

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY)

AT MWANZA

LAND REVISION NO. 03 OF 2023

MGALA MANUMBU (Administrator of the estate

of the late **MANUMBU MALELO**.....**APPLICANT**

VERSUS

WAMBURA DAUDI MAMBURA.....**RESPONDENT**

(Arising from Misc. Land Application No 08 of 2022 of the District Land and Housing Tribunal of Ukerewe at Nansio, from Misc. Land Application No 05 of 2023 of the District Land and Housing Tribunal of Ukerewe at Nansio originating from Application No 27/2022 of the District Land and Housing Tribunal for Ukerewe)

JUDGEMENT

Last Order date: 29/05/2023

Judgment Date: 01/06/2023

M. MNYUKWA, J.

In the present Revision Application the applicant moved this Court through Chamber Summons brought under Section 41(1) and section 43(1)(b) of the Land Dispute Courts Act, Cap 216 [RE:2019] seeking the following orders;



- a. That, this Honourable Court may be pleased to call for, inspect and revise the decision of the District Land and Housing Tribunal for Ukerewe at Nansio (Hon. Kato, C) in Misc. Application No. 08 of 2023 dated 23/03/2023 and make appropriate directions for the interest of justice.*
- b. That, costs of the Application to be in due course.*
- c. Any other order(s) or/ and relief(s) as this Honourable Court may deem fit and/or just to grant.*

The facts leading to the dispute between the parties may be briefly stated as follows; the applicant was the 1st respondent in Land Application No 27 of 2022 before the District Land and Housing Tribunal (DLHT) of Ukerewe at Nansio filed by the respondent seeking the DLHT to declare him as the lawful owner of the disputed house situated at Plot No 83 Block G, Nakutunguru, Nansio at Ukerewe. After hearing the parties to the case, the DLHT ruled out in favour of the respondent by declaring him as the lawful owner of the disputed house for the reason that he bought it from a valid sale done to him, and that the respondents are the trespassers and costs of the suit be paid to respondents.

Aggrieved by the decision of the DLHT, the applicant filed an appeal before this Court. On the other hand, the respondent filed the Application for Execution before the DLHT that was granted. The applicant also filed a Misc. Land Application No 08 of 2023 before the DLHT for



Ukerewe for stay of execution of the decree pending the hearing of the appeal before the High Court. Before the Misc. Land Application No 08 of 2023 is heard on merit, the applicant herein was served with the 14 days' notice from the broker known as Rock City Takers requiring him to vacate from the disputed house. Before the expiration of 14 days' notice, the Misc. Land Application No. 08/2023 was heard and ultimately the DLHT dismissed the application for the reason that, the application for stay of execution was brought while the execution was completed. It is from this background which resulted the applicant to file the present application seeking an order for this Court to intervene by inspecting and revise the decision of the DLHT.

When the Revision Application came for hearing, the applicant was represented by Lilian Lymo, the learned counsel and the respondent enjoyed the legal services of Arsen Molland, the legal counsel too. The application was argued orally.

Arguing in support of the application, Ms. Lymo challenged the decision of the DLHT which dismissed the application for stay of execution for the reason that, the execution was still under way since the notice of eviction and handover of the disputed house to the respondent were not done. She added that, the execution was in the stage of notice as the



applicant was served with 14 days' notice and therefore at that time, the DLHT could have power to grant an order for stay of execution as the respondent was not given what he was awarded in the decree. To support her argument she referred to the case of **Tanzania Motors Service Limited v Tantrack Agencies Limited**, Civil Application No 86 of 2004 which held that execution is completed when the judgment creditor gets the money or things awarded in the judgment. She went on that, the above decision among other thing stated that since execution was in the process, stay for execution can be issued. She therefore had the view that, the DLHT was supposed to stay execution.

The counsel for applicant further submitted that, the applicant had a reasonable cause to ask the DLHT to stay execution because if execution will not be stayed, the beneficiaries of the estate of the deceased will get irreparable loss since they depend on the disputed house as their residential home and they stayed with the deceased during his lifetime and their removal will cause hardship to them. She further added that, if the application will not be granted and the appeal will succeed, the applicant will not be able to get the disputed house especially if the status of the house will be changed after being sold to another person. She therefore prayed the application to be granted because the applicant met

all the requirements for granting the application as stated in the case of **Mary Joseph v Rachel Zephania**, Misc. Land Application No 32 of 2020.

She retires her submissions by stating that the Land Appeal No 06 of 2023 filed by the applicant has overwhelming chance to succeed since the DLHT declared the respondent as the winner on the sale which was declared as null and void.

Opposing the application, the respondent's counsel prayed to adopt the counter affidavit filed by the respondent to form part of his submissions. He submitted that, stay of execution is the discretionary power of the court and it is only granted upon fulfilment of the certain conditions as stated in the case of **Mick Tanzania v CXC Africa Limited**, Civil Application No 172/01/2019. Attacking the application he averred that, the applicant failed to convince the DLHT that he met the criteria(s) for the application to be granted. That he failed to prove prima facie case and its likelihood to succeed. He added that, the he failed to prove that the refusal will cause irreparable loss or injury and failed to prove balance of convenience on the order prayed as it was stated in the case of **Tanzania Electric Supply Company Limited (TANESCO) V Independent Power Tanzania Limited (IPTL) and 2 others**, 2000 TLR 324.



The counsel for respondent further attacked the application by averring that, at the DLHT, the applicant's main reason for stay of execution was that she lodged an appeal before the High Court while it is settled that an appeal is not a condition to grant stay of execution. He invited this Court to the provision of Order XXXIX Rule 5(1) of the Civil Procedure Code, Cap 33 R.E 2019 that an appeal is not a bar for execution and Order XXXIX Rule 5(3)(a)(b) of the Civil Procedure Code, Cap 33 R.E 2019 which gives conditions for granting an order for stay of execution.

He went on that, the Land Appeal which is pending before this Court has no overwhelming chances of success since the respondent is a bonafide purchaser of the disputed land. He retires by submitting that, the applicant could have filed the application for stay of execution to this Court and that there was no order which stopped the broker not to continue with execution. He therefore prays the application not to be granted.

Re-joining, the applicant's counsel reiterated what she has submitted in chief and insisted that the applicant met all the conditions for stay of execution. She added that, in the circumstances of this case, it was difficult for the applicant to file the application for execution in this court because the appeal was scheduled for hearing on 9/05/2023 while the



application for stay of execution was delivered on 23/03/2023 and that during all this period, it was difficult for applicant to wait because she was in a danger position to lose her right because there was no application for stay of execution and the respondent could have proceed with the execution while the appeal was pending. She therefore prays the application to be granted.

After hearing the submissions of both parties, the main issue for consideration and determination is whether the present Revision application is merited.

Upon going through into the available record, I noticed that, the application for Execution which is Misc. Land Application No 05 of 2023 was filed by the respondent before the DLHT on 07/01/2023 and its decision was delivered on 31/01/2023 where by the application was granted and it was ordered that respondent be handed over the disputed house within 14 days. However, soon after the decision on the Misc. Land Application No 05 of 2023 to be delivered, the Misc. Land Application No 08 of 2023 was filed by the applicant on 06/02/2023 for an order of stay of execution, where by on 23/03/2023 the DLHT dismissed the application for the reason that execution was completed and the application for stay was brought after the execution has been completed.



The above schedule of filling and deciding the Misc. Land Applications before the DLHT, it is evident that, the Misc. Land Application No 08 of 2023 was filed before the expiration of 14 days. The question now is that, was it justifiable for the DLHT to dismiss the application for stay of execution for a mere reason that the application for execution was already granted while the respondent was not handed over with the disputed house.

Admittedly, it is true that if the execution is completed, then the order for stay of execution cannot serve any useful purpose. And, if there is substantial loss to one party due to execution, there is no order that can undo what has been actually carried out as it was rightly stated by the Court of Appeal in the case of **Juto Ally v Lucas Komba and Another**, Civil Application No 84 of 2017.

The circumstances prevailing in our case at hand shows that, execution was just in the initial stage of appointing the broker and requiring him to hand over the disputed house within the time in which the application for stay of execution was filed. To my view, the nature of the subject matter for execution and the prevailing circumstances permitted the DLHT to stay of execution as prayed by the applicant. I hold that view because the appointed broker was yet to complete the



process of execution including serving a notice of eviction and handing over the disputed house to the respondent which to my view is the final act in the execution processes. This Court in **Mary Joseph v Rachel Zephani** (supra) quoted with approval the Court of Appeal decision in **Shell and BP Tanzania Limited v The University of Dar es Salaam**, Civil Appeal No 68 of 1998 it was observed that:

"..... Execution is the final act, that is, the satisfaction of the judgment..... The nature of the subject matter would dictate the mode of execution."

It was the contention of Ms, Lymo that as per the nature of the subject matter, it was erroneous for the DLHT to state that execution was carried out while the notice of eviction and the handover of the disputed house as I have indicated above were not done as the execution was just in the initial stage of issuing to applicant 14 days' notice.

Relying on the affidavit of both parties filed in this Court, I side with the applicant's counsel that as of now, the execution was not completed since the respondent was not handed over with what he was awarded in the decree. My reading on paragraphs 11 and 12 of the applicant's affidavit as well as paragraphs 8 and 9 of the respondent's counter affidavit does not imply if the applicant is evicted from the disputed house. For that reason, as the execution order which involves a number of



processes is not completed, the DLHT could have power to order stay of execution in the remaining processes such as an order of serving notice of eviction to applicant and handed over the disputed house to respondent. This is also the stand of the Court of Appeal in the case of **Tanzania Motor Services Ltd v Tantrack Agencies Ltd** (supra).

The counsel for respondent argued that, granting stay of execution is within the discretionary power of the court and that as the applicant only reason for stay of execution was that an appeal was preferred to this Court, it was justified for the DLHT to refuse grant of the application since an appeal does not operate as a bar for execution. With due respect from the learned counsel of the respondent, it is a trite law that discretionary power of the court should be exercised judiciously. It is not expected for any adjudicator to abuse it. Again, going into records of the DLHT in Misc. Land Application No 08, the same bears testimony that in his affidavit as evident under paragraph 5, the applicant deposed that, he had overwhelming chances for his untended appeal filed in this Court to succeed and if the application for stay of execution will not be granted, he will suffer loss. The same was repeatedly in his submissions before the DLHT when the application was heard on 23/03/2023. Therefore, it was



wrong for the respondent's counsel to state that the applicant reason for stay of execution was because he had lodged an appeal to this Court.

It is settled position of the law that for an application for stay of execution to be granted, the court shall consider if the applicant has demonstrated that his application falls within the principles that govern the application. The principles has been stated in a plethora of authorities including the cases of **Tanzania Motor Services Ltd v Tantrack Agencies Ltd** (supra) and **Tanzania Electric Supply Company Limited (TANESCO) V Independent Power Tanzania Limited (IPTL) and 2 others**, (supra). Moreover, in the case of **Ignazilo Messina & National Shipping Agencies v Willow Investment & Costa Shinyanga**, Civil Reference No 08 of 1999 as quoted by approval in the case of **Mary Joseph v Rachel Zephania** (supra), The Court of Appeal held that:

"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 damages*



- 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."*

As highlighted above, in his affidavit filed in Application No 8 of 2023 the applicant deposed that, if the application will not be granted he will suffer loss and this fact was not challenged by the respondent as he did not file counter affidavit. As it was rightly submitted by the counsel for the applicant in this Application, I agree with her that if the order issued by the DLHT in Application No 08 of 2023 will remain intact, the beneficiaries of the estate of the late Manumbu Malelo will suffer irreparable loss as they depend on that disputed house as their residential home.

The irreparable loss might also happen when the application if this application will not be granted because the respondent might dispose the disputed house the way he wishes and even if it happens that the applicant became a winner in the Land Appeal pending before this Court, it will be difficult for him to recover it easily as the property might be disposed of by way of sale to another person.



Since the applicant as of now is in physical possession of the disputed house, to my view the balance of convenience weighs heavily in favour of the applicant while pending the determination of the Land Appeal before this Court.

Finally, the applicant counsel submitted on the overwhelming chances of the appeal to succeed which is challenged by the respondent's counsel, since this is the matter which its determination is still pending to this Court, I will not say any word on it as it will be properly dealt with in the appeal.

All said and considered, it is my firm that the applicant has demonstrated the reasons for this Court to revise the decision of the DLHT in Misc. Land Application No 08 of 2023, the same is hereby revised by granting the application and ordered the respondent, his agent or broker not to evict the applicant from the disputed house pending the hearing and determination of Land Appeal No 06 of 2023 before this Court.

Consequently the application is hereby granted as prayed, Costs to follow the event. It is so ordered.




M.MNYUKWA
JUDGE
01/06/2023

Court: Judgment delivered today this 01st day of June, 2023, in presence of the parties.



M.MNYUKWA
JUDGE
01/06/2023