

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 183 OF 2021

*(Arising from Misc. Civil Application No. 696/2018 and Execution
No. 75 of 2020)*

LUPYANA FREDERICK TIMOTHY KADUMA

(Personal Legal Representative of

***TIMOTHY KADUMA*)----- APPLICANT/JUDGMENT DEBTOR**

VERSUS

SAMWEL MASSAWE-----1ST RESPONDENT/DECREE HOLDER

KISHE AUCTION MART CO. LIMITED ----- 2ND RESPONDENT

R U L I N G

Date of last Order: 16/07/2021

Date of Ruling: 13/08/2021

MGONYA, J.

The Application before the court has been brought under **section 2(3) of the Judicature and Application of Laws Act, Cap. 358 [R. E. 2002]; Section 68 (e) and 95 of the Civil Procedure Code Cap. 33 [R. E. 2019]**. The same is supported by an affidavit sworn by **Lupyana Frederick Timothy Kaduma** the Applicant herein seeking for the following orders:

- (a) That, this Honourable Court be pleased to grant an Order quashing, vacating and setting aside the Ruling and Order dated the 8th day of February, 2021 by Honourable C. M. Magesa, Deputy Registrar.***
- (b) That, this Honourable Court be pleased to grant an Order restoring the status quo of the Applicant and thereby putting the Applicant into possession into occupation of the suit property suit property known as Plot No. 240/1 and 240/2 BLOCK 'C' KIMARA, KINONDONI MUNICIPALITY, DAR ES SALAAM pending determination of the Application for stay of execution by way of Notice of Motion No. 40/01 of 2021 in the Court of Appeal of Tanzania interpaertase.***
- (c) That, costs of this Application be provided in due course.***
- (d) Any other relief (s) this Honourable Court may deem fit to grant.***

I have noted from the record that parties have duly filed their respective pleadings together with their respective written submissions as ordered by this Honourable Court. I appreciate the lengthy and critical submissions that have been filed. However, in the cause of determining this Ruling, I don't intend

in any way to reproduce the said submissions, but I have decided to straight determine the Application. Let the parties and their respective Advocates be at rest that I have carefully read their respective submissions and taken the same for consideration in determination of this Application.

In order to determine the prayers before the court, I would like to list hereunder the sequence of events and decisions that had occurred since my decision dated 28th August, 2020 to this end. The same are as hereunder:

1. On the **28th August, 2020**, the High Court through Honourable Mgonya, J. ordered the Applicant to give vacant possession of the suit property to the *bonafide* purchaser within 14 days from the date of decision. However, it is from the record that the Applicant never vacated as ordered;
2. Further, on the **8th February, 2021** the High Court via Hon. Deputy Registrar granted an order for Execution originating from the above court's decision;
3. The records further reveals that on the **12th February, 2021** the Applicant was duly served with a Notice of Eviction;
4. On the **1st March, 2021** this Honourable Court requested for police to support during eviction;
5. On the **10th March, 2021**, the eviction took place and the house, the subject matter of this application was

handed over to the 1st Respondent by the 2nd Respondent.

6. On the **22nd February, 2021** filing of the alleged Notice of Motion took place; and which was never served to the Respondents, hence *Exparte* hearing.
7. On the **16th March, 2021** *Exparte* order by Justice Lila of the Court of Appeal, ordering the Ruling and Order of the High Court, Dar es Salaam Registry in Misc. Civil Application No. 696 of 2018 to be stayed pending hearing of the application for stay of execution Interparties.

It is from the above that one will notice that when the last Court Order was delivered, being an *Exparte* Order from the Court of the Appeal being the Highest Court of the Land, (Lilla CA), **the Execution had already been conducted**. I really wonder as to why the Applicant's Counsel did not disclose this very crucial information to the Justice of Appeal who was attending the Application under the *Exparte* hearing since the said fact was in the knowledge of not only the Applicant and his Advocate but rather in the knowledge of the Respondents and the Court, at least by the Deputy Registrar who granted the eviction order.

From the above scenario, the question comes, are the instant prayers before this court tenable and fit for implementation? The proper answer to this question comes

from the Court of Appeal in the very recent Ruling of the Court in ***Civil Application No. 84 of 2017; JUTO ALLY VERSUS LUCAS KOMBA AND ALOYCE MSAFIRI MUSIKA*** where under the similar circumstances, the Court of Appeal had observed that:

*"We shall first discuss the factor of substantial loss. Counsel for the respondent has submitted that execution has already been carried out and the applicant is not in occupation of the house. We revert to the question we raised earlier, whether the order of stay will serve any practical purpose. We **are firmly of the view that since execution has been carried out, we cannot make an order to stay it and that if it caused substantial loss to the applicant, there is no order that can undo that.**" [The emphasis is mine].*

Going by events in chronological dates and events, it suffices to say that, there was nothing to be considered by the Court of Appeal on the **16th March, 2021** because through the High Court, the execution was completed on the **10th March, 2021**, despite the fact that the senior counsel for the Applicant never disclosed this fact to the Court of Appeal and thus, the Court of Appeal in its Exparte Order at Page 3 - 4 had this to say:

"Given the ruling and order made by the Deputy Registrar, it is indeed evident that there is,

imminent danger of the High Court order being executed". (Emphasize supplied).

From the above, it is obvious that Hon. Justice did not have any due that the order in respect of execution had already been carried out and therefore, the Court of Appeal gave its order under a mistaken belief.

It is my concern and firm view that, under any circumstances, and **for the interest of Justice**; the learned Advocate for Applicant together with the Applicant they were supposed to disclosed the fact that execution had already taken place by the time the matter was heard and determined by the Court of Appeal Exparte, so as to the Judge can give out the order that can be implemented and adhered to. However, that was not the case

The omission in respect of disclosing the above crucial fact, was a grave mistake by the Applicant's Advocate. I do understand that someone can be rely desperate to some extent in litigating his matter; but always counsel have to understand that they are **officers of the court** who are mandatorily required to assist the Court in administration of Justice.

To me, the Applicant's act not to disclose that crucial information under the given circumstances, indeed is to **abuse the court process** which is still under way. I wonder if the Applicant has re-visited his prayers before this honourable Court, and whether the Court of Appeal's Exparte Order can

assist in handling this matter or on the other hand make the matter worse by confusing parties from the sought orders. I leave the questions and answers to the Applicant and his respective Counsel whom they both know the current status of this matter.

On this, I can't hesitate to say that I am really disappointed by the Applicant and his Advocate since this matter seems to still surface in court and on the worse scenario is that it now becomes hard to implement the even the Court of Appeal's *Exparte* Order dated **16th March, 2021**, under the circumstances.

At this Juncture, it is imperative to emphasize briefly on the role of the Legal Practitioner to the court and Administration of Justice. Especially after having confirmed that the Justice of Appeal had no any clue that at the time he was attending the Application before it *Exparte*, execution had already taken place.

It cannot be disputed that a lawyer as an officer of the Court has a paramount duty to the Court to the proper Administration of Justice. Lawyers therefore are required to discharge their duties and advice to their respective clients, even if that duty comes into conflict with interest of their clients, so as to see that cases are administrated respectfully and determined to the end of Justice. Indeed, the words of

Foremen, J. in the case of ***GIANARALLI VS. WRATH (1988) 165 CLR 543, 578*** are instructive of this duty thus it was observed that:

"The lawyer's duty to the Court is an incident of the lawyer's duty to the proper administration of Justice. This duty arises as a result of the position of the Legal practitioner as an officer of the Court and an integral participant in the Administration of Justice. The Practitioner's role is not merely to push his client's interest in the adversarial process, rather the practitioner has a duty to assist the court in doing Justice accordingly to law."

Furthermore, to exemplify the above words of wisdom, it was stated in the case of ***RE GRUZMAN (1968) 70 SR (NSW) 316, 313*** that:

"The duty requires that lawyers act with honesty, condor and competence, exercise independent judgment in the conduct of the case, and not engage in a conduct that is an abuse of process. Importantly, lawyers must not mislead the court and must be frank in their responses and disclose to it. In short, lawyers

must do what they can to ensure that the law is applied correctly to the case."

In this regard, it is important for any lawyer to understand that in the Administration of Justice he/she carries both benefits of pursuing the carrier and burden of strengthening the administration of Justice.

It is not monotonous, but I think I should end at this juncture by remarks of **Lord Reid** in the case of ***RONDEL VS. WORSLEY (1969) IAC 191, 277*** thus:

"As an officer of the Court concerned in the Administration of justice (a legal practitioner) has an overriding duty to the court, to the standards of his profession, and to the public which may and often does lead to a conflict with his client's wishes or with what the client thinks are his personal interest."

In the end, in view of what I have discussed above, I have no hesitation to conclude that the Applicant's Counsel acts in reflection of what had happened before the Exparte Order was **unprofessional and unjust.**

As to the jurisdiction of this court to determine the instant Application at this stage and after all the development thereto, I still deliberate as to what am I supposed to do in this matter at this particular stage reflecting to this Applicant's prayers,

especially after I have delivered my decision on this very same matter on **28th August, 2020**, the decision which must be taken to be the final decision of this court on this issue. As far as this court is concerned, the matter is closed and it cannot be re-opened.

It would be very wrong for this court to assume that it has such powers. In my view, the only remedy that can be taken in regard of the said decision is for the Applicant to appeal to the Court above this court; that is to the Court of Appeal, as this Court becomes *funtus officio* and **cannot nullify its own decision, as it has no jurisdiction to do so especially after the execution has already taken place.**

At this end, and in view of all that I have pointed and discussed above, it is without any doubt that the Application before the court has both been **misconceived** and above all **it has no merits.**

It is from the same, **I proceed to dismiss the instant Application with costs only to the 1st Respondent.**

It is so ordered.



L. E. MGONYA

JUDGE

13/08/2021

Court: Ruling delivered in my chambers on 13th day of August, 2021 in the presence of Applicant, 1st Respondent and Mr. Richard, RMA and absence of the 2nd Respondent.



A handwritten signature in blue ink, appearing to read "L. E. Mgonya", is written above the printed name.

L. E. MGONYA

JUDGE

13/08/2021