

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**IN THE DISTRICT REGISTRY OF ARUSHA**

**AT ARUSHA**

**MISC. LAND APPLICATION NO. 59 OF 2022**

(C/F Misc. Land Application No. 55 of 2022, Misc. Land Application No. 54 of 2022)

(Originating from District land and Housing Tribunal for Manyara Region, Taxation Cause No. 57 of 2020, Application No. 23 of 2017 and Taxation Cause No. 56 of 2020)

**PASKALI ARUSHA.....APPLICANT**

**VERSUS**

**MOSES MOLLEL..... RESPONDENT**

**RULING**

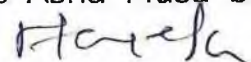
01.07.2022 & 05.07.2022

**N.R. MWASEBA, J**

This is a ruling in respect of a preliminary objection raised by the respondent's counsel on 2<sup>nd</sup> day of June, 2022 to wit:

- i. The application is misconceived as there is no any appeal against the Orders intended to be stayed as envisaged by Order XXXIX Rule 5 (1) of the Civil Procedure Code, Cap 33 R.E 2019 under which this application has been preferred.

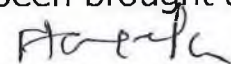
On 01.07.2022 when the matter was called for hearing of the raised preliminary objection, Ms Nuru Mang'unda and Ms Asha Musa both



learned counsels represented the applicant while Mr John Lundu, represented the respondent.

Submitting in support of the preliminary objection Mr Lundu argued that the court that the applicant misled himself by bringing this application under the provision of **Order XXXIX Rule 5 (1) (4) and Section 95 of the Civil Procedure Code** which is related to an appeal. He submitted further that the Court of Appeal has decided in many cases including the case of **Tanzania Electrical Supply Co. Ltd Vs Omary Sufrani and Another** (2011) TLR 360 and **Ally Mtambuka Vs Omary Limburingo** (2008) TLR 44 that improper and wrong citation of the law is fatal and that a court can stay execution of a lower court where there is a pending appeal. Thus, the applicant was supposed to refer to a specific provision of the law which moves the court to grant his prayer. Thus, he prayed that this application be struck out for being brought under wrong citation.

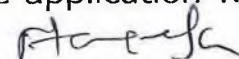
Responding to the raised preliminary objection, Ms Mang'unda submitted that, the raised preliminary objection does not meet the test of being raised as a preliminary objection since it needs facts to be ascertained. The raised matter would have been determined in the course of hearing of the suit and ought not to have been brought as a



preliminary objection. She added that the fact that there is no appeal which has been filed by the applicant is an argument based on facts so it cannot stand as a preliminary objection. Regarding the issue of an improper provision of law she cited the case of **Mekefason Mandali and 8 Others Vs. The Registered Trustees of the Archdiocese of Dar Es Salaam**, Civil Application No. 491 of 2019 where the Court of Appeal held that there is no similar provision in situation where revision is applied before the court. Thus, absence of such provision in the Court of Appeal Rules the applicant was right to invoke Rule 4 (2) (a) and (b) of the rules in moving the court. The counsel for the applicant added that even in the case at hand the applicant was right in filling this application based on **Order XXXIX Rule 5 (1) and (4) of the Civil Procedure Code** since there is no specific provision in the **Civil Procedure Code** to cover the situation. She prayed for the preliminary objection to be dismissed with costs.

In addition to that Ms. Asha Musa insisted that the court ought to invoke its inherent power under **Section 95 of the Civil Procedure Code** to serve the justice.

In his brief rejoinder, Mr Lundu asserted that the raised preliminary objection is a pure point of law and insisted that the application was



filed under a wrong provision of the law and it deserves to be struck out with costs.

Having heard the rival arguments from both parties the main issue for determination is whether the raised preliminary objection has merit.

The respondent's counsel argued that the applicant used improper provision to move the court to grant the prayer sought under the chamber summons. The said provision of **Order XXXIX Rule 5 (1) and (4) of the Civil Procedure Code** stipulates that:

*"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. (Emphasis added)*

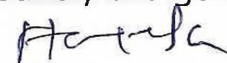
*4. Notwithstanding anything contained in sub-rule (3), the court may make an ex parte order for stay of execution pending the hearing of the application."*

The above provision is clear that an appeal against a decree shall not operate as a stay of proceedings under a decree or order appealed

*Alaraja*

from. However, the court may order execution of the decree be stayed by reason only of an appeal having been preferred from the decree. In the case at hand it is undisputed that there is no appeal lodged against the decree which is subject for execution. The applicant has filed before this court applications for extension of time within which to file reference against taxation cause No. 56 of 2020 and taxation cause No 57 of 2020. In my considered view an application for extension of time is not an appeal so the above provision cannot apply here. This court do agree with the respondent's counsel that this court was not properly moved by the applicant due to wrong citation of the enabling provision of the law.

It was the contention of the applicant's counsels that there is no specific provision that governs their application for stay of execution pending determination of applications for extension of time to file an appeal. Thus, they relied on the Court of Appeal decision that in such situation a similar provision will be used, See **Mekefason Mandali and 8 Others Vs. The Registered Trustees of the Archdiocese of Dar Es Salaam** (Supra). With due respect, this case is distinguishable to the application at hand. Since the matter herein originated from the District Land and Housing Tribunal, the governing



law provides for a specific provision regarding applications for stay of execution.

**Regulation 25 (1), (2) and (3) of the Land Disputes Courts (The District land and Housing Tribunal) Regulations, 2003** provides that: -

- 1. Notwithstanding regulation 24 a judgment debtor who intend to appeal to the High Court (Land -Division) may at any time before the decree or order of the Tribunal is executed, apply to the Tribunal for stay of execution.*
- 2. The chairman shall, immediately after receiving an application for stay of execution under sub-regulation (1) require all parties to appear before the Tribunal for hearing and determination of the application for stay of execution.*
- 3. Subject to provisions of this regulation, no application for stay of execution shall be heard ex-parte.'*

Based on the above cited provision, it goes without saying that a judgment debtor who intends to appeal to the High Court has to apply to the Tribunal for stay of execution. In that regard, this application was supposed to be filed at the trial tribunal not at this court. This is due to the fact that the applicant intends to challenge the decision of the tribunal that's why he has lodged his applications for extension of time to file reference against the decree issued by the District Land and

*Flora*

Housing Tribunal. Therefore, this court join hands with the respondent's counsel that the court was not properly moved.

In this application, not only that the applicant cited improper provision of the law but even the application itself was filed before an improper court which has no mandate to grant the application unless there is a pending appeal. See the case of **Aswile S/O Mwampaswike Vs. John Johnson Summer**, Misc. Land Application No. 41 of 2019, HC Mbeya Registry.

For the above reasons, the preliminary objection is sustained for being meritorious. Consequently, the application is struck out for being incompetent. Each party to bear his own costs.

Ordered accordingly.

**DATED at ARUSHA** this 5<sup>th</sup> day of July 2022.



*N.R. Mwaseba*  
**N.R. MWASEBA**

**JUDGE**

**05.07.2022**