

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY

IN THE HIGH COURT OF TANZANIA
(DISTRICT REGISTRY OF MBEYA)
AT MBEYA

MISC. LAND APPLICATION NO. 97 OF 2020

(From the High Court of Tanzania at Mbeya in Land Case No. 16 of 2015)

ABUBAKAR G. KUSHOKA.....1ST APPLICANT
MWAJABU ABUBAKAR KUSHOKA.....2ND APPLICANT

VERSUS

BANK OF AFRICA-TANZANIA.....1ST RESPONDENT
HARVEST TANZANIA LIMITED.....2ND RESPONDENT
BILLI AMANI MWAKISU.....3RD RESPONDENT

RULING

Date of Last Order: 20/01/2021

Date of Ruling : 25/02/2021

MONGELLA, J.

This application is filed under Order XXXIX Rule 5 (1) (3) (a) and (c) of the Civil Procedure Code, Cap 33 R.E. 2019. The applicant is seeking for an order from this court restraining the respondent from executing a decree issued by this court in Land Case No. 16 of 2015. While filing their counter affidavit, the 1st and 2nd respondents filed a notice of preliminary objection on two points to wit;



1. *That the application is an abuse of the court process as it seeks for an order of stay of execution of decree pending nothing.*
2. *That the application is frivolous and vexatious.*

This ruling is therefore with respect to the preliminary objection. Both parties were represented whereby the applicant was represented by Mr. Justinian Mushokorwa, learned senior counsel and the 1st and 2nd respondents were represented by Mr. Kamru Habib, learned counsel. The preliminary objection was argued by written submissions. I shall deal with the first point and if need be proceed to determine the second point.

Arguing on the first point, Mr. Habib submitted that Order XXXIX Rule 5 (1) (3) (a) (c) of the Civil Procedure Code presupposes that there must be a pending appeal for an application for stay of execution to succeed. He argued that the purpose for stay of execution is to protect the applicant from suffering irreparable loss, hence making the appeal nugatory. On those bases he contended that it becomes an abuse of the court process applying for stay of execution where there is no pending appeal. In the matter at hand, he said, the applicants never lodged and served the respondents a notice of appeal to the Court of Appeal and there are no any proceedings to initiate the appeal process pending before this court. To buttress his point, he referred the court to the case of ***E. R. Mutaganywa v. Aladin and Others*** [1996] TLR 285 in which this court (Maina, J. as he then was) held:



"In my view, Order 39 Rule 5 of the Civil Procedure Code which gives power to the court to grant stay of execution pending appeal contemplates that an appeal has been filed and the appellant then seeks the order for stay of execution. If there is no appeal filed, there cannot be a basis to apply for stay of execution..."

He further referred to the case of **Ujagar Singh v. Runda Coffee Estates Ltd.** [1966] EA 263 which was cited in approval in the case of **E. R. Mutaganwa** (supra). In this case it was also held that an application for stay of execution cannot be entertained where no appeal has been filed.

In reply to this point, Mr. Mushokorwa argued that the provisions of Rule 5 (1) of Order XXXIX of the Civil Procedure Code accord vast powers to the court to order stay of execution of a decree regardless of whether there is an appeal pending or not. Citing sub rule (1) which states that "**the court may, for sufficient cause, order the stay of execution of such decree**" he said that the provision should be understood in the context of empowering the court with such powers. He further contended that the words in this provision complement the words in the first line providing that "**an appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the court may order.**"

He further challenged the case of **E. R. Mutaganwa** (supra) on the ground that the facts in this case are distinguishable from the case at hand. He submitted that in this case the application for stay of execution was made to the district court under Rule 24 of Order XXI of the Civil Procedure Code. Further, he argued that the decision in **E. R. Mutaganwa** (supra) and that of **Ujagar Singh** (supra) were decided *per incurium* of Rule 5 of

Civil Procedure Code cannot be invoked in this matter as prayed by Mr. Mushokorwa. This is simply because the overriding objective principle is not a panacea of all ills. It cannot be invoked against mandatory provisions of the law. See: See: **Mariam Samburo v. Masoud Mohamed Joshi and Others**, Civil Appeal No. 109 of 2016 (CAT, unreported) and **Mondorosi Village Council & 2 Others v. Tanzania Breweries Limited & 4 Others**, Civil Appeal No. 66 of 2017 (CAT, unreported). The inherent powers of the court cannot also be invoked where there are express and unambiguous provisions of the law. See: **Aero Helicopter (T) Ltd. v. F. N. Jansen** (1990) TLR 142 and **Republic v. Twalib Ubwa** (2005) TLR 420.

Given my observations as presented above, I sustain the 1st and 2nd respondents' preliminary objection. The applicants' application is found untenable and is dismissed with costs.

Dated at Mbeya on this 25th day of February 2021.


L. M. MONGELLA

JUDGE

Court: Ruling delivered in Mbeya in Chambers on this 25th day of February 2021 in the presence of the 1st applicant and Ms. Hilda Mbele, learned counsel for the 1st and 2nd respondents.




L. M. MONGELLA

JUDGE