

IN THE HIGH COURT OF TANZANIA

AT MOSHI

MISC. CIVIL APPLICATION NO: 48 OF 2004

C/F CIVIL APPEAL NO: 6 OF 2004 HIGH COURT MOSHI

1. THE GOVERNING BODY OF	}	- APPLICANT/J. DEBTOR
CO-OPERATIVE COLLEGE MOSHI		
2. PROF. SULEIMAN CHAMBO		

VERSUS

JOASH MBONEA KAVUTA ----- RESPONDENT/D. HOLDER

R U L I N G:

HON: JUNDU, J.

The Applicants/Judgement/Debtors on 8/7/2004 vide this Miscellaneous Civil Application No. 48 OF 2004 filed in this court an application for stay of execution under Section 68 (e), 95 and Order XXXIX rules 5 (1) and (4) of the Civil Procedure Code, 1966 arising from an order of the Resident Magistrate Court of Kilimanjaro at Moshi in Miscellaneous Civil Application No. 100 of 2003 delivered on 26/1/2004 pending hearing and determination of their appeal filed in this Court vide (DC) Civil Appeal No. 6 of 2004 on 6/2/2004 against the said Order of the said court passed on 26/1/2004 in the said Miscellaneous Civil Application No. 100 of 2003 ordering for an execution of a decree against the Applicants/Judgement/Debtors.

The said decree was in respect of a decision of the Minister for Labour given in favour of the Respondent/Decree Holder in terms of Section 24 and 26 (2) of the Security of Employment Act, 1964 which was instituted in the lower court vide the said Miscellaneous Civil Application No. 100 of 2003 by the Respondent/Decree Holder for enforcement of the same as if it were a decree in terms of Section 27 (1) (c) of the Security of Employment Act, 1964 and so instituted in the said lower court in terms of the latter provision and under Order XXI rule 9 of the Civil Procedure Code, 1966. The Applicants/Judgement Debtors applied for Stay of execution of the order of the lower court vide Miscellaneous Civil Application No. 14 of 2004 in the lower court but the application was dismissed on 23/3/2004.

After the order of the lower court of refusing the said application for stay of execution filed by the Applicants/Judgement Debtors, the latter on 24/3/2004 filed in this court under Sections 79, 95 of the Civil Procedure Code, 1966 and Section 44 (1) of the Magistrates' Courts Act, 1984 an application for revision of the Order of the lower court dated 23/3/2004 refusing stay of execution and the proceedings thereto vide Miscellaneous Civil Revision No. 4 of 2004.

application prayed for an order couched in the following words -

"That the Honourable court may be placed to revise the Order and proceedings of the Misc. Civ. Appl. No. 14 of 2004 which has been decided by Resident Magistrate Court of Kilimanjaro at Moshi on 23/3/2004 and Order that the said ruling be quashed".

The Respondent/Decree Holder vide his learned Counsel Mr. Makange raised preliminary Objections against the said application and on 1/7/2004, my brother Mmilla, J. upheld some of the objections therein and dismissed the application for revision not on merits but on incompetency based on one of the objections in respect of Section 8 of the Notaries Public and Commissioners for Oaths Ordinance Cap. 12 of the Laws. This is clear from his conclusion in his Ruling and I hereby quote him -

"In conclusion, on the basis of this courts finding in respect of the third point of law that they did not convince this court that they complied with the mandatory provisions of Section 8 of the Notaries Public and Commissioners for Oaths Ordinance Cap.12 of the Law, the overall result is that the application is dismissed with costs for incompetency".

As I have already stated the said application was dismissed on 1/7/2004 by my brother Mmilla, J. However, on 8/7/2004, the Applicants/Judgement Debtors filed the current application for stay of execution of the Order of the lower court passed on 26/1/2004 in Misc. Civil Application No. 100 of 2003 under Sections 68 (e), 95 and Order XXXIX of the Civil Procedure Code, 1966. Again, in the current application for Stay of execution filed in this court, Mr. Makange, the learned counsel for the Respondent/Decree Holder has filed a Notice of Preliminary Objections against the said application praying that it be dismissed with Costs on the following points of law -

"(1) On the strength of the rule in estoppel by matter of record arising out of this Honourable Courts Ruling vide Miscellaneous Civil Revision Application No. 4 of 2004, a copy thereof hereto attached the present Applicant vide Miscellaneous Civil Application No. 48 of 2004 is both frivolous, vexatious and ought to be dismissed with costs.

(ii) That, WITHOUT PREJUDICE TO THE FOREGOING LEGAL POINTS OF OBJECTION, the present application having been unreasonably delayed ought to be dismissed with Costs.

(iii) That, WITHOUT PREJUDICE TO THE LEGAL POINTS OF OBJECTION UNDER (i) and (ii) HEREIN ABOVE, as the appeal is not available to the Applicants/Judgement Debtors in the pending Civil Appeal No. 6 of 2004 upon which the present application is predicated, it follows that the self-same Application is wholly misconceived at law in the outcome that it ought to be dismissed with costs".

On 16/7/2004, this court ordered the counsel for both parties to argue the Preliminary Objections by way of Written Submissions. Therefore, this Ruling is for the above mentioned Preliminary Objections raised by the learned Counsel for the Respondent/Decree Holder. I will first dwell on the third point of Preliminary Objection, then come to the first point and I will lastly deal with the second point of Preliminary Objection.

As regards the third point of Preliminary Objection, the learned Counsel for the Respondent/Decree Holder, Mr. Makange, in his submission contends that the order of the lower court dated 26/1/2004 which is sought to be stayed by the Applicants/Judgement Debtors in their application filed in this court springs from Order XXI rule 9 of the Civil Procedure Code, 1966 but the same is not an appealable Order in terms of appealable orders listed under Order XL of the Civil Procedure Code, 1966.

Mr. Makange contends further in his submission that a right of appeal is a statutory creation (citing Bhogal versus Karsan (1953) 20 EACA) and that as the same is not available to the Applicants/Judgement Debtors in the pending Civil Appeal No. 6 of 2004 upon which the present application is based, there would be nothing to stay for there would be nothing being appealed against. Therefore, in view of the aforesaid, Mr. Makange has contended in his submission that the present application for stay of execution filed in this court is wholly misconceived at law and the same ought to be dismissed with Costs. On the other hand, Mr. Chuwa, the learned Counsel for the Applicants/Judgement Debtors in his submission contends that the order of the lower court is appealable first because it has amended the decision of the Minister for Labour given in favour of the Respondent/Decree Holder, secondly because it is an appealable order under Section 74 (c) of the Civil Procedure Code, 1966 as an order modifying or correcting an award of the Minister for Labour and thirdly because it is a practise of this court to admit and hear an appeal of this nature and which sometime proceed on appeal up to the Court of Appeal of Tanzania,

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In this respect, Mr. Chuwa, in his submission he has cited the case of Paulo Solomon Mwaipyana Vs NBC Holding Corporation, Civil Appeal No. 68 of 2001, Court of Appeal of Tanzania, Dar es Salaam (unreported) in which a decision of a Conciliation Board was filed in a District Court for enforcement but the Respondent therein appealed to the High Court against the Order of the District Court and thereafter the Appellant in the said case appealed to the Court of Appeal where the matter was finally resolved. So Mr. Chuwa contends in his submission that the appeal taken by the Applicants/Judgement Debtors in our present case is similar to the one in the aforesaid case hence the submission by the learned Counsel for the Respondent/Decree Holder that the Order of the lower court arising from Order XXI rule 9 of the Civil Procedure Code, 1966 is not open to appeal is intended to mislead this court. In his rejoinder submission, Mr. Makange, the learned Counsel for the Respondent/Decree Holder reiterated his earlier submission and that the case of Paulo Solomon Mwaipyana (supra) cannot avail the Applicants/Judgement Debtors any statutory right of appeal nor is there such thing like inherent appellate jurisdiction.

I have carefully considered the submissions of both parties in respect of the aforesaid third point of preliminary objection. First, I had the view that this point of Preliminary Objection ought to be taken by or raised during the hearing of the appeal itself to avoid the risk of prematurely determining or preempting the appeal itself in this application for stay of execution. Secondly, I am mindful that the grant of stay of execution is discretionary depending on circumstances of each case. However, in a second thought and upon the emphatic submission by Mr. Makange that the right of appeal does not exist for an order made under Order XXI rule 9 of the Civil Procedure Code, 1966 hence in the present matter there would be nothing to stay for there would be nothing being appealed against, I am of the considered view that it is logical and prudent to resolve this matter now.

It is true and I quite agree with Mr. Makange that an appeal is a creature of a statute and that there is nothing such as inherent appellate jurisdiction. I further agree with Mr. Makange that appellable orders under the Civil Procedure Code, 1966 are listed under Order XL thereto but one should not lose sight about appellable orders mentioned under Section 74 of the said Code. I also agree with Mr. Makange in principle that an order made under Order XXI rule 9 of the Civil Procedure Code, 1966 is not expressly listed under Order XL as one of the appellable orders hence one may argue that there is no right of appeal. However, there is truth in the submission of Mr. Chuwa that there are a number of cases which show that in similar cases like the one at hand appeals have been pursued from the lower courts to the High Court and finally to the Court of Appeal, one example is the cited case of Paulo Solomon Mwaipyana (supra) which Mr. Makange still responded that the same does not create a right of appeal to the Applicants/Judgement Debtors.

question to be answered is whether a right of appeal exists statutorily or otherwise so far as Order XXI rule 9 of the Civil Procedure Code is concerned or in the matter at hand. Mr. Chuwa in his submission contended that and infact invited this court to hold that a right of appeal existed for the matter at hand under Section 74 (c) of the Civil Procedure Code, 1966 but in my considered opinion that section deals with "an Order modifying or correcting an award". An award arises from an arbitratonal proceedings while the decision of the Minister under the Security of Employment Act, 1964 as far as Section 27 (1) (c) therein is deemed to be a "decree". So in my considered view Section 74 (c) of the Civil Procedure Code, 1966 is anapplicable nor does it create a right of appeal in our matter at hand. In my condiered view, we have to research further for an answer in terms of the provisions of Security of Employment Act, 1964 and the Civil Procedure Code, 1966.

As I have said Section 27 (1) (c) of the Security of Employment Act, 1964 states in no uncertainty terms that the decision of the Minister on a reference to him 'may b enforced in any Court of Competent jurisdiction as if it were a decree'. Now, it is common knowledge that the enforcement of decrees by the courts inclusive of district courts, resident magistrates courts and the High Court is governed by the provisions of the Civil Procedure Code, 1966 mainly Part II and Order XXI thereto. Section 33 of the Civil Procedure Code, 1966 states as follows:-

"33. A decree may be executed by the court which  
passed it or by the court to which is sent  
for execution"

In my considered view, since the Minister or the Conciliation Board as far as the provisions of the Security of Employment Act, 1964 are concerned have no power of execution of their decisions regarded as "decree", then it follows that the words "may be enforced in any court of competent jurisdiction as if it were a decree" found in Section 27 (1) (c) of the Security of Employment Act, 1964 necessarily means that the "decree" has to be placed or send to a competent Court for execution and the latter court becomes "the court executng the decree". If this construction is correct, it is also logical to conclude that one party in this "decree" envisaged under Section 27 (1) (c) of the Security of Employment Act, 1964 in whose favour the decision of the Minister or Board was given is "the decree holder" while the other party who lost in the dispute is "the judgement debtor". Another logical construction is that as a decree is usually a result from a determination arising from a suit, it follows that the envisaged "decree" under Section 27 (1) (c) of the Security of Employment Act, 1964 has to be equated with a result of a dispute in form of a suit between the parties that was determined by the Minister or the Conciliation Board otherwise the emphasis in Section 27 (1) (c) of the Security of Employment Act, 1964 of regarding the decision of the Minister or the Conciliation Board as if it were a "decree" may not be compatible with the provisions of the Civil Procedure Code, 1966 for execution of decrees.

Mr. Makange in his submission contended that the application for execution of the decision of the Minister in favour of the Respondent/Decree Holder was instituted under Order XXI rule 9 of the Civil Procedure Code, 1966 for execution and that an order emanating therein is not one of the appellable Orders under Order XL. In my considered view and in confirmity of what I have explained above, Order XXI rule 9 has to be read together with Sections 36, 38 (1), 3 and 70 (1) of the Civil Procedure Code, 1966 for a purposeful construction as far as the issue of right of appeal is concerned in our present matter.

I have already stated that the "decree" envisaged under Section 27 (1) (c) of the Security of Employment Act, 1964 is sent or placed or instituted by the decree holder in a court of competent jurisdiction for enforcement or execution thereof against the Judgement Debtor. The said court is the court executing the decree. Now Section 36 of the Civil Procedure Code, 1966 states as follows:-

"36. The court executing a decree sent to it shall  
Have the same powers in executing such decree  
as if it had been passed by itself; and all  
persons disobeying or obstructing the decision  
of the decree shall be punishable by such court  
in the same manner as if it had passed the decree  
and its Order in executing such decree shall be  
subject to the same rules in respect of appeal  
as if the decree had been passed by itself"  
(emphasis mine).

In some way the above Section is self explanatory that the Court executing a decree as was the case of the lower court in our present matter has the same powers in ~~executing~~ such decree as if it had been passed by itself and that its order in executing such decree is subject to the same rules in respect of appeal as if the decree had been passed by itself. In my considered view, one clear construction or meaning from the above section is that the words "as if the decree had been passed by itself" also refers necessarily to the kind of jurisdiction such that in our case at hand the meaning is that the "decree" has been issued in the original jurisdiction of the executing court, that is the lower court, otherwise the words would not be <sup>of</sup> useful assistance as to the jurisdiction of the court in which the decree was passed. Another observation to be made as far as the above section is concerned is on the words "... and its Order in executing such decree shall be subject to the same rules in respect of appeal as if the decree had been passed by itself".

In my considered view, the logical and necessary meaning of these words is that an order of executing court in execution of the decree as was the case in our matter at hand,

It is an order made under Order XXI rule 9 of the Civil Procedure Code, 1966 in pursuance of execution of a decree by the lower court which is an executing court for the envisaged "decree" under Section 27 (1) (c) of the Security of Employment Act, 1964 is "subject to the same rules in respect of appeal as if the decree had been passed by itself". The Section uses the word "shall", meaning therefore, it is mandatory, that the order issuing or made by the executing court to be subject to the same rules in respect of appeal as if the decree had been passed by itself. Another construction of the words "--- and its order in executing such decree shall be subject to the same rules in respect of appeal as if the decree had been passed by itself" is that an appeal is necessarily envisaged from an order passed by the court executing the decree otherwise those words would not have any logical meaning. Mind you, I am not saying that those words expressly creates the right of appeal.

I now move forward to Section 38 (1) of the Civil Procedure Code, 1966, it states as follows:-

"38 - (1) All questions arising between the parties to the suit in which the decree was passed, or their representative, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit"

In my considered view, the lower court which was the court executing the decision of the Minister or the envisaged decree in terms of Section 27 (1) (c) of the Security of Employment Act, 1964 is empowered in terms of the said Section 38 (1) of the Civil Procedure Code, 1966 to determine as to whether the execution or enforcement of the decision of the Minister or the envisaged "decree" per Section 27 (1) (c) of the Security of Employment Act, 1964. As we have seen the lower court made its order or determination under Order XXI rule 9 of the Civil Procedure Code, 1966 on 26/1/2004 where it ordered that the order of the Minister in favour of the Respondent/Decree Holder be enforced by the Applicants/Judgement Debtors. Is this order or determination not appellable?

In my considered view, an order made under Order XXI rule 9 of the Civil Procedure Code, 1966 in pursuance of execution of a decree is a determination between the decree holder and the judgement debtor envisaged under Section 38 (1) of the Civil Procedure Code, 1966. Now, what does Section 3 of the Civil Procedure Code, 1966 states in respect of a determination made pursuant to Section 38 (1) of the Civil Procedure Code, 1966.

~~The answer~~ is to be found in the definition of the word "Decree" in Section 3 as follows -

"decree" means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy to the suit and may be either preliminary or final and it shall be deemed to include the rejection of a plaint and the determination of any question within Section 38 or Section 39 ----"

So from a proper reading of the word "decree" in Section 3 of the Civil Procedure Code it is expressly clear that it mandatorily includes the determination of any question within section 38" of the Civil Procedure Code, 1966. I have already stated that an order made under Order XXI rule 9 of the Civil Procedure Code, 1966, in pursuance of execution of a decree is a determination between the decree holder and the judgement debtor envisaged under section 38 (1) of the said Code. Now, after subjecting the same to the meaning of the word "decree" in Section 3 of the said Code, I safely conclude that an order or determination of a court in pursuance of an execution of a decree by the court executing that decree is also a decree in terms of a meaning of a decree found in Section 3 of the Civil Procedure Code, 1966 as I have gallantly demonstrated above. In the same footing, I conclude further that the order that was issued by the lower court on 26/1/2004 ordering execution of the decision of the Minister in favour of the Respondent/Decree Holder as far as my aforesaid explanation in terms of Section 36, 38 (1) and 3 of the Civil Procedure Code is concerned is also regarded as a decree though essentially it appears to be simply an order passed under Order XXI rule 9 of the Civil Procedure Code, 1966 by the executing court.

Now let us move forward and look the status of a decree as far as a right of appeal is concerned under Section 70 (1) of the Civil Procedure Code, 1966. The section is worded as follows -

"70-(1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed by a court of a resident magistrate or a district court exercising original jurisdiction".

have already stated that an order made under Order XXI rule 9 of the Civil Procedure Code, 1966 in pursuance of execution of a decree is a determination between a decree holder and a judgement debtor envisaged under Section 38 (1) of the Civil Procedure Code, 1966 and that as far as the definition of a decree under Section 3 of the said Code is concerned that determination or order is also included as a decree. So this is the position for the order of the lower court dated 26/1/2004 in pursuance of ~~execution or enforcement~~ of the order of the Minister regarded as a "decree" in terms of Section 27 (1) (c) of the Security of Employment Act, 1964. I have also already stated that the lower court that is the Resident Magistrate Court of Moshi is as far as it concerned in terms of Section 31 and Section 36 of the Civil Procedure Code, 1966 ~~is a court in which the decree was sent for execution~~ but the same is regarded as if it had been passed by itself implying that it was made in its original jurisdiction. Given all what I have stated as far as the execution and the status of a decree is concerned in terms of Sections 3, 31, 36, 38 of the Civil Procedure Code, 1966 is concerned, I conclude that the order of the lower court made on 26/1/2004 under Order XXI rule 9 of the Civil Procedure Code, 1966 in pursuance of the execution of the decision of the Minister which is regarded as a decree in terms of Section 27 (1) (c) of the Security of Employment Act, 1964 is a determination under Section 38 (1) of the said Code regarded as a decree in terms of the definition of a decree under Section 3 of the said Code and is therefore open to a right of appeal in terms of Section 70 (1) of the Civil Procedure Code, 1966 given the wording of this section as above shown. This concludes the third preliminary objection raised by Mr. Makange, the learned Counsel for the Respondent/Decree Holder. If the right of appeal exists to this matter in terms of Section 70 (1) of the Civil Procedure Code, 1966, then the present application for stay of execution is relevant to determine whether the order of the lower court dated 26/1/2004 can be stayed by this court pending hearing and determination of the appeal filed by the Applicants/Judgement Debtors in this court.

I will move to the first point of preliminary objection as regards the contention that, since the matter of stay of execution arising from Miscellaneous Civil Application No. 14 of 2004 in the lower court had been finally and conclusively settled by this court in Miscellaneous Civil Revision No. 4 of 2004, then by the rule in estoppel by matter of record or judgement, it is not open for the Applicants/Judgement Debtors to reopen the same in this Misc. Civil Application No. 48 of 2004 in this court. Mr. Makange, the learned Counsel for the Respondent/Decree Holder in his submission has contended that the rule of estoppel by matter of record or judgement is a rule of evidence and pleading. He has referred me to the commentaries by SARKAR ON EVIDENCE as regards estoppel by matter of record or judgement which he contended in his submission that it is relevant to this issue in this application.

the other hand, Mr. Chuwa the learned Counsel for the Applicants/Judgement Debtors in his submission has contended that the power of the lower court for stay of execution can be exercised during the period between the decree and the time for filing appeal but once the appeal has been filed in the appellate court the jurisdiction for stay of execution rests with the appellate court. He referred me to SARKAR'S LAW OF CIVIL PROCEDURE, 18th Edition and the case of Khadija Abdallah Vs Ajesh Voja and 2 others (1996) TLR 126 in support of his submission. He further contended in his submission that since the Applicants/Judgement Debtors have filed an appeal in this court which is yet to be determined, the proper court to file application for stay of execution is only this court and that there is no Statutory law or case law that bars the same. In his rejoinder submission Mr. Makange, the learned Counsel for the Respondent/Decree Holder has contended that the reply submission by Mr. Chuwa including the authorities he cited are irrelevant to the above named preliminary objection because whereas Mr. Chuwa referred to the application for stay of execution rejected by the executing court, the rule of estoppel by matter of record was invoked by the Respondent/Decree Holder arising out of this court's Ruling in Miscellaneous Civil Revision No. 4 of 2004 whereby the said application was dismissed by this court.

I have carefully considered the submissions of the parties in respect of the above named point of Preliminary Objection. First, since I have concluded in the third point of preliminary objection that the decision of the lower court dated 26/1/2004 is appealable in terms of Section 70 (1) of the Civil Procedure Code, 1966, it is therefore, my considered view that the rule of estoppel by matter of record or judgement cannot be invoked to defeat an enabling statute or statutory provisions I have demonstrated that is Sections 3, 31, 36, 38, 70 (1) and Order XXI rule 9 of the Civil Procedure Code, 1966. Secondly, Mr. Makange in his submission has contended that as the dismissal order in the Ruling of my brother Mmilla, J. in Miscellaneous Civil Revision No. 4 of 2004 finally and conclusively determined the issue of stay of execution raised in the lower court, the same could not be re-opened in the present application because the rule of estoppel by matter of record or judgement bars it. Mr. Makange has referred this court to SARKAR ON EVIDENCE in support of his submission As I have already earlier said that the dismissal of the application for revision by my brother Mmilla, J. was based not on merits but on incompetency of the application on a technical point of law. Could that dismissal order then be said to have finally and conclusively determined the issue of stay of execution? In my considered view, it could not do so. It is common knowledge that a stay of execution is a matter of discretionary power of the competent court. It could not be finally and conclusively determined on incompetency point based not on merits but on a technical point of law.

In "HALSBURYS LAWS OF ENGLAND", Third Edition, Volume 15 at page 176 to 177 it is stated as far as is relevant to the present issue -

"— that a party relying on estoppel by record should be able to show that the matter has been determined by a judgement in its nature final. The word "final" is opposed to "interlocutory".  
--- The proceedings must have resulted in a judgement or decree ---. A verdict not followed by judgement will not create an estoppel the reason being that the verdict may not have been set aside or that the court has not declined to act upon it; nor will a verdict be admitted in evidence unless the judgement which is founded upon it is also proved".

In my considered view, the Ruling of my brother Mmilla, J. as it was merely based on ~~incompetency~~ it simply meant that the application for revision was not maintainable in court on a technical point of law but the decision was not a judgement nor was it a decree with final and conclusive effect on the issue of stay of execution. The proceedings, the subject of the said Ruling by my brother Mmilla, J. were on preliminary objections to the substantiative application for revision, therefore it can be safely concluded that the said pointsoff objections were interlocutory matters to the said application for revision of the lower court order and proceedings thereof leading not to a judgement or decree, therefore, the finality and conclusiveness of the real controversy, that is the order of the lower court on stay of execution was not ~~S~~ absolute. Finality and conclusiveness in judicial decisions is not merely demonstrated by copies of rulings and judgements but have to be backed by extracted certified copies of decrees or orders. The difference can be demonstrated in the definitions of the words "Ruling", "Judgement", "Decree" and "Order" in respect of the Civil Procedure Code, 1966. The word "Ruling" is not defined anywhere in the Civil Procedure Code, 1966 as far as Section 3 of the same Code is concerned which gives definitions of certain words used in the said Code. The word "Judgement" is defined therein in the said Sections. It "means the statement given by a judge or a magistrate of the grounds for a decree or order". The word "decree" is defined in the same section that it "means the formal expression of an adjudication which so far as regards the court expressing it conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final --". The word "Order", is also defined in the said section, it "means the formal expression of any decision of a civil court which is not a decree".

Therefore, in my considered view if a litigant raises estoppel by matter of record or judgement of a court of law then in addition to a copy of judgement it must be backed by a certified copy of the decree or order which evidences the finality and conclusiveness of the matters adjudicated in the particular suit or proceeding being based on.

As I have already said granting stay of execution is within the discretionary powers of the court, in the present matter as I have already demonstrated the Applicants/Judgement Debtors have a right of appeal to this court in respect of the order of the lower court in Misc. Civil Application No. 100 of 2003, it follows therefore that stay of execution is still a matter which can be entertained by this court once the appeal is in place in this court in terms of Order XXXIX rule 5 of the Civil Procedure Code, 1966 regardless of the Ruling of my brother Mmilla, J. in Misc. Civil Revision No. 4 of 2004 delivered on 1/7/2004. The rule of estoppel by matter of record or judgement is inoperative to the said matter. Finally, with all what I have stated above in relation to the first point of Preliminary Objection on estoppel by matter of record or judgement, I hold that it has no merit in this particular matter and hereby fails.

I have now to deal and determine the second point of Preliminary Objection, that is the present application for stay of execution having been unreasonably delayed and ought to be dismissed with costs. In his submission, Mr. Makange, the learned counsel for the Respondent/Decree Holder contends that the substantive appeal on which the present application is based was filed in this court on 6/2/2004, however, the application for stay of execution was filed on 8/7/2004 which was after a period of slightly in excess of one hundred and fifty days had elapsed. Mr. Makange in his submission contends that an application for stay of execution in terms of Order XXXIX rule 5 (3) (b) of the Civil Procedure Code, 1966 must be made without unreasonable delay. Order XXXIX rule 5 (3) (b) of the Civil Procedure Code, 1966 states as follows:-

"(3) No order for stay of execution shall be made under sub rule (1) or sub-rule (2) unless the High Court or the Court making it is satisfied:-

(b) that the application has been made without unreasonable delay.

Mr. Makange contends further in his submission that the above rule is mandatory due to the use of word "shall", therefore this court by reason of inordinate delay on the part of the Applicants/Judgement Debtors is precluded under the law from making an order for stay of execution. On the other hand, Mr. Chuwa, the learned Counsel for the Applicants/Judgement Debtors in his submission contends that the delay talked was reasonable because they could not apply for stay of execution in this court without first filing the appeal and that this court could not have jurisdiction if there is no appeal duly filed.

contends further in his submission that the application for stay of execution filed in the lower court vide Misc. Civil Application No. 14 of 2004 which was the executing court was done so purposely to enable the Applicants/Judgement Debtors to file the same application into a court with proper jurisdiction, that is the High Court. Mr. Chuwa in support of his submission has referred me to the decision of this court by my brother the late Mkude, J. in Khadija Abdallah Versus Ajesh Vaoja and 2 others (1996) TLR 126 where he said -

"— the requirement that the period of stay of execution granted must be reasonable is tied up with the need to enable the Judgement Debtor to apply to the court by which the decree was passed or the court having appellate jurisdiction in respect of the decree".

Mr. Chuwa further contended in his submission that since no execution has been done yet, the application is still in time. He cited the decision of the Court of Appeal in Civil Application No. 72/1999 by Lubuva J.R. in the case of Project Manager of Noremco Vrs Joseph Urio and Makara Auction Mart (unreported). He also invoked Sections 68 (e) and 95 of the Civil Procedure Code, 1966 in support of his submission and urged that this court should let the application be heard on merits so that justice can be done. In his rejoinder submission, Mr. Makange, the learned counsel for the Respondent/Decree Holder maintained his earlier submission that in terms of Order XXXIX rule 5 (3) (b) of the Civil Procedure Code, 1966 the application for stay of execution filed by the Appellants/Judgement Debtors was inordinately unreasonably delayed and further that judicial decisions frowns upon invoking the inherent powers of the court in enlarging period of limitation.

I have carefully considered the submission of each party in respect of the above mentioned points of preliminary objection under Order XXXIX rule 5 (3) (b) of the Civil Procedure Code, 1966. First, in principle I quite agree with Mr. Makange that in terms of the said provision of law an application for stay of execution has to be made without unreasonable delay. Secondly, in principle I also quite agree with Mr. Makange that from the date the Applicants/Judgement Debtor filed their appeal in this court against the decision of the lower court on 6/2/2004 to the date they filed the application for stay of execution is slightly in excess of 150 days period. Thirdly, I further agree in principle with Mr. Makange that in terms of judicial decisions including Ntare Vrs Shinganya (1971) HCD n. 244 and United India Fire and General Insurance Co. Ltd. (1968) E.A 102, contended that the courts cannot invoke the inherent powers of the court to enlarge period of limitation. However, the courts have been very emphatic on the principle that each case should be looked on its own merits or facts.

the present matter, the present Applicants/Judgement Debtors had instituted a similar application for stay of execution under Order XXXIX rule 5 of the Civil Procedure Code, 1966 in the lower court because the said court had jurisdiction to entertain such application. Naturally, and in my considered view the Applicants/Judgement Debtors could not institute another application for stay of application until they had known the result of that application for stay of execution they had instituted in the lower court though they had already instituted their appeal in this court on 6/2/2004. As it turned out, the lower court dismissed the application for stay of execution and finally the application for revision of the order of the lower court refusing to grant stay of execution was dismissed on 1/7/2004 by this court. Now, on this date the Applicants/Judgement Debtors had conclusively and finally known the outcome of their earlier application they had filed in the lower court. Therefore, in my considered view when on 8/7/2004 they again filed the present application for stay of execution pursuant to their appeal they had filed in this court, it could not be said that they had unreasonably delayed to file the said application. First, as I have already said they could not file it before until they had known the final outcome of the application they had filed in the lower court. Secondly, having known the final outcome on 1/7/2004, they filed the present application soonest on 8/7/2004 which is a period of seven days only. In my considered view this is not an inordinate delay by any standard and they could not file it earlier before knowing the final result of the application for stay of execution they had filed it in the lower court which found its way to the High Court by way of revision of the order of the lower court and the application as I have already said was dismissed not on merits but on incompetency based on points of law. So, I find and hold that the second point of preliminary Objection, that the application for stay of execution was made with unreasonably inordinate delay in terms of Order XXXIX rule 5 (3) (b) of the Civil Procedure Code, 1966 has no merit and hereby fails.

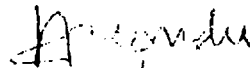
In the final result, all the three points of preliminary objections raised by the learned counsel for the Respondents/Decree Holder are hereby overruled with costs. The application for stay of execution filed by the Applicants/Judgement Debtors shall proceed for hearing on merits as by law required. In the meantime in the interest of justice an interim Order in terms of Section 68 (e) of the Civil Procedure Code, 1966 is hereby issued restraining the Respondent/Decree Holder from making any execution of the decree and the lower court order in Miscellaneous Civil Application No. 100 of 2003 or otherwise until the application for stay of execution filed in this court in this Miscellaneous Civil Application No. 48 of 2004 has been finally and conclusively heard and determined by this court. It is So Ordered.

*F.A.R. Jundu*  
F.A.R. Jundu,

Judge,

30/08/2004.

Delivered in the presence of Mr. Makange, the learned Counsel for the Respondent/  
Decree Holders and in the presence of Mr. Kimwangana, the learned Counsel for the  
Applicants/Judgement Debtors.

  
F.A.R. Jundu,

Judge,

30/08/2004

Date: 30/8/2004


Coram: F.A.R. Jundu, J.

For the Applicant/Judgement Debtors - Mr. Kimwangana.

For the Respondent/Decree Holder - Mr. Makange.

C/C:- Mrs Mzungu.

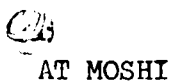
Mr. Kimwangana:- My Lord, according to the situation surrounding this matter,

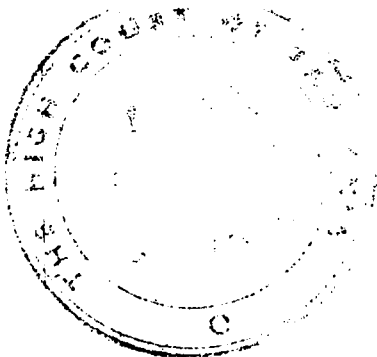
 I propose that we dispose this matter by way of written submission at a date convenient  
to this court. My lord, I will file my submission on or before 14/9/2004.

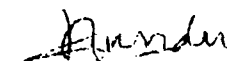
Mr. Makange:- My Lord, I will file my submission on or before 1st October, 2004.

Mr. Kimwangana:- My Lord, I shall file a rejoinder, if any, on or before 8/10/2004.

Order:- By consent of the parties it is hereby ordered that the application for  
stay of execution be argued by way of written submission. The Applicants/  
Judgement Debtors to file their submission on or before 14/9/2004. The  
Respondent/Decree Holder to file his submission on 1/10/2004. The Applicants/  
Judgement Debtors to file rejoinder submission, if any, on or before  
8/10/2004. Ruling on notice.

  
AT MOSHI



  
F.A.R. Jundu,

Judge,

30/08/2004.