

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(ARUSHA DISTRICT REGISTRY)  
AT ARUSHA**

**MISC. LAND APPLICATION NO. 99 OF 2022**

**(C/F Land case No. 15/2012)**

**THE REGISTERED TRUSTEES OF UMOJA**

**WA WANAWAKE TANZANIA (UWT).....1<sup>ST</sup> APPLICANT**

**NUTMEG AUCTIONEERS (NMA AUCTIONEERS) .....2<sup>ND</sup> APPLICANT**

**VERSUS**

1. BRIAN LYIMO
2. BASHIRI MUSS
3. HABIBU MUSSA
4. SHABANI ISSY
5. ZAINABU RASHIDI
6. ASIFIWEELI LYIMO
7. PETER AMANI MOLLEL
8. CHERISH GENERAL TRADERS
9. JOSEPH KARUMUNA
10. MARTIN LUGAIMUKAMU
11. RICHARD KIHIO
12. ELIZABETH MWAKIPESILE
13. LIDYA SIMON
14. FRANK MAKUNDI
15. HENDRY JOSEPH MOSHI
16. NAHLA JAMIL
17. DEMMY LUCAS
18. ABDALLAH S. KIVUVIA
19. NEEMA BRIAN
20. PETER COSTA MUSHI
21. ROBERT A. CHUWA
22. MARIANA JOSEPH MASSAWE
23. COSMAS JOSEPH MASSAWE
24. MARK MSURI
25. VICTOR JOSEPH KAIZER
26. JANETH S. MWAKIDEBE
27. PAUL FANUEL PAUL T/a ADVANCED CREDIT RECOVERY CO. LTD

**RESPONDENTS**

## **RULING**

**18/08/2022 & 29/09/2022**

**GWAE, J**

Following the verdict of this court (**Mwaimu**, J now retired judge) dated 23<sup>rd</sup> day of October 2015 through Land Case No. 15 of 2012 and its ruling delivered on 28<sup>th</sup> September 2016, the respondents named herein above filed an application for execution of their decree. The application for execution was duly received by this court on 15<sup>th</sup> July 2022. The property intended to be attached for the satisfaction of the decree worthy about Tshs. 533, 270, 604/= and it is the land property on Plot No. 58 of Block "W" area "F" in Arusha Region.

On 25<sup>th</sup> July 2022 the applicant, the registered trustees of Umoja wa Wanawake Tanzania known by its acronym "UWT" and Nutmeg Auctioneers (NMA AUCTIONEERS) filed this application under Order XXI Rule 27 and section 95 of the Civil Procedure Code Cap 33 Revised Edition, 2019 ("CPC") praying for an order of this court staying execution of the decree pending hearing and determination of Misc. Land Application No. 79 of 2022 before this court.

Through an affidavit of one Edmund Rweyemamu Ngemela, the learned counsel for both applicants, the reasons advanced for the sought stay of execution are;

1. That, the applicants were aggrieved by the court's judgment and decree and they applied for a rectified decree but the same was not timely issued till 24<sup>th</sup> June 2022
2. That, the applicant have filed an application for extension of time to file notice of appeal out of time vide Misc. Land Application No. 79 of 2022
3. That, the respondents have misused a proclamation of sale without first valued the land to be attached and sold
4. That, the amount reflected in the application for execution is not reflected in the decree
5. That , it is the interest of justice that this application be granted

On 18<sup>th</sup> August 2022 when this matter was called on for hearing, the applicants were being represented by Mr. Ngemela, the learned (Adv) whereas advocate Sarah Lawena, entered her appearance representing all respondents.

Arguing for the application, the applicants' advocate first and foremost asked this court to adopt his sworn affidavit. However, he added that, as their appeal to the Court of Appeal was struck out, it was therefore their mandatory duty to apply afresh for filing of notice of appeal out of the prescribed period and that, the applicants did not promptly file their

intended appeal due to the fact that, they were not timely availed with certified and rectified copies of decree. He then urged this court to make a reference to the case of **Balozi Abubakary Ibrahim and another and Benard Limited** and two others, Civil Rev. 6 of 2015 (Unreported-CAT) where it was emphasized that, whenever there is any complaint on an application for execution of a decree, it is prudent for our court to stay execution. Finally, the applicants' counsel sought unconditional grant of this application as the 1<sup>st</sup> applicant has her own property or properties to be rendered for execution in case her intended appeal fails.

Resisting the arguments of the applicants' advocate, Miss Sarah also requested for adoption of the counter affidavit by the court and went on arguing that, the respondents have not been served with a copy of the said application No. 79 of 2022 allegedly filed before the court and that, the applicants have not demonstrated or shown any good cause for the sought stay.

Submitting on the alleged failure to conduct valuation of the landed property, she argued that, the applicants' assertion is baseless since the respondents had conducted valuation in accordance with the law. The respondents' advocate also contended that, the 1<sup>st</sup> applicant ought to have stated security as required under Order 21 Rule 27 of the CPC. She

added that the applicants' application falls short of necessary elements such as likelihood of success in the intended appeal, the court's refusal is likely to cause irreparable loss and that there is a prima facie case on the face of the record. She further submitted that, the factors for grant of an application for stay must be accumulatively met. Hence, the respondents' counsel invited the court to make a reference to the principles of the law enunciated in **TANESCO V. IPTL** (2000) TLR 324.

In his rejoinder, the applicants' advocate stated that the respondents were served with a copy of the applicants' application for extension of time to file notice of appeal out the time and that the applicants have sufficiently established as to why this application should be granted and he reiterated that, there is no valuation that was conducted to the said property targeted for the attachment and sale by the decree holders now respondents.

Having briefly explained what transpired in relation to the parties' case, it is now for determination of the applicants' application. Granting or refusing an application of a stay of execution is a matter of discretion which is always to be exercised by courts on a common sense and balance of advantage basis. Therefore, there must be basis or sufficient cause for grant or refusal of the sought stay of execution such as the applicant (s) seeking an order staying an intended execution will suffer irreparable loss

or injury if the application for stay of execution is not granted, that, there is an apparent error or illegality on the judgment to be challenged before an appellate court. In order to be in a safe side, I think it is apposite to be guided by Order XXI Rule 27 of the CPC which reads;

*“Where a suit is pending in any court against the holder of a decree of such court, on the 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”.*

Considering the above quoted provision of the law, it is therefore plainly clear that, the court is vested with the discretion to either grant or refuse to grant an application for execution of a decree pending hearing of an appeal or an application to pursue an intended appeal by a party who has been aggrieved by such decree or order. The word “suit” envisaged in the statute denotes existence of a matter after a decision had been rendered.

In our present application, it goes without saying that, the applicants have filed an application for extension of time so that they can be able to file a notice of appeal out of time since the former notice became useless immediately after the applicants’ appeal was struck out by the Court of

Appeal due to its incompetence. It is further true as rightly argued by the applicants' counsel that, the rectified decree was issued on 27<sup>th</sup> day of May 2022 by the court.

Equally, if the 1<sup>st</sup> applicant's property will be sold by way of a public auction, there will be irreparable loss and the intended appeal will be rendered insignificant. In **Kaare Timoth v General Manager –Mara** (1987) TLR 17, it was emphasized that, before granting a discretionary interlocutory injunction the court should consider the following;

*"(a) Whether there is a bonafide contest in between the parties.*

*(b) On which side, in the event of the plaintiff's success will be the balance of inconvenience if the injunction does not issue, bearing in mind the principle of retaining immovable property in status quo.*

*(c) Whether there is an occasion to protect either of the parties from injury known as "irreparable" before his right can be established. "Irreparable Injury" means that the injury will be material....."*

See also the decisions in **Attilio vs. Mbowe** (1970) H.C. D 3 and **Tanzania Cotton Marketing Board vs. Cogecot Cotton Co. SA** (1997) TLR 63.

In our instant application, it is as explained earlier that, if the 1<sup>st</sup> applicant's landed property is left to be sold in a public auction as intended

by the respondents, the substantial loss on the part of the 1<sup>st</sup> applicant will be inevitable. I have however observed that, the applicants' assertion that, the respondents did not conduct valuation of the property is merited since the respondents have failed to attach a copy of valuation report for the alleged valuation in their joint counter affidavit save to the general denial and mere verbal submission by the respondents through their counsel that, there was valuation. This kind of argument is not legally excusable since such serious contention by the respondent ought to be substantiated by a tangible proof.

Similarly, the amount indicated as the decretal sum in the execution form (Tshs. 533, 270,000/=) cannot easily be said be so simply because it is not as appearing in the decree intended to be executed by the respondent (rectified decree). The applicants' complaints in that regard is therefore not without merit

I have further considered the fact that, the applicants have at once filed an application for leave and the same was dismissed on the 28<sup>th</sup> July 2016 through Misc. Land Application No.186 of 2015 and the fact that the applicants' application for leave as a second bite before the Court of Appeal was struck out with costs on the 26<sup>th</sup> November 2018 for being improperly filed. In the said circumstances, I am made to decline granting the order sought without condition (s). The order granting stay of the




intended execution must therefore pertain with an order directing the applicants to deposit approximately half of the decretal sum that is Tshs. 200, 000, 000/= by virtue of provisions of Order XXXIX Rule 5 (3) (c) of the Civil Procedure Code, Cap 33 Revised Edition, 2019.

That said and done, this application is granted accordingly. The intended execution is stayed pending hearing and determination of Misc. Land Application No. 79 of 2022 and or an intended appeal to the Court of Appeal of Tanzania subject to depositing of Tshs. 200,000,000/= or deposit of bank guarantee to the same tune into the court as security for due performance. The costs of this application shall abide to an outcome of the application or the applicants' intended appeal as the case may be. The ordered deposit must be within **thirty (30)** days from the date of this order.

It is so ordered



  
**M. R. GWAE,**  
**JUDGE**  
**29/09/2022**