

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF ARUSHA**

AT ARUSHA

MISCELLANEOUS LAND APPLICATION NO. 125 OF 2018

(Originating from the High Court Of Tanzania District Registry of Arusha
Land Case No. 60 of 2015)

ENOCK JACOB SAMBOTO 1ST APPLICANT

FRANCIS URIO 2ND APPLICANT

SETH ZAKARIA 3RD APPLICANT

JACOB YOANE 4TH APPLICANT

VERSUS

JESCA HENOCK AKYOORESPONDENT

RULING

16th November, 2018

T. Mwenempazi, J.

The applicants were defendants in land case No.6/2015 which was in the High Court of Arusha. They were aggrieved by the exparte judgment. They brought an application to extend time to apply for setting aside an

ex parte decree. This application was brought while there was no information of an application for execution. This application intended to maintain the status quo so that no loss will be incurred by the applicants. In the wording of the counsel for the applicant, the applicants have the view that by not being given chance to address the court their rights will be infringed in the pieces of land they possess which are basically bordering the area of land the respondent believe belong to her.

We attached the application for execution and the decision of the court. As it was held in the case of ***NICHOLAS NERE LEKULE v INDEPENDENT POWER (T) LTD AND ANOTHER 1997 TLR 58 (CA)***, the court, Lubuva JA held;

"One of the essential conditions for granting stay of execution pending an intended appeal was the loss or injury that an applicant will be subjected to."

The applicant submitted that the application for execution involves eviction of applicant and demolition of structure. The third applicant has erected a wall and also has planted trees and banana plants since 2015. He depends on the farm for food. Considering time taken and efforts made to invest on the area, if the execution will be executed will result into irreparable loss.

In Misc. Appeal No.6/2017 before Maghimbi, J. the 3rd applicant was declared the owner. This court also decided in another case Land Case No.60/2015 the same area was judged to be owned by the 1st applicant and the Respondent. This ought to be heard by this court. This will also

give right to be heard to the 3rd applicant who was declared owner of the area. The 2nd applicant has also constructed a fence. The same was demolished by the respondent.

Now the 2nd applicant planted trees which are growing, this is an investment and costly act. Considering all these, it won't be just to execute without giving the 2nd appellant to be heard. This court has power M/S 95 of CPC, Cap. 37 to make sure the end of justice is met. More so, the applicant has a constitutional Right for their properties to be respected and protected under art 24(1) of the Constitution of the United Republic of Tanzania.

Of importance there is a pending Misc. Application No.60/2018 which has the prayer to this court to set aside the exparte decree. This is the remedy granted by law to the applicant to be heard by this court. According art 13(6) (a) of COURT, 1997 it is the Right for the applicants to be heard. If the exparte decree is executed this application will be overtaken by the events. If this application will be executed that means even if this application to set aside is heard, the applicant will suffer irreparable loss. It is in the interest of Justice to stay execution so that the rights of the applicants are protected. This court under Order XXI R 27 of CPC and Order XXI R 26 has power to stay execution so as to protect the pending application.

Also, in the case of **Tanzania Cotton Marketing Board Vs Cogecot Cotton Co SA** [1997] TLR 63, Lubuva JA held that the granting of stay of execution as a matter of discretion which has to be

exercised in a common same and balance of advantage bases. on a balance of inconvenience, the applicants will suffer if the execution will be executed than the Respondent. The dispute area has never been used by the respondent since it was purchased.

The applicants have been using the area since 2015. If execution will be affected the applicants will suffer. The Respondent's Rights will be preserved save for a temporary stay of execution. Therefore, all conditions and factors for granting stay of execution are for the interest of justice. This court has power to stay the execution under Order XXI R 24(1) and Order XXI Rule 26 of CPC, cap 33. Therefore, since there is pending application in this court, interest of justice the applicants pray this court to stay execution temporarily waiting determination of the application to set aside an exparte judgment and decree.

In responding to the submission by the applicants, the Respondent submitted that applicants are complaining that execution of the exparte judgment and decree will cause loss to them as it is the area they are living. I object to that argument as the applicant have their place which they bought from us, me and the 1st applicant. That area has no dispute. The area with dispute is that which was bought from my husband without involving me. This was at the time we had a matrimonial dispute. The respondent however could not explain clearly, the undisputable area has which measurements.

That area was purchased from the 1st applicant while they knew I am the legal wife of the 1st applicant. They knew that there is a family

living. The applicants are not far, they know my life; they were driven with ambition to acquire more land. The applicants won't be affected if execution will proceed as the area, I claimed which belong to me is different from the area which they are living.

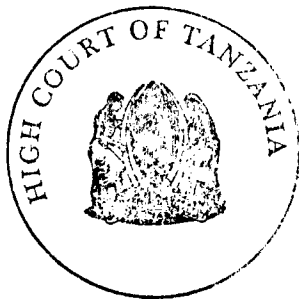
The respondent prayed therefore, that the application should not be granted as it will cause delay to the court process and finalization of litigation. This court should look at me with sympathy as this is a huge burden to me. It also affects kids psychologically. This will finalize disputes with neighbours and will maintain peace. If execution will not be affected, I am the one suffering.

I have careful listened and recorded the submission by the parties in this application and I do see there are certain issues would have been resolved if the parties would be able to express their concern in court. The respondent when expressing herself seemed to have more blame to the applicants and now the application has as its aim to cause more suffering to her and the children.

In my view, the 1st applicant and the respondents misunderstanding has been also fueled more by these disputes over land, which in the respondent's word, belong to the matrimonial home. Sorting out the ownership by measurement will facilitate settling the misunderstanding. That will be achieved in case the applicant will be able to express their view in court. They are working on that, hence this application.

Under the circumstances, and on the respondent's admission that there is the area which was bought by the parties lawful and she has no dispute with it but an addition was made by the 1st applicant selling more piece of land to the applicant it will be in the interest of justice to grant and order of stay of execution pending determination of Misc. Land Application No. 60 of 2018. The application for stay of execution of Land Case no. 60 of 2015 is therefore granted. No order as to cost is granted as the respondent has raised concern of her suffering with her family.

It is ordered accordingly




T. M. Mwenempazi

JUDGE

16TH NOVEMBER, 2018