

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)
AT DAR ES SALAAM**

LAND CASE REVISION NO. 41 OF 2010

**(From the Decision of the District Land and Housing Tribunal of
Kinondoni at Magomeni in Application No. 77 of 2010)**

RAMADHANI MRIRI HANDANIA HEZRON AMANO WENCESLAUS A. KWARI	} APPLICANTS
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VERSUS

MBATA GARI OUNO RESPONDENT

13th & 27th March, 2013

RULING

MWAMBEGELE, J.:

On 04.10.2012, I dismissed the Applicants' application in which the three Applicants had sought to move this court to call for, inspect and revise the records and order of the District Land and Housing Tribunal of Kinondoni dated 20.08.2010 in Land Application No. 77 of 2010. The Applicants were aggrieved. They thus, on 15.11.2012, filed a Notice of

Appeal to the Court of Appeal. On 23.11.2012, the Applicants filed in this court an application for stay of execution of the ruling of this court. This application was made under Order XXXIX Rule 5 (1) of the Civil Procedure Code, Cap 33.

The Respondent has raised a plea *in limine litis* against an application for stay of execution filed by the Applicants to the effect that since the Applicants have already filed a Notice of Appeal, the High Court lacks jurisdiction to entertain the application. This preliminary objection was argued before me on 13.03.2013 during which Mr. Magusu; Learned Counsel advocated for the Applicants while the Respondent had the services of Mr. Ogunde, learned Counsel.

In their submissions, both Counsel were very brief and to the point. Mr. Ogunde for the Respondent argued in support of the preliminary objection that the ruling of the court was delivered on 04.10.2012 and Notice of Appeal was filed on 15.11.2012. Later on, on 23.11.2012, the Applicants filed an application for stay of execution in this court. He submitted that since the Applicants had filed a Notice of Appeal to appeal to the Court of Appeal, this court was no longer vested with jurisdiction to entertain an application for stay of execution. Mr. Ogunde elucidated that once a Notice of Appeal to appeal to the Court of Appeal is filed against the decision of the High Court, it is only the Court of Appeal which is vested with jurisdiction to entertain and determine an

application for stay of execution. To buttress his argument, Mr. Ogunde cited to me ***Aero Helicopter (T) Ltd Vs F. N. Jansen*** [1990] TLR 142.

Mr Magusu; Learned Counsel, as already alluded to hereinabove, was equally brief and to the point. He submitted that under the provisions of Section 95 of the Civil Procedure Code, Cap 33, this court has inherent jurisdiction to entertain any matter before it for purposes of determining justice between the parties. He argued that since the Notice of Appeal does not operate as a stay of execution, the High Court has power to hear and determine the application for stay of execution. He argued further that under Order XXXIX Rule 5 (1) of the Civil Procedure Code, Cap 33, it is clearly stated that the court which passed the decree, on sufficient cause shown by an applicant, shall order stay of execution. Mr. Magusu thus submitted that the preliminary objection lacks merit and should therefore be overruled.

In rebuttal, Mr. Ogunde; Learned Counsel, in respect of inherent powers of this court under Section 95 of the Civil Procedure Code, Cap 33, submitted that the ***Aero Helicopter (T) Ltd*** case (supra) discussed this issue and held that the inherent powers of the Court are only exercisable where the law has made no provision governing a particular matter at hand and that once Notice of Appeal has been filed, the proper court to entertain an application for stay of execution is the appellate court; in this case the Court of Appeal and not the High Court.

I have given equal due regard to the rival submissions by both learned counsel appearing. Before me, there is only one issue for determination and this is whether the High Court, after the filing of a Notice of Appeal to appeal to the Court of Appeal, has jurisdiction to entertain an application for stay of execution. Mr. Magusu, Learned Counsel for the Applicants, thinks the answer to this question should be in the affirmative as, he contends, the court has such inherent powers under the provisions of Section 95 of the Civil Procedure Code, Cap 33. With due respect, I find myself disinclined to share this view. I shall demonstrate why. It is trite law that inherent jurisdiction under the provisions of Section 95 of the Civil Procedure Code, Cap 33, are only exercisable in situations where there is no provision in the Code providing for the solution to the problem at hand. To this, I am fortified by the commentary by Mulla on Section 151 of the Indian Code of Civil Procedure which is *in pari materia* with our Section 95 of the Civil Procedure Code, Cap 33, in which, commenting on the nature and object of the inherent powers of the court, the learned author (as quoted by Nsekela, J.; as he then was, in ***Bunda District Council Vs Virian Tanzania Ltd*** [2000] TLR 385 at page 388) stated:

"Inherent jurisdiction must be exercised subject to the rule that if the Code does contain specific provisions which would meet the necessities of the case in question such provisions should be followed and the inherent jurisdiction should

not be involved. It is only when there is no clear provisions in the Civil Procedure Code that inherent jurisdiction can be invoked”.

His Lordship went on to quote page 484 of Sarkar’s Law of Civil Procedure (8th Edition) which elucidates further on inherent powers of the Court under the provision as follows:

"The inherent power being wide and incapable of detention its limits should be carefully guarded. The power is intended to supplement the other provisions of the Code and not to evade them or invent a new procedure according to individual sentiment”.

In the instant case, the application has been taken under the provisions of Order XXXIX Rule 5 (1) of the Civil Procedure Code, Cap 33. It is obvious therefore that there is a provision in the Code to cater for the problem. In the circumstances, inherent powers of the court cannot be brought into play. And in addition, there is a provision in our law governing the present situation. This is none other than Rule 11 (2) (b) of the Court of Appeal Rules, 2009. In these circumstances, these provisions should be invoked instead of resorting to the inherent powers of the court. This argument may become clear later in this ruling.

Reverting to the question whether the High Court, after the filing of the Notice of Appeal to appeal to the Court of Appeal, has jurisdiction to entertain an application for stay of execution, I wish to say at the outset that this is not a virgin territory; it has been canvassed by this court in several decisions. The only unfortunate situation is that there are conflicting decisions on the subject. I am aware of the decisions of this court in ***Christopher Ritte Vs SHIVACOM Tanzania Limited***, Commercial Case No. 27 of 2010 (unreported), ***Tanzania Electric Supply Co. Ltd Vs Dowans (Costa Rica) & Another***, Misc. Civil Case No. 8 of 2011 (unreported) and the decisions of the Tax Revenue Appeals Tribunal in ***Ace Distributors Ltd Vs Commissioner General, Tanzania Revenue Authority***, Application No. 8 of 2010 (unreported) and ***Mabangu Mining Limited Vs the Commissioner General, Tanzania Revenue Authority***, Income Tax Appeal No. 4 of 2011 (unreported).

I wish to state that before the coming into force of the Court of Appeal Rules, 2009 (henceforth "the New Rules") on 01.02.2010 (by virtue of GN No. 36/2010), the position was elaborately clear. For a clear understanding of my verdict hereinafter and for purposes of clarity, let me expound on the position before the coming into force of the new Court of Appeal Rules, 2009 which revoked the old Court of Appeal Rules, 1979. I wish to start with what the learned author of Mulla states at P. 1654 of Mulla Code of Civil Procedure (Abridged) (Fourteenth Edition):

"Once an appeal has been preferred from a decree, it is the appellate court alone that is seized of the matter, and an application for a stay of execution should be made to that court."

This position was followed by the Court of Appeal in a number of decisions including the ***Aero Helicopter (T) Ltd*** case (supra); a case cited to me by Mr. Ogunde; Learned Counsel in which it was held:

"Once appeal proceedings to this Court [the Court of Appeal] have been commenced by filing notice of appeal, the High Court has no inherent jurisdiction under section 95 of the Civil Procedure Code to order a stay of execution pending appeal to this court [the Court of Appeal]".

This was very correct and clear in the light of the provisions of Rule 9 (2) (b) of the Court of Appeal Rules, 1979 (henceforth "the Old Rules") which, so far as is relevant to the present case, read:

"... the institution of an appeal shall not operate to stay execution, but the Court may—

(a) ...;

(b) in any civil proceedings, where a notice of appeal has been lodged in accordance with Rule 76, order a stay of execution, on such terms as the Court may think just".

For the avoidance of doubt, like in the New Rules, "the Court" was defined by Rule 2 of the Old Rules to mean "the Court of Appeal of the United Republic of Tanzania established by the Constitution, and includes any division of that Court and a single Judge exercising any power vested in him sitting alone". Neither the High Court nor the Tribunal was mentioned in the rule.

But the above provision of the Old Rules reads differently in the New Rules. The corresponding provision in the New Rules is Rule 11 (2) (b) which provides, again, so far as is relevant to the instant case, provides:

"...the institution of an appeal, shall not operate to stay execution, but the Court may-

(a) ...

(b) in any civil proceedings, where a notice of appeal has been lodged in accordance with Rule 83, an appeal, shall not operate as a stay of execution of the decree or order

*appealed from **except so far as the High court or tribunal may order**, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree or order; but the Court, may upon good cause shown, order stay of execution of such decree or order ...".* [Bold mine]

It is apparent from the reading of the foregoing provision of the New Rules that an appeal does not operate as a stay of execution. Even if a Notice of Appeal has been lodged, the decree holder, on the one hand, is at liberty to apply for execution of the decree. On the other hand, the judgment debtor is free to apply for a stay of execution despite the fact that a Notice of Appeal has been lodged. The question is where that application for stay of execution should be filed between the court which passed the decree or to the appellate court. From the wording of Rule 11 (2) (b) supra, it would appear the application can be filed in either court. This is suggestive of the use of the phrase "shall not operate as a stay of execution of the decree or order appealed from except so far as the High court or tribunal may order" and the phrase "but the Court, may upon good cause shown, order stay of execution of such decree or order". As will be clear hereinbelow, it seems to me, this provision does not confer power upon the High Court or Tribunal to adjudicate upon an application for stay of execution once a Notice of Appeal has been filed.

In the ***Christopher Ritte*** case (supra), my brother on the Bench Makaramba, J. was of the view that once a Notice of Appeal has been lodged, this Court has jurisdiction to adjudicate upon an application for stay of execution. However, His Lordship elucidated, once an appeal has been preferred, it is only the Court of Appeal which will have such jurisdiction. His Lordship stated:

"... where a Notice of Appeal has been lodged with the Registrar of the High Court of Tanzania in terms of Rule 83 of the Court of Appeal Rules, 2009, the High Court is seized with jurisdiction to consider application for stay of execution and upon good cause, the High Court may grant such stay. However, where an appeal has been preferred to the Court of Appeal, it is only that Court which has jurisdiction to deal with application for stay of execution".

And His Lordship concluded:

"The Court of Appeal is only seized with jurisdiction to consider application for stay of execution where an appeal has been preferred

which means that by then it will have been seized of the case record”.

The gist of the above decision is that an application for a stay of execution pending appeal may be filed in the High Court after the appellant has given Notice of Appeal but before the appeal is lodged in which case the application should be filed in the Court of Appeal.

But Twaib, J. is of a different view. His Lordship is of the view that the High Court has power to order stay of execution under Order XXXIX Rule 5 (1) of the Civil Procedure Code, Cap 33 but once Notice of Appeal has been filed, the High Court ceases to have such jurisdiction in which case it is only the Court of Appeal which will have such jurisdiction. His Lordship stated in the ***Tanzania Electric Supply Co. Ltd*** case (supra) as follows:

"The plausible explanation for the mention made of the High Court and Tribunals in that clause is, in my view, a reference to a situation where those two authorities exercise their powers under Order XXXIX Rule 5 (1) and (2) of the Civil Procedure Code, Cap 33 (R.E 2002). That power can only be exercised before the filing of a Notice of Appeal. Once a Notice has

been filed ... the High Court ceases to have jurisdiction”.

The mention of the High Court and Tribunal in Rule 11 (2) (b) of the New Rules was perhaps intended to grant the High Court and TribunalS concurrent jurisdiction with the Court of Appeal in determining applications for stay of execution. That is perhaps the reason why the wording of Rule 9 (2) (b) of the Old Rules was changed in the New Rules. If my thinking is correct, which I think indeed it is, I am afraid, Rule 11 (2) (b) of the New Rules has not addressed the problem it intended to. If anything, confusion has been created in its stead. I say so because it is not apparently clear at what point in time will the High Court (or Tribunal) cease to have jurisdiction to entertain an application for stay of execution of its order. Likewise, it does not come out clearly when will the Court of Appeal be said to have been seized of the matter so as to be clothed with jurisdiction to entertain such an application.

I am inclined to share the views of my brother Twaib, J. expressed in the ***Tanzania Electric Supply Co. Ltd*** case (supra) in which he said the mention of the High Court and Tribunal in Rule 11 (2) (b) of the New Rules does not mean they (the High Court and Tribunal) have powers to order stay of execution once a Notice of Appeal has been lodged. But rather, such reference is in relation to the exercise of such powers under the provisions of Order XXXIX Rule 5 (1) of the Civil Procedure Code,

Cap 33 which power is only exercisable before the lodging of a Notice of Appeal to the Court of Appeal.

It is my considered view that if no Notice of appeal has been filed, the application for stay of execution should be made to the court which has passed the decree; that is the court that has given the order sought to be impugned; in this case the High Court. Such application will be made under the provisions of Order XXXIX Rule 5 (1) of the Civil Procedure Code, Cap 33. However, once a process of appeal has been commenced by lodging a Notice of Appeal, the application for stay of execution should be made to the appellate court; in this case the Court of Appeal. That application will be made under Rule 11 (2) (b), (c) and (d) of the Court of Appeal Rules, 2009.

The process of appeal is triggered by lodging of a Notice of Appeal. In my view, for the purposes of stay of execution, an appeal is deemed to have been filed as soon as the Notice of Appeal is lodged. It therefore follows that, as already alluded to above, the provisions of Rule 11 (2) (b) of the New Rules has not changed the position under Rule 9 (2) (b) of the Old Rules in respect of where to file an application for stay of execution once a Notice of Appeal has been filed. What Rule 11 (2) (b) of the New Rules has successfully done is, unlike Rule 9 (2) (b) of the Old Rules, to equip the Court of Appeal with specific guidelines regarding stay of execution [see ***Peter P. Temba t/a Mahenge Timber & Ent Vs Dar es Salaam City Council and Hassan Ibrahim Sobo***, DSM

Civil Application No. 149 of 2009 (unreported) and ***Mantrac Tanzania Limited Vs Raymond Costa***, MZA Civil Application No. 11 of 2010 (unreported)].

In my view, once a process of appeal has been commenced by filing Notice of Appeal, the High Court ceases to have jurisdiction to entertain an application for stay of execution. Once a Notice of Appeal has been filed, like in the case at hand, it is the Court of Appeal only that will have jurisdiction to entertain and determine an application for stay of execution. I am therefore in agreement with Mr. Ogunde; Learned Counsel that the Applicants ought to have filed the application in the Court of Appeal, for the High Court is no longer clothed with jurisdiction to entertain it.

In our neighbouring jurisdiction; Kenya, there is a provision that clears the ambiguity that is existing in our New Rules. Order XLI Rule 4 (4) of the Civil Procedure Act, Cap 21 of the Laws of Kenya, is a provision under reference. It provides:

"For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the rules of that court notice of appeal has been given"

Perhaps it is high time we had such a provision in our legislation. Otherwise, if the mention of "the High Court" and "Tribunal" in Rule 11 (2) (b) of the New Rules was meant to empower the High Court, Tribunal and Court of Appeal with concurrent jurisdiction to entertain applications for stay of execution once a Notice of Appeal (or appeal) has been filed, it should candidly be said so in no uncertain terms. The ball is now in the court of the drafters of the New Rules to clear this ambiguity in our midst.

In the upshot, in view of the position I have taken, the preliminary point of objection is sustained. The application for stay of execution is struck out. It is struck out with the usual consequences of costs.

DATED at DAR ES SALAAM this 27th day of March, 2013.

J. C. M. MWAMBEGELE

JUDGE