

THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE ARUSHA DISTRICT REGISTRY

AT ARUSHA

MISCELLANEOUS LAND APPLICATION No. 147 OF 2022

(Originating from the District Land and Housing Tribunal for Babati Misc. Land

Application No. 173 of 2022, Originally from Magugu Ward Tribunal in Land

Complaints Nos 18 of 2017 and 4 of 2017)

LUKAS KATAMBALAAPPLICANT

VERSUS

FATUMA SALUM.....RESPONDENT

RULING

Date of last order 14th December 2022

Date of Ruling 17th February, 2023

Bade, J.

This application has been made under Order XXI, rules 24, 27 and Section 95 of the Civil Procedure Code, [Cap. 33 RE 2019]. It is made through the Chamber Application supported by an affidavit sworn by the applicant himself.

The orders sought in the chamber summons are two, paraded in the following language:

1. That, this Honourable Court be pleased to stay the execution of the Land Complaint No. 18 of 2017 done through Execution No. 63 of 2018 of the District Land and Housing Tribunal for Babati; and
2. Any other relief this court deems fit and just to grant.

The application was contested by the respondent through oral submission, even though she did not file any counter affidavit. The respondent appeared in person, unrepresented; while the Applicant had the services of the counsel John Ndibalema. There was a filing schedule that was entered by this Court upon the initial filing of the application, the same was communicated to both parties, and the Applicant counsel provided the Court with proof of the service of the documents and the order. Unfortunately, the Respondent was not able to adhere to the filing schedule, explaining that her advocate was indisposed and thus unable to file. The applicants counsel demanded proof of the indisposition, which the Respondent could not produce, and thus compel the hearing without further filing against the option of proceeding with the applicant only, since the Respondent entered appearance in person during the hearing of the application. As a matter of procedure, the

applicant's counsel started arguing the application, adopting the averments of the contents of the applicant's affidavit to form part of his submission.

He submits that the matter started at Magugu Ward Tribunal as Land Complaint No. 4 of 2017, which decided that it had no jurisdiction to hear the complaint, and were thus directed to file at District Land and Housing Tribunal Babati.

Meanwhile, the Ward Tribunal opened a Land Complaint No. 18 of 2017 with same parties where the complainant (Fatuma Salimu now Respondent) was declared a winner. The Respondent executed the decree at District Land and Housing Tribunal Application No. 63/2018. So, the Respondent (now Applicant) was prejudiced.

The Counsel explained further that the Applicants had previously filed Application No. 171 of 2022 for Revision of the Ward Tribunal decision against Land Complaint No. 18 of 2017.

They also filed Misc. Land Application No. 174/2022 praying to stay Execution No. 63 of 2018. They were both dismissed on 27th September, 2022 as they were found to lack merit.

Counsel submits that they have filed Land Revision No. 21 of 2022 so as to challenge the jurisdiction of the Magugu Ward Tribunal.

The counsel urged the Court that regarding the grant of stay of execution, three factors are important. In **TanESCO vs IPTL & 2 Others [2000]** TLR 324 the 3 factors that were conditioned for stay to issue were;

First, Pendency of a suit with likelihood of success – the counsel explained that they have filed Land Revision Application challenging the jurisdiction of the Ward Tribunal, and maintained that in his view they believe they stand a chance to succeed.

Secondly, Irreparable loss if the Application is not granted the stay. This he urges shall hold true since the Applicant was not heard on the Land complaint No. 4 and 18 of 2017 at the Ward Tribunal. But also, because the Execution proceedings are against a family dwelling.

Thirdly, on the balance of convenience, the balance tilts to the Applicant because of the issues as mentioned above.

The counsel concludes his submission that the execution be stayed for these reasons until the Land Revision Application is heard and determined.

The Respondent on the other hand charged that she filed Complaint No. 4 of 2017 at the Ward Tribunal where they were heard *intepartes*. She maintains that both parties produced witnesses. She insists that this whole dispute is resulted from the Applicant trespassing to her deceased grandmother land which was in fact bordering the Applicant. The Respondent insists that she won; prompting the Applicant to appeal to the Ward Tribunal.

The Respondent submits further that at Ward Tribunal they were not heard *interpartes*, instead the Applicant took the matter to the District Land and Housing Tribunal through Case No. 64/2016. There the matter was heard *exparte* and won the case on 18/06/2022. The

Respondent further maintains that she was assigned a court broker to help her recover the land that was issued to her as a winner. The Applicant was also ordered to remove the property that he had built on the site, but up to this moment the Applicant has not complied with the said order.

In conclusion, she laments on how the Applicant has been abusing the Court processes to thwart their efforts to reclaim their property, and she urged further that the balance of convenience is tilted on her side because her own family is now on a rented place as they don't have the use of this property of theirs, which they inherited from their late grandmother, despite being declared lawful owners.

Rejoining, the Applicant's Counsel submits that the Respondent has not shown that she will suffer irreparably; and does not object to the application in principle and that she could wait without much damage to her, and thus urged the Court to grant the stay.

Having heard both submissions, it was opportune to determine the application. However, before going to the merits of the application some flaws were noticed in the chamber application and the supporting affidavit which, in real sense, are pleadings and need to be at one point or another supporting each other. See the case of **MPS Oil Tanzania Limited and 2 others vs CITIBANK Tanzania Limited,**

Miscellaneous Application No. 248 of 2014 CAT at Dar es salaam (unreported) where it was observed that:

"These cases dealt with pleadings in a suit but I have no flicker of doubt that the principle is applicable in the present situation as well, for in applications, the chamber summons and affidavits thereof are pleadings within the meaning envisaged by the term in suits generally."

The chamber application's prayer is on stay of execution as depicted from the same document. The affidavit, particularly paragraph 10 intimates the rest of the application is for leave. The remaining paragraphs being demonstrating the historical background of the matter, speaks on the revision of the land complaints No. 18 of 2017 and 4 of 2017 before Magugu Ward Tribunal and Land Application No. 171 of 2022 before the District Land and Housing Tribunal for Babati. In the case of **Benjamini Mugagani vs Bunda District Designated Hospital**, Labour Application No. 80 of 2020, HC at Musoma (unreported) Kisanya J, when confronted with the situation akin to the one under scrutiny observed, and to which I fully subscribe that:

"In the premises, I agree with Mr. Mhagama, that the application is not properly supported by the affidavit due to variance between the chamber summons and the affidavit."

The variance of prayers in those two documents as gleaned in my view, can not assist the Court to reach substantial justice as they do not back each other up.

The chamber summons and affidavit must have engagement in order to make the Court understand the prayer(s) sought by the Applicant.

Another defect vivid on the chamber summons and affidavit is that if at all, the intention of the applicant is to seek stay of execution as demonstrated through the chamber summons, the said pleadings do not indicate that there is a pending matter in Court. This is against the long-established principle by the Court. See the case of **Juma Hamis versus Mwanamkasi Ramadhani**, Civil Application No. 34 of 2014 CAT at Arusha (unreported) where it was held that:

*"When all is said and applied to the factual situation at hand, it cannot be doubted that the applicant **has lodged a Notice of Appeal** to this Court in accordance with Rule 83, and that this application was instituted without delay. Furthermore the Applicant*

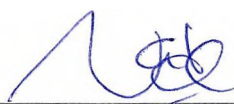
had deponed that if stay is not granted there a real likelihood that he will suffer irreparable inconvenience. But those are not the only requirements which must be fulfilled to entitle an applicant for an order of stay.....all the requirements must be satisfied before an application for stay is granted ”

As said, nowhere in the filed pleadings intimated that the applicant has filed a pending case/appeal, revision or review which could justify this Court grant the sought vague and contradictory application. To add ink on it, no application for stay of execution can be made and stand stiff where there is no case pending. In the circumstances therefore, no way this Court can legally side with the Applicant in realization of his prayer.

That said and done, the Application is adjudged incompetent and therefore it is hereby strike out with costs.

It is accordingly ordered

DATED at ARUSHA on the 17th day of February 2023.



A.Z. BADE
JUDGE

RULING delivered before parties at **ARUSHA** on the **17th** day of
February 2023



A handwritten signature in blue ink, appearing to read "A. Z. Bade", is written above a horizontal line.

A. Z. BADE
JUDGE