

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LAND DIVISION)

TANGA DISTRICT REGISTRY

AT TANGA

MISC. LAND APPLICATION NO. 56 OF 2023

JOHN ZELUBABETI APPLICANT

VERSUS

AKIMU JOHN RUGETE 1ST RESPONDENT

TAOMTRA LIMITED 2ND RESPONDENT

(Originating from the Land Revision No. 52 of 2023 and Application for Execution No. 14 of 2023 of the District Land and Housing Tribunal for Tanga at Tanga)

RULING

11/12/2023 & 15/12/2023

NDESAMBURO, J.:

This is an application filed under a certificate of urgency for an order of stay of the execution made under Order XXXIX Rule 5(1) and (4) and Order XLIII Rule (2), sections 68 (e) and 95 of the Civil Procedure Code Cap 33 R.E 2019. The applicant is seeking this court to issue an order of stay of execution against an execution order of the District Land and Housing Tribunal for Tanga (DLHT), dated 23rd of June 2023 pending the final and conclusive determination of Land Application No. 52 of 2023 pending before this court.

The application is supported by a joint affidavit sworn by John Zelubaberi, the applicant and countered by the first respondent's counter-affidavit deposed by himself. The second respondent did not file the counter affidavit.

The application's background, as can be gleaned from the affidavit and counter affidavit unfolds as follows: The applicant was involved in a land dispute initiated by the first respondent through Application No. 09 of 2021 at the DLHT. The crux of the matter revolves around a piece of land, with the applicant contending that the respondent had encroached upon it, setting fire to the surroundings and causing the disappearance of the bees kept on the land. Following a thorough consideration of the case, the DLHT rendered its decision favouring the respondent.

Discontented with the DLHT decision, the applicant filed an appeal, which was dismissed with costs. Subsequently, on the 29th of August 2023, the respondent took further legal action by filing an Application for Execution No. 14 of 2022. This application sought the enforcement of the DLHT's ruling from Application No. 09 of 2021.

On the 23rd of June 2023, the DLHT, exercising its mandate under Regulation 23(3) of the Land Dispute Courts (The District Land and Housing Tribunal) Regulations, 2003 GN. No. 174 of 2003, issued an order to the judgment debtor, (herein the applicant), to adhere to the decree within a stipulated period of 14 days. Failure to comply would result in the appointment of a court broker tasked with executing the DLHT's decision. According to the existing records, the DLHT made an order that the execution was successfully executed, and the case file was officially closed on the 17th of August 2023.

As indicated earlier, the applicant before this court is seeking a stay of execution pending the hearing and determination of Misc. Land Application No. 52 of 2023, which is currently pending before this court. In the supporting affidavit, the applicant, articulated in paragraphs 7, 8, and 9, asserts that the proceedings and subsequent execution by the DLHT are marred by significant irregularities, citing specific legal points within those paragraphs.

Furthermore, the applicant contends that he stands a greater chance of success in the pending application before this court. Failure to grant the stay would result in irreparable loss,

particularly as the applicant asserts that the respondents are destroying all of his crops. Moreover, the applicant underscores that the pendency of Misc. Land Application No. 52 of 2023 would be rendered nugatory if the stay is not granted.

By mutual agreement, the hearing was conducted through oral arguments. Mr. Yona Lucas, a learned counsel, adeptly represented the applicant, while the first respondent opted to present his case personally. It is noteworthy that the second respondent neither submitted a counter-affidavit nor attended the hearing. Consequently, the proceedings against the second respondent unfolded *ex parte*, given her absence.

In a submission in chief, Mr. Yona Lucas adopted the applicant's affidavit to form part of his submission. He submitted that the principle governing the stay of execution had been provided in **Atilio v Mbowe** (1969) HCD 284, where three tests were set. First is the existence of a *prima facie* case; second, whether the refusal is likely to cause substantial and irreparable injury to the appellant and third, the balance of convenience.

Relying on the above authority, Mr. Yona, on the first condition, contended that the pending Misc. Land Application No.

52 of 2023 stands a significant chance of success. This is so because of the identified irregularities (including that the land is unknown) within the decision of the DLHT, which proves there are triable issues between the parties.

Moving on to the second condition, Mr. Yona emphasized that the applicant's land has been encroached upon, and his orange trees cut down by the respondents. If the application is not granted, he argued, the applicant will suffer irreparable loss. Consequently, Mr. Yona urged the court, based on the balance of convenience, to grant the stay of execution with costs.

In reply, the first respondent adopted the counter affidavit and vehemently opposed the application for lack of merit. He contended that the land in dispute is well known, and the execution has been finalized whereby the land in dispute was handed to him by the second respondent following the lapse of the stipulated 14 days.

He disputed the assertion by the applicant that he would suffer irreparable loss if the application is not granted. He highlighted that he would be suffering more losses since the case all along had been ruled in his favour while alleging that the

applicant, in defiance of the decision, has proceeded to cut down his mitiki trees. Based on the above reasons, he beseeched the court not to grant the application with costs.

Mr. Yona in rejoinder submission reiterated his submission in chief.

After listening to the arguments presented by both parties, the court took the next step by inviting further insights from them. The specific focus was on the viability of the application, taking into consideration the assertion that the execution had been completed, the land had been handed over to the first respondent, and the case file had been officially closed.

Mr. Yona asserted that no handing over from the second respondent to the first respondent was done. Moreover, he argued that even if such a handover did take place, it was illegal since it stemmed from a non-executable decree. Additionally, Mr. Yona emphasized that the DLHT did not appoint a court broker.

In response, the first respondent maintained that the handing over was done on the 16th of August 2023, and the DLHT formally closed the matter. Further, the court broker was appointed by the DLHT.

Now, having summarized the arguments presented by both parties, the pivotal question awaiting determination is whether the court should grant a stay of execution.

I would like to begin by addressing the issue posed by the court regarding the tenability of this application before delving into the substantive application. If the court finds the application to be tenable, then it will proceed to evaluate and make a determination on the application for the stay.

A thorough review of the DLHT file relating to Application for Execution No. 14 of 2023, reveals that on the 23rd of June 2023, the DLHT issued an order to the judgment debtor, (herein the applicant), to adhere to the decree within 14 days. Failure to adhere would result in the appointment of a court broker.

Crucially, the records indicate that on the 17th of August 2023, the respondent informed the DLHT that he had secured the court broker who in turn successfully executed the DLHT's order. The DLHT proceeded and entered an order that the execution had been completed and the application was closed. Among the documents found in the DLHT's file and which were annexed to the counter affidavit include the handover certificate and handing over

a report indicating that the 10-acre land was handed over to the respondent on the 16th of August 2023.

Given the established facts from the review of the record, it is evident that the execution has indeed been carried out, with the disputed land officially handed over to the first respondent on the 16th of August 2023. In light of this, it is crucial to recognize that the primary focus for the application is to stay the execution pending the hearing and determination of Misc. Application No. 52 of 2023. As pointed out the relief sought by the applicant to stay proceedings has already been implemented as of the 16th of August 2023 well before the institution of this application. Consequently, this court is unable to grant a stay as the execution processes have been fully carried out. While Mr. Yona has argued that the DLHT decision is tainted with illegalities, it is crucial to highlight that the execution has been concluded, leaving nothing to be stayed.

That being the situation, the crucial question arises: Does the applicant's prayer for stay of execution still remains valid given the presented circumstances? It appears not. I agree with the first respondent that the execution has been completed. In that sense, the applicant's application has been overtaken by events and the

application is no longer tenable. Consequently, the relief prayed is untenable for having been overtaken by events.

As to the consequences of the application, this court is compelled to dismiss the application. Consequently, the application is dismissed, with each part ordered to bear its costs.

It is so ordered.

DATED at **TANGA** this 15th day of December 2023.



A handwritten signature in blue ink, appearing to be "H.P. Ndesamburo", is written above the judge's name.

H.P. NDESAMBURO

JUDGE