompany an application for staying execution of a decree. According to the learned counsel, this condition was added in the rules to emphasize that for a decree to be stayed, it must in the first place, be executable. Since the decree sought to be stayed in the instant application falls short of the said threshold, the

application for stay was misconceived and as such, he prayed that it be struck out with costs.

Responding to the submission by his learned friend, Dr. Nshala, distinguished the decision of the case which was relied upon Mr. Mboneko in his submission from the one under scrutiny, arguing that while in **Patel Trading Company's case** (supra) the decree sought to be stayed was a declaratory one which did not involve substantive justice, the situation in the instant application was different in that, the dismissal of the suit by the High Court paved way for the first respondent, to sell the suit property, which would result to untold hardships to the applicant and her children.

Dr. Nshala, submitted further in amplification of paragraph 5 of the affidavit by the applicant in support of the notice of motion; that in case the applicant's application for staying execution of the decree will not be granted, she will be left unprotected and thereby, rendering her and the children subjected to eviction from the suit property by the first respondent. And, once the applicant is evicted from the suit property, the substance of the intended appeal will be put at stake. In that regard, the learned counsel, submitted that the Court being a temple of justice, had to interfere by restraining the first respondent from evicting the applicant by

way of a stay order. On her part, the applicant was ready as indicated in paragraph 9 of her affidavit in support of the notice of motion, to furnish security as it may be ordered by the Court, for due performance of the decree as may ultimately be binding upon her.

The learned counsel for the applicant, also acknowledged that with the amendment which was brought to **the Rules** by GN. No. 362 of 2017 indeed, a stay of execution can only be made to an executable decree. However, he was quick to point out that, the same had no effect to the application at hand which was lodged prior to the said amendment. In his view, what was important by then as reflected in rule 11 (2) (c) of **the Rules**; was that any appealable decree, could be stayed regardless of whether it was executable or not. To that end, he urged us to dismiss the preliminary objection so that the determination of the application for staying execution of the decree on merit, could proceed.

In the light of the submissions from either side as summarized above, the first issue for determination which arises from what Dr. Nshala lastly submitted above, is whether prior to the amendment which was brought about by GN No. 362 of 2017 to **the Rules**, any appealable decree whether executable or not, could be stayed. Basing on the decisions in

Patel Trading Company's case (supra) and **Quality Group Limited Vs Tanzania Building Agency**, Civil Application No. 69 of 2014 (unreported), which were given prior to the named amendment of **the Rules**, our answer is in the negative. It was categorically stated in both cases that the law is settled, that it is only decrees which are capable of being executed, which could be stayed.

Nonetheless, despite the above stated position of law, Dr. Nshala, came with another proposition founded on the contents of paragraph 5 of the affidavit sworn by the applicant in support of the notice of motion, which reads: -

"That, the judgment and decree of the High Court in Land Case No. 15 of 2011 has empowered the first respondent to sell my matrimonial house situate on Plot No. 127 House Number 159 Block L Section 11 with Title No. 20490, LO. No. 266270 in Moshi Municipality. And the first respondent holds the applicant's certificate of title over the property."

On the basis of the unpleasant situation currently faced by the applicant as averred above, Dr. Nshala strongly implored the Court, to interfere by restraining the first respondent, from doing what he intends to

pending the outcome of the intended appeal to the Court, with a stay order. He was positive that the Court being a temple of justice, was empowered to protect the integrity of the appeal intended to be lodged by the applicant, by maintaining the *status quo* of the parties. This submission by the learned counsel for the applicant, brings us to the second issue, which is whether the Court is legally mandated to issue the requested stay order.

At this juncture, we deem it apposite to reproduce the provisions of rule 11 (2) (b) of **the Rules**, which was dealing with stay of execution at the time the application under discussion was lodged. It read: -

"Subject to the provisions of sub-rule (1), the institution of an appeal, shall not operate to suspend any sentence or stay execution, but the Court may-

(a)n/a

(b)in any civil proceedings, where notice has been lodged in accordance with rule 83, an appeal, shall not operate as a stay of execution of the decree or order appealed from except so far as the High court or tribunal may order, nor shall execution of a decree be stayed by reason only of an appeal

*having been preferred from the decree or order;
**but the Court, may upon good cause shown,
order stay of execution of such a decree or
order.***

*(c) Where an application is made for stay of execution
of an appealable decree or order before the
expiration of the time allowed for appealing
therefrom, the Court, may upon good cause shown,
order the execution to be stayed”.*

[Emphasis supplied]

What is apparent to us from the bolded words in the above quoted provision of law, is the fact that what the Court can stay from being executed, is the decree or order emanating from the High Court or tribunal, which is about to be executed while there is a pending appeal against it. Contrary to the said position; what the Court is being moved by the applicant to restrain the first respondent in the instant application; is from selling a house, which is said to be a matrimonial property. Since such right of sale to the first respondent, did not emanate from a court decree or order, undoubtedly, the Court lacks the requisite mandate to issue the stay order which is sought by the applicant

As it was correctly submitted by Mr. Mboneko, the position of law is well settled, that a stay to execute a decree or order, can only be made in respect of an executable decree or order given by a court or tribunal. That was the position stated by a single Justice (Kisanga J.A) in **Athanas Albert and Four Others Vs Tumaini University College** [2001] TLR 63, and followed in **Patel Trading Company Ltd. and Another Vs Baraka Omary Wema t/a Sisi Kwa Sisi Panel Beatings Enterprises Ltd.** (supra), **Quality Group Ltd. Vs Tanzania Building Agency** (supra), and **Keith Horan and Three Others Vs Zameer Sherali Rashid**, Civil Application No. 230/15 of 2019 (unreported).

It was stated in **Athanas Albert and Four Others'** case (supra), that: -

*"It seems to me that **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.** In such situation, the applicant can meaningfully ask the court for a stay and restrain the respondent from executing that order pending the results of an intended appeal."*

[Emphasis supplied]

Relying on what was held in **Athanas Albert's** case (supra), we raised *suo motu* the issue as to whether a decree was executable so as to be stayed or not in **Patel Trading's** case (supra), where there was an application for stay of execution of a decree in a suit which had been dismissed. Upon hearing the submissions from both sides, we stated thus:

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"On our part, we agree with the learned counsel that the decision of the High court was not capable of being executed because it was merely a dismissal. On the basis of the dismissal order of the High court, the parties' positions reverted to the same status quo as they were before the appeal."

The Court went on to state that: -

"In the absence of a decree that is capable of being executed, which this Court could allow or refuse to be stayed, we find that the application before us is misconceived. Consequently, we strike it out."

In the same vein, we find the application by the applicant not maintainable. While Dr. Nshala may be correct in stating that the dismissal of the instant application will leave the applicant unprotected, such fact

cannot move the Court to do what the law does not provide. As to what remedy can the applicant resort to, we believe, there are some other legal remedies which can be resorted to by the applicant to preserve the integrity of her intended appeal. That said, we sustain the preliminary objection and mark the application for stay of execution, struck out. Costs to be in the cause.

Order accordingly.

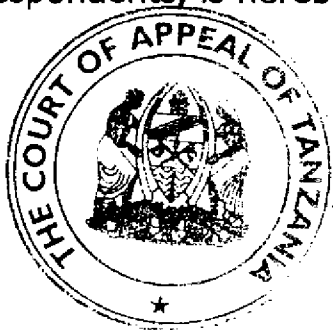
DATED at DAR ES SALAAM this 9th day of November, 2020.


S. S. MWANGESI
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

Ruling delivered this 16th day of November, 2020 in the presence of Dr. Rugemeleza Nshalla, learned counsel for the Applicant and Mr. Gerald Mosha counsel for the 1st Respondent and in the absence of the 2nd and 3rd Respondents, is hereby certified as a true copy of original.




S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL