

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRY OF DAR ES SALAAM**

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 302 OF 2022

MONICA MBALE APPLICANT

VERSUS

BENEDICT SUDI RESPONDENT

**(Arising from the judgment and decree of this Court in Land
Case No. 71 of 2014 and Execution No. 70 of 2021)**

RULING

5th and 25th October, 2022

KISANYA, J.:

The applicant filed a Chamber Summons under Order XXXIX rule 5(1), 3(a)-(c) and (4) and sections 68(e) of the Civil Procedure Code, Cap. 33, R.E. 2019 (the CPC) and section 2(1) and (5) of the Judicature and Application of Laws Act, Cap. 358, R.E. 2019 (the JALA) seeking an order for stay of execution of the decree of this Court in Land Case No. 71 of 2014 in which this Court (Mgonya, J) decided the suit in favour of the respondent.

Pursuant the judgment and decree, the orders granted in favour of the respondent and against the applicant and four other five persons (who are not subject to this application, hereinafter referred to as “co-defendants”) were to the following effect: One, that the respondent was declared to be the lawful

owner of the suit land situated at Ununio within the City of Dar es Salaam. Two, the applicant and co-defendants were declared as trespassers to the suit land. Three, the applicant and her assignee or transferees were evicted from the suit land. Four, that, the structures developed on the suit land be demolished by the applicant and co-defendants or their assignees and agents. Five, the respondent is entitled to general damages of Tshs 20,000,000/=. Six, that perpetual injunction was granted to restrain the applicant and co-defendants in the suit area. Seventh, that the respondent was awarded costs of the suit. Eighth, the applicant counter-claim against the respondent was dismissed for being meritless.

As gleaned from para 5 of the affidavit in support of the application for stay of execution, the applicant was dissatisfied with that decision. Since she became aware of the judgment when she was already out of time, she filed an application for extension of time to lodge the notice of appeal. The said application (Misc. Civil Application No. 381 of 2021) is pending in this Court.

At the same time, the respondent lodged Execution No. 70 of 2021 seeking, inter alia, to have the applicant evicted from the suit land. On her part, the applicant filed two applications praying for temporary injunction orders. These were Misc. Civil Application No. 560 of 2021 and Misc. Civil Application No. 565 of 2021. On 25th May, 2022, both applications were struck out by this Court (Laltaika, J) after sustaining the preliminary objections which were to the

effect that the application were bad in law for containing untenable prayers. Against that background, the applicant was inclined to file this application which is being contested by the respondent vide his counter affidavit.

By consent, this application was disposed of by way of written submissions. Dr. Rugemeleza Nshala and Mr. Raphael Rwezahula, learned advocates filed their respective written submission on behalf of the applicant and respondent in accordance with the Court's schedule.

Having examined the Chamber Summons, supporting affidavit and counter affidavit and dispassionately considered the rival submission, the main issue is whether the application is meritorious.

It is common ground that this application is, among others, made under Order XXXIX Rule 5(1), (3) and (4) of the CPC. The said provision reads:

*"5.-(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.***

(2) Where an application is made for stay of execution of an appealable decree before the expiration of the time allowed for appealing therefrom, the court which passed the decree may, on sufficient cause shown, order the execution to be stayed.

(3) No order for stay of execution shall be made under sub-rule (1) or sub-rule (2) unless the High Court or the court making it is satisfied that-

(a) that substantial loss may result to the party applying for stay of execution unless the order is made;

(b) that the application has been made without unreasonable delay; and

(c) that security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him.

(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

As rightly submitted by Dr. Nshala, the scope and application of the above provision were discussed in the book entitled **Sarkar Code of Civil Procedure**, 11th Edition 2010 by **Sudipto Sarkar** and **VR Manohar**. Referring to Order XLI Rule 1 of the CPC which is in *pari material* with Order XXXIX of the CPC, the authors state as follow at page 2325:-

"This rule applies to stay by appellate court of (1) proceedings under a decree, or order appealed from and (2) stay of execution of a decree appealed from, or (3) stay by the trial court of execution of an appealable decree. The power of the trial court can be exercised during the period between decree and the time for filling appeal. Once an

appeal has been filed, the jurisdiction rests with appellate court.

In the light of the above comment which I subscribe to, it is apparent that the trial court is enjoined to order stay of execution during the time which appeal against the impugned decree has not been filed.

Applying the said legal position, it is also common ground that the applicant has not filed her appeal to the Court of Appeal to challenge the decree sought to be stayed. I have hinted earlier that, her application for extension of time to lodge the notice of appeal is pending before this Court. In that circumstances, I agree with Dr. Nshala that, this Court is seized with jurisdiction to entertain the matter until such time the pending application for extension of time is determined.

In their respective submissions, the learned counsel for both parties were at one that Order XXXIX Rule 5(1) of the CPC, gives this Court's discretion to grant or to refuse to grant the order of stay of execution. I agree with them. That is the correct position of law. It is further provided for by the law that, in exercising its discretionary power of granting the order of stay of execution, the court must be satisfied that there is sufficient cause shown by the applicant. However, the parties' counsel disagreed on whether the applicant has demonstrated sufficient cause for stay of execution as shown hereunder.

Dr. Nshala submitted that the applicant has demonstrated sufficient cause to the effect that; no appeal has been filed, the applicant was late to

become aware of the impugned judgment, the applicant has filed an application for extension of time, the respondent has filed an application for execution seeking to evict her from the suit land, unless stayed no sufficient resource to make the applicant whole in the event her appeal succeeds in the Court of Appeal, the respondent has no means of refunding the applicant in the event her appeal succeeds and the applicant has undertaken to provide security. All the above considered, the learned counsel submitted that sections 68(e) and 95 of the CPC cited in the Chamber Summons empowers this Court to make such other interlocutory orders as may be necessary for the ends of justice and convenience.

Dr. Nshala further submitted that the application was filed within sixty days following the striking out of her applications for interim injunctive order. It was therefore, his contention that, the time spent in prosecuting the said application is excluded in computing the time limitation under section 21(1) of the LLA. That said and making reference to the cases of **Jaram Biswalo vs Hamis Richard MZA** Civil Application No.11 of 213 and **Therod Fredrick vs Abdusamud Salim**, Civil Application No. 7 of 2012, Dr Nshala submitted that the applicant has adequately met the requirement specified by Order XXXIX Rule 5(3) of the CPC.

On his part, Mr. Rwezahula submitted by restating the position that for stay of execution to be granted, the applicant must satisfy the court that the pre-conditions set out under Order XXXIX Rule, 5(3) of the CPC have been met.

He was in agreement with Dr. Nshala that the said conditions must be met as held in the case of **Joram Biswalo** (supra). Mr. Rwezahula went on submitting that the applicant has not demonstrated sufficient cause to trigger this Court to grant the order sought in the chamber summons.

As for the condition of substantial loss, the learned counsel submitted that the purported developments on the suit land were done at the applicant's peril. His submission was based on the contention that the developments were done during the pendency of Land Case No. 71 of 2014. It was his further submission that the contention that the respondent has no sufficient means to pay the applicant is immaterial in establishing substantial loss. He cited the case of **Salvatory Gibson vs William Laurent Malya and Another**, Civil Application No. 6/05 of 2017 and **Tanzania Ports Authority vs Pembe Floors Mills Ltd**, Civil Application No. 78 of 2007 (both unreported) where it was held that substantial loss implies among others, loss which is irrecoverable in any form or manner, including damages or other monetary recompense. Referring further to paragraph 8 of the supporting affidavit, the learned counsel submitted that the applicant had indicated how the loss is irreparable within the meaning of the case of **Salvatory Gibson** (supra).

On the second condition, Mr. Rwezahula submitted that the application was filed more than six months after becoming aware of the execution proceedings. He pointed out that this application was filed on 19th July, 2022 while the application for stay of execution was served to the applicant on 13th

December, 2021. It was also his argument that section 21(1) of the LLA is invoked upon the applicant seeking first extension of time.

As regards the third condition, Mr. Rwezahura submitted that Order XXXIX Rule 5(c) and Order XXI Rule 24(3) of the CPC are to the effect that for the court to grant an order of stay of execution, the applicant must have given security. It was therefore, his argument that the applicant has not met the third condition as the applicant undertook to pay the same. In alternative, he urged this Court to order the applicant to deposit security to the court by way of a bank guarantee aggravating to the value of the suit property.

Rejoining, Dr. Nshalla reiterated his submission in chief that the application meets the conditions set out by the law. He urged this Court to consider the case of **Africachick Hatchers vs CRDB Bank PLC**, Civil Application No. 98 of 2016 (unreported)

That said, the learned counsel argued that the application is untenable. He then invited this Court to dismiss the same with costs.

My starting point is to restate the legal position that application for stay of execution stands upon meeting the conditions prescribed by Order XXXIX Rule 5(3) of the CPC. The conditions require that the applicant has to satisfy the court that, he or she he will suffer substantial loss in the event the application is not granted; the application was lodged without undue delay; and that he or she has furnished security for the due performance of the decree

sought to be stayed. As held in the cases of **Joram Biswalo** (supra) **Salvatory Gibson** (supra) and **Tanzania Ports Authority** (supra), referred to this Court by the parties' counsel, the three conditions must be conjunctively and not disjunctively met. Thus, it is not sufficient for the applicant to satisfy one or two conditions in isolation of another.

See also the case of **Felix Emmanuel Mkongwa vs Andrew Kimwaga**, Civil Application No. 249 of 2016 (unreported) in which the Court of Appeal referred to rule 11(2)(d) of the Court of Appeal Rules, 2009 which are in *pari materia* with Order XXXIX Rule 3 of the CPC and went on to hold as follows:-

*"Suffice only to state that, for an application for stay of execution to be granted under the Rules, the above conditions had to be cumulatively complied with, meaning that where one of them could have not been satisfied, the Court would decline to grant the order for stay of execution. The duty of the applicant to satisfy all the conditions cumulatively has been constantly reiterated by this Court in its several decisions. See for instance the cases of **Joseph Anthony Spares @ Goha v. Hussein Omary**, Civil Application No. 6 of 2012 and **Laurent Kavishe v. Enely Hezron**, Civil Application No. 5 of 2012 (both unreported). It follows therefore that the applicant must satisfy that, the application was filed within a reasonable time; he will suffer substantial loss if the order is not granted; and he has furnished security for due performance of the decree sought to be stayed."*

In view of the above cited position of law which guides this Court, the question that arise whether this application meets the conditions for grant of stay of execution.

For convenience, I prefer to start with the second condition that the application must be filed without undue delay. The applicant stated on oath to have become aware of the judgment and decree at the time when the time to lodge the notice of appeal had lapsed. Indeed, the impugned judgment was delivered on 28th May, 2021 in the absence of the applicant. The record bears it out that the decree was extracted on 26th July, 2021 and received by the applicant on 27th July, 2021. She then filed an application for extension of time to lodge the notice of appeal. The copy of the said application was appended to the supporting affidavit and it suggests that the application was lodged on 11th August, 2021.

Mr. Rwezahura was of the view that the application was filed out of time on the account simply because he was served with the notice of application for stay of execution on 13th December, 2021. However, as rightly submitted by Dr. Nshala, the record reveals that the applicant was not asleep after being aware of the decree and application for execution. She filed the applications for temporary/interim injunctive orders which were struck out on 25th May, 2022. Thereafter, the applicant filed the present application on 19th July, 2022. Considering further that nothing to suggest that the applicant's applications for

temporary/interim injunctive orders were filed in bad faith, I hold the view that, the applicant did not exhibit undue delay. Thus, the first condition has been met.

Reverting to first condition on irreparable loss, I find it apposite to reproduce what the applicant deposed in paragraph 8 of her affidavit:

"That the suit property if taken by the Respondent stand to be wasted or transferred to other person and render my appellate quest nugatory and the Respondent has no other means to make me whole in case I succeed against him in the Court of Appeal. In said piece of land, I have built apartments and If I am evicted from them I stand to lose a colossal amount of money I spent to construct them and my appeal fruits, in case I am successful, will be very hard to recover from the Respondent who has no known assets that may be attached and sold to satisfy a decree against him."
(Emphasize supplied).

I also worth nothing again that, in terms of the decree sought to be executed by the respondent, this Court ordered demolition of any structure developed on the suit land. The applicant has demonstrated to have built apartments thereon, a fact which was not disputed by the respondent and Mr. Rwezahula. His contention that the developments were done at the applicant's peril cannot be considered at this stage.

Therefore, if the apartments on the suit land are to be demolished in the course of executing the decree, I find merit in the applicant's contention that the suit property will be wasted. Considering further that the respondent did not specifically dispute or state to have sufficient money to compensate the applicant in the event the latter succeed in her appeal, I am of the firm view that the applicant stands to suffer substantial loss if the order for stay of execution is not granted. Mr. Rwezahula's argument that the applicant has not demonstrated irreparable loss lacks legal basis. This is so when it is also considered that the respondent has prayed to execute the decree by arresting and detaining the applicant as a civil prisoner. It is clear that the requested detention cannot be compensated in monetary value if the applicant succeeds in her appeal.

Moving to the last condition, is not disputed that the applicant deposed that she is prepared to furnish security as may be ordered by the Court to satisfy the judgment and decree. This fact is reflected in paragraphs 9 and 10 of the applicant's affidavit. I respectfully disagree with Mr. Rwezahura who held the view that applicant ought to have given the security before filing the application. It is settled law that the applicant's undertaking to pay security for the due performance is sufficient to comply the legal requirement. I am fortified, among others, by the case of **Mantrac Tanzania Ltd v. Raymond Costa**, Civil Application No. 11 of 2010 (unreported) in which the Court of Appeal held as follow:-

"Such undertaking is sufficient compliance with that requirement. To meet the condition the law does not strictly demand that the said security must be given prior to the grant of the stay order. To us a firm undertaking by the applicant to provide security might prove sufficient to move the Court, all things being equal to grant a stay order, provided the Court sets a reasonable time limit within which the applicant should give the same."

Given that the applicant has undertaken that she is prepared to furnish security, I agree with Dr. Nshala that the third condition has been met. That stance was also taken in the case of **Africhick Hatchers Limited** (supra)

In his alternative submission. Mr. Rwezahula urged me to require the applicant to deposit "bank guarantee aggravating to the value of the suit property". I am unable to agree with him on his quest. This is because the decree sought to be stayed did not require the applicant to pay the respondent value of the suit property. The decree ordered the applicant to vacate the suit land and demolish the development made thereon. That being the case, I am of the view that there is no need of undertaking to give vacant possession or demolish the suit property as the respondent will have nothing to lose if the applicant's appeal fails. He will proceed with execution of the decree.

However, I am satisfied that security for execution of monetary decree granted by this Court is required. This include, general damages of TZS

20,000,000 and replacement of the demolished wire fence with TZS. 6,500,000/=.

In the final analysis I hereby grant the application basing on the reasons offered herein. I accordingly proceed to order as follows:-

1. The execution of the judgment and decree of this Court in Land Case No. 71 of 2014 should be stayed pending determination of the application for extension of time to file notice of appeal that is pending in this Court.
2. The order for stay of execution in paragraph 1 above is given on that the applicant should deposit in Court a bank guarantee in the sum of TZS 26,500,000 within the period of thirty days from the date hereof.
3. Each party shall bear its own costs.

It is so ordered.

DATED at DAR ES SALAAM this **25th** day of **October, 2022.**



S.E. KISANYA
JUDGE