

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN THE DISTRICT REGISTRY OF ARUSHA**

**AT ARUSHA**

**MISC. LAND APPLICATION NO. 40 OF 2018**

*( Originating from Land Case No 15 of 2012 at the Sokoni I Ward Tribunal and Arising  
from Execution application No 357 of 2015 at the District Land and Housing Tribunal at  
Arusha)*

**ISRAEL JOSEPH .....APPLICANT**

**VERSUS**

**STEPHANO JOSEPH .....RESPONDENT**

**RULING**

**DR. OPIYO, J.**

This Ruling is on application brought under section 68 ( e), Order XXI Rule 24 (1) and section 95 of the Civil Procedure Code, Cap 33 R.E 2002 and Section 38 (1) of the Courts ( Land Disputes Settlement ) Act Cap No 2 of 2002 and any other enabling position of the Law. The application was brought by way of a certificate of Urgency. The applicant is seeking for the orders that, this court be pleased to stay execution of the order of District Land and Housing Tribunal of Arusha dated 08<sup>th</sup> March, 2018 pending hearing of the appeal.

The application is supported by the affidavit of the applicant one Israel Joseph. In this application the respondent never entered appearance. On 25/04/2018, this court ordered he be served through the substituted service but nevertheless he did not appear show appearance, so the application proceeded *ex parte*. The *ex parte* hearing was heard by way of written submission.

In the applicant written submission, it is submitted that, the applicant filed the present application calling for this honourable court to issue an order of stay of execution, restraining the respondent from interfering with the suit property until determination of the intended appeal. The applicant further stated that, the applicant is seeking refuge from unjustified and illegal execution and the intended eviction of the applicant from the suit property. It was his further submission that, the elements required for an order for stay of execution have long been established in the case of **Tanzania Motors Services LTD VS Tan track Agencies LTD** Civil Application No 86 of 2004 (unreported) where the court said, there must be three elements which are that whether the appeal has prima facie likelihood of success, whether its refusal is likely to cause substantial and irreparable injury to the applicant and balance of inconvenience.

It was the learned counsel's submission that, as far as the first limb is concerned, it suffices to say that, the facts as pleaded in the pleadings made under oaths from the parties to this application and appeal amount to serious issues of facts to be determined by this honourable court in the

appeal. This is because the applicant pleaded completely different facts and respondents have brought information completely different involving completely different people who created a contractual relationship with the respondent.

On the second element, he submitted that, as enumerated in the **case of Tanzania Motors Services Ltd** requires that the court's interference is necessary to protect the applicant from irreparable loss damage. This element is vital in its own sense and the most important word, though not substantive is necessary and the need of this court interference is based on the foreseeable irreparable injury that the applicant is likely to suffer due to the behavior of the respondent. The threats leveled against the applicant are unfounded, if the respondent is allowed to execute the order that will amount to illegally evicting the applicant, an act which will cause irreparable loss to the applicant.

On the third element, he went on to submit that, there will be greater hardship and mischief suffered by the applicant from withholding of the stay, the respondent will neither suffer irreparably nor any injury by granting of stay of execution pending determination of the appeal. It was therefore the applicant's prayers that, this honourable court issue stay of execution against the respondent pending the determination of the appeal to the finality.

The central issue in this application is whether there are special circumstances upon which the court could exercise its discretion to grant stay of execution. It was the applicant contention that, on the balance of convenience and common sense, the circumstances of the case are such that the court should exercise its discretion to grant stay of execution in favor of the applicant, one of the factors to be considered in deciding to grant stay of execution whether irreparable loss would be sustained if stay is not grant. The records show that, the parties had a dispute over suit property before Sokoni I Ward Tribunal in case No 15/2012 where decision was in favor of the respondent Stephano Joseph, (Decree Holder). He filed an application for execution before District Land and Housing Tribunal (DLHT) which was application No 46/2013, The DLHT (Mungure) ruled out that the decision of Sokoni I Ward Tribunal cannot be executed for not describing properly the land in dispute and showing measurement, the parties were advised to file a fresh application before the trial tribunal subject to the law of limitation, instead of filing the new application the respondent filed another application for execution which was application No 357/2015. The DLHT granted the application and ordered the applicant to be evicted from the disputed land. Aggrieved the applicant filed appeal before this court against the said decision which is still pending before this court. The applicant then decided to file the present application for the courts interventions on the matter before determination of his appeal.

I have gone through the records, from the circumstances of this case, in the view of implication of immediate execution of DLHT order, I am

convinced that on balance of convenience and common sense, granting stay of execution would be in the interest of justice. It is now well established that the following are the principles factors court should consider whether or not to grant a stay of execution:-

1. Whether the appeal has, prima facie a likelihood of success,
2. Whether its refusal is likely to cause substantial and irreparable injury to the applicant.
3. Balance of convenience.

On the first principle, on whether the appeal has prima facie a likelihood of success. At this stage it is not possible to make a meaningful assessment of the chances because arguments from both sides have not been heard, but it suffice to say that, from what has been submitted by the applicant, the appeal stands chance of success on the point that the respondent opted to file another execution application in presence of the same court's order to file the application afresh and without challenging the court order.

In the matter at hand, the applicant is also relying on the second and the third principles that is, whether the applicant is likely to suffer substantial and irreparable loss, if the order applied for is not granted, and whether common sense and balance of conveniences is in favor of the applicant. It is on record that, the applicant is in occupation of the suit land in that respect, it is my view that common sense and balance of convenience weighs heavily in favor of the applicant.

Therefore, since the applicant has satisfied this court that, he will suffer irreparable loss if the order applied for is not granted and since common sense and balance of convenience weighs heavily in favor of the applicant. I am increasingly inclined to grant the application as prayed, accordingly it is ordered that the execution of the order of DLHT dated 08/03/2018 be stayed pending the determination of Miscellaneous Land Appeal No 21 of 2017 .

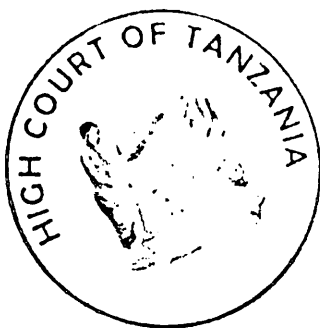
(Sgd)

**DR. M. OPIYO,**

**JUDGE**

**13/07/2018**

I hereby certify this to be a true copy of the original.



A handwritten signature in black ink, consisting of stylized, overlapping loops and strokes.

**DEPUTY REGISTRAR**

**ARUSHA**

19/7/2018