

**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. 584 OF 2020

ALEX DAUDI CHIBUNU APPLICANT

VERSUS

SARAPHINE KAMARA 1ST RESPONDENT

KINONDONI MUNICIPAL COUNCIL 2ND RESPONDENT

DAR ES SALAAM CITY COUNCIL 3RD RESPONDENT

IGALULA AUCTION MART LIMITED 4TH RESPONDENT

**(Application for stay of execution of the decree of District Court of
Kinondoni in Civil Case No. 15 of 2001)**

RULING

8th April, 2021 & 3rd March, 2022

KISANYA, J.:

When the present application for stay of execution came up for mention on 1st March, 2021, it was ordered that the matter would be disposed of by way of written submissions. Parties were given the schedule within which to file their respective submissions, whereby the application was fixed for mention on 3rd May, 2021. The applicant and 1st respondent timely filed their respective submissions for and against the application. However, the trial judge was transferred to another duty station before fixing the date of ruling. It was also observed later that parties had other two cases on the same matter. Since the said cases had been assigned

to two different judges, it was found effective that the same be handed by one judge. Those are the reasons for delaying in delivering the ruling at hand.

The application is made under Order XXXIX, Rule 5(1), (3) and (4), Order XLIII Rule 2 and section 95 of the Civil Procedure Code, Cap. 33, R.E. 2019 ("the CPC"). The applicant, Alex Daudi Chibunu has moved this Court seeking stay of execution of the eviction order arising from the *ex-parte* decree of the District Court of Kinondoni in Civil Case No. 15 of 2001 pending hearing and determination of Civil Appeal No. 224 of 2020 filed in this Court.

The background facts as deposed in the affidavit in support of application and the annexures appended thereon are as follows. The 1st respondent, Seraphine Kamara successfully sued the applicant on a claim of ownership of land described as Plots No. 339 and 340, Block H, Mbezi Beach High Density Area, Dar es Salaam (the suit premises). In its judgment delivered on the 11th day of September, 2014, the District Court of Kinondoni ordered the applicant to vacate the suit premises and demolish the development made thereon, within ninety days from the date of service of the copies of judgment and decree.

When he became aware of the *ex-parte* judgment, the applicant lodged two applications. The first application was for extension of time to set aside the *ex-parte* judgment and was filed and registered in the Resident Magistrate's Court of Kinondoni Misc. Civil Application No. 222 of 2019. Another application was for

extension of time within which to apply for stay of execution of the *ex-parte* decree pending hearing of an application for extension of time to set aside the ex-parte judgment. The second application was lodged in the District Court of Kinondoni as Misc. Civil Application No. 219 of 2019. While the former application was granted, the application for extension of time within which to apply for stay of execution of the ex-parte decree was dismissed for it being incompetent before the lower court.

Subsequent to the two decisions, the applicant lodged an application to set aside the *ex-parte* judgment. The application was filed in the District Court of Kinondoni and registered as Misc. Civil Application No. 135 of 2020. As regards the dismissal of the application for extension of time within which to apply for stay of execution, the applicant appealed to this Court against the ruling and drawn order issued thereto.

At the same time, the 1st respondent lodged before this Court, an appeal to contest the ruling that extended the time within which to file application to set aside the *ex-parte* judgment. She also engaged the fourth respondent who served the applicant with the eviction notice dated 2nd November, 2020. In that regard, the applicant decided to lodge the present application for the foresaid order. The 1st respondent contested the application by filing her counter-affidavit.

As indicated earlier, only the appellant and 1st respondent filed their respective written submission for and against the application.

Having gone through the submissions, I have observed that the respondent's counsel, Dr. Rugemeleza Nshala raised an issue which goes to root of this matter. He argued that the application is not meritorious because it seeks stay of execution of the *ex-parte* decree whose appeal is not pending before this Court. It appears that his submission was based on the submission in chief in which the applicant's counsel, Mr. Emmanuel Hyera submitted that the basis of the application is the ex-parte judgment delivered on 11th September, 2014 and which resulted to the application for stay of execution which was dismissed by the lower court. Therefore, citing the case of **Awinia Mushi vs Tropical Pesticides Research Institute**, Civil Appeal No. 2 of 2006 (unreported), Dr. Nshala argued that the ruling and drawn order subject to the appeal pending before this Court is not executable. He, thus, implored me to dismiss the application with costs.

It is on record that the applicant's counsel did not file the rejoinder submission. Thus, the 1st respondent's submission on the above issue was not controverted.

My starting point is that this application has been preferred under Order XXXIX, Rule 5 (1),(2) and (4) of the CPC, which provides:-

"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) N/A

(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.”(Emphasize supplied).

Flowing from the above provision, sub rule (1) in particular, it is apparent that this Court has discretion to order stay of execution of decree whose appeal is pending before it. Therefore, in order the application for stay of execution to stand, there must be an appeal against an executable decree. This stance was taken in the case of **Awinia Mushi vs Tropical Pesticides Research Institute**, (supra) cited by Dr. Nshalla.

It is common ground that the applicant seeks stay of execution of eviction order arising from an *ex-parte* decree of the District Court Kinondoni in Civil Case No. 15 of 2001. However, it is on record that an appeal against the *ex-parte* decree of the District Court of Kinondoni in Civil Case No. 15 of 2001 was not instituted in this Court. Both parties are at one that, what is pending in this Court is an appeal against the ruling of the Resident Magistrate Court of Kinondoni in Misc. Civil

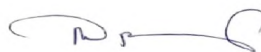
Application No. 219 of 2019, in which the applicant's application for extension of time within which to apply for stay of execution was dismissed. As rightly argued by Dr. Nshalla, the ruling and drawn order subject to the appeal pending in this Court are un-executable and incapable of being stayed. This position was stated in **Awinia Mushi vs Tropical Pesticides Research Institute** (supra), when the Court of Appeal had this to say on the issue under consideration:-

"In the instant case the decree which is sought to be stayed is not intended to be appealed against, and the refusal order which is intended to be appealed against is not executable, and so incapable of being stayed. The applicant appears to be in a dilemma."

I associate myself with the above position of law. Considering that the appeal against the ex-parte decree sought to be stayed is not pending in this Court and given the fact that the ruling and drawn order in respect of the appeal pending before this court is not executable, I am of the view that the application for stay of execution pending the said appeal is incompetent before this Court.

In view of the foregoing, this application is hereby struck out with costs. It is so ordered.

DATED at DAR ES SALAAM this 3rd day of March, 2022.



S. E. Kisanya
JUDGE

Court: Ruling delivered this 3rd day of March, 2022 in the presence of Mr. Emmanuel Hyera, learned advocate for the applicant and holding brief of Dr. Rugemeleza Nshala, advocate for the 1st respondent and in the absence of other respondents.



S.E. Kisanya
JUDGE
03/03/2022