IN THE HIGH COURT OF TANZANIA

MWANZA DISTRICT REGISTRY

AT MWANZA

LAND REVISION No. 11 OF 2020

(Arising from the of the District Land and Housing Tribunal of Mwanza at Mwanza in Land Application No. 104B of 2020)

NATIONAL MICROFINANCE BANK .....1ST APPLICANT

YONO AUCTION MART .....2ND APPLICANT

VERSUS

STEPHEN NKAINA MARWA .....1ST RESPONDENT

ROCK CITY TAKERS LIMITED.....2NDRESPONDENT

RULING

17th December, 2020 – 19th February, 2021

TIGANGA, J

The applicants, National Microfinance Bank and Yono Auction Mart, a banking institution and an auctioneer respectively, under the service of Dr. George Mwaisondola and Mr. Gwakisa Gervas are, under certificate of urgency certified by Gwakisa Gervas, moving this court under section 43 (1)(a) and (b) of the Land Disputes Courts Act [Cap 216 R.E 2019], and section 95 of the Civil Procedure Code Cap 33 R.E 2019 asking for the following orders:

1. To call for record of the District Land and Housing Tribunal and revise the order dated on 24/11/2020 and 04/12/2020 in Misc. Application No. 104B of 2020
2. The warrant of attachment issued by the tribunal in respective case on the date mentioned above attaching the motor vehicles with registration No. T.888 CHM, T.740 BCA, T.195 CWG, T 648 DKQ and T.250 DUM be lifted.
3. The order restricting the respondent, their agents or persons acting under their instructions from proceedings with execution proceedings pending the hearing of the intended appeal to the Court of Appeal.
4. This court be pleased to grant any order which it considers just to grant, and
5. Cost of the application be provided.

As earlier on pointed out, the chamber summons in which these prayers were presented was supported by the affidavit sworn by Mr. Gwakisa Gervas, one of the Advocates who are representing the applicants.

The same depose that the respondent in Application No. 104 of 2019 before the DLHT for Mwanza which was decided on 14/02/2020 against the applicant by awarding the respondent Tshs. 128,190,000/= as the refund

of the purchase price and damages arising out of the purchase of the house No/ IGM/NY/02/29.

Following that decision, the applicant filed Land Appeal No. 09/2020 which was struck out by the High Court on the reasons that, the same was prematurely filed. Against that decision, the applicant filed a notice of appeal to challenge it before the Court of Appeal.

As part of the appeal process, he applied for the certified copies of the proceedings and other documents and filed an application for leave to appeal, which application is still pending before Hon. Ismail, J and is scheduled for hearing on 02/03/2021. The applicant also filed an application for stay of execution before the Court of Appeal of Tanzania pending the intended appeal. That was after the respondent had moved tribunal to execute the decision of Land Application No. 104 of 2019 and had proceeded to determine the application for execution in favour of the first respondent by appointing Rock City Court Brokers to attach and sell the first applicant's motor vehicle through the tribunal's rulings dated on 24/11/2020 and 04/12/2020.

When this application was filed, it was objected by the notice of preliminary objection filed on the 16/12/2020. However, the said objection was withdrawn by the counsel for the respondent on 17/12/2020. The application was opposed by the counter affidavit affirmed by Mr. Kassim Gilla, the counsel for the respondent. In that counter affidavit, he noted some of the facts but disputed most of the facts which were deposed in the affidavit filed in support of the application.

Alternatively, Mr. Gilla deposed that, Land Appeal No.09/2020 was struck out after parties had been accorded opportunity to be heard on the objection filed by the first respondent. He deposed that the purported application is a calculated delaying tactics aiming at denying the 1st respondent enjoyment of his decree.

He also posed a complaint that, he is not aware of the application for stay of execution as they have not been served and even if it is proved that the same is proved to be filed yet still its existence does not warrant and entails for an automatic stay of execution.

Further to that, he deposed that, after the application for execution had been filed before the tribunal, and summons to show cause served to

the applicant, the applicant did not show cause as to why the execution should not proceed. Also that having not filed an affidavit to show cause then, the applicant cannot now complain as to why the execution was issued.

He said the order of the District Land and Housing Tribunal passed in execution cannot be easily challenged; this is because as of now, there is no stay of execution sought and obtained. Last but not least, he deposed that the filing of the notice of appeal and application for leave does not bar a decree holder in any matter to apply for execution of the decree.

During the hearing of the application, the counsel for the applicant adopted the contents of the affidavit. His submissions did as well reiterate the content of the affidavit. Now needless to repeat what has already been on records, I will thus summarize new arguments which did not form part of the affidavit and some authorities submitted in expounding the position of the law on the issue in dispute.

In his submission in chief, Dr. Mwaisondola submitted that, the fact that there is an appeal process commenced before the Court of Appeal by lodging a notice of appeal and before the High Court by filing an

application for leave to appeal, would, in the normal circumstances be a reasons for stopping the execution process pending the determination of an appeal. He asked this court to be guided by the decision of the Court of Appeal in the case of **Mark Alexander Gaeje & 2 Others vs Brigitte Gaeje Defloor**, Civil Appeal No. 15 of 2010 (unreported) in which it was held that, once the Notice of Appeal is filed the proceedings stops except those issues which the lower court has jurisdiction to proceed with giving the example of the application for leave.

Further to that, the applicant submitted that he did not sit idle but pending the hearing and determination of appeal, he filed the application before the Court of Appeal for stay of execution which is still pending before the Court of Appeal, which fact also would have been the reasons to stop the execution awaiting for the Court of Appeal to decide on that application.

He also raised a complaint that the execution was sought in a rush which smells a danger of miscarriage of justice on the part of the applicant as the same is even carried in a duplicate file before the original record has been returned from the High Court.

He asked this court under the authority of the law upon which this application has been preferred and the authority in the case of **Yusuph Adam vs Abdi Hirsi**, Civil Revision No. 02 of 2009- CAT DSM in which the Court of Appeal held *inter alia* that, it was not proper to proceed with execution in the duplicate file.

He asked the court to be guided by the said authorities and take note that the applicant has not only filed the Notice of Appeal, but also has already filed application for stay of execution before the Court of Appeal, and the application for leave before the High Court, to appeal to the Court of Appeal and use its powers under section 43 of the Land Disputes Courts Act (supra) to supervise and rectify the errors committed by the District Land and Housing Tribunal.

Adding from what Dr. Mwaisondola submitted, Mr. Gwakisa Gervas, learned counsel also submitted that, Regulation 23 of the Land Dispute Courts (The District Land and Housing Tribunal) Regulations, 2003, GN. No. 174 of 2003, he submitted that the law, that is regulation 23(3) requires the chairman to give a 14 days notice to the judgment debtor to comply with the decree, or take any other appropriate action including to apply for stay of execution which they did, therefore it was not proper for

Furthermore, he submitted that, in the absence of the summons to show cause, the respondent was justified to issue execution in consonance with Order XXI Rule 21 of the Civil Procedure Code [Cap 33 R.E 2019]. He submitted that having failed to challenge the execution before the tribunal the applicant has no right to do so before the High Court.

The second issue according to him is, whether the filing of the Notice of Appeal and application for leave bars the tribunal from proceeding with the execution. He submitted that these two actions taken do not act as the bar for execution of the decree. He cited to his submission, rule 11(3) of the Court of Appeal Rules as amended by GN. No. 344 of 2019 which provides that the notice of appeal does not act as an automatic stay of execution and rule 11(4) and (5), the judgment debtor must, if he wants the execution to be stayed file the application for stay of execution. He said that is the stand of the High Court, also in the case of **Mussa Msangi vs Sumry High Class** [2016] TLS Law Report 330 at page 430, 431 and 437

Distinguishing the case of **Yusuph Adam vs Abdi Hirsi**, Civil Revision No. 02 of 2009- CAT DSM, he submitted that the decision is of 2009 and it based on the Court of Appeal Rules of 2009, while the current

rules allows execution except where there is an order of the Court of Appeal staying execution.

Further to that, he also submitted that, even the case of **Mark Alexander Gaeje & 2 Others vs Brigitte Gaeje Defloor**, Civil Appeal No. 15 of 2010 (unreported) is distinguishable it also based on the old position before the amendment of the Court of Appeal Rules, of 2017 and 2019.

Further more, he submitted informing the court that the alleged application for execution has never been served to the respondent. Alternatively he submitted that even if the same were filed and they were served, the issue remains that there is no order of the Court of Appeal staying the execution which would have stopped the tribunal from continuing with execution.

Responding on the complaint, that the tribunal committed an error for opening the duplicate file and proceed with execution, he submitted that there is neither any law nor regulation which bars that practice. However, according to him, there is no any evidence from any officer of the tribunal proving that there is a duplicate file opened.

Regarding the invocation of section 43 of the Land Disputes Courts Act, [Cap 216 R.E 2019], he submitted that, he does not see any illegality or irregularity which has been committed by the trial tribunal to warrant the grant of the orders sought. It is his conviction that, the applicant did not use the chance to show cause as to why the execution should not be issued. In the end, he asked the application to be found to have no merits, he consequently asked it to be dismissed with costs.

In rejoinder Dr. Mwaisondola, submitted on the issue of duplicate that, the authority in the case of **Yusuph Adam vs Abdi Hirsi**, (supra) though the same was decided in the year, 2009, but the same was still relevant as there is no decision against that stand of the law.

Regarding the relevance of the notice of appeal and an application for stay of execution, he submitted that the authority in the case of **Mark Alexander Gaeje & 2 Others vs Brigitte Gaeje Defloor**, (supra) he asked the court to find that since there is an application for execution, there is no reasons to rush, the respondent should await if the same will be refused then the tribunal will continue with execution. He in the end asked for the order sought to be allowed with cost.

Adding on what Dr. Mwaisondola had rejoined, Mr. Gwakisa, submitted that the alleged proof of service of Notice to show cause, shows that the respondent served Mwanza Business Center Branch, while in the reply filed in the tribunal, the applicant indicated that all service must be through Galati Law Chamber, Advocate. The fact that the service was done to another entity other that the applicant, means that the applicant could not utilize opportunity to show cause without being properly served.

Responding on the allegation that they were present on the date when the execution order was made, but did not show cause, he submitted that, that does not automatically mean that they were aware that there was a pending application for execution. He prayed the court to find that, there was an error in the service, and asked the application to be allowed with costs.

Now having summarized at length, the contents of the application and the submissions by the counsel for the parties, I find that, basically this court in this application has been moved to grant three substantive orders as follows. First, to revise the order of the District Land and Housing Tribunal dated on 24/11/2020 and 04/12/2020 in Misc. Application No. 104B of 2020.

Second, to lift the warrant of attachment issued by the tribunal in Misc. Application No. 104B of 2020 on the above stated dates attaching the motor vehicles with registration No. T.888 CHM, T.740 BCA, T 195CWG, T 648 DKQ and T.250 DUM.

Third, to give an order restricting the respondents, their agents or persons acting under their instruction from proceeding with execution proceedings pending the hearing of the intended appeal to the Court of Appeal.

As earlier on pointed out, this court has been asked to do so under section 43(1)(b) of the Land Dispute Courts Act, (supra), the first question to ask oneself is, whether I have such powers to do so under that provision? The answer to that question is in section 43 (1)(b) it self as an enabling provision which provides as follows:-

> *43.-(1) In addition to any other powers in that behalf conferred upon the High Court, the High Court-*
>
> *(b) may in any proceedings determined in the District Land and Housing Tribunal in the exercise of its original, appellate or revisional jurisdiction, on application being*

made in that behalf by any party or of its own motion, if it appears that there has been an error material to the merits of the case involving injustice, revise the proceedings and make such decision or order therein as it may think fit.

From the above provision, it goes without saying that this court has powers to revise the proceedings or orders of the tribunal if it appears that, there has been an error material to the merits of the case involving injustice. This means whoever moves the court to issue revision order has the duty to prove to the court that the orders sought to be revised was issued in error material to the merits of the case and has caused injustice to him.

Now, the issue is whether in this application the applicant has exhibited such an error or errors, and has proved the same to have caused or occasioned injustice to them. The error which was so complained of is the fact that the execution proceedings were commenced and carried out while there was impending appeals processes before the High Court and the Court of Appeal. These processes are the presence of the Notice of Appeal filed against the decision sought to be executed, and the

application for leave to appeal to the Court of Appeal of Tanzania as well as the presence of the application for stay of execution filed and pending before the Court of Appeal. The applicant counsel terms that as an error because the decision in the case of **Mark Alexander Gaeje & 2 Others vs Brigitte Gaeje Defloor**, Civil Appeal No. 15 of 2010 (unreported) held to the effect that once the Notice of Appeal is filed, the proceedings stops except those issues which the lower court has jurisdiction to proceed with giving the example of the application for leave.

Mr. Kassim Gilla for the respondent submitted that, the case is distinguishable as it was given on the old position that is, the Court of Appeal Rules 2009, before the amendment of 2017 and 2019. He cited to rule 11(3) of the Court of Appeal Rules as amended by GN. No. 344 of 2019 which provides that the notice of appeal does not act as an automatic stay of execution and rule 11(4) and (5) the judgment debtor must, if he wants the execution to be stayed, file the application for stay of execution. He said that is the stand of the High Court also in the case of **Mussa Msangi vs Sumry High Class** [2016] T.L.S Law Report 330 at page 430, 431 and 437.

Now from these two contending submissions the court remains with one question what is the position of the law as of now?

The Court of Appeal 2009 as amended by GN. No. 344 of 2019 under Rule 11(3) and has been interpreted in the case of **Mohamed Masoud Abdallah and 16 Others vrs Tanzania Road Haulage (1980) Ltd**, Civil Application No. 58/17 of 2016 in which it was held *inter alia* that;

> *"In any civil proceedings where a notice of appeal has been lodged in accordance with rule 83 an appeal shall not operate as stay of execution of the decree or order appealed from nor shall execution of the decree be stayed by reason only of appeal having been preferred from the decree or order, but the court may, upon good cause shown order stay of execution of such a decree or order.*
>
> *(4) The application for stay of execution shall be made within fourteen days of service of the notice of execution on the applicant by the executing officer or from the date he is otherwise made aware of this existence of an application for execution. which under*

(4A) The application under sub rule (4) shall be substantially in form K as specified in the first schedule to these rules.

(5) No order for stay of execution shall be made under this rule unless the court is satisfied that;

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

(b) Security has been given by the applicant for due performance of such a decree or order as may ultimately be binding upon him.

From these provisions, it goes without saying that, the position of the law as of now, is that the lodging of the Notice of Appeal or an appeal itself does not operate as an automatic stay of execution of the decree or order. For the execution to be stayed, there must be an application for stay of execution sought through Form K and obtained in terms of Rule 11(4), (4A) and (5) of the Court of Appeal Rules.

Further to that, as correctly submitted by Mr. Kassim Gilla, Advocate, regulation 23(1) of the Land Dispute Courts (The District Land and Housing Tribunal) Regulations, 2003, GN. No. 174 of 2003, allows the decree holder as soon as practicable after the pronouncement of the judgment or ruling to apply for execution of a decree or order as the case may be. This means there was no error committed either by the respondent to apply for execution or by the trial tribunal to register the application and entertain the application for execution as they are so allowed by the law.

However, there is a contention that the applicant, after noting that there was an application for execution he applied for stay of execution before the Court of Appeal, that fact was disputed by the respondent on the ground that he has not been served with such an application. Whether he was served or not is not something to be dealt with by this court in this application, but it suffices to say that the applicant attached the copy of such an application filed in the Court of Appeal under certificate of urgency seemingly received and filed on 27/11/2020.

Now the next issue is whether having been filed the application for execution before the Court of Appeal, this court, has powers to entertain

the application of similar nature and make orders similar to those applied for before the Court of Appeal?

In the case of **Nornan Mahboub t/a Norman Al Mahboub General Trading Corporation vs Milcafe Limited**, Commercial Case No. 41 of 2003 which quoted the case of **Matsushita Electric Co. Ltd vs Charles George t/a G.G Traders**, Civil Appeal No. 71 of 2001 in which it was held *inter alia* that;

> *"once a notice of appeal is filed under **rule 76** then this court is seized with the matter in exclusion of the High Court, except for applications specifically provided for, **such as leave to appeal, provision of a certificate on point of law or execution where there is no order of stay of execution from this court**". [Emphasis]*

With all greatest respect to the counsel for the applicant, the powers which this court has at this moment in this matter is limited to three, **leave to appeal, provision of a certificate on point of law or execution where there is no order of stay of execution from the Court of Appeal.** This court cannot entertain prayers and issue any other order not

specified or similar to those sought before the Court of Appeal in an application which is pending before the Court of Appeal. Further more, even Form "K" provided on the schedule to the Court of Appeal Rules, (supra) recognizes that at this stage the application for stay of execution is within the mandate of the Court of Appeal. That said therefore, it goes without saying that, I cannot, at this stage issue any order staying execution or any other order similar to that.

The other anomaly which was complained of and was termed as an error worthy to be revised by this court is that, the application for execution was conducted in a duplicate file. While the counsel for the applicant is contending that, it is not proper for the trial tribunal to conduct the execution proceedings in the duplicate file, and cited the authority in the case of **Yusuph Adam vs Abdi Hirsi**, Civil Revision No. 02 of 2009- CAT- DSM in which the Court of Appeal held *inter alia* that, it was not proper to proceed with execution in the duplicate file.

The counsel for the respondent does not see any problem in use of duplicate to carryout execution, as there is no law or regulation actually restricting the practice of courts or tribunals from opening the duplicate files and proceed with execution. Despite the lack of law or regulation to

that effect, there is no even evidence from any officer of the tribunal proving that there is a duplicate file opened.

It is true that I have never come across any statutory law provision, a rule or regulation specifically providing for the requirement of not to proceed with execution in the duplicate file. However, there enough number of decided cases loudly declaring that practice to be improper and irregular. One of those cases is the case of **Yusuph Adam vrs Abdi Hirsi** (supra) cited by the counsel for the applicant in which the Court of Appeal of Tanzania held *inter alia* that,

> *"Like the learned Judge in charge, we think it was improper for execution to proceed in duplicate files. One, the record had been transmitted to the High Court, for appeal. Two, since the appeal had been instituted the trial court was functus officio that means execution as of necessity have to await the return of the original record from the High Court at a later stage to enable execution to be conducted in the said record, and not in a duplicate files."*

There is also no law statutory or case law which encourages the practice of using duplicate files. In practice, duplicate files are made in very special and exceptional circumstances, the normal and common one being where the original has been lost. However even in that circumstances, the registry officer, and the Registrar must swear of affirm affidavit that they have, with all due diligence searched for it in vain.

Its making is normally sanctioned by the Judge in charge or Magistrate in charge of the registry, after having been satisfied by the affidavit of either the Registrar or the registry officer in charge depending on the level of the court.

It is normally made where an appeal or any other judicial process of further searching of justice is stalled on account of the lack of or the missing of original record.

Last, after it has been proved that the record is missing and all efforts were made to search for it but in vain, the reconstruction of the record which in essence becomes a duplicate file is done. The reconstruct of a duplicate file does not entirely fall under the court alone, it involves all stake holders in the cases including the parties to the case. See **Robert**

Madololyo vs The Republic, Criminal Appeal No. 486 of 2015 CAT, at Tabora.

From the above reasoning it goes without saying that duplicate files are not just made to meet the convenience of one party, it is for solving a critical problem of the missing records. It is therefore not proper to make a duplicate file simply because the original has been transmitted to the higher court for appeal purpose. For that reasons the authority in the case of **Yusuph Adam vrs Abdi Hirsi** (supra) is relevant and applicable in the circumstances of this case.

Moreover in this case, there is no evidence advanced to prove that the execution proceedings were conducted in a duplicate file. There is also no evidence to prove that the original record was returned to the tribunal. However circumstantially, there is all indication that the record was not returned to the trial tribunal, this is because by practice once the notice of appeal has been filed, the records are prepared to be sent to the court of appeal not to the lower court. Therefore, it is not expected that in this case the record was retuned. Further to that, the fact that the case which was appealed against before the High Court in an appeal which is sought to be challenged before the Court of Appeal was Land Application No. 104 of

2019, but the proceeding and orders challenged in this application were issued in Misc. Application No. 104B of 2020. This means, this is a completely a different case file with a different case number. This cannot be called a duplicate, because the duplicates bears the same numbers and constitutes the same documents as the original. That means if to challenge, the applicant was supposed to challenge the propriety of the execution proceedings in the completely new case file something which he did not do.

For that reasons, I find the application to have no merits, the order sought in this application are the domain of the Court of Appeal. The same is dismissed with costs.

It is so ordered,

DATED at **MWANZA** this 19th February, 2021

J. C. Tiganga

Judge

19/02/2021