IN THE HIGH COURT OF TANZANIA

AT MTWARA

MISC. LAND CASE APPLICATION NO. 41 OF 2013

JUMA A. BAKARI- -APPLICANT

(THE ADMINISTRATOR OF THE ESTATE OF
THE LATE ABDILLAH BAKARI)

VERSUS

MBARAKA A. BAKARI -RESPONDENT

RULING

11/11/13 & 29/11/13

MZUNA, J.:

Juma A. Bakari, has filed this application against Mbaraka A. Bakari praying for stay of execution of a decree pending determination of Appeal case No. 1/2011 before this court. The application is preferred under Order XXI rule 24 (1) of the Civil Procedure Code, Cap 33 R.E 2002, and is accompanied by the affidavit affirmed by the applicant. During the hearing both parties appeared in person to argue the application.

The main issue is whether or not there is sufficient cause shown to allow stay of execution?

The argument by the applicant was that the reason behind this application for stay of execution is because the disputed house had been allocated to four (4) issues including the widow of the deceased. That if the execution is carried out it will cause chaos to the family as the

respondent may opt to sell it which will also create some problems on how to trace it. He therefore prayed for this court to stay the execution as prayed for.

In reply thereto, the respondent (a blood brother of the applicant from same father but different mothers) stated that what is being said is on the estate of the late Abdillah. That, the disputed house belongs to him as Mbaraka A. Bakari. That he was not summoned to attend during the alleged clan meeting which made such division. That, since he won at the District Land and Housing Tribunal at Lindi, he has all the rights to own the disputed house.

That the case has taken 3 years before hearing and that what is being seen is a delaying tactics that in why there is a change of administrators. He prayed for the application to be dismissed.

I have earnestly followed the arguments from the parties. The governing principles for the issue of stay of execution are provided for under Order XXXIX Rule 5 (1)-(4) of the Civil Procedure Code, Cap.33 R.E. 2002.

Reading the above provisions of the law, it is clear that appeal by itself does not *ipso facto* entitle the appellant/applicant an automatic right to be granted an order for stay of execution. The court has been given discretion to order stay of a decree or order only if there are sufficient cause some of which are specified under category (3) (a) - (c). It reads as follows;

"...(3) No order for stay of execution shall be made under subrule (1) or subrule (2) unless the High Court or the court making it is satisfied–

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

(b) ***that the application has been made without unreasonable 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..." Emphasis mine.

It is not disputed as per the applicant's affidavit that there is the appeal pending in the High Court of Tanzania and that the respondent had obtained judgment in his favour. The applicant says in paragraph 9 of the affidavit that if the order for stay is not granted there is a likelihood of family conflicts and disaster to arise between issues of the late Abdilah Bakari and their respective mothers, since one group would have nothing inherited from their father.

Does that constitute *substantial loss* or an irreparable loss as the law says?

That is a condition precedent as it was held by Samatta, J.A (as he then was) in the case of **Tanzania Electric Supply Company (TANESCO) vs. Independent Power Tanzania Ltd. (IPTL) and Two Others** (2000) T.L.R 324 at page 328. He listed three prerequisite conditions namely:

element which must occur in every case and since the Code expressly prohibits stay of execution as an ordinary rule it is clear the words "substantial loss" must mean something in addition to and different from that.'"

Again in **Simonite v Sheffield County Council** Times Law Reports, 12 January 1993 held that:

"... and that there were strong grounds for an appeal was no reason for granting a stay, for no one ought to appeal without strong grounds for doing so".

Lastly, in the case of **Winchester Cigarette Machinery Ltd v Payne and Another** (2) Times Law Reports, 15 December 1993 the court inter alia stated:

*'In recent cases it has been said that the practice of the court had moved on from the principle that the only ground for a stay was the reasonable probability that damages and costs paid would not be repaid if the appeal succeeded. These cases held that the approach of the court now was a matter of common sense and a balance of advantage ...**But in holding any such balance of advantage, full and proper weight had to be given by the court to the starting principle that there had to be a good reason for depriving a plaintiff from obtaining the fruits of a judgment."*** (Emphasis supplied).

There is a need to show sufficient cause for the one who prays to be granted an order for stay of execution. I have perused the applicant's

affidavit as detailed above. What he has said is mere fear without any backing. It can be paid for by compensation in case they win on appeal. Above all, a house is such property which is an immovable property. It is easily traceable. In other words, (and this is the first ground for not allowing the application), there is no loss in *"an irreparable nature which could not be adequately compensated by way of damages"* as well stated in the case of **Nicholas Nere Lekule vs. Independent Power (T) Ltd and Another** 1997 TLR 58 (CA), Lubuva, J.A (as he then was).

Secondly, the allegation that one group would have nothing inherited from their father I would say in view of the decision in the above cited case of **Bansidhar (supra)** substantial loss of property is something far beyond mere *"ordinary loss to which every judgment-debtor is necessarily subjected when he loses his case .and is deprived of his property in consequence."* The same logic will befall the respondent in case the appeal fails.

Thirdly, from the above laid down principles, *the balance of convenience or balance of advantage* should equally cover the respondent that he has an equal right to benefit from the fruits of the judgment which was decided in his favour.

Fourthly, this application was made so belatedly contrary to the spirits of the law allowing its grant under Order XXXIX Rule 5 (3) (b) of the Civil Procedure Code, Cap.33 R.E. 2002 which specifically says ***"that the application has been made without unreasonable delay."*** I say so because, this application was filed on 7th October 2013 which was after

three years had lapsed as the judgment was passed on 18th November 2010. As the respondent said, the applicant is employing a delaying tactic.

For the above stated reasons, this application has no sufficient cause shown such that this court can grant stay for execution as applied for. I find that if there will be any loss suffered by the applicant as a result of execution, it will be recovered by way of compensation or costs in case he wins in the pending appeal.

Application stands dismissed with costs.

M. G. MZUNA,
JUDGE
29/11/2013

Court: Ruling delivered this 29th day of November, 2013 in the presence of the respondent and absence of the applicant.

M.G. MZUNA

JUDGE

29/11/2013