

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

LAND APPEAL NO. 28 OF 2022

(Originating from the Katavi District Land and Housing Tribunal in Misc. Land Application No. 363/2022)

LUCAS M. MALYANGO APPELLANT

VERSUS

VICENT MASHENENE RESPONDENT

JUDGMENT

24/04/2023 & 09/05/2023

MWENEMPAZI J.

The appellant is aggrieved by the decision of the District Land and Housing Tribunal of Mpanda District at Mpanda granting prayers of stay execution in the impugned Ruling in Miscellaneous Land Application No. 363 of 2022.

In the trial Tribunal, the respondent applied for an order for stay of execution of the Judgement and decree in Application No. 8 of 2015 which was heard and determined ex-parte. The applicant (respondent herein) alleged that he was not aware of the pendency of the main application as he was not served

with the main application. That hindered him from filing for defence and also not entering appearance in the trial Tribunal. The appellant (respondent thereat) however argued that summons was served by substituted service under **Order V Rule 20(2) of the Civil Procedure Code, Cap. 33 R.E 2022** thus legally the respondent had sufficient notice to make him know the pendency of the application in the Tribunal. Thus, the tribunal ruled by granting the application for stay of execution with no order as to cost, the reasoning being that the applicant (respondent herein) has acted and taken necessary steps after being aware of the case.

The appellant filed this appeal to challenge the decision of the trial tribunal raising three grounds of appeal as follows:

1. That, the trial tribunal erred in law to entertain the application for stay of execution which was time barred.
2. That, the trial Tribunal erred in law to hold that the substituted service made by the appellant was not sufficient for the respondent to know the presence of the case.

3. That, the trial tribunal erred in law to entertain the application which didn't join the tribunal broker, though he was impleaded as the one who was conducting execution at the material time.

The appellant prays for the appeal to be allowed in its entirety; that the Ruling and drawn order of the trial tribunal in Miscellaneous Land Application No. 363 of 2022 quashed and set aside; that the respondent be condemned to bear costs of this appeal; and, any other relief(s) that this Honourable Court shall deem fit and just to grant.

At the hearing the appellant was being represented by Mr. Laurence John, Advocate for the appellant and the Respondent was being represented by Ms. Sekela Amulike, learned advocate. As a matter of procedure, the appellant has the first right of audience and his Counsel submitted as hereunder. The counsel prayed to submit on the appeal following the serial number of the ground of appeal:

On the first ground of appeal the counsel argued in line of the ground of appeal that "*the tribunal erred in law to entertain the application for stay of execution which was time barred*". He submitted that the application for execution in the District Land and Housing Tribunal is governed by

Regulation 25(1) of **Land Disputes Courts (the District Land and Housing Tribunal), Regulation GN. No. 174/2003** which provides that *'a judgment debtor who intends to appeal to the High Court (Land Division) may at any time before the decree or order of the Tribunal is executed, apply for stay execution'*. However, looking at the law keenly, there must be a pending appeal for an application to be entertained. The counsel cited the case of **Catherine Honorali Vs. CRDB plc [2020] II T.L. R 185**.

Also, it is a legal principle that parties are bound by their pleadings. That was explained in the case of **Barclays Bank Tanzania Ltd Vs. Jacob Muro**, Civil Appeal No. 357 of 2019 at page 11 – 12 wherein it was observed that even the Court is bound by the pleadings. Looking at the order of the District Land and Housing tribunal, the respondent was given an extension of time to apply for Stay of execution without there being an application to that effect.

The application in the District Land and Housing Tribunal for stay of execution was filed out of time and there was no pending appeal in the High Court. Also, the position of law as provided for in Order **XXXIX Rule 5(2) of Civil Procedure Code, Cap 33 R.E 2019** is that

"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."

In the case of **Lameck Rupiya Vs. Muna Meki**, Land Revision No. 02 of 2019, High Court of Tanzania at Sumbawanga at page 2 this Court observed that time allowed to file stay of execution is before expiration of period to appeal. And according to section **41(22) of the Land Disputes Courts Act, Cap. 216 R.E. 2019** time allowed to appeal is 45 days. The decision sought to be executed was delivered on 19/07/2016 and the application for stay of execution was made on the 13/06/2022 which is six 6 years later. It is our opinion that the application was out of time. The Counsel prayed that this court allows this appeal basing on the ground as submitted.

On the second ground that the trial tribunal erred in law to hold that the substituted service made by appellant was not sufficient for respondent to know the presence of the case.

The decision whose order was sought to be stayed was delivered on the 19/07/2016. It was an ex parte decision but after the decision, the appellant applied for execution in the trial tribunal, which application was registered as application no. 18/2022. The respondent defaulted to enter appearance. The same trial tribunal ordered for substituted services which was acted upon by serving through Raia mwema dated 01/04/2022.

By ordering substituted service the tribunal was complying with Regulation 9(c) of GN. 174/2003. Also Order V Rule 16(2) of Civil Procedure Code, Cap 33 R.E 2019 provide that service by substituted service is recognizable as service effected to the defendant. Also, in the ruling delivered admitted that the service was effective as reflected at page 2 of the ruling. Thus, the service was effective.

On the last ground of appeal, that the trial tribunal erred in law to entertain the application which did not join the tribunal broker though he was impleaded as the one who was conducting execution at the material date. The counsel for the appellant submitted that in the application for stay of execution, according to annexure B of the affidavit, the person who has been named implementing the execution is a broker. However, the

respondent did not join him in the application for stay of execution. Even the order which was issued did not act to stop the broker. The broker was necessary party in the application.

According to the case of **Cloudy Roman Shikonyi Vs. Estomi A, Baraka and 4 Others [2019] 1 TLR 192** the Court decided that any decision which will determine the right of the parties and effect any other person not involved it will be void. We have the opinion the decision was void it did not stop execution.

The counsel for the appellant prayed that the appeal be allowed, ruling and drawn order be quashed and set respectively and that the respondent be condemned to pay cost of this appeal. The appellant also prayed for any other relief this Court will deem it just to grant.

The respondent was being represented by Ms. Sekela Amulike – Advocate. In response to the submission in chief by the counsel for the appellant she submitted first by praying to narrate the background of the case before replying to the submission in chief.

The counsel for the respondent submitted that any appeal is a creature of statute. For example, the Civil Procedure Code, Cap 33 R.E 2019 Order

XL provides for orders a litigant may appeal against. If the law has not granted leave to appeal a person may not appeal. The cited law does not mention stay of execution as being appealable. The same is taken to be preliminary order; it does not affect finality of the case. In law it is not appealable. Civil Procedure Code, is used at the tribunal by virtue section 51(2) of Land Dispute Court Act, Cap 216 R.E 2019.

Regulation 22 (proviso) prohibit an interlocutory application as not being appealable. All these show an appeal is a creature of law. The law must allow an appeal. To know that the application affects finality of the case there are decisions. For example, Civil Appeal No. 318/2018 the Court of Appeal of Tanzania at Dar es Salaam **Celestine Samora Manase & Twelve Others Vs. TASAF & AG** the Court stated that the nature of the order test must be used.

Although the stay order was issued, still there is a case still pending. There is an order for stay to execution by an order for execution is still pending. That shows still there is no final disposition of rights of parties. Thus, the order is not final, it is an interlocutory one.

Then the counsel proceeded to reply to the submission in chief as hereunder shown. On the first ground of appeal, that the stay of execution application was time barred. The Counsel for the Respondent submitted that the counsel the appellant misled himself. The application was not made according to the provisions of law cited by the counsel. The application in the tribunal were filed under Order XXI Rule 24(1) and 27 of Civil Procedure Code, Cap. 33 R. E.2019. These provisions allow to apply for stay of execution if there is anything which is in Court. The case of **Lameck Rupia Vs. Amina Meki** (supra) is distinguishable. The respondent filed for stay of execution because he made an application for execution out of time. The application made is different in nature to what has been submitted by the counsel for the appellant.

On the second ground of appeal, the appellant fault the decision by the tribunal to observe that substituted service was not proper; the counsel for the respondent had an opinion that it was proper and the reason is at page 2. The tribunal was right as the respondent denied to have received the service.

On the third ground of appeal, that not joining the broker was not proper. The counsel opined that it was proper not to join the broker. The broker would not be affected by the decision of the tribunal. The broker follows the directives of the Court which appointed him. The counsel prayed that the appeal be dismissed with cost.

In rejoinder to the reply by the counsel for the respondent, Mr. Laurence John – Advocate submitted that it is a legal standing that preliminary objection must be raised at the earliest opportunity so as to enable the other party to comply with it. The counsel submitted that that the objection made has taken the appellant by surprise, they cannot respond properly.

However, the counsel submitted that according to regulation 24 (part v) of the **Land Disputes (The District Land and Housing Tribunal) Regulations, G.N. 174/2003**

"Any party who is aggrieved by the decision of the Tribunal shall subject to the provisions of the Act, have the right to appeal to the High Court (Land Division).

Provided that, an appeal shall not in any case be a bar to the execution of decree or order of Tribunal"

The counsel prayed to distinguish the argument that Order XL is applicable. The Civil Procedure Code is not applicable where there is no lacuna in the **Land Disputes Courts Act, Cap 216 R.E 2019**. All the relevant law is available in the Cap. 216 R.E 2019. The counsel had the view that the order allowing stay of execution is appealable.

The argument that the order by the tribunal was interlocutory is not proper. Regulation 22 of G.N. 124/2003 is not applicable. The impugned decision is not interlocutory in this case the order was final. Nothing continued to be pending. Thus, it was final. The case of **Celestine Samora Manase** (supra) is inapplicable in the present situation. As for the application of Order XXI Rule 24 Civil Procedure Code, Cap. 33 R.E.2022; the counsel submitted that it was not proper to apply this law; that the law that there be a pending activity; and that in the present case, the order is final. Nothing was said to be pending.

On the second argument that substituted service was presumed (dhania); it was rebuttable by the adverse party confirming the reception of

service or not. Confusion is that if the order was presumed, why did the tribunal issue an order.

On the third ground, the counsel reiterated the submission in chief. The stay order was supposed to be issued against the broker. He was appointed to execute. The application was to stay execution of an order of the tribunal. Though the order was issued, the order was not categorical so as to be clear. Joining the broker would have assisted the clearance of the confusion. The counsel prayed for the appeal to be allowed with costs.

I have read the record as well as heard the submissions made by the counsels for the appellant and the counsel for the respondent. There is no dispute that the decree which was stayed was issued ex-parte. The reason for the application of the stay is that the respondent, applicant then was not aware of the case in the tribunal until when it came to be executed. The appellant argues that the application for stay of execution was time barred.

The Respondent has argued that the application was not made under the provisions cited by the appellant. It was made under the provisions of **Order XXI Rule 24(1) and 27 of the Civil Procedure Code, Cap. 33 R.E. 2019**. The same provides as follows:

24(1) The court to which a decree has been sent for execution 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 made by such court of first instance or appellate court if execution had been issued thereby, or if application for execution had been made thereto.

Rule 27 of the same Order provides:

"Where a suit is pending in any court against the holder of a decree of such court, on the part of the person against whom the decree was passed the court may, on such terms as to security or otherwise as it thinks fit, stay execution of the decree until the pending suit has been decided."

The application which was made by the respondent is different in nature to what transpired in the case of ***Lameck Rupia vs. Amina***

Meki(supra). The provisions allow to apply for stay of execution if there is anything which is in court. The applicant asserted in paragraph 9 of the affidavit supporting the application whose ruling is being challenged that he intends to apply for setting aside an ex parte order and the matter be heard inter partes. It is recorded in the impugned ruling at page 2 that:

"Kwa kuwa mwombaji amepata taarifa na kufika barazani ili kuchukua hatua , sheria iliyotumika kuleta maombi haya inatoa mwongozo maombi haya kukubalika."

I think, under the circumstances, it is fair that the rights of the parties be determined according to the principles of natural justice. In the case of ***Cloudy Roman Shikonyi Vs. Estomi A, Baraka and 4 Others [2019] 1 TLR 192*** it was decided that:

"it is now settled law that no decision must be made by any court of justice, body or authority entrusted with the power to determine rights and duties so as to adversely affect the interests of any person without first giving him a hearing according to the principles of natural justice."

The appellant has not asserted that there is nothing going on as averred by the respondent. Thus, the respondent's counsel is right by the

averment that there is no final disposition of rights of parties. The appellant has a chance to assert his right, and so it the respondent, in the hearing and hopefully final determination of the case by the tribunal.

On the second ground of appeal as to the effectiveness of substituted service, it is not disputed by both the appellant that it is effective and legal. However, the respondent honestly stated in the affidavit at paragraphs 6, 7 and 8 that he never read the Newspaper (Raia Mwema) and received the information of the case from Jofrey Stan Kipoma as per paragraph 2. The Tribunal appreciated the position and granted the application as shown above. In the case of **Njeru v Muturi and others [2007] 2 EA 363** it was observed that:

"Substituted service is normally ordered where the court is satisfied that there is reason to believe that the person to be served is keeping out of the way for the purpose of avoiding service, or that for any other reason, the summons cannot be served in the ordinary way. Service in the ordinary way is generally personalised service."

In the affidavit it is clearly shown that the respondent asserted that he resides at Ulanga, Morogoro he could not be easily served personally. The

question is whether substituted service was effective on the respondent. I think, substituted service in the circumstances of the present case was not effective on the respondent and the Tribunal properly accepted the explanation by the respondent because by substituted service it is not reasonably possible to say for sure the respondent had information on time and therefore, he intentionally avoided the same just because we are sure the summons was published in the Newspaper. Also, the respondent has explained that he did not have knowledge hence when he came to know he came to the Court. He took action. Above all, accepting the explanation does not deprive the appellant of his rights if he is entitled to the claims. In short, he cannot be prejudiced by accepting the explanation. Hence, it was proper to accept the same.

I have also heard the submission on not including the court broker as one of the parties. The appellant has submitted that he is a necessary party hence he should have been joined, otherwise the order won't be complied with. In his opinion, the decision for stay of execution is void. The respondent submitted that the broker follows the directives of the court, thus he is not affected. In my view, the broker works as an agent of the decree holder of course appointed by the Court. Thus, since the tribunal has stayed execution,

he cannot proceed as it is the same tribunal which assigned him the duty to execute which has now stayed the execution. Also, at this stage, I have the opinion the case will be prolonged unnecessarily in case it will be ordered that he be included in the application.

Under the circumstances and for the reasons stated the appeal is dismissed with costs.

It is ordered accordingly.

Dated at Sumbawanga this 9th day of May, 2023.




T. M. MWENEMPAZI
JUDGE