

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRI OF MWANZA
AT MWANZA

MISC. LAND APPLICATION NO. 47 OF 2022

(Arising from Land Appeal No. 36 of 2022, from District Land and Housing Tribunal for Mwanza at Mwanza Application No. 134 of 2012)

CRDB BANK PLC 1st APPLICANT

EAGLE AUCTION MART & COURT BROKERS 2nd APPLICANT

VERSUS

HAMIDA SEIF AHMAD 1st RESPONDENT

FIDELIS PETRO SWAI 2nd RESPONDENT

RULING

15th & 21st February, 2023

ITEMBA, J

The applicants herein, lost their case in **Application no. 134 of 2012** at the District Land and Housing Tribunal for Mwanza at Mwanza herein the Tribunal, where the judgment and decree were issued against them. Among others, the Tribunal declared that the sale of the suit premises namely **Plot No. 50 Block "C" Igoma** was null and void and that the 1st applicant has breached the loan agreement with the 1st respondent. The applicants being dissatisfied with the said decision, filed a land Appeal no. 36 of 2022 before this court and later brought this

application to stay of execution pending hearing and determination of the intended appeal.

In support of their application, is the applicant's affidavit sworn by their counsel Advocate Renatus L. Shiduki. Briefly, the deponent averred that the appeal which they have file raises a number of significant issues to be determined by this court including (i) determination on the propriety of the Tribunal in nullifying the auction of the suit premises, (ii) the return of the suit premises to the 1st respondent (iii) awarding the 1st respondent compensation of TZS 250,000,000/= the applicant being in breach of the loan agreement while ordering the 1st respondent to repay the outstanding loan amount in a manner to be agreed with the 1st applicant among others. The applicant's counsel also avers in the affidavit that the applicant is an ongoing concern, a commercial bank with branches throughout the country therefore able to satisfy the decree should this court find the appeal unmeritorious. He added that there was evidence produced at the tribunal that the respondent is sick and paralysed something which raises questions to his financial capability.

The respondents have filed a counter affidavit deponed by their counsel Salim Ahmed Fundikila Yahya. He opposes the application stating

that the Tribunal justly and fairly decided the matter in favour of the 1st respondent. He also avers that granting of this application will delay justice to the 1st respondent therefore, the applicant should furnish security of cost so that balance of convenient is observed as the property subject to execution 'may be used as hidden' by the applicant and render the execution a nullity to the detriment of the 1st respondent.

Both parties were of the view that hearing of the application should be by way of writing. However, the respondents did not file their written submission.

In his submission, counsel for the applicant reiterated what is in the affidavit. He insisted that the 1st respondent's financial standing is unknown and she does not have assets capable of refunding the TZS 250,000,000/=. That this application was not made with unreasonable delay. On the issue of security, the learned counsel relied on a case of **National Bank of Commerce Limited v Alfred Mwita**, Civil Application No. 172 of 2015 which states inter alia that the law does not strictly demand that the said security must be given prior to the grant of the stay order. He stressed that the execution by respondent of TZS 250,000,000/- on top of nullification of auction of the suit premises will affect the 1st

applicant cash flow as the 1st applicant's business depends on undisturbed movement of cash to finance her daily operations. The learned counsel also argued that the grant of stay will prevent irreparable loss as it was held in the case of **Tanzania Breweries Limited v Antony Nyingi** Civil application no. 12 of 2014.

As mentioned earlier, the respondents did not file their submissions. It is trite law that, failure to file written submission as directed by the court is equal as being absent on the hearing date without notice. See **Monica d/o Dickson v. Hussein J. (Kny Chama Cha Wafanyabiashara)**, PC Civil Appeal No. 04 of 2019. Therefore, the the matter will be heard *ex-parte*.

Having appreciated the records and both parties' affidavit and counter affidavits applicant's submission and the authorities cited, the issue is whether this application holds water.

Stay of execution principles were as articulated in ***Ignazio Messina & National Shipping Agencies V. Willow Investment & Costa Shinganya***, CAT-Civil Reference No. 8 of 1999 (DSM-unreported), in which the Court of Appeal of Tanzania held as follows:

“It is now settled that

- (i) The Court will grant a stay of execution if the applicant can show that refusal to do so would cause substantial irreparable loss to him which cannot be atoned by any award of damage;*
- (ii) It is equally settled that the Court will order a stay if refusal to do so would, in the event the intended appeal succeeds, render that success nugatory;*
- (iii) Again, the Court will grant a stay if, in its opinion, it would be on a balance of convenience to the parties to do so.”*

See also: **SDV Transmi (Tanzania) Limited v. MS STE DATCO**, CAT-Civil Application No. 97 of 2004 (DSM-unreported).

The Court has evolved from the above principles, and in the case of **The Registered Trustees of The Chama Cha Mapinduzi v Mehboob Ibrahim Alibhai (As legal Representative of the late Ibrahim Gulamhussein Alibhai** Civil Application No. 117/17 of 2018 (CAT) Dar es salaam, it was held that;

"No order for stay of execution shall be made under this rule unless the Court is satisfied that-

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

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

The applicant claims that substantial and irreparable loss will result if the decree is executed. The respondent challenge this claim to the extent that stay of execution will delay justice to the respondent he therefore prays that the applicant should furnish security for costs.

To answer the issue raised above, the purpose of staying execution of a decree has to be looked into. Commenting on rule 5 of the Indian Code of Civil Procedure, 1908 which empowers an appellate court to stay execution of a decree, in his book, **Civil Procedure**, 6th Ed., 2011 Reprint, Eastern Book Company, Lucknow, India, Justice C. K. Thakker (Takwani) states as follow:

"The object underlying Rule 5 is to safeguard the interests of both, the judgment - holder and the judgment - debtor. It is the right of decree - holder to reap the fruits of his decree. Similarly, it is the right of the judgment - debtor not merely to get barren success in case his appeal is allowed by the appellate court. This rule thus strikes a just and reasonable balance between these apposing rights."

Based on this reasoning, in respect of stay of execution in the quotation above, to which I totally agree, whereby in the particular circumstances of this case is to safeguard the applicant from ending up with barren success in the event he succeeds in his appeal.

I am convinced that the applicant will be subjected to considerable and irreparable loss if the impugned decree is executed. However, as prayed for by the respondent and as mentioned above one of the conditions for the court to issue an order of stay of execution is for the applicant to furnish security. Therefore, it is important and safe for the respondent if the applicant will file security which is the amount of the compensation ordered by the Tribunal.

In the end, I find merit in the application which I hereby grant. Accordingly, I order stay of execution of the decree in **Application No. 134 of 2012** before the District Land and Housing Tribunal for Mwanza, pending hearing and determination of Land Appeal no. 36 of 2022, before this court. This order is conditional upon the applicant depositing security of costs to the tune of Tanzania Shillings Two Hundred and Fifty Million (**TZS 250,000,000/-**) within thirty days from the date of this ruling. In

default, this order shall lapse automatically. Costs of the application shall abide the outcome of the intended appeal.

It is so ordered.

Dated at Mwanza this 21st day of February 2023.



Ruling delivered under my hand and seal of the court in chambers, in presence of Mr. Lubango advocate for the plaintiffs also holding brief for the respondents' counsel, and Ms. G. Mnjari, RMA.

A handwritten signature in blue ink, identical to the one in the previous image, appearing to be 'L. J. Itemba'.

L. J. ITEMBA
JUDGE
21.02.2023