

**IN THE COURT OF APPEAL OF TANZANIA**  
**AT DAR ES SALAAM**  
**(CORAM: LILA, J.A., LEVIRA, J.A., And MASHAKA, J.A.)**  
**CIVIL APPLICATION NO. 621/17 OF 2021**

**S. M. SAEED LIMITED.....APPLICANT**

**VERSUS**

**CORPORATE SECURITY LTD.....1<sup>ST</sup> RESPONDENT**

**MRS. PARVIS AZAD POONJA BHANJI.....2<sup>ND</sup> RESPONDENT**

**EQUITY BANK TANZANIA LTD.....3<sup>RD</sup> RESPONDENT**

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

**(Maghimbi, J.)**

**dated the 28<sup>th</sup> day of May, 2021**

**in**

**Land Case No. 381 of 2017**

.....

**RULING OF THE COURT**

*14<sup>th</sup> & 30th June, 2023*

**LEVIRA, J.A.:**

The applicant, S. M. Saeed Limited by way of notice of motion has moved the Court under Rules 11 (3) (4) (4A) (5) (a) and (b), 6 and 7 (a) (b) (c) (d) and 48 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules) seeking for an order staying execution of the decree of the High Court, Land Division (the High Court) in Land Case No. 381 of 2017 dated 28<sup>th</sup> May, 2021. The notice of motion is supported by an affidavit deposed by Mnyira Abdallah, the applicant's advocate. The application is contested by the respondents. The grounds upon which this application is made are as follows:

- 1. That the applicant shall suffer substantial and irreparable loss that cannot be atoned unless the order for stay is made.*
- 2. That this application has been made timely and without unreasonable delay.*
- 3. That balance of convenience, common sense and logic tilts in favour of granting stay and that the applicant is willing to furnish security for due performance of the decree pending hearing of the intended appeal.*

It can be gathered from the record that, the applicant partly succeeded in a suit against the respondents before the High Court in which she claimed for a nullification of the loan agreement entered between the respondents. In the said agreement, the first respondent deposited as collateral a property one nineteenth (1/19<sup>th</sup>) undivided in share in plot No. 16 block "55" Kariakoo area Dar es Salaam (suit property) which was already purchased by the applicant from the first respondent. Thus, the applicant prayed before the High Court for Judgment and decree against the respondents declaring that the mortgage deed between the respondents was unlawful or in the alternative, to refund payment of USD 60,000.00 being purchase price and costs of the suit.

Having heard the parties the High Court found that the sale of the suit property was not complete as the applicant did not finish paying the purchase price as she had only paid USD 45,000.00. As a result, it ordered

the first and second respondents to refund the applicant a sum of USD 45,000.00 being partly paid purchase price of the suit property. Also, the first and second respondents were ordered to pay the costs of the suit. The applicant was aggrieved by that decision. Therefore, on 2<sup>nd</sup> June, 2021 she filed a notice of appeal to the Court. Despite that notice, the third respondent in exercise of her right of sale of mortgaged property issued a default notice to the respondents and advertised the sale of the suit property by public auction following the first and second respondents' breach of the loan agreement. The intended sale of the mortgaged property by the third respondent moved the applicant to lodge the present application arguing that she is a lawful owner of the same.

At the hearing of the application, the applicant was represented by Mr. Samwel Shadrack Ntabaliba, learned advocate whereas, the first and second respondents had the services of Mr. Honestus Kulaya and the third respondent was represented by Mr. Godwin Nyaisa, both learned advocates.

We had an opportunity of perusing the record of the application thoroughly before hearing of the application. We faced difficulties in understanding the aim of the applicant, being a decree holder, in bringing this application. In fact, we doubted its competence and thus we invited the counsel for the parties to address us before commencement of the hearing in earnest.

Upon taking the floor, Mr. Ntabaliba submitted that the applicant was dissatisfied with the decision of the High Court in Land Case No. 381 of 2017 and thus she filed a notice of appeal. However, while the same was pending in Court, she was served with the notice of auction and eviction from the suit property subject of the intended appeal. In order to rescue the same, on 10<sup>th</sup> December, 2021 she filed the current application to stay execution of the decree of the High Court.

According to Mr. Ntabaliba, the applicant had no any other avenue of restraining the third respondent from selling the suit property except through the Court's intervention. He referred us to the third respondent's affidavit in reply at paragraphs 8 and 9 where it is deponed that, the third respondent was simply exercising her right of recovery pursuant to the mortgage deed following borrower's default in servicing the loan; and, the announcement of public sale was made after notice of eviction stating that the third respondent intended to sale the suit property which was issued to the applicant since 30<sup>th</sup> September, 2021. However, responding to the question from the Court, Mr. Ntabaliba stated that what the third respondent is doing is not part of the decree but she assumes that she won the case. Therefore, basing on his submission, he concluded that the application is properly before the Court.

In reply, Mr Kulaya submitted firmly that the Court cannot stay what the third respondent is doing as the same is not execution of the decree.

He thus implored the Court to dismiss the application with costs because it is bad in law and untenable.

On his part, Mr. Nyaisa referred us to a notice of preliminary objection he had filed on 13<sup>th</sup> April, 2022 against this application on a similar issue as the one raised by the Court. He went on to state that the decree attached to this application does not give any right to the respondents and thus there is nothing that the Court can stay against them. In support of his argument, he referred us to the decisions of the Court in **Athanas Albert and 4 Others v. Tumaini University College, Iringa** [2001] T.L.R 63 and **Hamis Mohamed (as the Administrator of the Estate of Risasi Ngawe, deceased) v. Mtumwa Moshi (as the Administrator of the Estate of Moshi Abdallah, deceased)**, Civil Application No.526 /17 of 2016 (unreported).

According to Mr. Nyaisa, the present application is misconceived and untenable in law. He did not agree with learned counsel for the applicant that, he had no any other avenue to restrain the third respondent from selling the house in dispute. Finally, he urged us to dismiss this application with costs because the third respondent incurred costs in preparation and filing the notice of preliminary objection.

Mr. Ntabalila made a very brief rejoinder stating that the decisions of the Court cited by learned counsel for the third respondent are distinguishable from the present case. He insisted that once a matter is in

Court, there is no any other avenue than applying for stay of execution. He reiterated that the present application is properly before the Court in the eyes of the law and thus prayed for the same to be heard on merit.

We have carefully considered the rival arguments by learned counsel for the parties, the notice of motion and parties' affidavits. We have also taken into account the authorities cited by the learned advocate and find that the only issue calling for our determination is whether this application is properly before the Court. As our starting point, we shall consider the provisions of Rule 11 (3) of the Rules which points out the nature of the legal process that may be stayed by this Court. We take liberty to reproduce it hereunder for ease of reference and it reads:

*"In any civil proceedings, where a notice of appeal 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 **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 decree or order.**"*

[Emphasis added].

It can be deduced from the above provision that an order for stay of execution can only be made to stay process of execution of a decree or order which is subject of an intended appeal. This means that whoever is

aggrieved by the decision of the court, be it a losing party or even a decree holder can apply for stay of execution in the event he / she is not satisfied with the decision of the court. Just like in the current application, the applicant was not satisfied with the decree of the High Court in Land Case No. 381 of 2017 which, as indicated above, gave her victory against the respondents. Therefore, on 2<sup>nd</sup> June 2021 she lodged a notice of appeal against that decree and the present application on 10<sup>th</sup> December 2021.

In the circumstances, the relevant question that follows is whether the decree under consideration is executable against the applicant by the respondents. It is a settled position that an order for stay of execution can only be made in respect of an executable decree or order given by a court or tribunal against the applicant. See: **Athanas Albert and 4 Others** supra **and Catherine Honorati v. CRDB Bank PLC & Two Others**, Civil Application No. 42 of 2016 (unreported). The decree of the High Court in the present application as intimated above, was in favour of the applicant. The relevant part of it for the purpose of this application reads:

***"IT IS HEREBY ORDERED and DECREED that:***

- 1. The 1<sup>st</sup> and 2<sup>nd</sup> defendants are ordered to refund the plaintiff a sum of USD 45,000.00 being partly paid purchase price of the suit property.*
- 2. The 1<sup>st</sup> and 2<sup>nd</sup> defendants to pay the plaintiff the costs of the suit.*

***GIVEN*** under my hand and the Seal of this court this  
28<sup>th</sup> day of May, 2021.

***Signed***".

The above decree requires the first and second defendants (the first and second respondents herein) to refund the applicant partly paid purchase price of the suit property. There is nothing in the decree granting a right to the respondents which may be enforced against the applicant. Besides, we observed from the applicant's supporting affidavit to the notice of motion that the applicant is not applying to stay the decree of the High Court as it is but she intends to stay the notice of auction of the property in dispute. We find this fact under paragraphs 8 and 9 of the supporting affidavit where it is provided as follows:

*"8. That the applicant has an arguable appeal with the high probability of success, if the said stay of execution is not granted the applicant's intended appeal will be rendered nugatory and the applicant will suffer irreparable loss and damage as **the said dispute property is occupied by the applicant and his family as dwelling house.***

*9. Unless this application is granted the **3<sup>rd</sup> Respondent threatens to sale the suit property** as result of the fact that the substantial loss will result to the applicant unless the order sought is granted."*

[Emphasis added].



We further take note that the applicant attached under paragraph 5 of the supporting affidavit, a copy of a notice of Public Auction of the house in dispute of 7<sup>th</sup> December, 2021 as annexure S.M 3. For ease of reference, we hereunder reproduce part of the said notice with a view of appreciating whether it had anything to do with the decree of the High Court subject of the present application. It reads:

**"MNADA MNADA MNADA**  
**KWA NIABA YA EQUITY BENK**  
**KAMPUNI YA LOCUS DEBT MANAGEMENT**  
**ITAUZA DHAMANA HII INAYODAIWA NA BENK TAJWA**  
**DHAMANA ILIYOPO SEHEMU YA GHORAFI YA PILI**  
**ILIYOPO KIWANJA NAMBA 16 KITALU '55' KARIAKOO**  
**KWA JINA LA AZAD POONJA BHANJI NA PARVIZ AZAD**  
**POONJA BHANJI NA PARVIZ AZAD POONJA BHANI**  
**MNADA HUU UTAFAANYIKA HAPA TAREHE 07/12/2021**  
**KUANZIA SAA NNE KAMILI (4:00) ASUBUHI NA**  
**KUENDELEA**  
**MNUNUZI ATALIPA ASILIMIA (25%) YA BEI YA MNADA**  
**ILIOFIKIA**  
**NA**  
**KUMALIZIA ASILIMA (75%) YA BEI YOTE NDANI YA**  
**SIKU 14**  
**KWA MAWASILIANO WASILIANA NA**  
**0714-450561; 0744-424600**  
**WOTE MNAKARIBISHWA".**

Simply, the above notice invited the public to the auction scheduled to take place on 7<sup>th</sup> December, 2021 at 10.00am; it also stated the mode of payment, 25% at the auction date and 75% of the purchase price within 14 days. The announcement made has no reference to the decree of the

High Court which is subject of the present application. We are further of the firm view that whatever the third respondent did under the circumstances of this matter, had no connection with the decree. In fact, she was only exercising her right of recovery pursuant to the mortgage deed. We gathered this information from the third respondent's affidavit in reply where she stated categorically while responding to the contents of paragraph 5 of the applicant's supporting affidavit, that realization of the security of the loan had nothing to do with the judgment in Land Case No. 381 of 2017 from which the decree was extracted. We find it important to quote paragraph 8 of the third respondent's affidavit in reply:

*"8. That contents of the repeated paragraph 5(sic) of the affidavit are noted. In reply I state that the **3<sup>d</sup> Respondent is simply exercising its right of recovery pursuant to the mortgage deed following borrower's default.** I state further that **the realization of the security of the loan has nothing to do with the Judgment in Land Case No. 381 of 2017** and / or the notice of appeal filed in this Court". [Emphasis added].*

In the light of the above, we cannot be moved to stay the decree of the High Court basing on a quite different matter which the parties are supposed to pursue by other means. This is because what the third respondent is doing is enforcing the mortgage covenants which process is completely different from execution of the decree, which process, we are

legally mandated to stay. That apart, even if we were to stay execution of the decree, the stay order would not benefit the applicant in terms of what he intends to achieve as the decree did not grant to the respondents any right that could be stayed.

For the reasons stated above, we find and hold that this application is misconceived. Accordingly, we dismiss it with costs.

**DATED at DAR ES SALAAM this 27<sup>th</sup> day of June, 2023.**

S. A. LILA  
**JUSTICE OF APPEAL**

M. C. LEVIRA  
**JUSTICE OF APPEAL**

L. L. MASHAKA  
**JUSTICE OF APPEAL**

The Ruling delivered this 30<sup>th</sup> day of June, 2023 in the absence of the applicant and Mr. William Fungo, learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondents holding brief for Mr. Michael Kulaya and Ms. Kavola Semu, learned counsel for the 3<sup>rd</sup> Respondent, is hereby certified as a true copy of the original.



  
G. H. HERBERT  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**