IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA SUB REGISTRY

AT MUSOMA

CIVIL REFERENCE NO. 07 OF 2021

(Arising from Misc. Application No 07 of 2021 of the District Land and Housing Tribunal for Tarime at Tarime)

AUGUSTINO NESTORY SASI ..... APPLICANT

VERSUS

ACACIA GOLD MINE ..... RESPONDENT

RULING

21st March and 20th May 2022

F. H. MAHIMBALI, J.:

The applicant was executing the decree of the trial District Land and Housing Tribunal in which it was in his favour. In the course of doing so, there emerged a legal concern from the judgment debtor that he was intending to challenge the verdict of the said trial tribunal before the Court of Appeal after the verdict in the High Court had confirmed the decision of the trial tribunal. In this regard, the trial tribunal stayed the execution pending the determination of the intended appeal before the Court of Appeal. This stay order of the trial tribunal has aggrieved the

applicant allegedly that the trial tribunal had erred in law in giving such an order as it is having no legal powers of ordering what it did in the circumstances of this case. On that stance, he is challenging that decision based on the following factors:

1. *That, this honourable Court be pleased to quash and set the decision of the District Land and Housing Tribunal for Tarime at Tarime dated 29th October, 2021 which ordered the stay of execution.*
2. *That this honourable court be pleased to direct the subordinate trial tribunal (Tarime District Land and Housing Tribunal) to proceed with execution on merit in Misc Application No 07 of 2021 and proceed to give the executions order.*
3. *Costs provided for*
4. *Any other/further relief (s) as this Honourable Court may deem fit and just to grant.*

During the hearing of the application, Mr. Chiwalo learned advocate represented the applicant whereas the respondent was dully represented by Mr. Mchome, who also raised a preliminary objection on account that section 95 of the Civil Procedure Code, Cap 33 R.E 2019 cited is a general provision and it is only applicable and invoked where there is no specific enabling provision of the law to remedy a given situation.

The hearing of the preliminary objection and the application was done simultaneously. However, the determination of the matter will depend whether the legal objection is legally tenable or not.

Submitting first in the support of the preliminary objection, Mr. Mchome learned advocate for the respondent argued that reference applications as preferred by the applicant's counsel as a matter of law, are governed under section 77 and XLI of the CPC. In the current situation, where there is no right of appeal, a party has right to revision under section 79 of the CPC he suggested. His argument is, why should the learned advocate have confined himself to reference application only? There is also section of 44 (1) of the MCA (also catering for revision proceedings/ applications). He clarified that there are several decisions of this court making reference to this scenario. He exemplified such as the case of **Exim Bank (T) Ltd vs National furnishers Ltd,** Misc. Land Application No. 995 of 2017 (HC Land division at page 12 and **Nassor Khalifa Ghalib and Wilson Chacha vs World Map International Ltd and 4 others,** Misc. Land Application No 535 of 2021 (HC – Land Division). Therefore section 95 is not applicable where there is specific provision of the law. In the circumstance of this case, where the application is for reference, then there are specific provisions

for this scenario. Alternatively, he suggested in his submission that the applicant can move this court by way of revision or any other available remedy. He then prayed that this application be struck out with costs for being unguided.

Rebutting the preliminary objection, Mr. Chiwalo learned advocate for the applicant in his reply submission, reacted that the argued preliminary objection is different from what has earlier been pointed out. The notice of preliminary objection has a different wording from what has been argued. He argued this while pointing out that the learned advocate in his submission cited numerous provisions as alternative to the current application before this court being different from those pointed out in his notice of preliminary objection. He thus criticised the said preliminary objection as being improper in the eyes of the law. That notwithstanding, he submitted that he is still confident that this application is competent before this court. He relied his stance basing the cited section 95 of the CPC as legally capable of making this court to give any order. In the situation at hand, he insisted that section 95 of the CPC is the enabling provision of the law.

Concluding on his preliminary objection as rejoinder submission, Mr. Mchome learned advocate while making reference to the earlier

ruling of this Court on the previous objection raised, he submitted that it is true that this court ordered there be amendment so as to cite the proper provision of the law but did not break through that the proper enabling law is section 95 of the CPC. He insisted on his stance whether it was necessary for the applicant's counsel if so aggrieved to challenge the same by way of reference.

On the argument that the submission done is beyond the scope of the preliminary objections raised, he rebutted it as being not true. He clarified that what he stated on the face of it is that the cited provision on inherent powers of the court cannot be invoked in the circumstances of this case. The mentioned provisions during his submissions were necessary for making the preliminary objection meaningful. That in his submission, he just cited other provisions as alternative to the relevant application. Nevertheless, Mr. Mchome concluded that the applicant is at liberty to re- appear before this court with a proper application as per law.

As regards the application itself, Mr. Chiwalo learned advocate for the applicant submitted that this reference application is brought under section 95 of the CPC for this court to quash and set aside the decision of the DLHT of Tarime dated 29th October, 2021. He also prayed that

this court to direct the trial Tribunal to proceed with the execution proceedings in Misc. Application no 7 of 2021 and give execution order. The application is supported by the affidavit (sworn by the applicant's counsel), on which he prayed that the same be adopted by the court so as to form part of this submission.

While making insistence on paragraphs 1, 2, 3, 4, 5, 6, 7, 8 and 10 of the sworn affidavit in support of the application, he submitted that the central argument of the application is at paragraph 7. That the said stay of execution was granted without there being an application for stay of execution. As per nature of this application, the stay of execution ought to have been issued by Court of Appeal pursuant to rule 11 of Court of Appeal Rules as amended in 2019. Otherwise, it was the domain of the Court of Appeal to issue and not the DLHT. He insisted that, even if done by the trial tribunal as per this scenario, there ought to have been consideration of an issue of security pursuant to regulation 25 of LCDA. He further made reliance to the decision in the case of **David John vs Unilever Tea Tanzara Ltd,** Revision No 05 of 2019 (HC – Labour Division), that there cannot be stay of execution without an application for stay of execution.

Rebutting the counter affidavit for the respondent, Mr. Chiwalo submitted that the respondent is addressing irrelevant issue. The executing court has no legal mandate of challenging the decree to be executed save the higher court. With all this, he humbly prayed this court to quash the order of the DLHT staying the execution application and direct that the execution process be carried out as prayed. If there is to be any stay application to that effect as to be preferred, the same will be legally determined.

In resisting the merit of the application apart from his legal concerns raised in preliminary objection, Mr. Mchome rebutted that the DLHT has not made a final order but just ordered stay of application, which is an interlocutory order. Furthermore, he challenged the decree itself as not being descriptive. It does not define what is the suit land. That the stay of execution ought to be given by Court of Appeal in the circumstances of this case is not proper as this is not the High Court's decree but the DLHT. Therefore, Court of Appeal cannot legally speaking stay the execution of the DLHT's decree but of the High Court, he submitted Mr. Mchome.

In his further submission, he clarified that as per counter affidavit, they had attached annexure (A 2 (i)) affidavit to show cause as per

section 51b of LDCA, Cap 216 in resisting the application for stay of execution. The reason before the DLHT contained into the affidavit to show cause was not to challenge the validity of the decree but on pending applications before the High Court (Mwanza).

He concluded his submission by urging this Court to consider whether as per these grounds argued by the applicant's counsel in support of his application sufficiently address issues for reference to this court? He closed his submission.

In re-joining his submission, Mr. Chiwalo learned advocate for the applicant insisted that, there ought to be specific grounds for stay of execution and that the law ought to have been fully applied. He added that in the circumstances of this case, the appropriate court to stay execution of decree was not the trial DLHT itself but CAT.

He reiterated that in execution proceedings, the possible orders are either execution to proceed or not to proceed. Both of these orders are final in his considered view. That the decree is not specific should not be a ground of challenge to the DLHT but to the superior court.

Whether this is a fit case for reference, he emphatically replied yes basing on the prayers and submissions in the application. He was

comfortable that section 95 of the CPC was relevant in the circumstances of this case.

Having heard the submissions of both learned counsel in support and rebuttal of the application and preliminary objection raised, the affidavit and counter affidavit, the relevant questions to be answered here are two. First, whether the application is proper before the Court. Reply to this issue is the determination of the issue raised preliminary objection. Second, whether the application is merited. The response to this issue will essentially depend on the response to issue number one which is on preliminary objection. This will entail whether the DLHT was proper in issuing the stay order for a matter determined by the High Court on appeal and the aggrieved respondent is in process to challenge the same before the Court of Appeal against the High Court's findings on the similar matter from the original decree of the DLHT.

To start with, I appreciate the rival submissions from both parties. Though the battle was tough, court's decorum was observed. The saying that old is gold, has also been encountered in the course of presenting the submissions relevant to the application. Composure, relevancy and maturity has been sufficiently observed and demonstrated by a senior

counsel on one hand but sound legal critique on the other hand by another.

Starting with the first issue, whether the application is properly before the Court, we need to know what is the application before the Court and the cited provision whether they are compatible. The gist of the applicant's application is this, that the trial tribunal erred in law in ordering stay of execution of the DLHT's award just because the respondent intends to pursue his appeal before the Court of Appeal after the High Court had dismissed the respondent's appeal before it. In that grief, he has challenged the DLHT's order of staying the execution of the decree by way of reference before this Court pursuant to section 95 of the CPC.

The law on reference under the CPC is as provided under section 77 of the CPC which caters for situations where there is a legal concern before a court/tribunal subordinate to High Court, to state it and refer the same before the High Court for its orders as it thinks fit. It is worded as follows:

> *77. Subject to such conditions and limitations as may be prescribed, any court may state a case and refer the same*

for the opinion of the High Court and the High Court may make such order thereon as it thinks fit.

A legal concern for reference to High Court as provided for under section 77 of the CPC as per CPC is well elaborated under Order XLI of the CPC that there must be a serious legal concern on use during hearing of a suit or execution stage that attention of the High Court is necessary, then the same can be stated and referred to High Court for redress. The same provides:

> *Where, before or on the hearing of a suit in which the decree is not subject to appeal or where, in the execution of any such decree,* ***any question of law or usage*** *having the force of law arises, on which the court trying the suit or appeal, or executing the decree,* ***entertains reasonable doubt*** *the court may, either of its own motion or on the application of any of the parties,* ***draw up a statement of the facts of the case and the point*** *on which doubt is entertained and refer such statement with its own opinion on the point for the decision of the High Court.[****emphasis added].***

So, as per section 77 of the CPC read together with order XLI, Rule 1 of the CPC, reference that is stated there is a stated case and not a mere application as opted by the applicant's counsel. This mode of application as provided under the CPC is not similar to such other

references as governed under the MCA, LCDA or the Advocates Remuneration order (GN 264 of 2015). Reference matter under this Code is a special stated case drawn up by a statement of the facts and the point on which doubt is entertained by the trial court or tribunal immediate subordinate to High Court for the decision of the High Court.

So, on the stated issue by Mr. Chiwalo on the order is aggrieved by the trial tribunal on execution proceeding is whether it is properly before the Court. The cited law is section 95 of the CPC, is it the proper law?

Section 95 of the CPC provides for inherent powers of the High Court, that it is not precluded from doing any just act for the ends of justice even if it is statutorily provided for. It goes this way in its wording:

> *95. Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.*

Coming back at the issue in question, I am in one with Mr. Mchome learned advocate that, where there is a specific provision of the law, remedying any legal issue, that law must be fully applied. Section

95 of the CPC only comes into play, in invoking the inherent powers of the Court in a situation where the application of the CPC can either limit or otherwise affect the doing of justice. In such a situation then, for the ends of justice, the intervention of the High Court is necessary to remedy the situation of legal justice. Otherwise, what is stated in **Exim Bank (T) Ltd vs National furnishers Ltd,** Misc. Land Application No. 995 of 2017 (HC Land division at page 12 and **Nassor Khalifa Ghalib and Wilson Chacha vs World Map International Ltd and 4 others,** Misc. Land Application No 535 of 2021 (HC – Land Division) is the correct situation of the application of the said section 95 of the CPC.

That said, the application before the court is legally incompetent. It is incompetent in two situations: It has no quality of being called a reference matter as per law so long as the provisions of section 77 read together with Order XLI, Rule of CPC dictate. Secondly, the said cited provision (section 95 of the CPC) does not provide for the reference matter. It is therefore preferred under wrong title and law. This being a second application by the applicant, he ought to have been very keen what a proper application is to be brought before the Court for the redress of the said grief. In essence, I agree that there is a legal issue for redress. In my considered view, revisional application is more

relevant in the provided situation than reference as opted by the applicant.

Otherwise, it is legally clear that the trial court cannot stay execution of a decree in the absence of a stay of application. What was before the DLHT as court of first instance in the given situation was execution of a decree. Conversely, the respondent as a matter of law ought in his affidavit to show cause why execution of the decree should not be granted, must have established what steps he had taken against the execution of the said decree. The available possible steps to be taken would be amongst others upon being served by the execution application, he would have applied for an application for a stay of execution in a court of law superior to the executing court, and for this matter is Court of Appeal pursuant to Rule 11(3), (4) and (5) of the Court of Appeal Rules as amended and revised in 2019 which the same states:

> *(3) In any civil proceedings, where a notice of appeal has been lodged in accordance with rule 83,* ***an appeal, shall not operate as a stay of execution of the decree or order*** *appealed from nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree or order; but the Court, may upon good*

cause shown, order stay of execution of such decree or order.

(4) An 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 the existence of an application for execution.*

(4A) An application under subrule (4) shall be substantially in the 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 the due performance of such decree or order as may ultimately be binding upon him [emphasis added].

These requirements are almost identical to what are provided by the Civil Procedure Code, Cap. 33 R.E. 2019 under Order XXXIX rule (5)(1).

From the above extracted Rule, it is clear that an application for stay of execution of a decree may be granted upon compliance by the

respondent with three conditions; firstly, that the application has been made within the prescribed time, secondly, showing that substantial loss may result if execution is not stayed and thirdly, that the applicant has given security for the due performance of the decree. Therefore, the issue for determination is whether or not the respondent had cumulatively met these three conditions.

In the matter at hand, it is evident that the respondent has not done anything as provided under Rule 11 (3), (4) and (5) of the Court of Appeal Rules. From the factual setting, it is common ground that the present matter was legally before the DLHT and upon being served with a summons of the notice of execution as stipulated by Rule 11 (4) of the Rules, the Respondent ought to have taken appropriate course against the execution proceeding of the DLHT's decree. The legal requirement set under Rule 11(4) of the Court of Appeal Rules caters for all matters decided by the High Court whether at appellate or original jurisdiction.

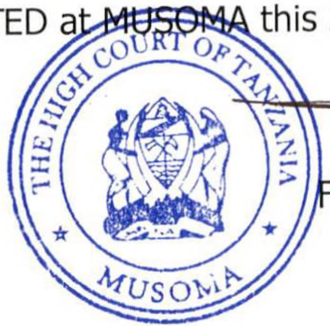
Guided by the decision of the Court of Appeal in the case of **Serenity on the Lake Ltd V. Dorcus Martin Nyanda,** Civil Revision no.1 of 2019 (unreported) and **Aero Helicopter (T) Ltd. vs. F. N. Jansen** [1990] T.L.R. 142, the High Court as well as subordinate court do not have jurisdiction to hear and order stay of execution while

already there is a Notice of Appeal filed in the Court of Appeal. By granting the order for stay of execution while there was a pending notice of appeal before the Court of Appeal was equally not proper as per law. The order was therefore unlawful.

Now in weighing the scale of justice between the application brought under wrong title of reference and wrong provision of the law on one hand and in digest to what has been decided by the DLHT on its execution mandate, I am of the considered view that it will be injustice to the applicant if I allow the objection for him just to re – nock the doors of this court. So long as the error is manifestly seen on the face of the record, this court upon that deliberation is legally mandated to intervene and direct accordingly. On that stance, pursuant to section 43 (1) and (2) of the Land Disputes Courts' Act, Cap 216, I hereby quash the stay order granted by the executing court for want of jurisdiction. In its place, I order and direct the executing court to proceed with the execution in Misc Application No 07 of 2021 for the DLHT's decree in Land Application No. 69 of 2015 and proceed to give the execution orders as per law unless it is deposited in that tribunal an order granting stay or proof that there is a pending application for stay of execution before the CAT.

To that end, the application is allowed. Each party shall bear own costs.

DATED at MUSOMA this 20th day of May, 2022.



F. H. Mahimbali

JUDGE

Court: Ruling delivered this 20th day of May, 2022 in the presence of Mr. Chiwalo, Advocate for the appellant, Mr. Mchome, advocate for the respondent and Mr. Gidion Mugoa, RMA.

F. H. Mahimbali

JUDGE

20/05/2022