

IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CIVIL REVISION NO. 37 OF 2007

GODSON THOMAS NGOWI APPLICANT

VERSUS

GRACE ESTOMIAH NKYA RESPONDENT

Date of last order –25/10/2007

Date of Ruling – 12/2/2008

R U L I N G

Oriyo, J.

The parties were husband and wife until on 30/11/2000 when the District Court of Hai, Moshi, dissolved their marriage in Matrimonial Cause No. 1 of 2000. In addition to the dissolution of the marriage, the trial court also ordered a division of matrimonial assets; payment of maintenance at shs.50,000/= per month and the applicant was ordered to pay for the education of the two issues of the marriage. On the division of matrimonial assets the trial court ordered that the respondent be given two lorries and two sofa sets. The judgment was

entered exparte after the applicant defaulted in appearance and in filing Reply to the Petition.

When the applicant defaulted in compliance with the court decision the respondent applied for and was granted leave to execute by way of attachment of the applicant's house situated in Dar es Salaam. So the decree of the District Court of Hai was transferred to the Resident Magistrates Court at Kisutu Dar es Salaam for execution, sometime in August 2001. It is apparent that the applicant has never had a peace of mind since then. He embarked on filing a series of applications in the Resident Magistrates Court at Kisutu, the High Court at Dar es Salaam, the District Court of Hai and the High Court at Moshi. In his applications in the various courts; the applicant sought orders for Stay of Execution, Revision, Extension of time to appeal against trial court decision, Extension of time to set aside the exparte judgment of 30/11/2000; etc. The chronological order of events is best as set out in the impugned decision of the Resident Magistrates Court at Kisutu (S.S. Mwangesi, PRM) delivered on 13/8/2007 in RM Misc. Civil Case

No. 164 of 2001. By that decision, the learned Principal Resident Magistrate dismissed the applicant's application for Stay of Execution. As with past court decisions, the applicant showed his dissatisfaction by filing this revision on 17/8/2007; (earlier and prior to this the applicant had filed Civil Appeal No. 10/2002 in this court. It was dismissed on 7/10/2002 (by Bubeshi, J.) While the application for Revision was pending determination, the applicant filed yet another application in this court. It is an application for stay of Execution of the decision of the learned Mwangesi, PRM.

With leave of the court, parties argued the applications by way of written submissions which were duly filed as scheduled. However, after going through parties submissions; I find that the applicants submissions to be very brief as filed on 21/11/2007. The submissions do not touch on the merits of the pending applications. Applicant merely states the fact that the sale of the disputed house was finalized on 9/9/2007. Further, the applicant, through the submissions asks this court to order the maintenance of the **status quo** so that the sale proceeds

remain in the custody of the court pending the determination of the applications. The applicant did not file any formal application for the last prayer to maintain ***status quo***.

For the respondents written submissions; it is also brief but touches more on the subject matter. She states that the applications have been overtaken by events. She argues that the application for Stay of Execution was intended to allow the applicant an opportunity to wait for the outcome of Misc. Civil Application No. 87 of 2003 pending in Moshi High Court; for extension of time to appeal against the trial court judgment in Matrimonial Cause No. 1 of 2000. The respondent informed the court that the said application was determined and rejected by the High Court at Moshi (Jundu, J.) on 6/11/2007.

In addition, the respondent informed the court that the applicant had another application pending in the High Court at Moshi in Misc. Civil Application No. 55 of 2007. In the second application the applicant was seeking court's order to set aside the sale of the applicants house situated in Dar es Salalam. She further informed the court that after the rejection of application

No. 87 of 2003; the applicant applied to withdraw the second application MCA 55/2007 and on 11/12/2007; the same was marked withdrawn.

On the representation of parties; the applicant was advocated for by Mr. F. Mkongwa, learned counsel while the respondent appeared in person.

Before I consider the merits of the applications; let me digress a bit to consider the prayer made by the applicant in his written submissions. The applicant is seeking a court order for the maintenance of the **status quo** after the sale of the house. The applicant had services of counsel who well knows that all applications to this court must comply with the provisions of Order XLIII r. 2 of the Civil Procedure Act, [Cap. 33 R.E 2002]. It states:

*"Every application to the court **shall** . . .
be made by a chamber summons
supported by affidavit." (emphasis
supplied)*

The applicants prayer made in the course of written submissions is not a competent application. Even if the prayer had been competently presented in court; it would have failed because it would have been **res judicata** in view of the application in Moshi High Court MCA 55/2007 to set aside the sale. In any event the informal order sought in the written submission is incompetent and is therefore rejected.

Now I turn to the merits of the applications. On perusal of the record there is ample confirmation of the contents of the respondents submissions. According to the copy of the ruling availed; the applicants application in MCA 87/2003 at the Moshi High Court for enlargement of time to appeal was dismissed with costs on 6/11/2007 (Jundu, J). Thereafter, on 14/11/2007 the applicant sent a Notice to the District Registrar, Moshi, of his intention to withdraw the application to set aside the sale of the house which was pending in the same court. That was Misc. Civil Application No. 55/2007 and the same was marked withdrawn.

The revisional proceedings and the subsequent application for Stay of Execution were lodged in this court when the two application in the High Court at Moshi were pending determination. In my view, their conclusion, sort of effectively marked the end of the road for the applicant in this matter.

On the foregoing, I agree with the respondent that the application for Stay of Execution has been overtaken by events. It is dismissed.

The revisional proceedings are against the proceedings and decision of the Resident Magistrates' Court at Kisumu in MCC 164/2001. From the applicant's written submissions; I do not see any submissions pointing out any errors, irregularities or illegalities in the proceedings which are material to the merits of the case involving injustice. This is in terms of Section 44 (1) (b) of the Magistrates Courts Act, Cap. 11 [R.E. 2002]; being one of the provisions under which the application for revision was filed. Neither does the applicant make any submissions on where the learned PRM erred in the exercise of his jurisdiction in the

proceedings in terms of Section 79 (1) of the Civil Procedure Act; being the second provision relied upon by the applicant to move the court.

The decision of the lower court in the Resident Magistrates Court at Kisumu which rejected the application for Stay of Execution was correctly arrived at. And in addition to that, the chronology order of events calls for an end to the litigation which began in 1999. In these circumstances, I find no reason to fault the lower court. And as already stated, the decisions made in the High Court at Nairobi in Miscellaneous Civil Application No. 87 of 2003 and No. 55 of 2007 actually rendered this court ***functus officio*** as far as Stay of Execution is concerned.

All in all and having stated the foregoing, both applications have been overtaken by events and effectively concluded.

In sum, therefore, I have no other option but to dismiss both applications for revision and for stay of execution.

The respondent to have the costs in both applications.

It is so ordered.

K. K. Oriyo

JUDGE

12/2/2008

12/2/2008

Coram: Oriyo, J.

For the Applicant – In person

For the Respondent – In person

C.C. Emmy

Court: Ruling delivered in the presence of parties.

K. K. Oriyo

JUDGE

12/2/2008

Order: Applications dismissed with costs.

K. K. Oriyo

JUDGE

12/2/2008

Court: Right of appeal explained.

K. K. Oriyo

JUDGE

12/2/2008