

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOSHI DISTRICT REGISTRY**

AT MOSHI

MISC. CIVIL APPLICATION NO. 4 OF 2022

(Arising from Execution No. 55 of 2021 originating from Civil Case No. 7
of 2020 High Court of Tanzania at Moshi)

M. A. KHARAFI & SONS LTD..... APPLICANT

Versus

MWANGA DISTRICT COUNCIL..... RESPONDENT

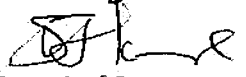
RULING

02/06/2022 & 15/7/2022

SIMFUKWE J.

The applicant herein filed the instant application under **Order XXXV, Rule 8, CAP 33 R.E 2019** (CPC) praying for the following orders as reproduced hereunder:

- i. The stay of the Execution of the Order of the High Court of the United Republic of Tanzania at Moshi dated 29th October, 2021 made by **Hon. S.H.Simfukwe** Which in effect requires the Respondent to pay the Applicant Tanzania shillings one hundred eighty two million nine hundred fifty nine thousand and five hundred and sixty nine(182,959,569/=) being the Service Levy and other charges thereof: while there is an application pending*


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*determination due to **Misc. Civil Application No.54 of 2021,**
before **Hon. S. H. Simfukwe, J***

- ii. Any other relief(s) this Honorable Court shall deem fit and just to grant.*

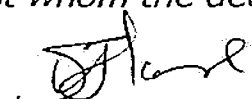
The application was supported by the affidavit sworn by Mr. Mwesigwa George Ishengoma advocate of the applicant. The application was argued by written submissions. Mr. Mwesigwa George Ishengoma learned counsel argued the application for the applicant, while Mr. Edwin Bayona Lusa learned State Attorney opposed the application for the respondent.

In support of the application, the applicant's advocate stated that the application has been made under **Order XXXV Rule 8 of the Civil Procedure Code** (supra) with the aim of explaining to this Court that the applicant has already filed an application seeking for leave to set aside the Decree so as to be granted leave to defend his case in the Summary Suit instituted in this court, in Civil Case No.7 of 2020 before. Hon. S. H. Simfukwe, J.

He argued further that in Misc. Civil Application No. 54 of 2021 the applicant is seeking for leave to set aside the decree and to be given chance to defend basing on good and worth reasons. He attached a copy of the said application and craved leave of the court for the same to form part of the application.

The applicant's advocate referred to **Order XXI Rule 27 of the Civil Procedure Code** (supra) which provides that:

... where a suit is pending in any court against the holder of a decree of such court, on the part the person against whom the decree was

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passed the court: may, on such terms as to security or otherwise as it thinks fit, stay execution of the decree until the pending suit has been decided.

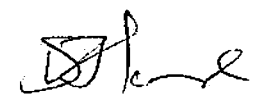
Basing on that provision it was stated that, the law gives right to the Applicant who have applied for leave of the Court, upon good, strong and sufficient reasons which are supported by provisions and authorities. He referred to the case of **Ratma vs. Cumarasamy & Others (1934), 3 ALL E R 933** in which it was stated that:

"...it is in the discretionary of the court, but as not enough, the court must have the material to work on so as to exercise such discretion."

On that basis the applicant's advocate formed opinion that he has good reason to seek leave of this court because there is a pending application which the applicant has filed as stated above.

The applicant made reference to the book titled; **C. K. Takwani; Civil Procedure, Fifth Edition, Eastern Book Company; Lucknow, 2003:** *at pages 430-431, Justice C.K. Thakker (Takwani), which provides that: where the suit by the judgment-debtor is pending in court against a decree-holder such court may, on the judgment debtor furnishing security or otherwise as it thinks fit, stay execution of the decree until the disposal of such suit in two-fold reasons:*

- 1. To enable the judgment-debtor to adjust their claims against each other, and*
- 2. To prevent multiplicity of execution proceedings.*



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It was further stated that in the above cited book the Author added that: *the applicability of the above rule is not enough that there is a suit pending by the judgment-debtor; such suit must be against the decree-holder in such court. That, the words "such court" are important and would mean that the suit must be pending in the same court.*

In the instant matter, Mr. Ishengoma said that they have already filed an application. Therefore, this court should allow the applicant to proceed defending the suit in the summary suit instituted in this court in Civil Case No. 7 of 2020 since he has established good cause as shown herein above. He added that delay is not rigorous reason; what is necessary is justice and not injustice to the other party.

He believed that the reasons provided in this submission constitute sufficient reasons to enable this Court to grant the prayer of staying Respondent's Application of Execution No. 55 of 2021.

In reply, Mr. Lusa, the learned State Attorney submitted to the effect that this matter originated from Execution Case No. 55 of 2021 which was instituted by the respondent to execute Summary Judgment of Civil Case No. 7 of 2020, and Misc. Application No. 54 of 2022 which was instituted by the applicant against the respondent. That, in Misc. Application No. 54 of 2021, the applicant prays for this court to set aside a Summary Decree in Civil Case No. 7 of 2020 and leave to the applicant/defendant to appear and defend the suit (Civil Case No. 7 of 2020 before Hon. S.H. Simfukwe, J.

Mr. Lusa stated that the applicant was supposed to file his application for leave to defend the suit prior to hearing and judgment since he was aware of the suit. Also, the applicant who was the defendant in Civil Case No. 7



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of 2020 was given a chance to file application for leave to defend by the court when the matter was for mention but he opted to file Written Statement of Defence. In that respect, Mr. Lusa was of the view that at this juncture the matter is at the point of no return since it has been decided and the respondent herein has the right to file execution according to the law. Thus, Execution case No. 55 of 2021 should proceed as the applicant intends to misuse court processes.

Moreover, the learned State Attorney stated that, after pronouncement of Summary Judgment in Civil Case No. 7 of 2020, the respondent notified the applicant, but he did not respond to settle the claimed amount as per the orders, which led the applicant to institute Execution Case No. 55 of 2021.

Concerning **Order XXI rule 27 of the Civil Procedure code** which was cited by the applicant, the learned State Attorney referred to **Section 53 of the Interpretation of Laws Act [Cap 1 R.E 2019]** which provides that:

"Where in a written law the word "may" is used in conferring a power, such word shall be interpreted to imply that the power so conferred may be exercised or not, at discretion."

On the strength of the above provisions, the learned State Attorney submitted that, Order XXI rule 27 used the word "may" to mean it is the discretion of the Court to grant or not, and that where there is justifiable reason adduced by the applicant, then the court may grant stay of execution and if not, the court cannot grant an order for stay of execution.

Mr. Lusa argued that as a matter of discretion of the Court, he implored the court to consider two principles; *first*; that the rights of the decree holder to enjoy the fruits of the judgment and decree which is in his favour and *two*; that the judgment debtor has the right to appeal if dissatisfied.

The learned State Attorney also urged the court to consider **order XXI rule 27 of the Civil Procedure Code** (supra) which provides that:

"Where a suit is pending in any court against the holder of the decree of such court, on part of the person against whom the decree was passed the court may; on such terms as to security or otherwise as it thinks fit, stay execution of the decree until the pending suit has been decided."

The learned State Attorney also referred to the case of **Indian Ocean Hotels t/a Golden Tulip Dar es Salaam vs Nitesh Suchak t/a Smart Dry Cleaners, Civil Application No. 82 'A' of 2010** in which the Court of Appeal of Tanzania in determining the application, referred to the above two principles and said:

"We are of the settled view that the interest of justice will be met if we allow the application for stay of execution subject to depositing into the Court as security for the due performance of the decree."

In respect of the above case, the learned State Attorney added that in that case, 14 days from the date of the ruling were given to deposit the said amount. The court determined the matter by considering rights of both parties that is decree holder's right to enjoy fruits of judgment and decree and the judgment debtor's right to appeal.

Regarding discretion of the court, Mr. Lusa urged the court to consult the decision of the Court of Appeal that the applicant has to deposit the claimed amount at a tune of Tanzania shillings 182,959,569/-as security and condition for granting stay of execution.

Mr. Lusa contended further that, the applicant was given an opportunity to file application for leave to defend but recklessly failed. Thus, neither the respondent nor the court acted unfairly against the applicant. That, it was applicant's carelessness of which he has to enjoy the consequences of it.

Lastly, Mr. Lusa submitted that for the applicant to be granted stay of execution, he is bound to comply with a condition of providing security by depositing the claimed amount within the specific time failure of which execution case has to proceed. Mr. Lusa also prayed for the costs of this application.

I have carefully considered the submissions of both parties and their respective affidavits.

The applicant brought this application under **Order XXXV rule 8 of CPC** which reads:

"After decree the court may, in exceptional circumstances set aside the decree and if necessary, stay or set aside the decree and if necessary, stay or set aside execution, and may give leave to the defendant to appear to the summons and to defend the suit, if it seems reasonable to the court so to do, and on such terms as the court thinks fit."

What I have gathered from the above provision as far as this application is concerned is that, it is the discretion of the court to grant application for stay of execution. In order for the court to exercise such discretion under **Order XXXV Rule 8**, the applicant should advance exceptional circumstances.

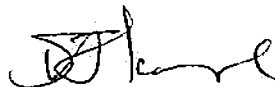
In the applicant's affidavit sworn by Mr. Ishengoma the learned advocate, under paragraph 4 stated that the applicant got the knowledge of the suit late and thus he was not present when the matter was proceeding. That, even the WSD was filed by the wrong person who was not authorized by the Company.

Without prejudice to the submissions of the parties, stay of execution in this case was sought pending determination of Misc. Application No. 54 of 2021 which was finalised on 28/6/2022. In the circumstances granting the application will be futile.

Therefore, the applicant's wish to stay the execution and leave to defend the Summary Suit has been overtaken by events. It's for that reason that I hereby dismiss this application for being overtaken by events with no order as to costs.

It is so ordered

Dated and delivered at Moshi this 15th day of July, 2022.



S. H. SIMFUKWE

JUDGE

15/7/2022