

**IN THE HIGH COURT OF TANZANIA
TABORA DISTRICT REGISTRY
AT TABORA**

MISC CIVIL APPLICATION NO. 5 OF 2020

KASULU TOWN COUNCIL..... APPLICANT/JUDGMENT DEBTOR

VERSUS

**PIUS LUZIBILA.....1ST RESPONDENT/DECREE HOLDER
YASE SAZI.....2ND RESPONDENT/DECREE HOLDER
DANIEL RUBUDHUKA.....3RD RESPONDENT/DECREE HOLDER
ANTHONY LOLE.....4TH RESPONDENT/DECREE HOLDER
JOSEPH BILOHE.....5TH RESPONDENT/DECREE HOLDER
MOSES KUNEZA.....6TH RESPONDENT/DECREE HOLDER
EMMANUEL NTAHONDI.....7TH RESPONDENT/DECREE HOLDER
RASHID KASIPI.....8TH RESPONDENT/DECREE HOLDER
MAIKO SAMSON.....9TH RESPONDENT/DECREE HOLDER**

RULING

Date of Last Order: 25/03/2022

Date of Delivery: 08/07/2022

AMOUR S. KHAMIS, J:

Kasulu Town Council filed the present application for an order of stay of execution of a Decree of this Court allegedly arising out of a "Settlement Deed" in Land Case No. 3 of 2018 involving parties herein.

The application was made by way of Chamber Summons under Order XXI Rule 24(1) and Section 95 of the



Civil Procedure Code, Cap 33, R.E 2019 and any other enabling provision of the law.

An affidavit affirmed by Fatina H. Laay, the applicant's Town Director, supported the application.

In the 9 paragraphed affidavit, the deponent stated that Land Case No. 3 of 2018 was settled after signing a Deed of Settlement and that the agreed terms were communicated to the higher authority of the Local Government in order to give way for execution.

She deposed that while waiting for the high authority's response, the applicant was secretly informed by some of the decree holders that some of them had no actual contracts to entitle them benefit from the terms of settlement and that some were involved in the suit without their consent.

She added that the applicant was also informed that some of the decree holders lied on their actual identity which revelation prompted the applicant to inquire original contracts (leases) from each of the decree holders in order to satisfy itself on the allegations.

Ms. Fatina Laay further deposed that some of the decree holders withdrew themselves from the suit in order to be given stalls under the new terms set by the applicant.

On those basis, the deponent pointed out that this Court's Decree cannot be executed but rather need be stayed in order to sort out the discrepancies mentioned.



For no apparent reasons, the respondents neither filed nor sought leave of the Court to file counter affidavits despite of appearance by Mr. Amos Gahise, learned advocate of this Court, who acted on their behalf. Mr. Edwin Rwekaza, learned advocate and Town Council Solicitor, appeared for the applicant.


With leave of the Court, the application was canvassed by way of written submissions and both sides timely presented their respective arguments.

I have read and considered the rival submissions drawn and filed by Mr. Edwin Rwekaza, learned advocate for the applicant and Mr. Amosi Japhet Gahise, learned advocate for the respondents/deed holders.

The presentations made by the learned counsel will be referred to in the course of addressing the relevant issue(s) in this application.

The main issue for consideration is whether the applicant has shown sufficient cause for stay of execution.

Mr. Edwin Rwekaza adopted contents of the affidavit in support of the application affirmed by Ms. Fatina H. Laay, the Town Council Director, and contended that the discrepancies pointed out in the affidavit were sufficient to warrant stay of execution of this Court's Decree in Land Case No. 3 of 2018.



On the other hand, Mr. Amosi Gahise strongly differed with Mr. Rwekaza and contended that the applicant was determined to mislead the Court.

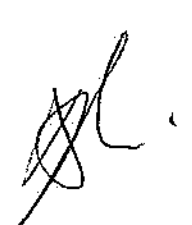
He explained that, contrary to the applicant's assertions, Land Case No. 3 of 2018 was heard on merits and a final judgment delivered after receiving parties' evidence.

He asserted that the case did not come to an end by way of settlement as claimed by the applicant.

The learned counsel further asserted that at no point in time did any of the decree holders withdraw from the suit as alleged or at all.

He brushed off the applicant's allegation that some of the respondents were not entitled to business stalls arguing that the contention had no legal justification particularly for being raised after delivery of Judgment and specifically at the stage of execution.

Order XXI Rule 24(1) of **THE CIVIL PROCEDURE CODE, CAP 33, R.E 2019** provides that upon sufficient cause being shown, the Court to which a decree has been sent for execution, shall stay execution of such decree for a reasonable time, to enable the judgment debtor apply to the Court by which the decree was passed or to any Court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay execution or for any other order relating to the decree or execution.



In **JOAKIM KALEMBWE V M.N MWAMLIMA, CIVIL APPLICATION NO. 76 OF 1998** (unreported), the Court of Appeal held that:

"It is common knowledge that the purpose of an order for stay of execution is to maintain a status quo position in a particular case pending further steps being taken thereafter, eg: pending determination of an appeal....."

In **STANBIC BANK TANZANIA LTD V WOODS TANZANIA LTD, CIVIL APPLICATION NO. 146 OF 2001** (unreported), the Court of Appeal underscored prime factors to be considered in determination of an application for stay of execution, thus:

".....It is well established in this country that there are three principal factors which a court must have regard to when deciding whether or not to make an order for a stay of execution. These are: whether the appeal has prima facie likelihood of success, whether the refusal of staying execution is likely to cause substantial and irreparable injury to the applicant and the balance of convenience."

In **NATIONAL HOUSING CORPORATION (NHC) V ETIENNES HOTEL, CIVIL APPLICATION NO. 175 Of 2004** (unreported), the Court of Appeal held that:

".....Stay of execution is not an end in itself but it serves a purpose where there is an appeal pending."



Here, as I have demonstrated above, there is no pending appeal. So what is the relevancy of stay of execution? Why allow an appeal which is for all intents and purpose, is academic?....."

In the present case, the application for stay of execution was blanketly made and did not suggest pendency of an appeal, revision or any other proceedings in Court.

The entire application did not reveal that the applicant filed an appeal or intended to file an appeal, revision or review that would examine the issues tabled by the applicant concerning the impugned decree of the Court.

Upon close scrutiny of the application, I landed on the Judgment of this Court in Land Case No. 3 of 2018 involving parties herein.

Records show that the respondents herein instituted Land Case No. 3 of 2018 against Kasulu Town Council, the applicant herein, for declaration that that they were entitled to lawful possession of the disputed plots, compensation at the rate of Tshs. 25,000,000/= on each of them, an order for alternative plots of land (stalls?), general damages, interests and costs of the suit.

Records further revealed that way back in the year 1986, Kasulu Town Council or its predecessor in title, allocated some parcels of land to the respondents on which



business stalls were erected by the respondents who operated their respective businesses therein.

Subsequently, the local authority split into two: Kasulu District Council and Kasulu Town Council. The respondents fell into the hands of Kasulu Town Council and kept on paying requisite rents for the business stalls.

The dispute arose in the year 2017 when Kasulu Town Council marked the respondents stalls with "X" mark and required them to demolish the stalls to pave way for construction of a tarmac road.

Despite of resistance, the respondents stalls were demolished by the applicant on 2nd February 2018 hence institution of the suit in this Court.

Records further show that the suit was heard on merits but nine (9) out of 19 plaintiffs appeared and testified in support of the claims.

The trial Judge dismissed claims by the other ten (10) plaintiffs for want of prosecution on account of their failure to enter appearance.

It is on record that the applicant, Kasulu Town Council, paraded three (3) witnesses, namely: Fatima Hussein Laay (DW 1), Mwesige Pesha (DW 2) and Rehani Yakobo (DW 3).

Apart from the oral testimonies, both sides produced documentary exhibits that were received as Exhibits: P1, P2, P3, P4, P5, P6, P7, P8, P9, P10 and D1.



At the conclusion of trial, the learned Judge entered Judgment for the respondents ordering Kasulu Town Council to pay each of them Tshs. 5,000,000/= as construction costs for the demolished stalls or in the alternative, construct new business stalls for each of them.

The respondents were also awarded Tshs. 6,000,000/= on account of general damages.

From these facts on record, it is evident that the suit, Land Case No. 3 of 2018, was determined after a full trial that involved presentation of both oral and documentary evidence by the rival sides of the case.

It is equally conspicuous that the disputed suit was not concluded by way of settlement as no Deed of Settlement or settlement terms were negotiated, concluded, signed and or presented in Court by the parties contrary to the applicant's allegations in the affidavit.

This is to say that, the applicant's contentions are unfounded both in law and in facts as they failed to live up to the legal requirements pointed out in the cases of **STANBIC BANK TANZANIA LTD V WOODS TANZANIA LTD** (supra) and **SDV (TRANSAMI) TANZANIA LIMITED V MS. STE DATCO, CIVIL APPLICATION NO. 97 OF 2004** (CAT – Dar es Salaam - unreported).

In the circumstances, I am convinced that the reasons advanced by the applicant are insufficient to warrant this Court grant an order for stay of execution.



In my view, it is not the duty of this Court to deprive a successful party (parties) of the fruits of litigation earned through hard labour, expenses and struggle, unless there are chances of success in a pending appeal, revision or review, refusal to stay execution is likely to cause substantial and irreparable injury to the applicant and lastly, as a consequence of a balance of convenience.

Unfortunately, upon my analysis, none of these important ingredients to be considered in an application for stay of execution was found to exist in favour of the applicant in the present matter.

In the upshot, the application is hereby dismissed with costs. It is so ordered.

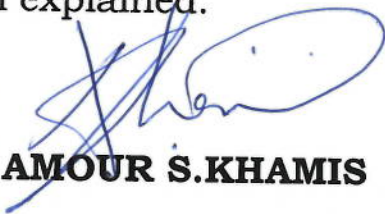


AMOUR S. KHAMIS
JUDGE
8/07/2022

ORDER.

Ruling delivered in chamber in presence of Mr. Amos Gahise advocate for the respondents and also holding brief of Mr. Edwin Rweikiza, advocate for the applicant.

Right of Appeal explained.



AMOUR S. KHAMIS
JUDGE
8/7/2022