

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(COMMERCIAL DIVISION)**

**DAR ES SALAAM.**

**MISCELLANEOUS COMMERCIAL APPLICATION NO. 133 OF 2023**  
(Arising from Commercial Case No. 113 of 2018)

**BETWEEN**

**BENBROS MOTORS LIMITED .....1<sup>st</sup> APPLICANT**

**YASSER MOHAMMED ES-HAQ.....2<sup>nd</sup> APPLICANT**

**NOUFAL MOHAMMED ES-HAQ.....3<sup>rd</sup> APPLICANT**

**YUSRA MOHAMMED ABDULLAH ES-HAQ.....4<sup>th</sup> APPLICANT**

**Versus**

**ECOBANK TANZANIA LIMITED..... 1<sup>st</sup> RESPONDENT**

**GASPER NYIKA..... 2<sup>nd</sup> RESPONDENT**

Date of Last Order: 01/09/2023

Date of Ruling: 01/09/2023

**RULING**

**MKEHA, J.**

In the present application, the applicants are moving the court for the following three orders:

- (i) A restraint order restraining the respondents from unlawfully selling landed property located at Plot No. 72 Mikocheni Industrial Area duly registered under Certificate of Title No. 38353 while the order of stay of execution issued by the Court of Appeal of Tanzania in Civil Application No. 458/16 of 2023 is still in existence.
- (ii) A finding that the order of stay of execution issued by the Court of Appeal of Tanzania in Civil Application No. 458 of 2023 is still in existence and it has not been vacated or rescinded.
- (iii) An order summoning the respondents to show cause why they should not be convicted for contempt of court by deliberately advertising for sale landed property located at Plot No. 72 Mikocheni Industrial Area CT No. 38353 while the order of stay of execution issued by the Court of Appeal of Tanzania is still in existence.

Messrs Killey Mwitasi and Novatus Mhangwa learned advocates represented the applicants. On the other hand, Mr. Gaspar Nyika learned

advocate represented the first respondent. He also appeared in person as the second respondent.

According to the submissions by the learned advocates for the applicants, the respondents were in breach of the terms of stay order of the Court of Appeal dated 5<sup>th</sup> May, 2023 by advertising for sale of the applicants' properties while the stay order was still in existence. The learned advocates condemned the respondents for circumventing the process of the court by attempting to carry out execution of a stayed decree. The learned advocates for the applicants called to their aid, the decisions in **HAMMERS INCORPORATION CO. LTD Vs THE BOARD OF TRUSTEES OF THE CASHEWNUT INDUSTRY DEVELOPMENT TRUSTFUND**, CIVIL APPLICATION NO. 166 OF 2014, CAT AT DAR ES SALAAM and that of **HAMMERS INCORPORATION CO. LTD Vs THE BOARD OF TRUSTEES OF THE CASHEWNUT INDUSTRY DEVELOPMENT TRUST FUND**, CIVIL APPLICATION NO. 93 OF 2015, CAT AT DAR ES SALAAM. In the said cases, it was held by the Court that once the order of stay is granted, it operates independently of the notice of appeal unless it is varied by the Court under Rule 64(2) of the Rules. It was the learned advocates' position that, since the stay order had not been

vacated, the respondents were not been justified to do anything purporting to execute the decree in their favour.

Mr. Gaspar Nyika learned advocate submitted in reply that, the stay order granted by the court was on a condition that a security had to be furnished. The learned advocate submitted that, the applicants had failed to validate the court's stay order by furnishing the ordered security. In view of the learned advocate, the cited case laws were distinguishable as in the cited cases, the court dealt with the status of stay order once a notice a notice of appeal is struck out.

The rejoinder by the learned advocates for the applicants was mainly a reiteration of what had been submitted in chief. The learned advocates insisted that, the cited cases were not distinguishable, rather they applied squarely to the facts of the present case. According to the learned advocates, the stay order by the Court of Appeal was not granted subject to furnishing security as would seem to be suggested by Mr. Nyika learned advocate.

The only issue for determination is **whether it was mandatory to furnish security on part of the applicants to validate the stay**

**order.** The operative portion of the stay order of the Court of Appeal resolves the issue. The court stated as hereunder:

*"In addition, we order that the applicants  
**should** furnish the mortgaged property valued  
at TZS. 4,380,000,000/= and a bank guarantee  
to the tune of TZS. 7,767,027,633/= within ninety  
(90) days from the date of this order."*

In terms of the order, by employing the word "**should**" which denotes a mandatory obligation, it is my holding that, the Court of Appeal meant that it was obligatory for the applicants to furnish the ordered security to make the order a valid one. Ninety (90) days' time was given for the applicants to satisfy the said condition. The said period of time expired when 90 days elapsed. The respondents' counter affidavit indicates in paragraph 6 that the applicants never provided the bank guarantee. This fact stands uncontroverted. Since the stay order was premised on a condition of there being a security furnished by the applicants which has not been furnished todate. I hold that there is no valid stay order in existence barring execution of the decree in Commercial Case No. 113 of 2018 in the manner directed by the trial judge in the court's judgment and decree dated 13<sup>th</sup>

August 2021. In the cited case laws, the Court did not hold that when a condition for furnishing of security to validate the stay order is made, breach of the condition on part of the applicant leaves the stay order operative. That is the reason I hold the facts of the present case and those in the cited cases to be distinguishable. I consequently hold the application to be unmeritorious. The same is dismissed with costs.

DATED at DAR ES SALAAM this 1<sup>st</sup> day of SEPTEMBER, 2023.



*C. P. MKEHA*  
C. P. MKEHA

JUDGE

01/09/2023

**Court:** Ruling is delivered in the presence of Messrs Mwitasi and Mhangwa learned advocates for the applicants and Mr. Nyika learned Advocate for the respondents.



*C. P. MKEHA*  
C. P. MKEHA

JUDGE

01/09/2023