

IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM DISTRICT REGISTRY

MISCELLANEOUS CIVIL APPLICATION NO. 297 OF 2020

AUGUSTINO PETER MMASI.....APPLICANT

VERSUS

TAUSI SELEMAN.....RESPONDENT

RULING

DATE OF LAST ORDER: 05/10/2022

DATE OF RULING: 07/10/2022

BADE, J

The Applicant in this application has moved the Court under S. 95 of the Civil Procedure Code Cap 33 of the Laws of Tanzania R.E 2002 (sic) and any other enabling provisions of the law for an order to stay execution of the order in Civil case No. 57 of 2007 dated the 15th October, 2019 granted by Hon. Tiganga, DR (as he then was) pending the hearing and final determination of an application for Reference in Civil Reference No. 22 of 2019. Parties have filed their Affidavits for and against the application.

Gleaning from the affidavits sworn and filed, the application is based on the need to stay the proceedings while it is being ascertained through reference what is the due debt to be paid having settled some of the amount by the judgement debtor who is the applicant herein, following an agreement to adjust the decree that was entered between the parties herein. The prayer

is for the said execution order be stayed awaiting determination of Reference which has high chances of succeeding.

The applicant's counsel also submitted in the written account that the Applicant will suffer substantial loss if the order is not granted since as per the sworn affidavit, the Applicant has paid the respondent the adjustable amount agreed in the unfiled agreement, and thus if the execution order is allowed to be carried out it will lead to unjust loss to the Applicant who has fulfilled his part of the agreement.

On the other hand, the Respondents maintain that while these facts are not wholly disputed, the Applicant has only fulfilled part of the unfiled agreement of out of court settlement and that the application for execution is mainly for the unfulfilled part of the decree of the court. But more importantly, the referred **Civil Reference No. 22 of 2019 between Augustino Mmasi and Tausi Selemani** which is supposed to have been the mainstay of this application before the court, has been overtaken by events. The same has been allegedly dismissed for want of appearance on September 23, 2021 by Hon Judge Mruma, before whom the matter was scheduled. None of the parties seemed to have been present during the fateful episode.

The respondents maintain that this application has no legs to stand on as there is nothing pending to make tenable a stay of execution order. The same they charged, was a position held by Lady Justice Kairo, as she then was in **Land Appeal No. 44/2016 between Rwechungura Idd vs**

Fulaison Flansi (Unreported), where while refusing to stay the execution she hold that;-

“...absence of the revision proceeding which was the basis of the stay of execution order, has made the same to collapse for lack of legs to stand on, and thereby die a natural death”.

I must admit even if in passing, that this ground would have been enough to dismiss this application if the facts were proven to be so. This is notwithstanding the fact that if the said reference were to be decided on merits, I do not see how it would have been so survive in light of the position of this Court through the case of **Sogea Satom Company vs. Barclays Bank Tanzania and 2 Others, Miscellaneous Civil Reference No.15 of 2021**, where this Court sitting at Dar es Salaam already took a stance that:

"Except where the law clearly states otherwise, a decision or order rendered by the Deputy Registrar of the High Court is a decision of the High Court and may be challenged by way of an appeal, reference and or revision to the Court of Appeal or by way of review to the same High Court"

Be as it may, I will not be detained by this fact since there is not enough supporting evidence brought before this court to verify this position other than a letter written by the respondent to be supplied with the drawn order following the alleged dismissal of the Civil Reference no 22 of 2019 between the parties herein.

What is of concern to this court though, is the fact that this application for stay of execution is made under S. 95 of the Civil Procedure Code. Granted that the referred section being a provision on inherent powers of the High Court, it should not have been applicable where the law has availed specific provisions to govern such particular matters.

The question that arise now is if there is anything capable of being stayed now that the applicants have not moved the Court and invoke it with powers to act for the interest of justice. This application should have been made under the provisions of Order XXI Rule 21 and or 24(1) of the Civil Procedure Code, Cap 33 RE 2022.

After all is said and done, it is my finding that this application is not properly before the Court since it is untenable under the law and incompetent for lack of proper enabling law. Consequently, I strike it out accordingly. Further, having regard to the nature of the application and the reasons it has been stricken down, without the industry of any of the counsel for the parties, I make no order to costs.

It is so ordered.

Dated at Dar es Salaam this 06th day of October, 2022



**A. Z. BADE,
JUDGE
06/10/2022**

This ruling is delivered this 07th day of October, 2022 in the presence of the Respondent.



X

A. Z. BADE

JUDGE

Signed by: Aisha Bade

10/7/2022