

IN THE HIGH COURT OF TANZANIA
TEMEKE SUB-REGISTRY
ONE STOP JUDICIAL CENTRE AT TEMEKE
MISC.CIVIL APPLICATION NO.02 OF 2023

(Arising from Matrimonial Cause No.38 of 2017 at Kinondoni District Court)

GYAVIRA NGONGA MUTAKYAHWA..... APPLICANT

VERSUS

ANNETE MUTAKYAHWA.....RESPONDENT

RULING

Date of last order: - 09/03/2023

Date of Ruling: - 17/03/2023

Omari, J.

This Application has been brought under a Certificate of Urgency. The Applicant is praying for stay of execution under order XXI Rule 24(1) and Rule 27 of the Civil Procedure Code, Cap 33, R.E 2019 pending this court's determination of Misc. Civil Application No. 63 of 2022; which is an Application for extension of time to file an Appeal out of time against the judgment and decree of the Kinondoni District Court in Matrimonial Cause No. 38 of 2017.

The facts leading to this Application are labyrinthically protracted. To keep it brief, the parties herein got married in 1999, in 2017 the Respondent herein successfully instituted Matrimonial Cause No. 38 of 2017 in the Kinondoni District Court. The Applicant herein successfully applied for Review of the court's judgment and decree vide Civil Review No. 70 of 2018 before the

Kinondoni District Court and subsequently the Respondent appealed to the High Court of Tanzania, Dar es Salaam Registry, vide Civil Appeal No. 102 of 2019 where she successfully challenged the Review and thereafter proceeded to apply for execution of the decree of Matrimonial Cause No. 38 of 2017 by way of attachment and sale of the landed property situated on Plot number 172 Block F, Tegeta Ununio Dar es Salaam. The court ordered the execution to proceed. In response to that, the Applicant filed this Application seeking for stay of execution pending the determination of the said Misc. Civil Application No. 63 of 2022 pending in this court.

When the Application was set for hearing, the Applicant was represented by Prof. Cyriacus Binamungu, learned Advocate while the Respondent was represented by Harry Mwakalyasa, also learned Advocate.

The Applicant's Advocate, Prof. Binamungu prayed to be allowed to adopt the accompanying Affidavit to form part of his submission. He submitted that the Application hinges on three grounds. The first is that Applicant herein has preferred an Application for extension of time to file an appeal out of time vide Civil Application No. 63 of 2022. The said Application, which is pending in this court is seeking for enlargement of time to Appeal against the judgment and decree of the Kinondoni District Court in Matrimonial Cause No. 38 of 2017. Secondly, he submitted that there are ongoing execution proceedings before the Kinondoni District Court for Matrimonial Cause No. 38 of 2017 and the said court has ordered execution to proceed by way of sale of the landed property in the absence of a decree dissolving the marriage, making the action contrary to law.

Lastly the learned counsel for the Applicant argued that the judgment of the lower court did not pronounce an order of divorce that is required to enable the court to grant division of matrimonial property, a fact which was agreed to by the Respondent at para 5 and 7 of her Affidavit where she stated that the anomaly is curable. He continued to submit at length as why he was arguing that the division of matrimonial properties in this case (that is Matrimonial Cause No. 38 of 2017) was illegal. To support his argument, Prof. Binamungu made a reference to the cases of **Festael Sadikiel Macha v. Salum Shabani**, PC Civil Appeal No.64 of 2004 High Court of Tanzania at Dar es Salaam (Unreported) and **Mohamed S. Kijida V. Francisca D. Kijida**, Civil Appeal No. 199 of 2004, High Court of Tanzania at Dar es Salaam (Unreported).

When it was his turn, Mr. Mwakalyasa, the learned counsel for the Respondent did not object the Application for stay of execution. He prayed for the Application to be granted pending the determination of Civil Application No. 63 of 2022 so that the same can be determined on time, and that each party to bear its own costs.

Conditions for granting an application for stay of execution are provided under Order XXI Rule 24 (1) and 27 of the Civil Procedure Code, CAP 33 RE 2019. The Rules are clear, where there is sufficient cause, the court is empowered to stay execution of the decree until the pending suit has been decided. Furthermore, the Court of Appeal of Tanzania in **Mekefason Mandari and Others v. The Registered Trustees of the Archdiocese of Dar es Salaam**, Civil Application No. 397/17 of 2019 (Unreported)


observed that the existence and pendency of an application; constitutes good cause for an application for stay of execution.

It is not disputed that there is an Application for extension of time to file an appeal, that is Civil Application No. 63 of 2022, pending before this court. It is also undisputed that there are execution proceedings regarding Matrimonial Cause No. 38 of 2017 in progress at the Kinondoni District Court. Therefore, and by necessary implication, if the stay of execution is not granted the Application for extension of time may be overtaken by events and the applicant may suffer a consequential loss.

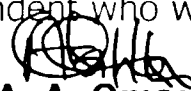
In view of the foregoing, I am satisfied that the Applicant has shown sufficient cause, it is ordered that the Application of stay of execution of the decree of Kinondoni District Court in Matrimonial Cause No. 38 of 2017 is granted pending determination of Misc. Application No. 63 of 2022. Each party to bear its own costs.

It is so ordered




A. A. Omari
JUDGE
17/03/2023

Ruling delivered in the presence of Prof. C. Binamungu the learned counsel for the Applicant who was also present in person and Mr. Harry Mwakilasya the learned counsel for the Respondent who was also present in person.


A. A. Omari
JUDGE
17/03/2023