

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

**AT BUKOBA**

**LAND CASE APPEAL No. 44/2016**

*(Arising from Misc. Land Application No. 8/2016 in the District Land and Housing Tribunal for Kagera and Original Civil Case No. 1/2013 of Rubale Ward Tribunal)*

**RWECHUNGURA IDD ----- APPELLANT**

**VERUS**

**FULAISON FLANSI ----- RESPONDENT**

**JUDGMENT**

**14/3/2017 & 22/2/2018**

**KAIRO, J.**

The Appellant was aggrieved by the decision of District Land and Housing Tribunal in Misc. Application No. 8/2016 delivered on 24/3/2016 which ordered for stay of execution, thus decided to appeal to this court to challenge the same raising five grounds of appeal as follows:-

1. That the Hon. Chairman erred in law and facts by ordering stay of execution without reasonable cause.

2. That the Hon. Chairman erred in law and facts by issuing the so called '*Judgment*' instead of '*a ruling*' as Preliminary issues and applications are determined by ruling and not Judgments. Even if it would have been a Judgment, the same doesn't qualify the ingredients of valid Judgment.
3. That the Hon. Chairman erred in law and facts by granting the application for stay of execution without hearing the application itself on the side of the Appellant so as to accord him an opportunity to advance the grounds and reasoning against the application.
4. That the Hon. Chairman erred in law and facts by ordering stay of execution on the so called "*pending the hearing and determination of the application pending before the High Court*" without naming which application and registered under which number as it was plain in the application for stay itself.
5. That the Hon. Chairman erred in law and facts by being biased against the appellant at all times when the matter was before him, the reason of which he removed the court broker in his Judgment while he was a party to the application for stay and at the same time refusing to register the Appellant's written submission in support of the preliminary objection while the Respondent was represented by an advocate. He thus prayed this court to allow his appeal with cost.

Briefly the facts that can be discerned from the court records are to the effect that, the Appellant had filed a complaint No. 1/2013 at Rubale Ward

Tribunal against the Respondent complaining of the act by the Respondent of constructing a septic hole and digging a dirty water passage at a place demarcating their houses, being neighbors. He thus sought for restraining orders against the Respondent.

The Ward Tribunal after hearing both of them and visiting the “*locus in quo*” observed that though the area where the septic hole was dug belong to the Respondent, but it was not safe and further unhealthy to dig the same at the said space (Kichocho). The Tribunal thus decided in favor of the Appellant by restraining the Respondent not to continue with the digging of the said septic hole and further barred him from conducting any activity that may cause destruction to the house of the Appellant. No appeal was preferred by any party.

According to the Appellant, the Respondent didn't complied/ abides with the given orders (restraining order) and continued with the conduct of such activities. The Appellant thus decided to apply for execution of the Rubale Ward Tribunal's decision at the DLHT, the application which was Misc. Civil Application No. 8/2016. The District Land and Housing Tribunal after hearing the parties and got verification from the court broker who went to visit the *locus in quo* decided on 10/3/2016 that execution be effected by removing the septic tank/ hole and the dirty water passage. However before the District Land and Housing Tribunal execution order could be implemented, Advocate Bitakwate representing the Respondent emerged on 21/3/2016 and informed the District Land and Housing Tribunal that they have filed an

application for revision at the High Court and further applied for a stay of execution at the District Land and Housing Tribunal. The Appellant raised a P.O. that the application was incompetent for citing a wrong provision of law. The District Land and Housing Tribunal on 24/3/2016 rejected the P.O raised and went on to grant the prayer for stay of execution pending the hearing and determination of the revision application before the High Court. This is the decision which aggrieved the Appellant hence this appeal basing on the above stipulated grounds of appeal.

The Respondent through his Counsel Advocate Bitakwate raised a P.O when replying to the petition of appeal to the effect that the appeal was wrongly filed before the court as it contravenes the provisions of Section 74 (1) & (2) of the CPC Cap 33 RE 2002. He thus prayed the court to uphold the objection and dismiss the appeal.

The court while in the process of writing the ruling for the P.O raised noted the presence of revision proceedings No. 4/2016 instituted by the Respondent at the High Court on 15/3/2016 while this appeal was instituted on 8/4/2016. Chronologically, the revision was to be determined earlier. The court thus in its wisdom decided to stay the appeal and dispose the application for revision which was earlier filed as per court record. However on 1/11/2016, the Respondent's Advocate prayed to withdraw revision No. 4/2016 with leave to re-file. The application was granted but the Respondent filed an appeal instead. The court thus on 13/1/2017 struck out the said appeal and continued to determine appeal No. 44/2016 from where

it was stayed. The P.O raised by the Respondent was rejected on 3/2/2017, remaining with this appeal to determine.

The parties by consensus decided to dispose this appeal by written submission. The schedule was set and the parties abided with accordingly. As earlier stated, the Respondent is represented by Advocate Bitakwate the Learned Counsel while the Appellant is self represented.

In analyzing the grounds of appeal, I will consider them collectively. After going through the court records, grounds of appeal and the parties' submission, the main issue for determination is whether or not the appeal is based on founded ground. Starting with the first ground of appeal the interlocutory question to be answered by this court is whether the order for stay of execution was without reasonable cause. In amplifying this ground, the Appellant contended that the Chairman at the District Land and Housing Tribunal has ordered for stay of execution in favor of the Respondent while he has not disclosed any reasonable cause. He further argued that the Respondent's affidavit had made a mere averments that he had already instituted a revision at the High Court without naming the revision number, to which Appellant argued to be an error.

He argued that the said order made the Respondent to conspire with unfaithful court officials to insert application for revision No. 4/2016 which he believes to have been inserted at the High Court after the District Land and Housing Tribunal's decision and though he objected but was ignored.

The Appellant went further that revision No. 4/2016 which has made the District Land and Housing Tribunal stay the execution has ended on 1/11/2016 when the court granted to the Respondent permission to withdraw the same with leave to re-file but didn't re-file the same, thus there is no pending revision before the court. He argued that the absence of the pending revision itself suffices to dispose this appeal in the Appellant's favor as the order of the District Land and Housing Tribunal has been overtaken by event. He cited the case of **National Bank of Commerce vrs Dar es salaam Education and Office Stationary (1995) TLR 272A** wherein the Court of Appeal held that, *an order overtaken by event has no legal base*" to bolting up his argument.

In reply to the first ground of appeal, the Respondent dismissed the argument that the stay of execution order pending hearing of revision application was granted without reasonable grounds. Further the argument that the number of the said application was not mentioned was a misconception on the part of the Appellant adding that the arguments have no basis. The Advocate argued that, the order for stay of execution may be issued when it is indicated that a party has initiated the appeal process and that is what the Respondent did. He clarified that the Respondent indicated that he had initiated the process for revision at the High Court in paragraph 7 of the applicant's affidavit therein (Respondent herein) in the application for stay of execution. He quoted the referred paragraph to authenticate his contentions. The Respondent went on that both the application for stay of

execution and the one for revision were filed on 15/3/2016. The Appellant was served with the application for stay of execution on 19/3/2016 wherein the stay execution prayers were granted after hearing both parties.

He went on that when the application for stay of execution was heard, the High Court has not issued the summons for Misc. Land Revision No. 4/2016 yet, but the Respondent produced the copy of the exchequer receipt dated 15/3/2016 being evidence of filing of the Misc. Land Revision No. 4/2016 before the High Court. He concluded that, the order for stay of execution was therefore issued after the Respondent had established to the satisfaction of the Chairman that the Respondent had initiated the proceedings of the said revision to challenge the decision of the Tribunal and that substantial and irreparable loss would result if the order for stay was withheld. He cited Regulation 25 (4) (a) and (b) of the Land Dispute (the DLHT) Regulation 2003 to support his argument together with Civil Application No.229/2014 between *Ahmed Mbaraka Vrs. Mwananchi Engineering & Contracting Co. Ltd* wherein it was *observed that executing authority is not to allow execution if there is a notice to appeal*. Thus the first ground of appeal has no merit and deserves to be dismissed.

Having heard the rival arguments concerning the first ground, the interlocutory issue to be determined is whether the execution was stayed without reasonable cause.

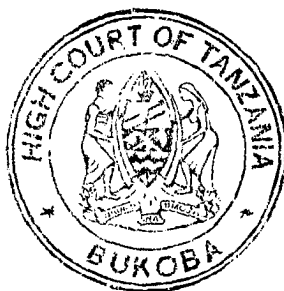
It is not in dispute that the Respondent has filed revision No. 4/2016 on 15/2016 as per exchequer receipt available in the court record. The Appellant has lamented that the revision was inserted at the High Court after the decision of the District Land and Housing Tribunal to stay the execution proceedings. Suffice to say that the contention is just speculative as there was no evidence to support the same. According to record, the stay of execution was given on 24/3/2016. I tend to agree the explanation by Advocate Bitakwate that on the hearing date of the application for stay of execution, though the revision proceeding has already been filed, but no summons yet has been issued by the High Court with regards to the said revision proceedings, but all the same he had the exchequer receipt to verify the initiation of the said revision proceedings at the High Court. In that regard therefore the contention is more of speculation than reality. Besides Section 110 (2) of the evidence Act Cap 6 RE 2002 shoulder the burden of proof of any alleged existing fact to the person who so alleges.

The Appellant when further amplifying the 1<sup>st</sup> and 4<sup>th</sup> grounds of appeal contended that, the said revision No. 4/2016 which was the basis of the District Land and Housing Tribunal to stay execution proceedings came to an end on 1/11/2016 as such the said order has been overtaken by event, the argument which was not addressed by the Advocate for the Respondent. The wanting question therefore is whether the order for stay of execution can still subsist in the absence of pending revision.



It is not disputable that the District Land and Housing Tribunal ordered for the stay of execution pending the revision proceedings filed at the High Court which is Revision Application No. 4/2016. The records reveal that, the said revision was withdrawn by the Respondent on 1/11/2016 with leave to re-file after observing that it was erroneously filed. However the Respondent filed an appeal instead of the revision as ordered. As such there was no revision before the court. It is the cardinal principle of law that a stay of execution application being an interim order to maintain the status quo pending determination of it has to hinge on a pending matter. In the present matter, the stay of execution was hinged on the application for revision which was withdrawn. In this regard therefore there is nothing pending to make the stay of execution order to go on subsisting. I thus concede to the Appellant's argument that the absence of the revision proceeding which was the basis of the stay of execution order, has made the same to collapse for lack of legs to stand on, and thereby die a natural death. I thus found this appeal to have merit. I further set aside the order for stay of execution given on 24/3/2016 and accordingly remit the court file to the District Land and Housing Tribunal for continuation of execution process.

Appeal allowed with cost. R/A Explained.



L.G. Kairo

Judge

2/3/2018

**Date:** 02/03/2018

**Coram:** Hon. L.G. Kairo, J.

**Appellant:** Present in person

**Respondent:** Present in person

**B/C:** R. Bamporiki

**Court:** The matter is scheduled for Judgment. The same is ready and is read over in open court today in the presence of the Appellant and the Respondent in person.



  
L.G. Kairo  
**Judge**  
2/3/2018