IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

MISC. LAND APPLICATION NO. 3 OF 2021

AGINEDA BALISELA ..... APPLICANT

VERSUS

ABILA BENEDICTOR ..... RESPONDENT

(Application for stay of execution from the judgment and decree of the District Land and Housing Tribunal for Mara at Musoma in Land Application No. 06 of 2019)

RULING

30th March and 30th April, 2021

KISANYA, J.:

The Court is moved for an order that the execution of the District Land and Housing Tribunal for Mara at Musoma (the DLHT) in Misc. Land Application No. 440 of 2019 be stayed pending hearing and determination of Misc. Land Appeal No. 80 of 2020. The application is made under section 14 (1) of the **Law of Limitation Act**, Cap. 89, R.E. 2019 and Order XXXI, Rule 24(1) and 27 of the **Civil Procedure Code,** Cap. 33, R.E. 2019. It is supported by an affidavit of Agineda Balisela sworn on 2nd February, 2021.

In terms of the said affidavit, the facts which gave rise to this application, can be briefly stated as follows. The respondent, Abila Benedictor successfully sued one, Fredrick Balisela in the suit for ownership of land filed before the Majimoto Ward Tribunal in Land Application No. 9 of 2016. Dissatisfied, Fredrick Balisela appealed to the DLHT in Land Appeal No. 10 of 2017. His second appeal was also dismissed by this Court (Mwanza Registry).

Therefore, Abila successfully filed an application for execution of the judgment and decree that had been issued against Fredrick. In the said application (Misc. Land Application No. 440 of 2019), the DLHT ordered Fredrick to be evicted from the suit land.

At the same time, Agineda Balisela sued Abila Benedictor before the DLHT in Application No. 6 of 2019 claiming for ownership of the same land. The said case was dismissed for being *res-judicata*. Aggrieved by the said decision, Agineda Balisela appealed to this Court in Land Appeal No. 80 of 2020. She then lodged the present application for stay of execution proceedings pending the said appeal.

Before me, Mr. Emmanuel Gervas, learned advocate appeared for the applicant to argue the application. On her part, the respondent who was also present in person engaged Ms. Vicky Mbunde, learned advocate.

From the very outset, Ms. Mbunde readily conceded that the affidavit in reply was defective as the oath thereto was administered by the counsel who had interest on the matter. It was accordingly expunged from the record. However, she reserved the right to submit on the issue related to law and not facts.

At the commencement of hearing the application, the Court, *suo motu*, raised the issue whether the application was competent. This issue was premised from the record of the application which give rise to the following questions.

1. Whether the Court has been properly moved to determine the application.
2. Whether the Court can order for stay of execution if the execution has been conducted as deposed in paragraph 12 of the affidavit.

For purposes of saving the Court's time, I allowed the parties to submit for and against the application. I informed both counsel that there will be no need of considering the application on merit upon being satisfied that the application is incompetent. For that reason, I will start by addressing the issues raised by the Court, *suo motu* before considering the merit of this application.

Responding the first issue, Mr. Gervas conceded that the provisions cited in the chamber summons do not empower this Court to grant the order sought. However, he was quick to move the Court to consider the principle of overriding objective. The learned counsel referred this Court to the following cases on that matter: **Samson Ngw'alida vs the Commissioner Genera (TRA),** Civil Appeal No. 86 of 2008, CAT at DSM, **Alliance One Tobacco Tanzania Ltd and Another vs Mwajuma Hamis (as the administratix of the estate of Philemoni R. Kinyeri) and Another,** Misc. Civil Application No. 803 of 2018 HCT at DSM both unreported.

Thus, relying on the principle of overriding objective, Mr. Gervas went on to urge me to determine the application under Order XXXIX, rule 5 of the Civil Procedure Code (supra) in lieu of the provisions cited in the Chamber Summons.

As regards the second issue, Mr. Gervas submitted that the execution has not been complicated for this application to be superfluous. His submission was based on the decision of the Court of Appeal in **Matsushita Electric Co. (E.A.) Ltd vs Charles George t/a C.G Traders**, Civil Application No. 71 of 2001 (unreported).

Responding, Ms. Mbunda submitted that the application was incompetent for being made under wrong provisions which do not empower the Court to determine the matter. She was of the view that, the circumstance of the case of **Samson Ngw'alida** (supra) do not fit in the case at hand. Citing the case of **Robert Stephano vs Vedatina Archard Msika**, Land Case Application No. 43 of 2018, HTC at Bukoba (unreported), Ms Mbunde argued that non-citation or wrong citation of the law renders the matter incompetent.

On the second issue, the learned counsel for the respondent contended that the affidavit suggest that the execution had been completed. She also pointed out that the execution order is against Fredrick Balisela and not Agineda Balisela. Therefore, Ms Mbunde asked me to dismiss the application with costs.

Rejoining, Mr. Gervas reiterated his submission in chief that, non-citation of the proper law does not render the application incompetent and that the execution was yet to be completed. He conceded that the appeal is against Land Application No. 6 of 2019 and that there was no matter pending in this Court against execution proceedings (Misc. Land Application No. 440 of 2019) or the judgment and decree subject to the said execution. However, he contended that the land in dispute is the same.

Having considered the application and the submissions of both counsels the ball is on this Court to determine whether the application is competent.

I prefer to start with the second issue whether the Court can order for stay of execution if the decree has been executed. I am at one with Mr. Gervas that execution is a process of enforcing the judgment. If the execution has been completed, the application for stay of execution becomes worthless. That stance was taken in the case of **Matsushita Electric Co. (E.A) Ltd** (supra).

Now, has the execution in the present case been completed? The answer to this question is not hard to find. It is reflected in the facts deposed by the Abineda Balisela. She averred as follows in paragraph 12 of the affidavit:

> *"That the Respondent* ***has executed the order which was granted by the trial tribunal on 29/07/2020*** *through Misc. Land Application No. 40 of 2019." (Emphasize supplied).*

I have also gone through the order referred to in the above paragraph. It directed the tribunal's broker to evict Fredick Balisela from the suit and demolish all structures and hand over the disputed land to the decree holder (Adela); and report to the Tribunal within 21 days to demonstrate how the execution was conducted.

Therefore, one might apprehend from para 12 of the affidavit that, the execution has been completed. However, paragraph 13 of the same affidavit suggests that the execution is still underway. The applicant stated:

> *"That, the Applicant has only one premise where she is dwelling, if the execution order will be executed accordingly the Applicant will remain homeless and she will be having irreparable loss."*

In view of the above, and having considered that the above fact was not contested by the respondent, I am satisfied that the execution has not been completed for the Court to find this application superfluous.

Reverting to the first issues, parties are in agreement that the provisions cited in the Chamber Summons do not empower this Court to determine the application for stay of execution. Indeed, neither section 14 (1) of the **Law of Limitation Act** (supra) nor Order XXXI, Rule 24(1) and 27 of the **Civil Procedure Code** (supra) provide for stay of execution. The law is settled that, non-citation or wrong citation of provisions of law renders the application incompetent. It has been the position of this Court and the Court of Appeal that an application made under wrong or non-citation of the provisions of the law is incompetent. See for instance, **Hussein Mgonja vs The Trustees Tanzania Episcopal Conference,** Civil Revision No. 2 of 2002, CAT at Arusha, (unreported) where the Court of Appeal held:

"If a party cites the wrong provisions of the law the matter becomes incompetent as the Court will not have been properly moved."

Other cases where similar position was held include **Chama cha Walimu Tanzania vs. Attorney General**, Civil Application No. 151 of 2008, CAT at Dar es Salaam (unreported) and **Bahadir Sharif Rashid and 2 Others v. Mansour Sharif Rashid and another**, Civil Application No. 127 of 2006, CAT at Dar es Salaam (Unreported).

I am mindful of the provision of Article 107A (2) (b) and (d) of the **Constitution of the United Republic of Tanzania**, 1977 (as amended) and section 3A of the **Civil Procedure Code** (supra) which requires this Court to uphold substantive justice by facilitating the just, expeditious, proportionate and affordable resolution of civil disputes without regard to legal technicalities. That is the basis of the authorities cited by Mr. Gervas. However, the law is settled that the principle of overriding objective cannot be invoked blindly. Thus, it cannot apply in breach of the law that governs the matter. This stance was taken in **Njake Enterprises Limited vs Blue Rock Limited**, CIVIL APPEAL NO. 69 OF 2017, CAT at Arusha (unreported). The Court of Appeal held:

"Also, the overriding objective principle cannot be applied blindly on the mandatory provisions of the procedural law which goes to the very foundation of the case. This can be gleaned from the objects and reasons of introducing the principle in the Act. According to the Bill it was said thus;

> *"The proposed amendments are not designed to blindly disregard the rules of procedure that are couched in mandatory terms ...""*

In the instant case, Mr. Gervas implored me to disregard the provisions of law cited in Chamber Summons and determine the application under Order XXXIX, R. 5 of the CPC. For better understanding the discussion at hand, I find it necessary to reproduce sub rule (1) and (2) of the said provision. It provides:

"5.-(1) 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, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree but the Court may, for sufficient cause, order the stay of execution of such decree.

(2) Where an application is made for stay of execution of an appealable decree before the expiration of the time allowed for appealing therefrom, the court which passed the decree may, on sufficient cause shown, order the execution to be stayed."

Reading from the above cited provision, I am of the view that the Court is mandated to order stay of execution of decree which has been appealed against. The said provision does not apply if there is no appeal against the decree sought to be executed.

It is not disputed that the Court has been moved to order that execution proceedings in Misc. Land Application No. 440 of 2019 which originated from Land Application No. 9 of 2016 of the Majimoto Ward Tribunal be stayed. It is also common ground that no appeal against the decree subject to the execution proceedings that is pending in this Court. In view of paragraph 7 of the affidavit, an appeal against the decree that is being executed by Adela Benedictor was determined in her favour by the High Court of Tanzania Mwanza Registry. It follows that this application has no legs to stand. This is so when it is considered that the Court has not been asked to stay execution of decree of the DLHT in Land Application No. 06 of 2019 which is subject to the appeal pending in this Court.

Therefore, even if I was to employ the principle of overriding objective, my hands are tied. The provisions of Order, XXXIX, Rule 5 of the CPC that were proposed by the learned counsel do not enable this Court to determine and grant the order sought by Agineda Balisela.

Eventually, for the stated reason, I find the application incompetent before this Court. In the same vain, it cannot be determined on merit. Therefore, I hereby strike out the application and order the respondent to have her costs.

It is so ordered.

DATED at MUSOMA this 30th April, 2021.

E. S. Kisanya
JUDGE

COURT: Ruling delivered this 30th day of April, 2021 in the presence of THE applicant and the respondent. B/C Simon present.

E. S. Kisanya
JUDGE
30/04/2021