

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA SUB REGISTRY

AT MBEYA

MISC. LAND APPLICATION NO. 35 OF 2023

(Originating from Land Appeal No. 48 of 2023 of the high court of Tanzania at Mbeya in original Application No. 10 of 2020 of the district land and housing tribunal for Kyela)

- 1. ELIA MWAMAFUMBA**
- 2. GADSON MWAKIFUMBWA**
- 3. TREZIA SEBA**
- 4. ASUBISYE LUVANDA**
- 5. DAUDI MWAMBALASWA**
- 6. UDITH GASTON**
- 7. ATUGANILE MWAIJALA**
- 8. HEZROM MWANDALIMA**
- 9. BRUNO GEORGE**
- 10. TABIA KAFUJE**
- 11. TASLIMU MWAKALAGILA**
- 12. DYUKE MWAITENDA**

.....**APPLICANTS**

VERSUS

**THE REGISTERED BOARD OF TRUSTEES OF
BAPTIST CHURCH OF TANZANIA.....RESPONDENT**

RULING

Date of hearing: 6/12/2023

Date of ruling: 25/1/2024

NONGWA, J.

This ruling comes upon applicants filing their application seeking for stay of execution of the decree in Application No. 10 of 2020 of the District

Land and Housing Tribunal for Kyela. It is made under section 95, orders XXI rule 24(1), XXXIX rule 5(3) of the Civil procedure code [Cap 33 R: E 2019] "the CPC", section 41(1) of the Land Disputes Courts Act [Cap 216 R: E 2019 and any other enabling provision. It is supported by joint affidavit of the applicants. The application is opposed by the respondent through the counter affidavit sworn by Rev. Issa Mwasinyanga.

Briefly, it is alleged that in the District Land and Housing Tribunal for Kyela vide Application No. 10 of 2020, the respondent successfully sued the applicants for ownership of 216.99 acres of land located at Katela village within Kyela districts. The applicants introduce themselves as the followers Baptist and acting under the registered board of trustees of Baptist convention of Tanzania, the founder and owner of the suit land. It is alleged that the respondent is isolated follower of Registered Board of Trustees of Baptist Convention of Tanzania and formed the new church by the name of Baptist Church of Tanzania under the umbrella of Registered Board of Trustees of Baptist Church of Tanzania.

Subsequently, the respondent successfully filed Application No. 10 of 2020 against the applicants. Aggrieved the applicant has filed an appeal which is registered as Land Appeal No. 48 of 2023 now pending before this court.

It is averred that while the appeal is pending, the respondent is harvesting crops and is about to sell part of the suit land together with improvements to another person. That the applicants stand to suffer irreparable loss which cannot be equated to monetary and it will be difficult to recover the same should the intended appeal succeed. Thus filed the present application for the following orders;

1. That this honourable court be pleased to stay execution of decree of the DHLT dated 29th March 2023 in Land Application No. 10 of 2020 pending determination of Land Appeal No. 48 of 2023;
2. That the intended appeal raises serious issue and if execution of the said decree is not stayed then the applicants will suffer material and irreparable loss as the properties in the suit land will be wasted as if sold to third person and at the end of the day appeal succeed, they will never be restored and the intended appeal will be rendered nugatory
3. Any other relief that this honourble court may deem fit and just.

When the matter was called for hearing, Mr. Partience Maumba and Kelvin Kuboja Gamba both learned advocates appeared for the applicants and respondent respectively. By party's consensu indorsed by the court

hearing of application took the form of written submission, parties complied to the scheduling order of the court.

In support of the application, Mr. Maumba submitted that the respondent is executing the decree by harvesting cocoa, banana cutting planted trees and is about to sell part of the suit land to third party. He stated that for stay of executing to be granted the applicant must satisfy that; **one**, whether the appeal has Prima Facie likelihood of success; **two**, whether its refusal is hereby to cause substantial and irreparable injury to the applicant; and **three**, balance of convenience.

Explaining the condition, Mr. Maumba submitted that the applicant will suffer substantial and irreparable loss if the order applied is not granted because the respondent has hired people to harvest crops, cut and slitt timbers. Further that the applicants are denied access to it which they fully participated in acquiring and developing.

On balance of convenience, it was stated that the applicants stand to suffer more compared to the respondent, they therefore prayed the application to the granted.

Replying to the above, Mr. Gamba started with the issue of reply to counter affidavit. It was submitted that the reply to counter affidavit was

defective because for being sworn by one applicant out of many applicants. That the law requires joint affidavit if there are many applicants or one person may swear upon the authorization from other parties. He stated that short of that the said affidavit is rendered incompetent, the case of **Sina Wilson Walonde @ Upendo Walonde & Others vs Prosper Evaristo Sanga, Misc.** Land Application 59 of 2021 [2021] TZHC was cited in support of the proposition.

With the pointed anomaly in the reply to counter affidavit, Mr. Gamba stated that there was no any affidavit to counter factual issues raised in the counter affidavit. The case of **Rashid Abiki Nguwa vs Ramadhani Hassan Kuteya & Another** Civil Application 431 of 2021 [2021] TZCA was cited to support the argument.

On merits of the application Mr. Gamba submitted that for stay of execution to be granted the applicant has to establish; **one**, that the applicant stands to suffer substantial loss once the order is not granted; **two**, the application has been made without delay and **three**, security has been offered for due performance as required by order XXXIX Rule 5(3) of the CPC. Referring to the case of **Ahmad Abdallah Kinyokwe vs Zulfa Salumu Makuka and 3 Others**, Misc. Land Application 489 of 2020 [2021]

TZHC and **Enikon T. Ltd & Another vs Abeid S. Makai & Others**, Civil Application No. 452/18 of 2022 [2023] TZCA (both unreported)

The respondent has submitted that sufficient reason for the court to grant stay has to be disclosed in the affidavit. According to Mr. Gamba the applicant has failed to establish condition for stay of execution because allegation that the respondent is harvesting crops has not been substantiated. She added that no document was attached to show that applicant is the owner of the suit land.

It was further argued that the applicant has failed to establish or furnish security for the due performance which is the key element in granting order for stay of execution. It was added that the applicant had not accounted for delay of three months in filing the present application. Mr. Gamba moved the court to dismiss the application with costs.

Rejoining on issue of defective reply to counter affidavit stated that there was no defect because under paragraph 1 of the reply to counter affidavit it is stated that the deponent was taking affidavit for himself and on behalf of others. Despite the above submission, Mr. Maumba was quick to point that the defect did not go to the root of the matter and can be ignored bearing that the main affidavit is proper.

On merits of the application, submission in chief was restated and I find no need to reproduce it here.

From the application pleadings and rival submissions of the parties, the main issue for my determination is whether the application is meritorious. Before I get to that issue, I will first deal with the point of defective reply to counter affidavit which has been raised by the respondent in their reply submission and applicants had time to reply in their rejoinder.

The contention of Mr. Gamba is that the reply to counter affidavit is defective for being sworn by one person while there are many applicants and there is no authorization by others. In reply it has been submitted that authorization is found under para 1 of the affidavit, alternatively that the defect was minor worth to be ignored.

Without much ado I agree with Mr. Maumba that the reply to counter affidavit is free of any defect. The deponent has clearly stated under paragraph 1 of the very affidavit that he was swearing the affidavit for himself and on behalf of other applicants whose names are disclosed. In fact there is no law which prohibits a party to a case to swear or affirm affidavit on behalf of others provided that there is clear instruction and authorization from other parties. In **Mohamed Abdillah Nur & Others vs Hamad**

Masauni & Others, Civil Application No. 547/16 of 2022) [2023] TZCA 17839 (TANZLII) the court stated;

*'... a person purporting to swear an affidavit on behalf of another person who is a party to a court proceeding must do so after consultation with and obtaining instructions from the party on whose behalf the affidavit is being sworn. **We also hasten here to emphasize that; such instructions and authorization must be expressly reflected in the relevant affidavit.** Otherwise, nothing must be presumed to the advantage of a party who fails or neglects to file pleadings or affidavits which are of the essence of the matter before a court of law.'* *Emphasize added.*

My perusal of the joint reply to counter affidavit as rightly submitted by Mr. Maumbe, the authorization and instruction is found under paragraph 1 of the said affidavit which reads;

'That, swear this affidavit for myself and on behalf of Gadson Mwakifwamba, Trezia Seba, Asubisye Luvanda, Daudi Mwambalaswa, Judith Gaston, Atuganile Mwaijala, Hezrom Mwandalima, Bruno George, Tabia Kafuje, Taslimu Mwakalagila, and Dyuke Mwaitenda my co applicants in this application hence conversant with what I depone herein.'

The above paragraph unambiguously depicts that the deponent had instruction and authority to swear the affidavit for himself and on behalf of

fellow applicants, thus no law was contravened. I therefore reject the raised complaint of reply to counter affidavit being defective.

Reverting to the main application of stay of execution, parties are in agreement that there are certain conditions which must be fulfilled before the court granting order to stay execution. The present application is made under section 95, order XXI rule 24, order XXXIX rule 5(1) of the CPC. Section 95 cover inherent power of the court on a particular a particular situation not covered. See the case of **Tanzania Electric Supply Company (TANESCO) vs Independent Power Tanzania Limited (IPTL) and 2 Others** [2000] TLR 324.

Order XXI rule 24 is a typical provision which empowers the court to stay execution if there is pending proceedings in respect of the decree. It provides;

'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.'

The above provision gives mandate for any court be the court of first instance or appellate court to stay execution of a decree. The ground upon which stay of execution can be orders is upon sufficient cause being shown and are provided under order XXXIX rule 5(3) of the CPC which provides;

'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.'

Mr. Maumba listed three grounds, although he did not cite any provision of the law which set those conditions or case law. Looking at the condition referred by counsel for the applicants there is parity with those mentioned under rule 5(3) of order XXXIX of the CPC. On the other hand, Mr. Gamba

listed three conditions to be fulfilled before stay of execution is granted which was enumerated in the case of **Ahmad Abdallah Kinyokwe** (supra).

After reproducing the laws governing stay of execution of a decree, rightly so in my view, Mr. Gamba correctly referred to conditions set under order XXXIX rule 5(3) of the CPC as being the requisite for any court to grant stay of execution. The question is have the applicants met those conditions.

To convince the court, Mr. Maumba submitted that the respondent is harvesting cocoa and banana, slitting timbers and is about to sell part of the decreed suit land. Countering the argument Mr. Gamba stated there was no documentary proof of the allegation.

After taking the issue on the board, in my view the act of the respondent harvesting cocoa and banana cannot be a reason to order stay of execution because it has nothing to do with the suit property. By the way it is not cocoa, banana or trees which was the center of dispute in the tribunal and the pending appeal rather is ownership of the suit land. Further it would be against men common sense to bar people from harvesting Cocoa, banana and trees and leave it to rotten in the farm on pretext that there is an appeal in court. The respondent being in possession of a decree which is yet to be overturned by the superior court, has the right to enjoy the fruits therein

and the applicants will have chance to recover them by way of damage should things turn on their favour.

Regarding part of the land being sold to third party, this indeed has impact on change of ownership of the suit land which is subject of the appeal. In the affidavit the applicants under para 8 disclosed that the respondent is about to sell part of the land, during submission it has been argued that applicants are in fear that the respondent may sell to third party. In the counter affidavit the respondent did not seriously counter the allegation, during submission it was stated that it was not proved.

Having considered the argument, in my view the applicants has failed to explain that the respondent is about to sell part of the land to another person, it was not disclosed to who such sale is intended to be made. The argument that they are in fear is just conjectures and the court of law does not act on fears or assumption of any person so as to grant order sought. In absence of material preposition to support the allegation of the land being alienated to another party, the allegation remains a mere conjecture unworthy to be relied upon by this court. The first condition has not been established.

Moving to second condition that the application has been made without unreasonable delay, this condition was not listed and touched by the applicants. For the respondent it was argued that the application was made after three months and no explanations for the delay. In my reading of the CPC there is no time limitation for filing application for stay of execution. Order XXXIX rule 5(3)(b) of the CPC itself uses the phrase without unreasonable delay, Mr. gamba did not state what criteria he used to argue that three months was a delay.

I have in mind that the respondent is yet to file application for execution in this court or in the tribunal, what prompted the applicants to file the present application was the conduct of the respondent to harvest crops in the suit land. While Order XXI rule 24(1) of the CPC mandates the court to which a decree is sent for execution to stay the execution on advancing sufficient cause, order XXXIX rule 5(1) of the CPC echoes the contrary. It provides that an appeal does not operate as stay of execution, it reads;

'5-(1) An appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the Court may order, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree but the Court may, for sufficient cause, order the stay of execution of such decree.'

Reading Order XXI rule 24(1) and XXXIX rule 5(1) both of the CPC there is no time within which stay of execution can be made to the court. At this juncture I borrow leaf from the court of appeal rule, 2009 as amended from time to time particularly rule 11(4) which requires stay of execution to be filed within fourteen days of the applicant being served with notice of execution of a decree. The said rule reads

'11(4) An application for stay of execution shall be made within fourteen days of service of the notice of execution on the applicant by the executing officer or from the date he is otherwise made aware of the existence of an application for execution.'

In my view, the above rule presents the contemporary law and intend to cube the congestion of unnecessary case in the court. Applying the principle to the present application, the respondent is yet to file application for execution of the decree and the law is silence on time for filing stay of execution. On those circumstances I find that this application was filed without unreasonable delay for it has been filed even before execution process of the decree are put in motion by the decree holder. The second condition is established.

Moving to third condition on security being furnished by the applicant, the affidavit is silence on this requirement, so as the

submission. Despite counsel for the applicant being alerted that security was a condition for grant of stay of execution made not attempt to submit on it in the rejoinder.

Principally security is provided so as to protect the respondent from facing difficulties or impossibility of realising the decree in case the intended appeal fails. In **Africhick Hatchers Limited vs CRDB Bank Plc**, Civil Application No. 98 of 2016 (unreported) the Court stated the importance of security in the following terms;

'Of course; most important is the fact that the respondent should not find it difficult or impossible to realize the decree in case the intended appeal fails. This is the cornerstone of the requirement for security. In such circumstances, the Court is principally obliged to figure out whether or not any one particular mode of security vouches risks on the part of the respondent.'

I understand that the applicants have their constitutional right of appeal and indeed they have their appeal pending in this case, however the court has to keep its eye open by taking measure to protect respondents' rights of enjoying fruits of the decree and how will recover costs in case the applicant's intended appeal fails. It is on those circumstances the law set conditions for the stay of execution to be granted. Reading order XXXIX rule 5(3) of the CPC the condition has to

be met cumulatively. In **Ongujo Wakibara Nyamarwa vs Beatrice Greyson Mmbaga**, Civil Application No. 200 of 2021 [2022] TZCA 732 (TANZLII) the court stated;

'It is trite law that, in order for the Court to grant the application for stay of execution all the three conditions must be cumulatively fulfilled.'

In the present application the affidavit is silent on offering security for due performance of a decree sought to be stayed, failure to state the willingness on part of the applicants to furnish security, the condition for granting stay of execution cannot be said has been met cumulatively.

Consequently, this application fails and it is hereby dismissed with costs.




V.M NONGWA
JUDGE
25/01/2024

DATED and DELIVERED at MBEYA this 25th day of January, 2024 in presence of Mr. Felix Kapinga Advocate, holding brief of Advocate Maumba for the applicant and Mr. Kelvin Kuboja Advocate for the respondent and Mr. Issa Mwasinyanga Principal Officer of the Respondent.


V.M NONGWA
JUDGE