

**IN THE HIGH COURT OF UNITED REPUBLIC OF THE  
TANZANIA**

**(COMMERCIAL DIVISION)**

**AT DAR-ES-SALAAM**

**MISC. COMMERCIAL APPL. NO. 230 OF 2022**

(Arising from Commercial Case No 50 of 2020, Misc. Comm. Case No. 189 of  
2021 and Misc. Commercial Appl.No.227 of 2022)

ALEX MSAMA MWITA .....APPLICANT

VERSUS

YUSUFU SHABANI OMARY.....1<sup>ST</sup> RESPONDENT

BANK OF AFRICA (T) LTD .....2<sup>ND</sup> RESPONDENT

LAURA BONAVENTURE MALYA MASERA.....3<sup>RD</sup> RESPONDENT

TEGEMEZA AUCTION MART LIMITED.....4<sup>TH</sup>RESPONDENT

Last order: 13<sup>rd</sup> JANUARY 2023

Ruling: 03<sup>TH</sup>FEBRUARY 2023

**RULING**

**NANGELA, J.:**

On 27<sup>th</sup>December 2022, the Applicant herein filed, under a certificate of urgency, a chamber summons supported by an affidavit. The chamber summons was brought under section 68(c) and (e), 95 and Order XXI Rule 24 of the Civil Procedure Code, Cap.33 R.E 2019 and any other enabling provision of the law.

The Applicant is seeking for the following orders:

1. That this Honourable Court  
be pleased to grant

temporary orders for Stay of Execution of the Orders of the Court delivered on 08<sup>th</sup> November 2022 and extracted by the Deputy Registrar on 1<sup>st</sup> Day of December 2022 vide execution proceedings of Commercial Case No.50 of 2020, pending determination of Misc. Commercial Application No.227 of 2022 which is pending in this Honourable Court.

2. Costs of this application.
3. Any other relief this honourable Court may deem fit and just.

The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents contested this application, while the 4<sup>th</sup> chose not to file a counter affidavit, meaning that she does not wish to contest it. When the parties appeared before me for the hearing of this matter, this Court ordered that they argue it by way of filing written submissions.

The Applicant, the 1<sup>st</sup> Respondent and the 2<sup>nd</sup> Respondent filed such submissions but the 3<sup>rd</sup> and 4<sup>th</sup> Respondents did not. I will consider their submissions as I proceed to determine the application. The bottom-line issue is whether I should grant the orders sought by the Applicant or

not. In his written submission, the learned counsel for the Applicant, Mr. Andrew Kanonyele, informed this Court that, on the 22<sup>nd</sup> December 2022, the Applicant filed in this Court, a Misc. Commercial Application No.227 of 2022, which is still pending.

In that application, the Applicant is praying for review of the Orders of this Court dated 08<sup>th</sup> November 2022 which renders the execution which the 4<sup>th</sup> Respondent herein is ordered to proceed with, vide a decree issued in Commercial Case No. 50 of 2020 and Misc. Commercial Case No. 2021. He submitted that, this application at hand was filed following the service to the Applicant of a 14 days' statutory notice to vacate from the house in dispute, a dwelling house wherein his family and some few tenants reside- vide Plot No.62 Block 17, Makurumla Street, Magomeni Area, within Kinondoni District, Dar-es-Salaam.

According to Mr. Kanonyele, the 14days statutory notice has already lapsed and the 4<sup>th</sup> Respondent is seeking aggressively to evict the occupants from the suit property and has obtained a letter from this Court to seek the assistance of the Police. He informed this Court further that, the background of this application and the disputes involving the parties herein is well canvassed in their affidavits. He submitted that, in the interest of justice, this Court should grant the application, given that, the law under which the application is premised gives the Court wider powers. He relied on Order XXI Rule 24(1) of the

Civil Procedure Code, Cap.33 R.E 2019 to back up his submission.

He contended that, in relation to the execution process touching on this present application, the 1<sup>st</sup> Respondent has already made application for execution and execution Orders have been issued since the 08<sup>th</sup> of November 2022 and, that, the Applicant herein, not only intends to file an application for Review of the Orders of the Court, but has already initiated steps to that end by preferring Misc. Commercial Application No.227 of 2022 for extension of time.

Citing the case of **Tanzania Electric Supply Company vs. Independent Power Tanzania Limited** [2000] TLR 324, he submitted that, although a Court will not grant a stay of execution in all instances, it may grant such a stay if an intended appeal or application has *prima facie* likelihood of success or where there will be occasioning of a substantive injustice and irreparable harm to the applicant, or that, the balance of convenience so dictates.

He urged this Court, on the basis of the facts deposed in the affidavit of the Applicant as the Applicant has demonstrated that he has an arguable point for the intended review application and the chances of success are overwhelming. He also stated that, it is the Applicant who stands to suffer most if this application is not granted while the status of the Respondent will always remain even if this application is granted. He further told the Court that, he has also furnished

part of the decretal amount to the Decree Holders and if execution is to proceed he stands at loss and suffering.

Mr. Kanonyele submitted that, in all respects, it will be seriously unsafe to refuse/withhold the granting of this application than allowing it pending determination of the other pending cases to which it is associated, and that, refusal will be as good as pre-empting the pending application and thus, go against the spirit of ends of justice.

To support his argument further, reliance was placed on the cases of **SDV Transim (T) Ltd vs. Ms STE Datco**, Civil Application No.97 of 2004, CAT, Dar-es-Salaam (unreported), a decision issued while granting the application for stay of execution, and further the case of **Ignazio Messina & National Shipping Agency vs. Willow Investment & Costa Shinyanga**, Civil Ref. No.9 of 1999. He urged this Court, therefore, to grant the application.

Responding to the Applicant's submission, Mr Sylvatus Sylvanus Mayenga, the learned counsel for the 1<sup>st</sup> Respondent, started off by adopting the contents of the counter affidavit filed in this Court. He submitted that, this matter has attracted a number of cases which, in his view, have been filed in Court with a view to block the 1<sup>st</sup> Respondent from enjoying his landed property, namely Plot No.62 Block 1, Makurumla Street Magomeni Dar-es-Salaam.

He told this Court that, so far there was a case which is between **Benedicto Rweikiza Ijumba vs. Alex Msama and Others**, Land Case No.219 of 2021, and that, the same stands

pending in the High Court, Land Division. He said that, the case was also seeking to challenge the transfer of the suit property in question and it got dismissed with costs.

He also submitted that, there was as well Misc. Land Application No.658 of 2012 between **Benedicto Rweikiza Ijumba vs Alex Msama and Others**, lodged at the High Court of Tanzania, Land Division seeking to challenge the transfer of the same landed property at issue here and its attachment, which as well got dismissed. Further still, Mr. Mayenga submitted that, there was also Land Application No.564 of 2021 between **Laura Bonaventure Malya Masera (the 3<sup>rd</sup> Respondent) vs. Alex Msama Mwita and 4Others**, which was lodged at the District Land and Housing Tribunal at Kinondoni Mwananyamala.

According to Mr. Mayenga, the above Land Application No.564 of 2021 was also struck out for being incompetent just like yet, another Land Application No.1273 between **Laura Bonaventure Malys Masera (the 3<sup>rd</sup> Respondent) vs. Alex Msama Mwita and 4Others**. He submitted that, the last case involving the parties was Misc. Commercial Application No. 189 of 2021 between **Laura Bonaventure Malys Masera (the 3<sup>rd</sup> Respondent) vs. Alex Msama Mwita and 4Others**, which was objection proceedings lodged by the Applicant's wife, seeking to set aside the consent judgement which ended up with a deed of compromise filed in this very Court by the parties and this Court gave its consent decision thereon.

Mr. Mayenga submitted that, what the Applicant is trying to do cannot be allowed since, this Court first issued its consent decision and decree dated 05<sup>th</sup> July 2021 which went unheeded by the Applicant. He submitted further that, though a deed of compromise lodged in this Court in another matter filed before it, this same Court issued a consent decision and decree dated 17<sup>th</sup> June 2022 and, as such, there are two decrees of this Court which are all summarised in the last decree issued by the Court on the 17<sup>th</sup> June 2022.

Mr. Mayenga submitted that, under paragraph 4 of the Decree, it was made apparent that, unless and until the agreed sum is paid, the Certificate of Title to the disputed property shall remain and **“the consent judgement shall have a full force”**. He submitted that, the Order capable of being stayed is the decree of this Court dated 17<sup>th</sup> June 2022 and not the Order dated 8<sup>th</sup> November 2022. He contended that, the situation would have been different if no decree was pronounced. He submitted that; this Court should not be lured to stay a resultant order while its decree exists.

Mr. Mayenga submitted that, what is being done is akin to staying the decree of the Court through a back door, a fact which make the application to be hopelessly barred as of now. He contended that, the last decree was issued on the 17<sup>th</sup> June 2022 and that, the six months period within which it could be stayed have long lapsed with no extension of time was ever sought or ever been granted. He submitted further that, if the order is at all capable of being stayed, since it was pronounced

by His Lordship Mkeha,J, and not His Lordship Nangela,J., then the matter is misplaced.

In his submission, Mr. Mayenga contended further that, whether the consent order is capable of being stayed or hindered from being executed is matter whose remedy is found in the case of **Motor Vessel Sepideh and Another vs. Yusuf Mohamed Yusuf and 2 Others**, Civil Application No.237 of 2013, (CAT) (unreported).

Mr. Mayenga was of a further submission that, by the nature of the order, its remedy is under section 38(1) of the CPC, Cap.33 R.E 2019 where questions relating to execution can be dealt with and not by way of seeking for a temporary stay as it is done herein by the Applicant.

He concluded by referring to this Court the unreported decision in **Msc. Commercial Application No.32 of 2022** between **Exim Bank Tanzania Limited vs. Sai Energy and Logistics Services Ltd**, and **Hatibu Omari vs. Belwisu Kuambaza, Civil Application No. 375/17 of 2018** (unreported) and, stated that, in any event and if the stay order be granted, there should be a furnishing of security and going by the Applicant's affidavit, no such security or undertaking to do so was pledged. He prayed that, the matter be dismissed stating that, nothing is there to entice this Court to apply the overriding objective principles to determine the merits of this application.

For their part, the 2<sup>nd</sup> Respondent's counsels, Mr. Philip Lincoln Irungu, and Stephen Axwesso, narrated the genesis of



the matters from which this application arose, i.e., the Commercial Case No.50 of 2020 and the Misc. Commercial Application No.189 of 2021 and how these matters got settled by way of compromise of the parties. They submitted that, the agreement was for the Applicant to pay the 1<sup>st</sup> and 2<sup>nd</sup> Respondents within two months' time, as from 17<sup>th</sup> June 2022 but the Applicant has failed to do so, and, hence, the filing of an application for execution orders.

According to the 2<sup>nd</sup> Respondent's learned counsels, although the Application is premised under Order XXI Rule 24(1) of the CPC, that rule is never read in isolation but is read with Order XXXIX Rule 5(3) of the CPC. They cited and relied on the decisions of this Court in the cases of **Exim Bank (T) Ltd** (supra) and **Nadds Bureau De Change & Another vs.Y2K Bureau De Change**, Misc. Comm. Appl. No. 26 of 2021. They submitted that, Order XXI Rule 24(3) of the CPC read together with Order XXXIX Rule 5(3)(c) of the CPC, requires a party applying for stay of execution to furnish security for due performance of the Decree to cover the decree holders in the event there is an upset in executing the decree. They argued that, nowhere in the applicant's affidavit has there been disclosed that the applicant will or has furnished security.

They argued further that, even if the property will be there, properties which are not exclusively in possession and control of the applicant cannot be taken as security. Reliance was placed on the case of **Patrick Edward Moshi vs. Commercial Bank of Africa (T) Ltd**, Civil Application

No.40/16 of 2017 (unreported). They also relied on the case of **Hatibu Omari vs. Belwisyy Kuambaza** (supra) and urged this Court to dismiss the application.

As regards the argument that the Applicant will suffer substantial loss compared to the Respondents, it was the submission of the 2<sup>nd</sup> Respondent's counsels that, currently the property belongs to the 1<sup>st</sup> Respondent by operation of the law since 2021. They submitted that, the submissions by the learned counsel for the Applicant that the Applicant will suffer irreparable loss as the house might be demolished and leave him with no place of residence, are mere statements from the bar and not evidence at all to be admissible in Court.

Reliance was placed on the case of **Uthmaan Madati (administrator of estate of the late Juma Posanyi Madati) vs. Hambasia N'kella Maeda**, Civil Application No.529/17 of 2016 (unreported) where Kihwelo, JA., made it clear that, as a matter of general principle, submissions by counsel, as opposed to an affidavit, are not evidence. See also **Registered Trustees of the Archdiocese of Dar-es-Salaam vs. Chairman of Bunju Village Government and Others**, Civil Appeal No.147 of 2006.

It was as well the submission of the learned counsels for the 2<sup>nd</sup> Respondent that, the Applicant has come to the Court late in the sense that the application was not filed without any delays. They submitted that, the eviction orders were issued by this Court on the 8<sup>th</sup> November 2022 and this application was filed on 27<sup>th</sup> December 2022 being one months and three

weeks after the eviction order was made. They contended, therefore, that, the application was not filed within reasonable time.

In a brief rejoinder, the Applicant's learned counsel relied on Article 13(6)(a) of the Constitution of the United Republic of Tanzania, 1977 (as amended from time to time) arguing that, the Applicant deserves to be accorded a fair hearing and other legal remedies. He contended that, the application is not misplaced simply because it has been placed before His Lordship Nangela, J., since that is not for the Applicant to decide. He contended that, the order sought is capable of being stayed.

He contended that, the order sought is for a temporary stay to allow for an application for extension of time to file a review application before the Honourable Judge who issued the Orders dated 08<sup>th</sup> November 2022. He argued that, the time for the remedy under section 38(1) of the CPC is not ripe since there are other pre-requisite steps to be taken to obtain the leave of the Court to do that out of time and, which is a matter before the Court, in the Applicant's parent application.

As regards the issue of deposit of security for cost, Mr. Kanonyele submitted that, that is not mandatory at this stage and distinguished the cases relied on by the Respondents stating that, the Applicant has made it clear that, he has started to effect payments of the decretal sum to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. He also reasoned that, the parent application which is pending in this Court has a legal consequential effect,

therefore, it is prudent for this Court not to grant the proposed order for deposit of security for costs to pay way for the review.

Further still, it was the rejoinder submission of the Applicant's learned counsel that, the deposit of security for costs has its legal requirements which are not in place in this current application. He reiterated his earlier submission by stating that the property in dispute is and will still be available and can satisfy as security as is still in control of the Applicant. He thus urged this Court to grant the prayers.

I have carefully considered the submissions and, as I stated earlier, the issue to address is whether this Court should grant the prayers sought by the Applicant. I think I need not labour much in this application. Essentially, as it was stated in the case of **Ignazio Messina & Another** (supra), it is now settled that:

- (a) The Court will grant a stay of execution order if the applicant can show that refusal to do so would cause substantial irreparable loss to him which cannot be atoned by any award of damages.
- (b) It is equally settled that, Court will order a stay if refusal to do so would, in the event the intended appeal succeeds, render that success nugatory.
- (c) Again, the Court will grant a stay, if in its opinion, it would be on a

balance of convenience to the parties to do so.

I have as well considered the submissions made by the parties and noted the genesis of this application including the two consent decrees which were issued by this Court. Several other cases have been filed in respect of the suit property and got dismissed or struck out. In my consideration, I am reminded of the decision of the Court of Appeal in case of **Mohamed Said Bakram vs. Gideon Mhewa & Another**, [1997] TZCA 91, (Media Neutral Citation). In that decision, the Court of Appeal of Tanzania was of the view, inter alia, that:

"It is elementary that a decree holder should not unduly be denied to enjoy the fruits of his rights accruing from the judgment or decree passed in his favour. For that reason, even in deserving and warranting cases in which stay orders for execution are granted, such are nonetheless not meant to "be of a permanent nature." In the instant case which, as already pointed out, has "been in the court corridors for the last 17 years without the decree holders enjoying the fruits of their rights, the issuance of the stay order sought should "be done with

extreme diligence and caution. This is in order to avoid further injustice and delay. In here, having regard to the circumstances and historical background of the case, I am satisfied that it is not in the interest of the justice of the case to issue a stay order for execution. In the event, and for the foregoing reasons the application is dismissed. Costs of this application.”

In my view, and taking into account that the 1<sup>st</sup> Respondent has since 2020 been in and out of Court corridors without enjoying the fruits of his decree, which decree was obtained from a consent decision arrived at following a compromise of the parties, unless there are indeed cogent reasons well demonstrated, allowing this application will be to condone injustice rather than meeting the ends of justice.

In his submissions, Mr. Kanonyele has pressed on this Court to grant the orders sought arguing that, doing so will meet the ends of justice. But what does “ends of justice” mean?

To give it a meaning, I am persuaded by what the Indian Supreme Court stated in the case of **Sangram Singh Vs. Election Tribunal, Kotah**, 1955 AIR (SC) 425, where it was held as under: -

“Now when we speak of the ends of justice, we mean justice not only to the [Applicant] and to the other side but also to ... others who may be inconvenienced...”

If contextualised to the application at hand, therefore, meeting the ends of justice will mean taking into account not only the interests of the Applicant but also those of the Respondents and weigh out where the pendulum of the real ends of justice will rest. In the present application, however, I do not find any compelling reason that fall squarely within the parameters set out by the Court of Appeal in the **Ignazio Messina & Another** (supra) to warrant that I grant the orders sought.

In my humble view, the mere fact that the Applicant is intending to seek extension of time to file a Review Application in respect of the Orders issued by Hon. Mkeha, J. on the 08<sup>th</sup> of November 2022, cannot withhold the 1<sup>st</sup> Respondent from enjoying of the fruits of the decree issued to him by this Court. Had the fact been that the Applicant is challenging the decisions from which the decrees were extracted in the Court of Appeal, that could at least have made a difference. Otherwise, I find no cogent reasons why I should allow this application.

For the reasons so stated, I hereby dismiss this application and, in the circumstance of it, I make no orders as to costs.

**It is so ordered.**

**DATED AT DAR-ES-SALAAM ON THIS 3<sup>rd</sup> DAY OF  
FEBRUARY 2023**



.....  
**DEO JOHN NANGELA**  
**JUDGE**