

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA DISTRICT REGISTRY

AT ARUSHA

MISC. CIVIL APPLICATION NO. 163 OF 2022

(Arising from Application for Execution No. 31/2021, Originating from Land Case No. 09 of 2019)

EDWIN MTEI.....APPELLANT

VERSUS

FINN CONSTRUCTION COMPANY LIMITED & 2 OTHERS.....RESPONDENT

RULING

23rd November & 07th December 2022

TIGANGA, J.

Under certificate of urgency certified by Catherine Edna Edwin and filed by the Counsel for the applicant, the applicant moved this court under section 68 (e) and 95 of the Civil Procedure Code [CAP 33 R.E 2019] and Order XXXIX Rule 5 (2)(3)(a)(b) and (c) as well as (4) of the same law.

The application was styled in two portion, the exparte portion and the inter-parties. In the exparte portion, the court was asked to issue an exparte order staying execution of the decree of this Court in Land case No. 09/2019 dated 06th September, 2021 pending hearing of this application interpartes. While in the interparties portion, the court was asked to stay execution pending hearing of an application to set aside an

exparte judgment and decree passed before the High Court (Arusha District Registry in Land Case No.09 of 2019).

The applicant also asked for costs of this application to follow event, and any other relief as this Honourable court may deem just and equitable to grant.

The application was made by chamber summons and supported by an affidavit sworn by Edwin Mtei, the applicant. When this application was called on for hearing, the counsel for the Respondent. Mr. Peter Nyamwero, Advocate informed the court that after reading the content of paragraph 16 of the affidavit, he finds that, the applicant has committed himself to deposit security. Now, that the applicant has committed himself to deposit security he has no objection to the application.

Following that response, it is obvious that the respondent has not or disputed the application but that non objection is on the condition that the applicant deposit the said security as may be determined by the court.

It should be noted that, the issue of security for costs has legal base under Order XXXIX rule 5(3) which depicts that no order for stay of execution shall be made under subsection (1) or (2) of the CPC unless the High Court or the Court making it is satisfied that;

- a) The 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 my ultimately be binding upon him."

The provision cited above is clear that, it is now a condition precedent that, for an order for stay of execution to issue, three conditions must be met. This provision must, as a matter of law, be read together with Order XXI rule 24(3) of the Civil Procedure Code (Supra) which provides that;

"Before making an order to stay execution or restitution of property or the discharge of the Judgment debtor, the court may require such security from or impose such conditions upon, the judgment debtor as it think fit."

As rightly observed and submitted by the counsel for respondent, the fact which has been conceded by the counsel for the applicant, is that the applicant undertook to provide for security pending hearing of the application to set aside an exparte Judgment which is the case in the execution sought to be stayed.

In the case of **Simon John Ngalesoni vs Father Valemil Tomic, (suing as a legal representative of Catholic Diocese of Arusha)** Misc. Civil Application No. 26 of 2022, (Unreported) My Sister Mwaseba, J

relied on the decision of the Court of Appeal of Tanzania of **MATRAC Tanzania Ltd vs Raymond Costa**, Civil Application No. 11/2010 (Unreported), where it was held *inter alia* that:

“That, the other condition is that, the applicant for stay order must give security for due performance of the decree against him. To meet this 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 a security might prove sufficiently to move the court. All things being equal, to grant a stay order. Provided the court sets reasonable time limit within which the applicant should give the same.”

Under the guidance of the above provisions and case authorities, I am satisfied that the fact that the application is sought pending the hearing and determination of the application for setting aside an *ex parte* Judgement prove that, the judgment was passed without affording the applicant an opportunity to be heard. Therefore, refusing to stay execution may result into substantial loss for him because, in that other application for setting aside we may win, who knows?.

There is evidence as well that, after the applicant had noticed the presence of the matter, he took reasonable step without unreasonable delay and that, his undertaking in paragraph 16 of paying the security

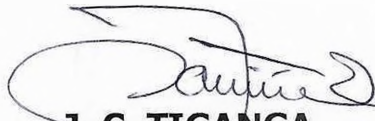
for due performance of the decree meets the third condition provided in Order XXXIX rule 5(3)(c) of the CPC. On that base therefore I allow the application by staying the execution of the decree passed on 06th September, 2021 in Land Case No. 09 of 2019 pending hearing and determination of the application to set aside the exparte Judgment passed in that Land case.

As a condition however, the applicant has to deposit with the court, the security which is cash money Tshs. 1,044,859,500/= or in alternative any immovable property worthy that amount. Costs should abide to the result of the main application.

It is so ordered.

DATED at **ARUSHA**, this 12th day December, 2022.




J. C. TIGANGA
JUDGE

