

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

AT MOSHI

MISC. CIVIL APPLICATION NO. 19 OF 2022

(Arising from Civil Reference No. 4 of 2022)

JOHN M. LITONDO (Administrator of the estate of the late Amina Abel Litondo)
..... **1ST APPLICANT**

HANNA H. LITONDO (Administratrix of the estate of the late Amina Abel
Litondo)
..... **2ND APPLICANT**

FRED P. SALAKANA (Administrator of the estate of the late Amina Abel
Litondo)
..... **3RD APPLICANT**

Versus

FATUMA AMRI MASIKA (Administratrix of the estate of the late Zaituni Amri
Masika)
..... **1ST RESPONDENT**

KBM-SONS & COMPANY LIMITED..... **2ND RESPONDENT**

RULING

28/10/2022 & 29/11/2022

SIMFUKWE, J.

The applicants filed a Chamber application under **section 95** and **Order XXXIX Rule 5(1) of the Civil Procedure Code, Cap 33 R.E 2019** seeking stay of execution of the Ruling and Order in Execution No. 14 of

2019 dated 2nd June 2022, arising from Land Case No. 19 of 2016 pending determination of Civil Reference No. 4/2022 which is pending before this court. The application was supported by the affidavit sworn by the learned counsel for the applicants one Mr. Almando Swenya. The respondents did not file counter affidavit.

The gist of this application is to the effect that, Land case No. 19 of 2016 was dismissed with an order that the suit premises is the property of the late Hoja Roweta and that all surviving heirs had the right over it. Following such decision, the respondents filed an application for execution that the court should issue an eviction order so that the administrator could distribute the property to the rightful heirs. The court granted the execution order. The applicants herein challenged the said execution order by filing to this court Civil Reference No. 4 of 2022. They also filed the instant application to stay the said execution pending determination of the said civil reference.

During the hearing of this application, the applicants enjoyed the service of Mr. Almando Swenya, the respondents were unrepresented. The matter was ordered to proceed by way of written submissions.

In support of this application, the learned counsel for the applicants adopted his affidavit to form part of his submission. He submitted to the effect that the background of this application is Land Case No. 19 of 2016 in which the court ordered that the house in question is subject to distribution of its proceeds of sale. Thus, all the grand children had the right to the proceeds of sale of the said house. Since some of the grand children of the late Hija Roweta are residing in the said house, Mr. Swenya was of the view that issuing eviction order will be contrary to the decree

issued by the court.

Mr. Swenya continued to submit that the 1st Respondent filed Execution Application No. 14 of 2019 and the mode of execution which she preferred was eviction of the residents of the disputed house while the judgment did not state that. He specified that the dispute emanated from the probate cause and it is centered on the distribution of the assets. Thus, it was wise to sell the said house and distribute the proceeds of sale of the house to the grand children of the late Hija Roweto on the reason that, the children of Hija Roweto all passed away survived with only grandchildren. He sustained that the court declared all the grandchildren to have the right over the house in question. To verify his contention, the learned counsel referred to page 7 of the court's judgment where it was stated that:

"There is no dispute however, that all the children of Hija Roweto the lawful owners of the house are all dead, none is surviving. The parties disputing over the suit are the grand children of Hija Roweto. It goes without saying therefore that all the surviving grand children have the right over the house subject to distribution."

Mr. Swenya elaborated that as a matter of fact, the procedure for execution of immovable property is stated under **section 42 of the Civil Procedure Code**, particularly under sub section (b), which provides that:

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"42 Subject to such conditions and limitations as may be prescribed, the court may, on the application of the decree holder, order execution of the decree-

a.

b. by attachment and sale or by sale without attachment of any property;"

As reflected under paragraph 5, 6 and 7 of the Applicants' joint Affidavit, Mr. Swenya believed that the impugned Execution is illegal from the fact that, it aimed at executing the order which was not issued by the trial court. He argued that the Applicants were compelled to file this application since the Execution was already in a process of being challenged, through Civil Reference No. 4 of 2022 which is pending for determination in this court.

Explaining the meaning of stay of execution, Mr. Swenya submitted that legally, "stay of execution" is an equitable remedy in a nature of an injunctive relief. It is a command of the court, intended to stop a particular act from being done or prohibiting certain fact from being actualized or realized. Also, it is an order of a court to stop a process of actualizing another lawful court order. That, it is an obstruction of a process of execution of a lawful court decree or order. That, such process is derived from the provision of **Order XXI rule 24 of the Civil Procedure Code** (supra) which provide that:

"The court shall upon sufficient cause being shown/ stay the execution of such decree for a reasonable time, to enable the judgment debtor to 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 which might have been issued thereby or if application for execution had been made thereto. A

judgment debtor has been in the situation whereby the property attached or seized under an execution the court which issued the execution order may order the restitution/ return of such property to the owner or discharge the judgment debtor pending the result of the application or appeal.”

In the instant matter, the learned counsel was of the view that in this application there are special circumstances which compelled the Applicants to file this application. According to Mr. Swenya, the term special circumstances constitute several grounds upon which, the court should consider. He referred to the famous case of **ATILIO VS MBOWE [1969] HCD 284** which laid down three grounds which constitute special circumstances. In the said case, Mr. Swenya stated that, Sir Georges, former Chief Justice of Tanzania amplified those three grounds as follows:

- 1. High chances of success on the main case;*
- 2. Balance of Convenience and*
- 3. Irreparable loss.*

He argued that the circumstances are similar to what was stated in the case of **The Permanent Secretary Ministry of Water and Irrigation and Another vs Overseas Infrastructure Alliance (India) PVT Ltd, Misc. Application No. 26 of 2020** (unreported) (HC) in which this Court at page 5 of its ruling held that:

"In deciding whether stay of execution be granted or otherwise, the court is purely exercising discretionary powers. In exercising that discretion, the trial judge

or magistrate use, reasonability, logic and common sense.”

The learned counsel submitted further that the applicants have narrated in their Affidavit that they have filed Civil reference No. 4 of 2022, which is pending for determination and the reasons for challenging the same is that, the execution order was illegal and not tenable since it is not from the decree filed for execution. Mr. Swenya was of the view that the possible consequences of the application if not stayed, will render the reference together with the appeal nugatory.

He explained further that considering that the matter is of probate by nature, then it is wise this application be granted in order to maintain peace and justice as held in the case of **Permanent Secretary Ministry of Water and Irrigation and Another** (supra) at page 10 that:

In the circumstances of this application, it is only prudent logical and for the benefit of both parties to grant the prayer for stay of execution. I accordingly grant as prayed with no order as to costs.

[Emphasis added]

The learned counsel implored the court to grant the application as prayed.

In reply, the 1st respondent who was assisted by advocate Charles Mwanganyi to draft the submission, on the outset submitted that this application is misconceived, frivolous, baseless and unfounded or otherwise hopeless before this Court. Also, it was stated that legally,

failure to file counter affidavit or affidavit in reply does not necessarily mean that one does not oppose an application as stated in the case of **Harith Rashid Shomvi v Aziza Juma Zomboko, Civil Application No. 496/01 of 2019** (CAT) where the Court emphasize that where the respondent does not dispute matters of fact made in affidavit, there is no need to file a counter affidavit or affidavit in reply. That failure did not mean the application is not contested but the Respondent may argue application on points of law. Basing on that finding, Mr. Mwanganyi opted to submit on points of law only.

The first point of law raised was *locus standi*. That, the applicants herein lack *locus standi* to institute this application before this Court since they were all suing as administrators of the estate of the late Amina Abel Litondo. However, in the affidavit in support of the application, nowhere the letter of administration suffices their appointment and capacity to sue on behalf of the deceased was ever attached to the affidavit.

He continued to state that the legal principle is very clear to the extent that failure to attach a letter of administration in a pleading to show the capacity to sue renders the application incompetent as the applicants lack *locus standi*. To buttress this argument, the learned counsel referred to the case of **Ramadhani Omary Mbuguni (as Legal representative of the late Rukia Ndaro) vs Asia Ramadhani, Civil Application No. 173/12 of 2022** (CAT) in which the Court at page 4 held that:

"Letter of administration being an instrument through which the applicant traces his standing to commence the

proceeding, was in our view an essential ingredient of the application in whose absence the Court cannot have any factual basis to imply the asserted representative capacity, the instrument constituting the appointment must be pleaded and attached. Failure to plead and attach the instrument is a fatal irregularity which renders the proceeding incompetent for want of the necessary standing.”

The learned advocate raised another point of law that, this court lacks jurisdiction to deal with this application. He referred to paragraph 3 of the affidavit in support of the application where the applicants averred that they have filed Civil Appeal No. 229 of 2020 before the Court of Appeal against the judgment and decree of Land Case No. 19 of 2016 which was delivered before this Court.

He stated that it is trite law that once a notice of appeal is filed to appeal against the decision of the High Court, the High Court ceases with jurisdiction. To substantiate this averment, the learned advocate referred to the case of **Exaud Gabriel Mmari (as Legal Representative of the Late Gabriel Barnabas Mmari) Versus Yona Seti Akyo and 9 Others, Civil Appeal No. 91 of 2019** (CAT) at Tanga (unreported) and argued that the applicants ought to have filed stay of Execution before the Court of appeal.

Another point of law which was raised by Mr. Mwanganyi was that this application is incompetent as the Court is not properly moved. He argued that the Applicant has moved this Court with **Order XXXIX rule 5(1)**

of the Civil Procedure Code (supra) while the provision deals with stay of execution pending appeal. Not only that, he said the said provision provides that the appeal shall not bar stay of execution.

He was of the view that since the applicant herein is seeking an order for stay of execution pending Revision (sic) before this Court, then the court is not properly moved which renders the entire application incompetent and ought to be dismissed.

Moreover, it was submitted that, the application before this court is incompetent for being supported by the affidavit which was sworn by the Advocate who represent the applicants as seen under paragraph 1 of the affidavit in support of the application. Reference was made to the case of **Lalago Cotton Ginnery and Oil Mills Company Ltd vs Loans and Advances Realization Trust (LART), Civil Application No. 80 of 2002** in which the Court said that:

"An advocate can swear and file an affidavit in proceedings in which he appears for his client, but on matters which are in the advocate's personal knowledge only. For example, he can swear an affidavit to state that he appeared earlier in the proceedings for his client and that he personally knew what transpired during proceedings."

He also cited another case of **Tanzania Breweries Limited v Herman Bildad Minja, Civil Application No. 11/18 of 2019** (CAT) to support his argument.

Submitting on the merits of the application, it was argued that the

Applicants have failed to warrant the Court to stay execution. Also, it was submitted that the application has been overtaken by events since the Execution Order had been granted long time and Court Brokers have been appointed. That, the applicant appeared in Execution No. 14 of 2019 and failed to show cause as to why execution should not be granted. The learned counsel was of the opinion that the cited cases in submission chief are distinguishable.

In conclusion, it was stated that this application is devoid of merits and he prayed the same to be dismissed with costs.

Having considered the submissions of both parties as well as the applicants' affidavit, the issue for determination is ***whether the application has merit.***

In her submission, the 1st respondent through advocate Mwanganyi has raised the matters of law which I will start dealing with before going to the merit of this application.

The issue of *locus standi* is among the points of law raised by the 1st respondent. I opted to start with this issue since it is a matter of law and it is a legal requirement that the suit/application cannot be initiated in court if the claimant/applicant has no interest/right to that claim.

In this application, it has been alleged that the applicants herein have no *locus standi* since they failed to attach the document to ascertain that they are indeed the administrators of the estate of the late Amina Abel Litondo.

I carefully examined the applicants' affidavit which was sworn by their learned advocate. I did not find the paragraph in which the applicants

stated to be the administrators of the estate of the late Amina Abel Litondo. The applicants did not attach the letter of administration to such effect.

It has been underscored by the Court of Appeal that in order to establish the right to commence the proceedings in court, the instrument constituting the appointment must be pleaded and attached. This was clearly stated in the recent decision of the Court of Appeal in the case of **Ramadhani Omary Mbuguni (a legal Representative of the late Rukia Ndarro)** (supra) which was also cited by the respondent in her submissions.

In the cited case, the Court of Appeal specified the effect of failure to plead and attach the instrument to prove the appointment. The Court of Appeal at page 4 of its ruling held that:

"Failure to plead and attach the instrument is a fatal irregularity which renders the proceedings incompetent for want of the necessary standing."

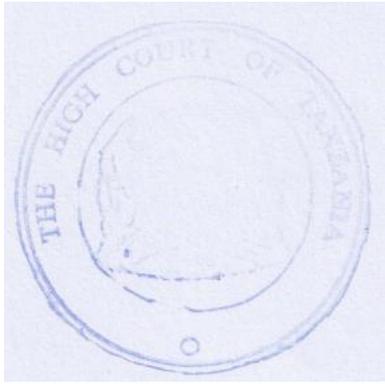
I fully subscribe to the position of the superior Court of Tanzania. In the event, I hereby decide that, just like the Court of Appeal, in this application failure by the applicants to attach the document to prove their representation as administrators of the late Amina Abel Litondo, renders this application incompetent.

In the premises, I find no need of discussing the merits of this application as well as other issues of law raised by the 1st respondent. Consequently, I hereby struck out this application for being incompetent before the court.

Considering the relationship between the parties, no order as to costs.

It is so ordered.

Dated and delivered at Moshi this 29th day of November, 2022.



X

A handwritten signature in blue ink, appearing to read "S. H. Simfukwe", is placed over a light blue rectangular background.

S. H. SIMFUKWE
JUDGE
Signed by: S. H. SIMFUKWE