

**IN THE HIGH COURT OF TANZANIA**  
**MUSOMA DISTRICT REGISTRY**  
**AT MUSOMA**

**MISC LAND APPLICATION NO. ADM/REF NO. 20231031000272860**

*(Original Case No. 117/2018, District Land & Housing Tribunal of Tarime)*

**SANGE WILLIAM WANGOYA ..... APPLICANT**

**VERSUS**

**JACOBO NDIRA ..... 1<sup>ST</sup> RESPONDENT**

**MARTIN OCHORA NDIRA ..... 2<sup>ND</sup> RESPONDENT**

**BANARD FESTO NDIRA (Administrator of the Estate of  
Late Anton Ndira Onguka) ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

*13<sup>th</sup> & 13 December, 2023*

**M. L. KOMBA, J.**

Before this Court, the applicant, **SANGE WILLIAM WANGOYA** has filed the present application through Chamber summons accompanied with his affidavit seeking for the following orders under certificate of urgency;

- 1. That, this Court be pleased to stay the orders of the trial Tribunal District Land and Housing Tribunal for Tarime at Tarime in Land case No. 117 of 2018 pending the decision of appeal that has been preferred by the applicant herein.*
- 2. Costs be ordered for against the respondent herein.*

*3. Any other orders that this Court deems fit and justified in the circumstances of the case.*

Chamber summons that initiates this application, indicates to be made under Rule 5 (3) of Order XXXIX of the Civil Procedures Code, Cap 33 R.E 2019. Appellate Jurisdiction Act, CAP 141 R.E 2019. As said, the application is accompanied by an affidavit deposed by the applicant. Upon being served with application, the respondent did not file a counter affidavit rather he prays to argue points of law during hearing of the matter. The prayer was granted.

When the matter was scheduled for hearing, applicant was represented by Mr. Baraka Makowe while the respondent hired a legal service of Mr. Onyango Otieno both learned advocates. It was the applicant who started to make his case.

Mr. Makowe prayed affidavit of the applicant to be adopted and reminded this court that this application is filed under Order XXXIX rule 5 and submitted that applicant was not satisfied by the decision of the trial tribunal and intends to appeal to this court as narrated at paragraph 6 though there is no number of appeals preferred. He complained that the action of respondents of uprooting the sisal plants and intention to

demolish house within the disputed land will put the applicant into difficult position. Because respondent did not file counter affidavit, he said they did not dispute those facts and pray this court to stay execution of orders of the District Land and Housing Tribunal (the DLHT) pending appeal. He prayed costs to be borne by respondents.

Submitting on counter legal, Mr. Otieno averred that the application is broad and spectrum as it did not specify which order is referred by the application at hand; whether injunction or execution. He submitted that the application of the Order XXXIX should start at sub-rule 1 to 3 of the same rule 5 and prayed this court to note that there is no pending application for execution before any court. He further submitted that under Regulation 25 (1) (2) (3) and (4) of the Land Dispute Courts (District Land and Housing Tribunal) Regulation, GN 174 of 2003 (GN 174 of 2003) the judgment debtor who intends to appeal should apply to DLHT for stay of execution and when appeal is admitted under Order XXXIX rule 9 it must have a number but he noted the application has no appeal number and to him there is no appeal anywhere.

Mr. Otieno was of the position that it is chamber summons which moves the court and not affidavit and the two have different contents. He prays

his counter legal to be found with merit and the application is an attainable. All his prayers are with costs.

During rejoinder Mr. Makowe complained that Mr. Otieno was supposed to issue notice for him to prepare for the argument, however he argues that applicant has facts to support application as deponed in affidavit. He further clarified that rule 5 of Order XXXIX has no precondition for it to apply and complained the counsel is importing Court of Appeal rules to Civil Procedure Code which he complained to be unfounded. He insisted their prayer is for this court to stop execution of orders issued in the judgment as respondents are executing the said orders unlawful, that is without applying for execution.

On the contradictions on injunction or stay of execution Mr. Makowe clarified that both terms used to stop someone from doing something and in the case at hand respondents are executing without deny. He further submitted that CPC under rule 5 sub rule 3 allow stay to be filed to appellate court and sub rule 2 provides for stay to the court that issue decree and that Regulation 25 (1) (supra) use the word 'may'. To him applicant is not barred to file application to the appellate court. He insisted the applicant has paid for the registration of appeal which was evidenced

by pay receipt as per paragraph 6 of affidavit which respondent admitted by not filing counter affidavit.

In due course of composing ruling, I noticed that application has only affidavit but the order/judgment/decree which is prayed to be stayed by this court is not attached. Today when parties appeared, I invited them to address this court if there was order or judgment by the DLHT and what was it all about as it was not attached in this application.

Applicant was the first to address this court on that issue. In his brief submission counsel for the applicant said Order XXXIX rule 5 does not have such requirement on the assumption that records should be within this court or court that will hear the appeal. He was of the position that if the law is silent then not attaching judgment and decree is not fatal.

Mr. Onyango for respondent submitted that even his copy of application has no referred attachment and that failure to have copies of the said order the intended ruling will have no base as this court has no record.

My duty is to determine whether the application is properly before this court. The application was supported by affidavit and attached the receipt to show he has paid for an appeal. There is no judgment neither decree

which was referred in submission attached. The applicant is complained that respondents are executing orders issued in the judgment by the DLHT Land Case No. 117 of 2018 dated 21/09/2023. During hearing counsel for the applicant confirmed that he did not attached judgment neither decree nor order on account that this court ought to have them as there is an appeal. His application was based under Order XXXIX rule 5(3). I am moved to recite here under for easy of reference;

*(3) No order for stay of execution shall be made under sub-rule (1) or sub-rule (2) unless the High Court or the court making it is satisfied that-*

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

*(b) That the application has been made without unreasonable delay;  
and*

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

From submission by the counsel, I find this court is denied right to know what was orders by the DLHT or even to be aware whether there was any decree. Attaching judgment/order/decree complained of is important and

necessary to allow this court to exercise its powers and it is settled practice in our legal system that a party who initiates an application must attach copies of judgement/decreed/order to be acted upon. See **Mohamed Rabii Honde (as the administrator of the Estate of the late RABII ISMAIL HONDE) vs. Hamida Ismail Honde and 11 others**, Civil Application No. 461 of 2017 CAT at Iringa (unreported), **Benedict Mabalanganya vs. Romwald Sanga**, Civil Application No. 1 of 2002 and **The Board of Trustees of the National Social Security Fund (NSSF) vs. Leonard Mtepa**, Civil Application No. 140 of 2005.

In the latter case of **The Board of Trustees of the National Social Security Fund (NSSF)** for instance, it was decided that;

*'.... he must make available to the court copy of the proceedings of the lower court or courts as well as the ruling and, it may be added, the copy of the extracted order of the High Court. An application to the Court for revision which does not have all those documents will be incomplete and incompetent. It will be struck out.'*

In respect of the need to attach copy of the impugned judgment or proceedings of the lower court, the above legal position was reiterated further in the case of **Chrisostom H. Lugiko vs Ahmednoor Mohamed**

**Ally**, Civil Application No. 5 of 2013 (All unreported) where the Court of Appeal stated that:

*'We are unable to say anything meaningful in relation to Land Application No. 25 of 2007 because we are not seized with all the proceedings relating to the said application. As such, we cannot step in and make an order of revision over something we do not have the full picture.'*

It is, indeed, clear that the cited decisions insisted that the applicant is duty bound to attach record of proceedings and order sought to be acted upon, in this case the order to be stayed in an application at hand. The logic is, as stated, to avail the higher court with full picture of what happened and what were the orders. The Court also made it clear that where the proceeding and the extracted order are missing the application becomes incompetent and liable to be struck out.

Assuming the judgment and decree has been attached, counsel for respondent informed this court that his clients has never applied for the execution of decree and the same was supported by Mr. Makowe. I am of the same position that there are no execution proceedings neither execution order and from that point I made further research and find rule 8 of Order XXXIX which reads;



*8. The powers conferred by rules 5 and 6 shall be exercisable where an appeal may be or has been preferred not from the decree but **from an order made in execution of such decree.***

In the case at hand, there is no application for execution and that means there is no order made in execution. For this court to exercise powers under rule 5 there must be execution order which from the record it had not been issued any how leave alone that it was not attached.

In the application at hand, the applicant informed this court that he did not attach relevant documents and this court is in suspicious on whether there is judgment and decree concerning parties herein. Basing on the cited authorities, it was the duty of the applicant, **SANGE WILLIAM WANGOYA** or his advocate to attach the complained order/judgment/decree to allow this court to act upon. This court is, in that account denied the opportunity to know the order and decree of the trial Tribunal and therefore cannot step in and provide order regarding the order which is not proved to exist.

Applicant attached receipt of registering an appeal and his application is to stay orders of the DLHT pending an appeal. In his submission counsel for the applicant was of the reservation that so far as there is an appeal, the tribunal record should be in this court. I find the application has no

number of appeal filed/ preferred by applicant, the receipt which was attached basing on deposition under paragraph 6 has insufficient information as to whose appeal was paid as it has no number, no names of parties herein. In order for this court to call for record, the appeal is supposed to be properly filed; that was not the case herein. The custom is to provide appeal number to enable this court to act upon bearing in mind that this application is filed under certificate of urgency. However, decisions of the lower courts are challenged by appeal to higher courts and the appeal itself is not a bar to stay execution. See Order XXXIX rule 1. Stay of execution is only possible when there is an execution order. See rule 8 (supra).

In a different note, the applicant is seeking this court to stay orders of the DLHT via Land case No. 117 of 2018 pending decision of appeal. The matter between parties suggests to be land matter which is regulated by specific legislation. To simplify procedures, apart from what legislated by Legislature, Minister responsible for Land has issued Regulations, GN 174 of 2003 which provides for procedure to judgment debtor who intends to appeal at regulation 25. That the applicant who wish to appeal may apply to tribunal for stay. Basing on words under the cited regulation, application

for stay is an option but the proper forum to apply is to the executing tribunal. For the application like this to succeed, it was supposed to be filed to the Tribunal as there is specific law for that. See the case of **Barclays Bank T. Limited vs Ayyam Matessa (Civil Appeal 481 of 2020) [2022] TZCA 189 (12 April 2022)** at pg 17.

All being said and done, as I have found there is no proof of existing appeal, there is no attachment of order and decree by the trial tribunal and there is no proof of existence of execution order, I find this court has no reason to and have nothing to stay. In a consequence, I struck out the application. And I do so with costs.

**DATED at Musoma** this 13<sup>th</sup> day of December, 2023.



*MLK*  
**M. L. KOMBA**  
**Judge**